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THE  
ENGLISH AND EMPIRE DIGEST  
WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS.

VOLUME XXI.



# THE ENGLISH AND EMPIRE DIGEST

WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXI.

*ESTATE AND OTHER DEATH DUTIES.*

*ESTOPPEL.*

*EXECUTION.*

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**In this Volume English Cases reported up to 1st January, 1925, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.**



# TABLE OF CONTENTS

## AND

## TABLE OF CROSS-REFERENCES.

	PAGE
<i>Reports included in this Work and their Abbreviations</i> — — — — —	xiii
<i>Abbreviations used in this Work</i> — — — — —	xxix
<i>Meaning of Terms used in Classifying Annotating Cases</i> — — —	xxxiii
<i>Table of Cases</i> — — — — —	xxxv

<b>ESTATE AND OTHER DEATH DUTIES</b> — — — — —	1—130
<i>[For detailed Table of Contents and Table of Cross-References, see pages 1-4.]</i>	

### ESTATE BY THE CURTESY.

*See* COPYHOLDS; HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL.

### ESTATE FOR LIFE.

*See* REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

### ESTATE PUR AUTRE VIE.

*See* DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

### ESTATE TAIL.

*See* DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL;  
SETTLEMENTS.

### ESTATES OF THE REALM.

*See* CONSTITUTIONAL LAW; PARLIAMENT.

<b>ESTOPPEL</b> — — — — —	132—404
<i>[For detailed Table of Contents and Table of Cross-References, see pages 132-136.]</i>	

### ESTOVERS.

*See* COMMONS AND RIGHTS OF COMMON.

### ESTRAYS.

*See* ANIMALS; CONSTITUTIONAL LAW.

## TABLE OF CONTENTS.

## ESTREAT.

*See CRIMINAL LAW AND PROCEDURE.*

## EVICTION.

*See COUNTY COURTS; LANDLORD AND TENANT.*

## EVIDENCE.

*[Owing to the extent of the above Title it was not feasible to include it in the present Volume, and it therefore forms Volume XXII.]*

## EXAMINERS.

*See COURTS; EVIDENCE; PRACTICE AND PROCEDURE.*

## EXCHANGE.

*See COMPULSORY PURCHASE OF LAND AND COMPENSATION; REAL PROPERTY AND CHATTELS REAL; STOCK EXCHANGE.*

## EXCHEQUER.

*See CONSTITUTIONAL LAW; REVENUE.*

## EXCHEQUER BILLS.

*See BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.*

## EXCISE.

*See INTOXICATING LIQUORS; REVENUE.*

## EXCOMMUNICATION.

*See ECCLESIASTICAL LAW.*

**EXECUTION** — — — — — PAGE  
407—677

*[For detailed Table of Contents and Table of Cross-References, see pages 407-415.]*

## EXECUTION CREDITOR.

*See BANKRUPTCY AND INSOLVENCY; EXECUTION.*

## EXECUTION OF DOCUMENTS.

*See DEEDS AND OTHER INSTRUMENTS; EVIDENCE; WILLS.*

## EXECUTION OF POWERS.

*See POWERS.*

## EXECUTIVE.

*See CONSTITUTIONAL LAW.*

## REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. C.)
A. Jur. Rep. ...	Australian Jurist Reports ...
A. L. T.	Australian Law Times
A. R. ...	Ontario Appeals ...
Act. ...	Acton's Reports, Prize Causes, 2 vols., 1809—1841
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842
Adam ...	Adam's Justiciary Reports (Scotland), 1893—(current)
Add. ...	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Agra ...	Agra High Court ...
Agra F. B. c. & N.	Agra High Court, Full Bench ...
Alc. Reg. Cas. ...	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Aleyn ...	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
All. ...	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Alta. L. R. ...	New Brunswick Reports (Allen) ...
Amb. ...	Alberta Law Reports ...
And. ...	Ambler's Reports, Chancery, 1 vol., 1716—1783
Andr. ...	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605
Anst. ...	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
App. Cas. ...	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Ct. Rep. ...	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
App. D. ...	Appeal Court Reports ...
Architects' L. R.	South African Law Reports, Appellate Division
Argus L. R. ...	Architects' Law Reports, 4 vols., 1904—1909
Arkley ...	Argus Law Reports ...
Arm. M. & O. ...	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arn. ...	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn. & H. ...	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Ashb. ...	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C. ...	Ashburner's Principles of Equity, 1902
Atk. ...	Aspinall's Maritime Law Cases, 1870—(current)
Ayl. Pan. ...	Atkins' Reports, Chancery, 3 vols., 1736—1754
Ayl. Par. ...	Ayliffe's New Pandect of Roman Civil Law
B. ...	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad. ...	Barber's Gold Law
B. & Ald. ...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—
B. & C. ...	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—
B. & C. R. (preceded by date)	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S. ...	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) ( <i>e.g.</i> , [1918—19] B. & C. R.)
B. C. R. ...	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
B. Dig. ...	British Columbia Reports ...
B. L. R. ...	Bose's Digest ...
B. L. R. A. C.	Bengal Law Reports ...
B. L. R. P. C.	Bengal Law Reports, Appeal Cases ...
B. L. R. Sup. Vol	Bengal Law Reports, Privy Council ...
B. W. C. C.	Bengal Law Reports, Supp. Vol. ...
Bac. Abr.	Butterworths' Workmen's Compensation Cases, 1907—(current)
Bail Ct. Cas.	Bacon's Abridgment ...
Baild. ...	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Ball & B.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814

xiv      **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

Bankr. & Ins. R.	...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	...	Eng.
Bar. & Arn.	...	Barron and Arnold's Election Cases, 1 vol., 1843—1846	...	Eng.
Bar. & Aust.	...	Barron and Austin's Election Cases, 1 vol., 1842	...	Eng.
Barn. Ch.	...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	...	Eng.
Barn. K. B.	...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	...	Eng.
Barnes	...	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	...	Eng.
Batt.	...	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	...	Ir.
Beat.	...	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	...	Ir.
Beav.	...	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	...	Eng.
Beav. & Wal.	...	Beavan and Walford's Railway Parliamentary Cases, 1 vol.,	...	Eng.
Beaw.	...	Beawes's Lex Mercatoria	...	Eng.
Bell, C. C.	...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	...	Eng.
Bell, Ct. of Sess.	...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	...	Scot.
Bell, Ct. of Sess. fol.	...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	...	Scot.
Bell, Dict. Dec.	...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	...	Scot.
Bell, Sc. App.	...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	...	Scot.
Bellewe	...	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	...	Eng.
Belt's Sup.	...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	...	Eng.
Ben.	...	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	...	Eng.
Benl.	...	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	...	Eng.
Ber.	...	New Brunswick Reports (Berton)	...	Can.
Bing.	...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	...	Eng.
Bing. N. C.	...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	...	Eng.
Biss. & Sm.	...	Bisset and Smith's Digest	...	S. Af.
Bitt. Prac. Cas.	...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	...	Eng.
Bitt. Rep. in Ch.	...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	...	Eng.
Bl. Com.	...	Blackstone's Commentaries	...	Eng.
Bl. D. & Osb.	...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	...	Ir.
Bli.	...	Bligh's Reports, House of Lords, 4 vols., 1819—1821	...	Eng.
Bli. N. S.	...	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	...	Eng.
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Bom. A. C.	...	Bombay Reports, Appellate Jurisdiction	...	Ind.
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Bom. O. C.	...	Bombay Reports, Original Civil Jurisdiction	...	Ind.
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Bourke	...	Bourke's Reports	...	Ind.
Br. & Col. Pr. Cas.	...	British and Colonial Prize Cases, 3 vols., 1914—1919	...	Eng.
Bract.	...	Bracton De Legibus et Consuetudinibus Angliæ	...	Eng.
Bro. Abr.	...	Sir R. Brooke's Abridgement	...	Eng.
Bro. C. C.	...	W. Brown's Chancery Reports, 4 vols., 1778—1794	...	Eng.
Bro. Ecc. Rep.	...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	...	Eng.
Bro. N. C.	...	Sir R. Brooke's New Cases, 1 vol., 1515—1558	...	Eng.
Bro. Parl. Cas.	...	J. Brown's Cases in Parliament, 8 vols., 1702—1800	...	Eng.
Bro. Supp. to Mor.	...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	...	Scot.
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Brod. & F.	...	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	...	Eng.
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Brownl.	...	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	...	Eng.
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Bueh.	...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	...	S. Af.
Buch. A. C.	...	Buchanan's Reports of Appeal Court (Cape)	...	S. Af.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xv

Buchan. ...	...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck ...	...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P. ...	...	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst. ...	...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb. ...	...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr. ...	...	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C. ...	...	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell ...	...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A. ...	...	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P. ...	...	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B. ...	...	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S. ...	...	Common Bench Reports, New Series, 20 vols., 1856—1865	Eng.
C. B. R. ...	...	Canadian Bankruptcy Reports Annotated, 1920—(current)	Can.
C. C. Ct. Cas. ...	...	Central Criminal Court Cases (Sessions Papers), 1834—1913	Eng.
C. L. Ch. ...	...	Common Law Chambers	Can.
C. L. J. ...	...	Cape Law Journal	S. Af.
C. L. J. N. S. ...	...	Canada Law Journal, New Series, 1865—(current)	Can.
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C. L. R. ...	...	Calcutta Law Reporter	Ind.
C. L. R. ...	...	Cape Law Reports	S. Af.
C. L. T. ...	...	Canadian Law Times	Can.
C. L. T. Occ. N. ...	...	Canadian Law Times, Occasional Notes	Can.
C. P. ...	...	Upper Canada Common Pleas	Can.
C. P. D. ...	...	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
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C. R. [date] A. C. ...	...	Canadian Reports, Appeal Cases	Can.
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Cab. & El. ...	...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
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Calth. ...	...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas. ...	...	Cameron's Supreme Court Cases	Can.
Cam. Prac. ...	...	Cameron's Supreme Court Practice	Can.
Camp. ...	...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas. ...	...	Commercial Law Reports of Canada	Can.
Can. Crim. Cas. ...	...	Canadian Criminal Cases, Annotated	Can.
Can. Gaz. ...	...	Canadian Gazette	Can.
Can. Ry. Cas. ...	...	Canadian Railway Cases	Can.
Car. & Kir. ...	...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
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Car. C. L. ...	...	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann. ...	...	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
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Cas. in Ch. ...	...	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B. ...	...	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett. ...	...	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. temp. Finch ...	...	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. temp. King ...	...	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733	Eng.
Cas. temp. Talb. ...	...	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig. ...	...	Cassell's Digest	Can.
Ch. (preceded by date) ...	...	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	Eng.
Ch. App. ...	...	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch. ...	...	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch. ...	...	Upper Canada Chancery Chambers Reports	Can.
Ch. D. ...	...	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. Rob. ...	...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas. ...	...	Charley's Chamber Cases, 2 vols., 1875—1876	Eng.
Char. Pr. Cas. ...	...	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip, ...	...	New Brunswick Reports (Chipman)	Can.
Chit. ...	...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822	Eng.
Cl. & Fin. ...	...	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.

Cl. & Sc. Dr. Cas.	...	Clark and Scully's Drainage Cases	...	Can.
Clay.	...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	...	Eng.
Clif. & Rick.	...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	...	Eng.
Clif. & Steph.	...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	...	Eng.
Co. A.	...	Cook's Lower Canada Admiralty Court Cases	...	Can.
Co. Ent.	...	Coke's Entries	...	Eng.
Co. Inst.	...	Coke's Institutes	...	Eng.
Co. L. J.	...	Colonial Law Journal	...	N.Z.
Co. Litt.	...	Coke on Littleton (1 Inst.)	...	Eng.
Co. Rep.	...	Coke's Reports, 13 parts, 1572—1616	...	Eng.
Coch.	...	Nova Scotia Reports (Cochran)	...	Can.
Cockb. & Rowe	...	Cockburn and Rowe's Election Cases, 1 vol., 1833	...	Eng.
Coll.	...	Collyer's Reports, Chancery, 2 vols., 1844—1846	...	Eng.
Coll. Jurid.	...	Collectanea Juridica, 2 vols.	...	Eng.
Colles	...	Colles' Cases in Parliament, 1 vol., 1697—1713	...	Eng.
Colt.	...	Coltman's Registration Cases, 1 vol., 1879—1885	...	Eng.
Com.	...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	...	Eng.
Com. Cas.	...	Commercial Cases, 1895—(current)	...	Eng.
Com. Dig.	...	Comyns' Digest	...	Eng.
Comb.	...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	...	Eng.
Con. & Law.	...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	...	Ir.
Cong. Dig.	...	Congdon's Digest	...	Can.
Const	...	Const's edition of Bott's Poor Laws, 3 vols., 1807	...	Eng.
Cooke & Al.	...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol.,	...	-
Cooke, Pr. Cas.	...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	...	Eng.
Cooke, Pr. Reg.	...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	...	Eng.
Coop. G.	...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	...	Eng.
Coop. Pr. Cas.	...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	...	Eng.
Coop. temp. Brough.	...	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	...	Eng.
Coop. temp. Cott.	...	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	...	Eng.
Cor.	...	Coryton's Reports	...	Ind.
Corb. & D.	...	Corbett and Daniell's Election Cases, 1 vol., 1819	...	Eng.
Correspondances Jud.	...	Correspondances Judiciaires	...	Can.
Couper	...	Couper's Justiciary Reports (Scotland), 5 vols., 1808—1885	...	Scot.
Cout.	...	Coutlees' Unreported Cases	...	Can.
Cout. Dig.	...	Coutlees' Digest	...	Can.
Cowp.	...	Cowper's Reports, King's Bench, 2 vols., 1774—1778	...	Eng.
Cox & Atk.	...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	...	Eng.
Cox, C. C.	...	E. W. Cox's Criminal Law Cases, 1843—(current)	...	Eng.
Cox, Eq. Cas.	...	S. C. Cox's Equity Cases, 2 vols., 1745—1797	...	Eng.
Cox, M. & H.	...	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	...	Eng.
Cr. & J.	...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	...	Eng.
Cr. & M.	...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	...	Eng.
Cr. & Ph.	...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	...	Eng.
Cr. App. Rep.	...	Cohen's Criminal Appeal Reports, 1908—(current)	...	Eng.
Cr. M. & R.	...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	...	Eng.
Craw. & D.	...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	...	Ir.
Craw. & D. Abr. C.	...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	...	Ir.
Cress. Insolv. Cas.	...	Cresswell's Insolvency Cases, 1 vol., 1827—1829	...	Eng.
Cripps' Church Cas.	...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	...	Eng.
Cro. Car.	...	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	...	Eng.
Cro. Eliz.	...	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	...	Eng.
Cro. Jac.	...	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625	...	Eng.
Cru. Dig.	...	Cruise's Digest of the Law of Real Property, 7 vols.	...	Eng.
Cunn.	...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	...	Eng.
Curt.	...	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	...	Eng.
D.	...	Duxbury's Reports of the High Court of the South African Republic	...	S. Af.
D. C. A.	...	Dorion's Queen's Bench Reports	...	Can.
D. L. R.	...	Dominion Law Reports	...	Can.
Dal.	...	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	Eng.
	...	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	Scot.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xvii

Dan. ...	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Dan. & Ll. ...	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.
Dav. & Mer. ...	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—	
Dav. Ir. ...	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—	Ir.
	...	1611 ...	
Dav. Pat. Cas. ...	...	Davies' Patent Cases, 1 vol., 1785—1816 ...	Eng.
Day ...	...	Day's Election Cases, 1 vol., 1892—1893 ...	Eng.
Dea. & Sw. ...	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng.
Deac. ...	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 ...	Eng.
Deac. & Ch. ...	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
Dears. & B. ...	...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858	Eng.
Dears. C. C. ...	...	Dearsley's Crown Cases Reserved, 1 vol., 1852—1856 ...	Eng.
Deas & And. ...	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	Scot.
De G. ...	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848 ...	Eng.
De G. & J. ...	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm. ...	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J. ...	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—	
	...	1862 ...	Eng.
De G. J. & Sm. ...	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—	
	...	1865 ...	Eng.
De G. M. & G. ...	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols.,	
	...	1851—1857 ...	Eng.
Delane ...	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den. ...	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick. ...	...	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dirl. ...	...	Dirlerton's Decisions, Court of Session (Scotland), fol., 1 vol.,	
	...	1665—1677 ...	Scot.
Dods. ...	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly ...	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas. ...	...	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B. ...	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow ...	...	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl. ...	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	Eng.
Dow. & L. ...	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	Eng.
Dow. & Ry. K. B. ...	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822	
	...	—1827 ...	Eng.
Dow. & Ry. M. C. ...	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	Eng.
Dow. & Ry. N. P. ...	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	Eng.
Dowl. ...	...	Dowling's Practice Reports, 9 vols., 1830—1841 ...	Eng.
Dowl. N. S. ...	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	Eng.
Dr. & Wal. ...	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—	
	...	1841 ...	Ir.
Dr. & War. ...	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—	
	...	1843 ...	Ir.
Dra. ...	...	Draper's King's Bench Reports ...	Can.
Drew. ...	...	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm. ...	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865	Eng.
Drinkwater ...	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap. ...	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—	
	...	1859 ...	Ir.
Drury temp. Sug. ...	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841	
Dugd. Orig. ...	...	Dugdale's Origines Juridicales ...	Eng.
Dunl. (Ct. of Sess.) ...	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols.,	
	...	1838—1862 ...	Scot.
Dunning ...	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie ...	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621	
	...	—1642 ...	Scot.
Dyer ...	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
E. & A. ...	...	Upper Canada Error and Appeal ...	Can.
E. & B. ...	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—	
	...	1858 ...	Eng.
E. & E. ...	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	Eng.
E. B. & E. ...	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol.,	
	...	1858—1860 ...	Eng.
E. D. C. ...	...	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L. ...	...	South African Law Reports, Eastern Districts Local Division	Af
E. L. R. ...	...	Eastern Law Reporter ...	
E. R. (or Eng. Rep.) ...	...	English Reports ...	Eng.
E. R. ...	...	Ontario Election Reports ...	Can.
Eag. & Y. ...	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ..	Eng.
East ...	...	East's Reports, King's Bench, 16 vols., 1800—1812 ..	Eng.
East, P. C. ...	...	East's Pleas of the Crown ...	Eng.
Ecc. & Ad. ...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.



xviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Eden	...	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	...	Eng.
Edgar	...	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	...	Scot.
Edw.	...	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	...	Eng.
Elchies	...	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	...	Scot.
Emden's B. C.	...	...	Emden's Building Contracts, Building Leases and Building Statutes	...	...	Eng.
Eng. Pr. Cas.	...	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	...	Eng.
Eq. Cas. Abr.	...	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	...	Eng.
Eq. Rep.	...	...	Equity Reports, 3 vols., 1853—1855	...	...	Eng.
Esp.	...	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	...	Eng.
Ex. D.	...	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	...	Eng.
Exch.	...	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	...	Eng.
Exch. C. R.	...	...	Exchequer Court Reports	...	...	Can.
F. (Ct. of Sess.)	...	...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	...	...	Scot.
F.	...	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	...	S. Af.
	...	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	...	Eng.
F. N. D.	...	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	...	S. Af.
Fac. Coll.	...	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	...	Scot.
Falc.	...	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	...	Scot.
Falc. & Fitz.	...	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	...	Eng.
Fenton	...	...	Fenton, Important Judgments	...	...	N.Z.
Ferg.	...	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	...	Scot.
Fitz. Nat. Brev.	...	...	Fitzherbert's Natura Brevium	...	...	Eng.
Fitz-G.	...	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	...	Eng.
Fl. & K.	...	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	...	Ir.
Fonbl.	...	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	...	Eng.
For.	...	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	...	Eng.
Forb.	...	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	...	Scot.
Fort. De Laud.	...	...	Fortesque, De Laudibus Legum Angliæ	...	...	Eng.
Fortes. Rep.	...	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	...	Eng.
Fost.	...	...	Foster's Crown Cases, 1 vol., 1708—1760	...	...	Eng.
Fount.	...	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	...	Scot.
Fox & S. Ir.	...	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	...	Ir.
Fox & S. Reg.	...	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	...	...	Eng.
Fras.	...	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	...	Eng.
Freem. Ch.	...	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	...	Eng.
Freem. K. B.	...	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	...	Eng.
G.	...	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	...	S. Af.
G. & R.	...	...	Nova Scotia Reports (Geldert & Russell)	...	...	Can.
G. I. Dig.	...	...	General Index Digest	...	...	Can.
Gal. & Dav.	...	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	...	Eng.
Gale	...	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	...	Eng.
Gaz. L. R.	...	...	New Zealand Gazette Law Reports	...	...	N.Z.
Geld. Dig.	...	...	Geldert's Digest	...	...	Can.
Gib. Cod.	...	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	...	Eng.
Giff.	...	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	...	Eng.
Gilb.	...	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	...	Eng.
Gilb. C. P.	...	...	Gilbert's History and Practice of the Court of Common Pleas	...	...	Eng.
Gilb. Ch.	...	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	...	Eng.
Gilm. & F.	...	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	...	Scot.
Gl. & J.	...	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	...	Eng.
Glanv.	...	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	...	Eng.
Glanv. El. Cas.	...	...	Glanville's Election Cases, 1 vol., 1623—1624	...	...	Eng.
Glascokk	...	...	Glascokk's Reports (Ireland), 1 vol., 1831—1832	...	...	Ir.
Godb.	...	...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	...	...	Eng.
Gouldsb.	...	...	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	...	...	Eng.
Gow	...	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	...	...	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xix

Gr.	...	...	Upper Canada Chancery (Grant) ...	...	...	...	Can.
Griffin's Patent Cases	...	...	Griffin's Patent Cases, 1884—1887	...	...	...	Eng.
Gwill.	...	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	...	...	...	
H.	...	...	Hertzog's Reports of the High Court of the South African Republic, 1893	...	...	...	S. Af.
H. & C.	...	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	...	...	...	Eng.
H. & N.	...	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	...	...	...	Eng.
H. & Tw.	...	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	...	...	...	Eng.
H. & W.	...	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—	...	...	...	
H. B. R. (preceded by date)	...	...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 ( <i>e.g.</i> , [1915] H. B. R.)	...	...	...	Eng.
H. C.	...	...	Reports of the High Court of Griqualand West	...	...	...	S. Af.
H. E. C.	...	...	Hodgin's Election Reports	...	...	...	Can.
H. L. Cas.	...	...	Clark's Reports, House of Lords, 11 vols., 1847—1866	...	...	...	Eng.
Hag. Adm.	...	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	...	...	...	Eng.
Hag. Con.	...	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	...	...	...	Eng.
Hag. Ecc.	...	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	...	...	...	Eng.
Hailes	...	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	...	...	...	Scot.
Hale, C. L.	...	...	Hale's Common Law	...	...	...	Eng.
Hale, P. C.	...	...	Hale's Pleas of the Crown, 2 vols.	...	...	...	Eng.
Han.	...	...	New Brunswick Reports (Hannay)	...	...	...	Can.
Har. & Ruth.	...	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	...	...	...	Eng.
Har. & W.	...	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	...	...	...	Eng.
Harc.	...	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	...	...	...	Scot.
Hard.	...	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	...	...	...	Eng.
Hare	...	...	Hare's Reports, Chancery, 11 vols., 1841—1853	...	...	...	Eng.
Hawk. P. C.	...	...	Hawkins's Pleas of the Crown, 2 vols.	...	...	...	Eng.
Hay	...	...	Hay's Reports	...	...	...	Ind.
Hay & Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	Eng.
Hayes	...	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	...	...	...	Ir.
Hayes & Jo.	...	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—	...	...	...	
Hem. & M.	...	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	...	...	...	Eng.
Het.	...	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	Eng.
Hob.	...	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	...	...	...	Eng.
Hodg.	...	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	...	...	...	Eng.
Hog.	...	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	...	...	...	Ir.
Holt, Adm.	...	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	...	...	...	Eng.
Holt, Eq.	...	...	W. Holt's Equity Reports, 2 vols., 1845...	...	...	...	Eng.
Holt, K. B.	...	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	...	...	...	Eng.
Holt, N. P.	...	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	...	...	...	Eng.
Home, Ct. of Sess.	...	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	...	...	...	Scot.
Hong Kong L. R.	...	...	Hong Kong Reports	...	...	...	Hong Kong
Hop. & Colt.	...	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	...	...	...	Eng.
Hop. & Ph.	...	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	...	...	...	Eng.
Horn & H.	...	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	...	...	...	Eng.
Hov. Supp.	...	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	...	...	...	Eng.
How. C.	...	...	Howard's Chancery Practice	...	...	...	Ir.
How. C. S.	...	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	...	...	...	Ir.
How. E. E.	...	...	Howard's Equity Exchequer	...	...	...	Ir.
How. P. L.	...	...	Howard on the Popery Laws	...	...	...	Ir.
Hud. & B.	...	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	...	...	...	Ir.
Hudson's B. C.	...	...	Hudson on Building Contracts, 2 vols.	...	...	...	Eng.
Hume	...	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	...	...	...	Scot.
Hut.	...	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	...	...	...	Eng.
Hy. Bl.	...	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	...	...	...	Eng.
Hyde	...	...	Hyde's Reports	...	...	...	Ind.
I. C. L. R.	...	...	Irish Common Law Reports, 17 vols., 1849—1866	...	...	...	Ir.
I. Ch. R.	...	...	Irish Chancery Reports, 17 vols., 1850—1867	...	...	...	Ir.
I. Eq. R.	...	...	Irish Equity Reports, 13 vols., 1838—1851	...	...	...	Ir.
I. L. R.	...	...	Irish Law Reports, 13 vols., 1838—1851	...	...	...	Ir.
I. L. R. (Vol.) All.	...	...	Indian Law Reports, Allahabad	...	...	...	Ind.
I. L. R. (Vol.) Bom.	...	...	Indian Law Reports, Bombay	...	...	...	Ind.
I. L. R. (Vol.) Calc.	...	...	Indian Law Reports, Calcutta	...	...	...	Ind.
I. L. R. (Vol.) Lah.	...	...	Indian Law Reports, Lahore	...	...	...	Ind.

# xx REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	...	...	...	...	Ind.
I. L. T.	...	Irish Law Times, 1867—(current)	...	...	...	...	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	...	...	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 ( <i>e.g.</i> , [1894] 1 I. R.)	...	...	...	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	...	...	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	...	...	...	Ir.
I. R., R. & L.	...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	...	...	...	...	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	...	...	...	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	...	...	...	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	...	...	...	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843.	...	...	...	...	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866...	...	...	...	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	...	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	...	...	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	...	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	...	...	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	...	...	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	...	...	...	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	...	...	...	Eng.
J. R.	...	Jurist Reports	...	...	...	...	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	...	...	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	...	...	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	...	...	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	...	...	...	Eng.
James	...	Nova Scotia Reports (James)	...	...	...	...	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	...	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	...	...	...	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	...	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	...	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	...	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	...	...	...	Eng.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	...	...	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	...	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	...	...	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	...	...	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	...	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	...	...	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	...	...	...	Eng.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	...	...	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	...	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 ( <i>e.g.</i> , [1901] 2	...	...	...	...	...	
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	...	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	...	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	...	...	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	...	...	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	...	...	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	...	...	...	Eng.
Keil.	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	...	...	...	Eng.
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	...	...	...	Eng.
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734...	...	...	...	...	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	...	...	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	...	...	...	Eng.
Kerr	...	New Brunswick Reports (Kerr)	...	...	...	...	...	Can.
Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	...	...	...	...	...	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	...	...	...	...	...	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	...	...	...	...	Eng.
Knox	...	Knox's Reports	...	...	...	...	...	Aus.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	...	...	...	...	...	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	...	...	...	...	...	Eng.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxi

L. & G. <i>temp.</i> Plunk.	...	Lloyd and Goold's Reports <i>temp.</i> Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. <i>temp.</i> Sugd.	...	Lloyd and Goold's Reports <i>temp.</i> Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	Can.
L. C. J.	...	Lower Canada Jurist	Can.
L. C. L. J.	...	Lower Canada Law Journal	Can.
L. C. R. ...	...	Lower Canada Reports	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P. ...	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	...	Leader Law Reports	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	...	Legal News	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols 1877—1893	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875	Eng.
L. T.	...	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	...	La Themis	Can.
Lane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee <i>temp.</i> Hard:	...	T. Lee's Cases <i>temp.</i> Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.
Leg. Rep.	...	Legal Reporter	Ir.
Legge	...	Legge's Reports	Aus.
Leon.	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	Eng.
Lev.	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	Eng.
Lew. C. C.	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—	
Ley	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	Eng.

Lib. Ass.	...	...	Liber Assisarum, Year Books, 1—51 Edw. III....	...	Eng.
Lilly	...	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	Eng.
Litt.	...	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	Eng.
Lloyd, L. R.	...	...	Lloyd's List Law Reports, 1919—(current)	...	Eng.
Lloyd, Pr. Cas.	...	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	Eng.
Lofft	...	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	Eng.
Long. & T.	...	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	Ir.
Lords Journals	...	...	Journals of the House of Lords	...	Eng.
Lud. E. C.	...	...	Luder's Election Cases, 3 vols., 1784—1787	...	Eng.
Lumley, P. L. C.	...	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	Eng.
Lush.	...	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	Eng.
Lut.	...	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	Eng.
Lut. Reg. Cas.	...	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	Eng.
Lynd.	...	...	Lyndwood, Provinciale, fol., 1 vol.	...	Eng.
M.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
M. & S.	...	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	Eng.
M. & W.	...	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	Eng.
M. C. R.	...	...	Montreal Condensed Reports	...	Can.
M. H. C. R.	...	...	Madras High Court Reports	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	...	Montreal Law Reports, King's Bench or Queen's Bench	...	Can.
M. L. R. (Vol.) S. C.	...	...	Montreal Law Reports, Superior Court	...	Can.
M. M. Cas.	...	...	Martin's Reports of Mining Cases	...	Can.
Mac.	...	...	Macassey's New Zealand Reports	...	N.Z.
Mac. & G.	...	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—	...	Eng.
Mac. & H.	...	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	Eng.
M'Cle.	...	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	Eng.
M'Cle. & Yo.	...	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	Eng.
Macfarlane	...	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	Scot.
Macl. & Rob.	...	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	Scot.
Macph. (Ct. of Sess.)	...	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	Scot.
Macq.	...	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	Scot.
Macr.	...	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	Eng.
Mad.	...	...	Madras High Court Reports	...	Ind.
Madd.	...	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	Eng.
Madd. & G.	...	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	Eng.
Madox	...	...	Madox's Formulæ Anglicanum	...	Eng.
Madox, Exch.	...	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	Eng.
Mag.	...	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	Eng.
Man. & G.	...	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	Eng.
Man. & Ry. K. B.	...	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	Eng.
Man. & Ry. M. C.	...	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	Eng.
Man. L. J.	...	...	Manitoba Law Journal	...	Can.
Man. L. R.	...	...	Manitoba Law Reports	...	Can.
Man. R. temp. Wood	...	...	Manitoba Reports temp. Wood	...	Can.
Mans.	...	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	Eng.
Mar. L. C.	...	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	Eng.
March	...	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	Eng.
Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	Eng.
Marsh.	...	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	Eng.
Marsh.	...	...	Marshall's Reports	...	Ind.
Mayn.	...	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	Eng.
Meg.	...	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	Eng.
Men.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
Mer.	...	...	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	Eng.
Milw.	...	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	Ir.
Mod. Rep.	...	...	Modern Reports, 12 vols., 1669—1755	...	Eng.
Mol.	...	...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	...	Ir.
Mont.	...	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	Eng.
Mont. & A.	...	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—	...	



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxiii

Mont. & B.	...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch.	...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M.	...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G.	...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P.	...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S.	...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App.	...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C.	...	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S.	...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M.	...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R.	...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C.	...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P.	...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B.	...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict.	...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr.	...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos.	...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep.	...	Municipal Reports	Can.
Murd. Epit.	...	Murdoch's Epitome	Can.
Murp. & H.	...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr.	...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr.	...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K.	...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. A. C.	...	Native Appeal Cases	S. Af.
N. & S.	...	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig.	...	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep.	...	New Brunswick Equity Reports	Can.
N. B. R.	...	New Brunswick Reports	Can.
N. B. R. (All.)	...	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.)	...	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.)	...	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.)	...	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.)	...	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr)	...	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.)	...	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.)	...	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.)	...	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.)	...	New Brunswick Reports (Trueman)	Can.
N. L. R.	...	Natal Law Reports	S. Af.
N. S. R.	...	Nova Scotia Reports	Can.
N. S. R. (Coch.)	...	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & R.)	...	Nova Scotia Reports (Geldert & Russell)	Can.
N. S. R. (James)	...	Nova Scotia Reports (James)	Can.
N. S. R. (Old.)	...	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.)	...	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.)	...	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.)	...	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad.	...	New South Wales Reports, Admiralty	Aus.
N. S. W. B.	...	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas.	...	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq.	...	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas.	...	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R.	...	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts.	...	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.)	...	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.)	...	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S.	...	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N.	...	New South Wales Weekly Notes	Aus.
N. W.	...	North-Western Provinces High Court Reports	Ind.
N. W. T. R.	...	North-West Territories Reports	Can.
N. Z. Jur.	...	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law	...	New Zealand Jurist Mining Law	N.Z.
N. Z. Jur. N. S.	...	New Zealand Jurist, New Series	N.Z.
N. Z. L. R.	...	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A.	...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels.	...	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B.	...	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C.	...	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B.	...	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C.	...	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837	Eng.
New Mag. Cas.	...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.

# xxiv      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

New Pract. Cas.	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep.	...	New Reports, 9 vols., 1862—1865	Eng.
New Sess. Cas.	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R.	...	Newfoundland Reports	Nfld.
Nolan	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649	Eng.
O. B. & F.	...	Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P.	...	Old Bailey Session Papers	Eng.
O. Bridg.	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	Eng.
O. F. S.	...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R.	...	Ontario Law Reports	Can.
O'M. & H.	...	O'Malley and Hardcastle's Election Cases, 1869—(current)	Eng.
O. P. D.	...	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R.	...	Ontario Reports	Can.
O. R.	...	Official Reports of the South African Republic, 1894—1899	S. Af.
O. R. C.	...	Reports of the High Court of the Orange River Colony	S. Af.
O. S.	...	Upper Canada Queen's Bench, Old Series	Can.
O. W. N.	...	Ontario Weekly Notes	Can.
O. W. R.	...	Ontario Weekly Reporter	Can.
Old.	...	Nova Scotia Reports (Oldrights)	Can.
Ont. Dig.	...	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date)	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.)	Eng.
P. & B.	...	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T.	...	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. Cas.	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D.	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I.	...	Prince Edward Island Reports	Can.
P. R.	...	Ontario Practice	Can.
P. Wms.	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
Palm.	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
Park.	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
Pat. App.	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App.	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
Peake, Add. Cas.	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	Eng.
Peck.	...	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham	...	Pelham (S. A.) Reports	Aus.
Per. & Dav.	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn.	...	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S.	...	Perrault's Conseil Supérieur	Can.
Per. P.	...	Perrault's Prévosté de Québec, 1726—1756	Can.
Ph.	...	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas.	...	Philipps' Election Cases, 1 vol., 1780	Eng.
Phillim.	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	Eng.
Phillim. Eccl. Jud.	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	...	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R.	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	Eng.
Pitc.	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	Scot.
Plowd.	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll.	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	Eng.
Poph.	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	Eng.
Pow. R. & D.	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.
Pratt	...	Pratt's Supplement to Bott's Poor Laws, 1833	Eng.
Prec. Ch.	...	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price	...	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price	...	Price's Mining Commissioners' Cases	Can.
Pug.	...	New Brunswick Reports (Pugsley)	Can.
Py. R.	...	Pykes' Lower Canada Reports	Can.
Q. B.	...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	...	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1	

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxv

Q. B. D. ...	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ...	Eng.
Q. J. P. ...	Queensland Justice of Peace Reports ...	Aus.
Q. L. J. ...	Queensland Law Journal and Reports, 11 vols., 1879—1901 ...	Aus.
Q. L. R. ...	Quebec Law Reports ...	Can.
Q. L. R. (Beor) ...	Queensland Law Reports by Beor, 1876—1878 ...	Aus.
Q. P. R. ...	Quebec Practice Reports ...	Can.
Q. R. (Vol.) K. B. or Q. B. ...	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current) ...	Can.
Q. R. (Vol.) S. C. ...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current) ...	Can.
Q. S. C. R. ...	Queensland Supreme Court Reports, 5 vols., 1860—1881 ...	Aus.
Q. S. R. ...	Queensland State Reports ...	Aus.
Q. W. N. ...	Weekly Notes, Queensland ...	Aus.
R. ...	The Reports, 15 vols., 1893—1895 ...	Eng.
R. ...	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878 ...	S. Af.
R. (Ct. of Sess.) ...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898 ...	Scot.
R. A. C. ...	Ramsay, Appeal Cases ...	Can.
R. & C. ...	Nova Scotia Reports (Russell & Chesley) ...	Can.
R. & G. ...	Nova Scotia Reports (Russell and Geldert) ...	Can.
R. C. ...	La Revue Critique de Législation et de Jurisprudence de Canada ...	Can.
R. de J. ...	Revue de Jurisprudence ...	Can.
R. de L. ...	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848 ...	Can.
R. E. D. ...	New South Wales, Reserved and Equity Decisions ...	Aus.
R. E. D. ...	Ritchie's Equity Decisions (Russell) ...	Can.
R. J. R. Q. ...	Quebec Revised Reports ...	Can.
R. L. N. S. ...	Revue Légale, New Series, 1895—(current) ...	Can.
R. L. O. S. ...	Revue Légale, Old Series, 21 vols., 1869—1892 ...	Can.
R. P. C. ...	Reports of Patent Cases, 1884—(current) ...	Eng.
R. R. ...	Revised Reports ...	Eng.
Rast. ...	Rastell's Entries ...	Eng.
Rayn. ...	Rayner's Tithe Cases, 3 vols., 1575—1782 ...	Eng.
Real Prop. Cas. ...	Real Property Cases, 2 vols., 1843—1847 ...	Eng.
Rep. Ch. ...	Reports in Chancery, fol., 3 vols., 1615—1710 ...	Eng.
Rep. in C. of A. ...	Reports in Courts of Appeal ...	N.Z.
Res. & Eq. Jud. ...	New South Wales Reserved and Equity Judgments ...	Aus.
Reserv. Cas. ...	Reserved Cases ...	Ir.
Rick. & M. ...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889 ...	Eng.
Rick. & S. ...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894 ...	Eng.
Ridg. L. & S. ...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795 ...	Ir.
Ridg. Parl. Rep. ...	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796 ...	Ir.
Ridg. temp. H. ...	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746 ...	Eng.
Ritch. Eq. Rep. ...	Ritchie's Equity Reports ...	Can.
Rob. Eccl. ...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ...	Eng.
Rob. L. & W. ...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851 ...	Eng.
Robert. App. ...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727 ...	Scot.
Robin. App. ...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841 ...	Scot.
Roll. Abr. ...	Rolle's Abridgment of the Common Law, fol., 2 vols. ...	Eng.
Roll. Rep. ...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ...	Eng.
Rom. ...	Romilly's Notes of Cases in Equity, 1 part, 1772—1787 ...	Eng.
Roscoe's B. C. ...	Roscoe, Digest of Building Cases ...	Eng.
Rose ...	Rose's Reports, Bankruptcy, 2 vols., 1810—1816 ...	Eng.
Ross, L. C. ...	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols. ...	Eng.
Rowe ...	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ...	Eng.
Rul. Cas. ...	Campbell's Ruling Cases, 25 vols. ...	Eng.
Russ. ...	Russell's Reports, Chancery, 5 vols., 1824—1829 ...	Eng.
Russ. & M. ...	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ...	Eng.
Russ. & Ry. ...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823 ...	Eng.
Rus. E. R. ...	Russell's Election Reports ...	Can.
Ry. & Can. Cas. ...	Railway and Canal Cases, 7 vols., 1835—1854 ...	Eng.
Ry. & Can. Tr. Cas. ...	Railway and Canal Traffic Cases, 1855—(current) ...	Eng.
Ry. & M. ...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ...	Eng.
Ryde, Rat. App. ...	Ryde's Rating Appeals, 3 vols., 1871—1893 ...	Eng.
S. ...	Searle's Reports of the Supreme Court of the Cape of Good Hope ...	S. Af.
S. A. L. J. ...	South African Law Journal ...	S. Af.



## xxvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

S. A. L. R.	...	...	South Australian Law Reports	...	...	...	...	Aus.
S. A. L. R.	...	...	South African Law Reports	...	...	...	...	S. Af.
S. A. R.	...	...	Reports of the High Court of the South African Republic, 1881—1892	...	...	...	...	S. Af.
S. A. S. R.	...	...	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921])	...	...	...	...	Aus.
S. C.	...	...	Reports of the Supreme Court of the Cape of Good Hope from 1880	...	...	...	...	S. Af.
S. C. (preceded by date)	...	...	Court of Session Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C.)	...	...	...	...	Scot.
S. C. (H. L.) (preceded by date).	...	...	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.))	...	...	...	...	Scot.
S. C. (J.) (preceded by date).	...	...	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.))	...	...	...	...	Scot.
S. C. R.	...	...	Canada, Supreme Court Reports	...	...	...	...	Can.
S. L. T.	...	...	Scots Law Times, 1893 (current)	...	...	...	...	Scot.
S. Q. R.	...	...	Queensland State Reports	...	...	...	...	Aus.
S. R.	...	...	Reports of the High Court of Southern Rhodesia	...	...	...	...	S. Af.
S. R. C.	...	...	Stuart's Lower Canada Reports	...	...	...	...	Can.
S. R. N. S. W.	...	...	New South Wales, State Reports	...	...	...	...	Aus.
S. R. Q.	...	...	Queensland Reports, Supreme Court	...	...	...	...	Aus.
S. V. A. R.	...	...	Stuart's Vice-Admiralty Reports	...	...	...	...	Can.
Saint	...	...	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	...	...	...	...	Eng.
Salk.	...	...	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	...	...	...	...	Eng.
Sask. L. R.	...	...	Saskatchewan Law Reports	...	...	...	...	Can.
Sau. & Sc.	...	...	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	...	...	...	...	Ir.
Saund.	...	...	Saunders's Reports, King's Bench, 2 vols., 1666—1672	...	...	...	...	Eng.
Saund. & A.	...	...	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	...	...	...	...	Eng.
Saund. & B.	...	...	Saunders and Bidder's Locus Standi Reports, 1905—(current)	...	...	...	...	Eng.
Saund. & C.	...	...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	...	...	...	...	Eng.
Saund. & M.	...	...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	...	...	...	...	Eng.
Sav.	...	...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	...	...	...	...	Eng.
Say.	...	...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	...	...	...	...	Eng.
Sc. Jur.	...	...	Scottish Jurist, 46 vols., 1829—1873	...	...	...	...	Scot.
Sc. L. R.	...	...	Scottish Law Reporter, 1865—(current)	...	...	...	...	Scot.
Sc. R. R.	...	...	Scots Revised Reports	...	...	...	...	Scot.
Sch. & Lef.	...	...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	...	...	...	...	Ir.
Scott	...	...	Scott's Reports, Common Pleas, 8 vols., 1834—1840	...	...	...	...	Eng.
Scott, N. R.	...	...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	...	...	...	...	Eng.
Sea. & Sm.	...	...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	...	...	...	...	Eng.
Sel. Cas. Ch.	...	...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	...	...	...	...	Eng.
Selwyn's N. P.	...	...	Selwyn's Abridgement of the Law of Nisi Prius	...	...	...	...	Eng.
Sess. Cas. K. B.	...	...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	...	...	...	...	Eng.
Sett. & Rem.	...	...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	...	...	...	...	Eng.
Sh. (Ct. of Sess.)	...	...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	...	...	...	...	Scot.
Sh. & MacI.	...	...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	...	...	...	...	Scot.
Sh. Dig.	...	...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	...	...	...	...	Scot.
Sh. Just.	...	...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	...	...	...	...	Scot.
Sh. Sc. App.	...	...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	...	...	...	...	Scot.
Sh. Teind Ct.	...	...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	...	...	...	...	Scot.
Shep. Touch.	...	...	Sheppard's Touchstone of Common Assurances	...	...	...	...	Eng.
Show.	...	...	Shower's Reports, King's Bench, 2 vols., 1678—1695	...	...	...	...	Eng.
Show. Parl. Cas.	...	...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	...	...	...	...	Eng.
Sid.	...	...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	...	...	...	...	Eng.
Sim.	...	...	Simons' Reports, Chancery, 17 vols., 1826—1852	...	...	...	...	Eng.
Sim. & St.	...	...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	...	...	...	...	Eng.
Sim. N. S.	...	...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	...	...	...	...	Eng.
Skin.	...	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	...	...	...	...	Eng.
Sm. & Bat.	...	...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	...	...	...	...	Ir.
Sm. & G.	...	...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	...	...	...	...	Eng.
Smith, K. B.	...	...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	...	...	...	...	Eng.
Smith, L. C.	...	...	Smith's Leading Cases, 2 vols.	...	...	...	...	Eng.
Smith, Reg. Cas.	...	...	C. L. Smith's Registration Cases, 1895—(current)	...	...	...	...	Eng.
Smythe	...	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	...	...	...	...	Ir.
Sol. Jo.	...	...	Solicitors' Journal, 1856—(current)	...	...	...	...	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxvii

Spence ... ..	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks ... ..	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
St. R. Qd. (preceded by date) ... ..	Queensland State Reports, since 1902 ( <i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep. ... ..	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ...	Scot.
Stark. ... ..	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ...	Eng.
State Tr. ... ..	State Trials, 34 vols., 1163—1820 ...	Eng.
State Tr. N. S. ... ..	State Trials, New Series, 8 vols., 1820—1858 ...	Eng.
Stewart ... ..	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton ... ..	Stockton's Vice-Admiralty Report and Digest ...	Can.
Story ... ..	Story's Commentaries on Equity Jurisprudence ...	Eng.
Stra. ... ..	Strange's Reports, 2 vols., 1716—1747 ...	Eng.
Stu. M. & P. ... ..	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ...	Scot.
Stuart ... ..	Sessions Cases (Stuart) ...	Scot.
Stuart, Adm. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ...	Can.
Stuart, K. B. ... ..	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ...	Can.
Sty. ... ..	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw. ... ..	Swabey's Report, Admiralty, 1 vol., 1855—1859 ...	Eng.
Sw. & Tr. ... ..	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ...	Eng.
Swan. ... ..	Swanston's Reports, Chancery, 3 vols., 1818—1821 ...	Eng.
Swin. ... ..	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841.	Scot.
Syme ... ..	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 .	Scot.
T. & M. ... ..	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ...	S. Af.
T. Jo. ... ..	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ...	Eng.
T. L. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ...	S. Af.
T. L. R. ... ..	The Times Law Reports, 1884—(current) ...	Eng.
T. P. ... ..	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D. ... ..	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym. ... ..	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ...	Eng.
T. S. ... ..	Reports of the Supreme Court of the Transvaal, 1902—1909...	S. Af.
Taml. ... ..	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ..	Eng.
Tas. L. R. ... ..	Tasmanian Law Reports ...	Aus.
Taunt. ... ..	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas. ... ..	Tax Cases, 1875—(current) ...	Eng.
Tay. ... ..	Taylor's King's Bench Reports ...	Can.
Temp. Wood ... ..	Manitoba Reports <i>temp.</i> Wood ...	Can.
Term Rep. ... ..	Term Reports (Durnford and East), fol., 8 vols., 1785—1800...	Eng.
Terr. L. R. ... ..	Territories Law Reports ...	Can.
Thom. ... ..	Nova Scotia Reports (Thomson) ...	Can.
Toth. ... ..	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr. ... ..	Townsend, Modern State Trials ...	Eng.
Trem. P. C. ... ..	Tremaine Pleas of the Crown, 1 vol., 1667 ...	Eng.
Trist. ... ..	Tristram's Consistory Judgments, 1 vol., 1872—1890 ...	Eng.
Tru. ... ..	New Brunswick Reports (Trueman) ...	Can.
Tudor, L. C. Merc. Law. ... ..	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop. ... ..	Tudor's Leading Cases on Real Property ...	Eng.
Turn. & R. ... ..	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr. ... ..	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ...	Eng.
Tyr. & Gr. ... ..	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur. ... ..	Upper Canada Jurist ...	Can.
U. C. L. J. N. S. ... ..	Canada Law Journal, New Series, 1865—(current) ...	Can.
U. C. L. J. O. S. ... ..	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
U. C. R. ... ..	Upper Canada Reports, Queen's Bench ...	Can.
Udal ... ..	Fiji Law Reports (Udal) ...	Fiji.
V. L. R. ... ..	Victorian Law Reports ...	Aus.
V. R. ... ..	Victorian Reports ...	Aus.
V. R. (Adm.) ... ..	Victorian Reports (Admiralty) ...	Aus.
V. R. (Eq.) ... ..	Victorian Reports (Equity) ...	Aus.
V. R. (Law) ... ..	Victorian Reports (Law) ...	Aus.
Vaugh. ... ..	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng.
Vent. ... ..	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691 ...	Eng.

## xxviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Vern.	...	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	...	Eng.
Vern. & Scr.	...	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	...	Ir.
Ves.	...	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	...	Eng.
Ves. & B.	...	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	...	Eng.
Ves. Sen.	...	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	...	Eng.
Vin. Abr.	...	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	...	Eng.
Vin. Supp.	...	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	...	Eng.
W.	...	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	...	S. Af.
W. A. L. R.	...	...	West Australian Law Reports	...	...	Aus.
W. A'B. & W.	...	...	Webb, A'Beckett and Williams' Victorian Reports	...	...	Aus.
W. & W.	...	...	Wyatt and Webb	...	...	Aus.
W. C. C.	...	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	...	Eng.
W. H. C.	...	...	South African Law Reports, Witwatersrand High Court	...	...	S. Af.
W. Jo.	...	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	...	Eng.
W. L. D.	...	...	South African Law Reports, Witwatersrand Local Division	...	...	S. Af.
W. L. R.	...	...	Western Law Reporter	...	...	Can.
W. L. T.	...	...	Western Law Times	...	...	Can.
W. N. (preceded by date)	...	...	Law Reports, Weekly Notes, 1866—(current) ( <i>e.g.</i> , [1866] W. N.)	...	...	Eng.
W. N.	...	...	Calcutta Weekly Notes	...	...	Ind.
W. R.	...	...	Weekly Reporter, 54 vols., 1852—1906	...	...	Eng.
W. R.	...	...	Sutherland's Weekly Reporter	...	...	Ind.
W. R.	...	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	...	S. Af.
W. W. & A'B.	...	...	Wyatt, Webb and A'Beckett	...	...	Aus.
W. W. R.	...	...	Western Weekly Reports	...	...	Can.
Wallis by Lyne	...	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	...	Ir.
Web. Pat. Cas.	...	...	Webster's Patent Cases, 2 vols., 1602—1855	...	...	Eng.
Welsh, Reg. Cas.	...	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	...	Ir.
Went. Off. Ex.	...	...	Wentworth's Office and Duty of Executors	...	...	Eng.
West	...	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	...	Eng.
West <i>temp.</i> Hard.	...	...	West's Reports <i>temp.</i> Hardwicke, Chancery, 1 vol., 1736—1740	...	...	Eng.
West. Tithe Cas.	...	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	...	Eng.
White	...	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	...	Scot.
White & Tud. L. C.	...	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	...	Eng.
Wight	...	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	...	Eng.
Will. Woll. & Dav.	...	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	...	Eng.
Will. Woll. & H.	...	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	...	Eng.
Willes	...	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	...	Eng.
Wilm.	...	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	...	Eng.
Wils.	...	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	...	Eng.
Wils. & S.	...	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	...	Scot.
Wils. Ch.	...	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	...	Eng.
Wils. Ex.	...	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	...	Eng.
Win.	...	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	...	Eng.
Wm. Bl.	...	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	...	...	Eng.
Wm. Rob.	...	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	...	Eng.
Wms. Saund.	...	...	Williams' Notes to Saunders' Reports, 2 vols.	...	...	Eng.
Wolf. & B.	...	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	...	Eng.
Wolf. & D.	...	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	...	Eng.
Woll.	...	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	...	Eng.
Wood	...	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	...	Eng.
Y. A. D.	...	...	Young's Vice-Admiralty Reports	...	...	Can.
Y. & C. Ch. Cas.	...	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—	...	...	Eng.
Y. & C. Ex.	...	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	...	...	Eng.
Y. & J.	...	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	...	...	Eng.
Y. B.	...	...	Year Books	...	...	Eng.
Yelv.	...	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	...	...	Eng.
You.	...	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	...	...	Eng.

# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, see pp. xiii.—xxviii., *ante.*)

A.-G.	.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	.	„ Actiengesellschaft.
Admlty.	.	.	.	.	.	Admiralty.
Affd.	.	.	.	.	.	Affirmed.
Affg.	.	.	.	.	.	Affirming.
Akt.	.	.	.	.	.	Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	.	.	.	.	.	Anonymous.
Apld.	.	.	.	.	.	Applied.
Appct.	.	.	.	.	.	Applicant.
Appln.	.	.	.	.	.	Application.
Appln.	.	.	.	.	.	Application to Register a Trade Mark.
Applt.	.	.	.	.	.	Appellant.
Apprvd.	.	.	.	.	.	Approved.
Arbn.	.	.	.	.	.	Arbitration.
Archbp.	.	.	.	.	.	Archbishop.
Art.	.	.	.	.	.	Article.
Assce.	.	.	.	.	.	Assurance.
Assocn.	.	.	.	.	.	Association.
B. C.	.	.	.	.	.	„ Borough Council.
Bkpcy.	.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	.	„ <i>Capias ad satisfaciendum.</i>
Cale. Ry. Co.	.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	.	„ Chancery.
Ch. Div	.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	.	Commissioners.
Consd.	.	.	.	.	.	Considered.
Corp'n.	.	.	.	.	.	Corporation.
Ct.	.	.	.	.	.	Court.
	.	.	.	.	.	Court of Chancery.
	.	.	.	.	.	„ of „
	.	.	.	.	.	„ Divisional Court.
Deft.	.	.	.	.	.	„



Distd. . . . .	for Distinguished.
Div. Ct. . . . .	„ Divisional Court.
Eccl. Comrs. . . . .	„ Ecclesiastical Commissioners.
Eccl. Ct. . . . .	„ Ecclesiastical Court.
Ex. Ch. . . . .	„ Exchequer Chamber.
<i>Ex p.</i> . . . . .	„ <i>Ex parte</i> .
Exch. . . . .	„ Exchequer.
Exor. . . . .	„ Executor.
Exorship. . . . .	„ Executorship.
Expld. . . . .	„ Explained.
Extd. . . . .	„ Extended.
Extrix. . . . .	„ Executrix.
<i>Fi. fa.</i> . . . . .	„ <i>Fieri facias</i> .
Folld. . . . .	„ Followed.
G. & S. W. Ry. Co. . . . .	„ Glasgow & South Western Railway Co.
G. C. Ry. Co. . . . .	„ Great Central Railway Co.
G. E. Ry. Co. . . . .	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. . . . .	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co. . . . .	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . . .	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland . . . . .	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . . .	„ Great Western Railway Co.
Govt. . . . .	„ Government.
Grdns. . . . .	„ Guardians or Guardians of the Poor.
H. C. of A. . . . .	„ High Court of Australia.
H. L. . . . .	„ House of Lords.
I. R. Comrs. . . . .	„ Inland Revenue Commissioners.
Insce. . . . .	„ Insurance.
JJ. . . . .	„ Justices.
Jud. Act . . . . .	„ Judicature Act.
K. B. Div. . . . .	„ King's Bench Division.
L. & B. Ry. Co. . . . .	„ London & Brighton Railway Co.
L. & N. E. Ry. Co. . . . .	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co. . . . .	„ London & North Western Railway Co.
L. & S. W. Ry. Co. . . . .	„ London & South Western Railway Co.
L. & Y. Ry. Co. . . . .	„ Lancashire & Yorkshire Railway Co.
L. B. . . . .	„ Local Board.
L. B. & S. C. Ry. Co. . . . .	„ London, Brighton & South Coast Railway Co.
L. C. . . . .	„ Lord Chancellor.
L. C. & D. Ry. Co. . . . .	„ London, Chatham & Dover Railway Co.
L. C. C. . . . .	„ London County Council.
L. Elec. Ry. Co. . . . .	„ London Electric Railway Co.
L. G. Board . . . . .	„ Local Government Board.
L.J. . . . .	„ Lord Justice.
L.JJ. . . . .	„ Lords Justices.
L. M. & S. Ry. Co. . . . .	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co. . . . .	„ London, Tilbury & Southend Railway Co.
M. S. Act . . . . .	„ Merchant Shipping Act.
M. S. & L. Ry. Co. . . . .	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . . .	„ Magistrates.
Mentd. . . . .	„ Mentioned.
Met. Dist. Ry. Co. . . . .	„ Metropolitan District Railway Co.
Met. Ry. Co. . . . .	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co. . . . .	„ Midland Great Western Railway Co.
Mid. Ry. Co. . . . .	„ Midland Railway Co.
Mtge. . . . .	„ Mortgage.
Mtgee. . . . .	„ Mortgagee.
Mtgor. . . . .	„ Mortgagor.
N. B. Ry. Co. . . . .	„ North British Railway Co.
N. E. Ry. Co. . . . .	„ North Eastern Railway Co.
N. F. . . . .	„ Not Followed.
N. P. . . . .	„ Nisi Prius.
Ord. . . . .	„ Order.
Overd. . . . .	„ Overruled.



# ABBREVIATIONS.

xxxi

P. C.	.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	.	„ <i>Quære</i> .
R. C.	.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	.	„ Revised Statutes of Canada.
R. S. C.	.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	.	„ Reversed.
Revsd.	.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	.	Rail. Co. or Railway Co.
S. C.	.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	.	„ Steamship.
Sched.	.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	.	„ <i>Scire facias</i> .
Sect.	.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	.	„ Workmen's Compensation Act.



## MEANING OF TERMS

### USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.



# TABLE OF CASES.

INCLUDING CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND DOMINIONS BEYOND THE SEAS.

## A.

	PAGE		PAGE
— (A Solicitor), <i>Re</i> (1884) ...	418, 470	Advocate-General v. Ramsay's Trustees (Scot.)	50
— v. Campbell (1771) ...	208	— v. Smith (1854)	56
— Bank, Ltd. v. E— (1887) ...	636	— v. Trotter (Scot.)	67
Abbassee Begum v. Maharanee Raj Roop Kooer (Ind.)...	445, 446	Adyn v. Ayre (1805)	555
Abbott, <i>Ex p.</i> , <i>Re</i> Gourlay (1880) ...	564	Affleck v. R. (Aus.)	128
— v. Greenwood (1839) ...	463	African Gold Recovery Co. v. Lace (S. Af.)	280
— v. Richards (1846) ...	553	African Mining & Financial Assocn. v. De Catelin (S. Af.) ...	364
Abbubaker Saheb v. Mohidin Saheb (Ind.)...	518	Aga Kurboolie Mahomed v. R. (1843) ...	581
Abdul Kadir v. Doolanbibi (Ind.) ...	232	Aga Syed Abdool Hossani v. Lenaine & Snadden (Ind.) ...	184
Abdullakhan v. Khanmia (Ind.) ...	175	Agarchand Guman Chand v. Rakhma Hanmant (Ind.) ...	346, 347
Abell v. Allan (Can.) ...	637	Agnew v. Davis (Can.) ...	359
Abell (John) Co. v. Hornby (Can.) ...	311, 312	Agricultural Insurance Co. of Watertown v. Ansley (Can.) ...	387
Aberaman Ironworks v. Wickens (1868) ...	322, 323	Agriculturists' Cattle Insurance Co., <i>Re</i> , Evans v. Smallcombe (1868) ...	333
Abergavenny (Marquess), <i>Re</i> , Nevill v. Inland Revenue Comrs. (1923) ...	22, 23	Agriculturists' Cattle Insurance Co., <i>Re</i> , Smallcombe's Case (1867) ...	333
Abergavenny's (Lord) Case (1607) ...	559	Ahmad Bakhsh v. Lalta Prasad & Azmat Ali (Ind.) ...	461, 462
Aburn, <i>Re</i> (N.Z.) ...	270	Ahmedbhoy Hubibhoy v. Vulleebhoy Casumbhoy (Ind.) ...	229
Ackermann v. Ravenscroft (S. Af.) ...	513	Aikinhead v. Blades (1813) ...	508
Ackland v. Paynter (1820) ...	508, 509, 510	Ainsworth, <i>Re</i> , Finch v. Smith (1915) ...	75
Ackworth v. Kempe (1778) ...	545	Aird, <i>Re</i> (Aus.) ...	125
Acworth v. Stone, <i>Re</i> Power, <i>Re</i> Stone (1901) ...	30	Aireton v. Davis (1833) ...	512, 513
Adam v. Bank of England (1908) ...	656	Airey v. Bower, <i>Re</i> Bower (1886) ...	450
Adams v. Adams, Janett & Adams (Can.) ...	454, 636	Airton v. Davis (1833) ...	512, 513
— v. Annett (Can.) ...	583	Aitamma v. Naraina Bhatta (Ind.) ...	163
— v. Bridger (1832) ...	359	Aitcheson & Co. v. Kidd (1894) ...	674
— v. Broughton (1737) ...	225, 584	Aitken v. Bremner (N.Z.) ...	312
— v. Brunswick Corp'n. (Aus.) ...	315, 316	— v. Godkin (Aus.) ...	633
— v. Cox (Can.) ...	541	Aitkenhead v. Blades (1813) ...	508
— v. Gillen (Ir.) ...	650	Aitkin v. Moody (Can.) ...	385, 536
— v. Ham (Can.)...	207	Akbar Husain v. Alia Bibi (Ind.)	383
— v. Montgomery (Can.) ...	627	Alchin v. Wells (1793)...	608
Adamson v. Adamson (Can.) ...	199, 200, 585	Alcock v. Smith (Can.) ...	355
Adanac Oil Co. v. Stocks (Can.) ...	568	Alderson v. Davenport (1844)	581
Addison v. Derbyshire & Staffordshire Ry. Co. (1855)	440	— v. Kerr (S. Af.)	532
— v. Dickson (Can.)	636, 642	— v. Maddison (1881)...	293, 294
— v. Tate (1855)	571, 573	Aldred v. Constable (1844) ...	513, 514
Adkins v. Bliss (1858)...	418	Aldridge v. Rawden (1853) ...	436
Adlam v. Noble (1841) ...	463	Alexander v. Walters (Can.) ...	447
Adlington v. Conyngham (1898) ...	647	Alexander's Trustees v. Alexander's Marriage-Contract Trustees (Scot.) ...	40
Adshead v. Grant (Can.) ...	524	Ali Moidian Ravuthan v. Elayachanidathil Kombia Achen (Ind.) ...	186
Advocate, H.M. v. Gunning's Trustees (Scot.)	26	Ali Sáheb v. Káji Ahmad (Ind.) ...	515, 516
— v. Heywood-Lonsdale's Trustees (Scot.) ...	10	Alison's Case (1873) ...	160, 182
— v. Routledge's Trustees (Scot.) ...	60	Alivon v. Furnival (1834) ...	448
— v. Warrender's Trustees (Scot.) ...	25	Allan v. McTavish (Can.) ...	184
Advocate-General v. Anstruther (Scot.) ...	118	— v. Place (Can.) ...	527
— v. Blackburn's Trustees (Scot.) ...	55	Allardice v. Onslow (1864) ...	62
— v. Hamilton (Scot.) ...	55		
— v. Oswald (Scot.) ...	68		



	PAGE		PAGE
Allason v. Stark (1838) ... ..	167, 186	Anon. (1434), Y. B. 12 Hen. 6, fo. 1, pl. 3 ...	251
Allcard v. Skinner (1887) ... ..	351	— (1465), Jenk. 143 ... ..	536
Allen v. Allen (1885) ... ..	596, 597	— (1484), Jenk. 163 ... ..	242
— v. Carter (1870) ... ..	383	— (1505), Keil. 61 b ... ..	583
— v. Cucksey (1867) ... ..	461	— (1536), 1 Dyer, 7 b ... ..	565
— v. Public Trustee, <i>Re</i> Wedgwood (1921) ...	36, 77	— (1543), Bro. N. C. 149 ... ..	504
— v. Wood (1834) ... ..	362	— (1546), Bro. N. C. 78 ... ..	243
— v. Woods (1893) ... ..	192	— (prior to 1547), Keil. 112 ... ..	243
Alleyne v. Darcy (Ir.) ... ..	481	— (1553), 1 Dyer, 100 a, pl. 71 ... ..	558
Allhusen & Sons v. Mitchell & Co. (Scot.) ...	345	— (1558), Ben. 59 ... ..	435
Allison v. Stark (1838) ... ..	167	— ( <i>temp.</i> 1558–1603), 4 Leon. 201 ... ..	560, 573
Allnutt v. Ryland (Can.) ... ..	257, 258	— (1560), Moore, K. B. 20 ... ..	281
Alloway v. St. Andrews Rural Municipality		— (1561), Dal. 29 (6) ... ..	557
(Can.) ... ..	242	— (1561), Moore, K. B. 32 ... ..	565
Allsop & Joy's Contract, <i>Re</i> (1889) ... ..	165	— (1564), Dal. 64 ... ..	273
Alston's Trustees v. Lord Advocate (Scot.) ...	128	— (1578), 3 Dyer, 363 a, pl. 24 ... ..	516
Alton v. Harrison (1869) ... ..	603	— (1578), 2 Leon. 11 ... ..	254
Alward v. St. John's Corp'n. (Can.) ... ..	528	— (1579), 3 Dyer, 371 b ... ..	201
American Abell Co. v. McMillan (Can.) ... ..	390	(prior to 1580), Plowd. Queries, 45,	
American Concentrated Must Corp'n. v.		pl. 241 ... ..	250, 251, 273
Hendry (1893) ... ..	475, 478	(1580), 3 Dyer, 373 b ... ..	561
Ames v. Birkenhead Docks Trustees (1855) ...	673	(1583), Moore, K. B. 159 ... ..	573
Amriteswari Debi v. Secretary of State for		(prior to 1585), Cro. Eliz. 37, n. ... ..	139
India (Ind.) ... ..	164	(1585), 3 Leon. 122 ... ..	222
Amundsen Estate & Merchants Bank of		(1586), Godb. 109 ... ..	208
Canada, <i>Re</i> , Merchants Bank of Canada v.		(1586), Gouldsb. 53 ... ..	243
Amundsen (Can.) ... ..	571	(1589), Cro. Eliz. 174 ... ..	525
Amyot, <i>Ex p.</i> (1841) ... ..	663	(1598), Moore, K. B. 542 ... ..	511
Anandibai v. Rajaram (Ind.) ... ..	562	(1599), Moore, K. B. 573 ... ..	516
Anctil v. Quebec City (Can.) ... ..	212	(prior to 1601), Cary, 14 ... ..	277
Anderson, <i>Re</i> , Pegler v. Gillatt (1905) ... ..	330	— (1602), 1 Brownl. 50 ... ..	478, 479
— v. Atkinson, <i>Re</i> Atkinson (1882) ... ..	106	— (1608), 1 Brownl. 41 ... ..	507, 511, 534
— v. Collinson (1901) ... ..	195	— (1610), Godb. 181 ... ..	435
— v. Cunningham (Can.) ... ..	425	— (1616), 3 Bulst. 212 ... ..	542
— v. Gill (Scot.) ... ..	169	— (1639), March, 47 ... ..	436
— v. Johnson (Can.) ... ..	432	— (1641), March, 105 ... ..	269, 275
— v. Mill (Aus.) ... ..	215, 216	— (1649), Clay. 140 ... ..	275
— v. North of Scotland Bank (Scot.) ... ..	320, 321	— (1665), Nels. 79 ... ..	189
— v. Radcliffe (1858) ... ..	544	— (1678), 1 Freem. K. B. 475 ... ..	272
— v. Shand (Scot.) ... ..	217	— (1684), 2 Cas. in Ch. 163 ... ..	596
— v. South Vancouver Municipality		— (1687), Comb. 62 ... ..	596, 597
(Can.) ... ..	372	— (1690), 2 Vent. 218 ... ..	505
— v. Sutherland (Can.) ... ..	388	— (1698), 12 Mod. Rep. 230 ... ..	582
Anderson's Trustees v. Matthew (Scot.) ... ..	40	— (1700), 12 Mod. Rep. 385 ... ..	582
Andrews, <i>Re</i> (N.Z.) ... ..	26	— (1701), 12 Mod. Rep. 561 ... ..	144
— v. Elliott (1855) ... ..	382, 383	— (1704), 6 Mod. Rep. 223 ... ..	580
— v. — (1856) ... ..	382, 383	— (1705), 2 Salk. 588 ... ..	469
— v. Marris (1841) ... ..	465, 466, 467	— (1709), 2 Eq. Cas. Abr. 522 ... ..	370
— v. Robertson (Can.) ... ..	530	— (1718), Bunb. 31 ... ..	605
— v. Saunderson (1857) ... ..	437	— (1724), 8 Mod. Rep. 225 ... ..	427
Andruss v. Page (Can.) ... ..	433	— (1728), 1 Barn. K. B. 43 ... ..	452
Angehrn v. Federal Cold Storage Co., Ltd.		— (1731), 1 Barn. K. B. 449 ... ..	427
(S. Af.) ... ..	293	— (1731), 1 Barn. K. B. 464 ... ..	583
Angel v. Smith (1804) ... ..	427, 428, 598, 604	— (1734), 2 Barn. K. B. 461: 480, 482, 483, 486	
Angell v. Baddeley (1877) ... ..	455, 530	— (1747), 3 Swan. 311, n. ... ..	604
Anglesey (Marquis), <i>Re</i> , De Galve (Countess)		— (1754), 3 Atk. 809 ... ..	141
v. Gardner (1903) ... ..	657	— (1772), Lofft, 81 ... ..	545
Anglo-American Telegraph Co. v. Spurling		— (1773), Lofft, 156 ... ..	594
(1879) ... ..	136, 281, 298, 305	— (1773), Lofft, 253 ... ..	609
Anglo-Canadian Mortgage Investment Corp'n.		— (1774), Lofft, 372 ... ..	536
v. Shaw (Can.) ... ..	200	— (1774), Lofft, 433 ... ..	608
Anglo-French Co-operative Society, <i>Re</i>		— (1774), Lofft, 651 ... ..	557
(1880) ... ..	152	— (1801), 6 Ves. 287 ... ..	604
Anglo-Italian Bank v. Davies (1878) ... ..	572, 665, 670	— (1815), 2 Chit. 390 ... ..	555
Annáji Dattatraya v. Chandrábái (Ind.) ... ..	561, 562	— (1823), 1 L. J. O. S. K. B. 87 ... ..	439
Annie Johnson, The, Larue (G.) & Co. v.		— (1825), 3 L. J. O. S. K. B. 174 ... ..	528
Procurator-General (1921) ... ..	195	— (1853), 20 L. T. O. S. 212 ... ..	580
Annot Lyle, The (1886) ... ..	446, 448, 451	—, [1875] W. N. 203 ... ..	500
Anon. (undated), Cary, 20 ... ..	138	— (1875), 1 Char. Cham. Cas. 6 ... ..	444, 452
— (1309), Y. B. 2 Edw. 2, 39 ... ..	289	— (1875), 1 Char. Cham. Cas. 129 ... ..	443
— (1310), Y. B. Mich. 3 Edw. 2, 53 ... ..	153	—, [1876] W. N. 9 ... ..	637
— (1311), Sel. Soc. Y. B. Vol. VI., p. 193 ...	150	— (1876), 2 Char. Cham. Cas. 12 ... ..	496
		— (Can.), 4 P. R. 242 ... ..	424
		— (Ir.), 3 L. R. Ir. 190 ... ..	585
		— (Ir.), 1 Hog. 207 ... ..	585

## TABLE OF CASES.

xxxvii

[illegible]

	PAGE		PAGE
A.-G. v. Fort (1804) ...	512, 517	A.-G. v. Naylor (1863) ...	322
— v. Gardner (1863) ...	88, 107	— v. New York Breweries Co. (1898) ...	121
— v. Gasquet (1877) ...	65	— v. Niagara Falls International Bridge	
— v. Gell (1865) ...	64, 67, 68	Co. (Can.) ...	248
— v. Gibbs (1829) ...		— v. Northumberland (Duke) (1904) ...	84
— v. Giles (1860) ...	73,	— v. Noyes (1881) ...	87, 97, 108, 109
— v. Glendining (1904) ...	17	— v. Owen (1899) ...	7, 45
— v. Glossop (1907) ...	14, 15, 17	— v. Parr (1924) ...	23
— v. Gosling (1892) ...	13, 129	— v. Partington (1864) ...	
— v. Great Northern Ry. Co. (1850) ...	593, 594	— v. Pearson (1924) ...	15, 23
— v. Grey (Earl) (1898) ...	12	— v. Peek (1913) ...	22, 47
— v. Halifax Corpn. (1869) ...	366	— v. Penrhyn (1900) ...	16, 17
— v. Hallett (1857) ...	105, 106	— v. Pickard (1838) ...	60
— v. Hancock (1837) ...	49, 71	— v. Popplestone (1731) ...	226
— v. Hanner (1904) ...	17	— v. Pottinger (1861) ...	64
— v. Hawkins (1901) ...	15, 16, 18	— v. Power (Ir.) ...	14
— v. Hay (1899) ...	20	— v. Pratt (1874) ...	121, 122
— v. Henniker (Lord) (1852) ...	52	— v. Public Trustee (1920) ...	96, 97
— v. Hertford (Marquis) (1845) ...	66	— v. Reynolds (1804) ...	154
— v. ——— (1849) ...	66	— v. Riall (Ir.) ...	92, 107
— v. Heywood (1887) ...	13	— v. Richards (1796) ...	583
— v. Higgins (1857) ...	121, 122	— v. Richmond (Duke) (No. 2) (1907) ...	
— v. Holbrook (1823) ...	50, 68	— v. Richmond & Gordon (Duke) (1909) ...	10,
— v. Holden (1903) ...	11	18, 25, 26	
— v. Holford (1815) ...	54	— v. Robertson (1893) ...	97, 109, 111
— v. Hollingworth (1857) ...	50, 51	— v. Robinson (Ir.) ...	15
— v. Hope (1834) ...	120	— v. Rochester Corpn. (1833) ...	210
— v. Hubbuck (1884) ...	118	— v. Rowe (Lady) (1862) ...	64, 65
— v. Hughes (1842) ...	82	— v. Rowsell (1844) ...	66
— v. Jackson (1831) ...	51, 72	— v. Rushton (1864) ...	106, 107
— v. ——— (1834) ...	61	— v. Sandwich (Earl) (1922) ...	17, 18, 19
— v. Jacobs-Smith (1895) ...	10, 11, 14	— v. Seccombe (1911) ...	12, 13
— v. Jameson (Ir.) ...	24	— v. Sefton (Earl) (1865) ...	83, 108, 109, 111
— v. Jewish Colonization Assocn. (1901) ...	97,	— v. Selborne (Earl) (1902) ...	102, 111
	98, 101, 102	— v. Sharpe (1891) ...	52
— v. Johnson (1903) ...	12, 18	— v. Sibthorp (1858) ...	94, 106, 110
— v. ——— (1907) ...	97, 98, 99, 109	— v. Simcox (1848) ...	55
— v. Jones (1849) ...	57, 118	— v. Smith (1892) ...	116
— v. Jones & Bartlett (1817) ...	49, 50	— v. ——— (1893) ...	116, 126, 127
— v. Kent (1862) ...	60, 64	— v. ——— (1923) ...	44, 45
— v. King (1817) ...	154	— v. Smith-Marriott (1899) ...	18
— v. Lane Fox (1924) ...	10	— v. Smyth (Ir.) ...	10
— v. Leconfield (Lord) (Ir.) ...	109	— v. Smythe (1862) ...	86, 95
— v. Lethbridge (1905) ...	18	— v. Staff (1833) ...	117, 118
— v. Lilford (Lord) (1864) ...	106	— v. Stephens, Putney Charity (1855) ...	319
— v. Littledale (1871) ...	83, 89, 105	— v. Strange (1898) ...	17
— v. Lomas (1873) ...	54, 118	— v. Sudeley (Lord) (1896) ...	122
— v. Londesborough (Earl) (1905) ...	20	— v. Swansea Improvements & Tram-	
— v. London (City) Corpn. (1913) ...	66, 67	ways Co. (1878) ...	446, 447
— v. Longford (Ir.) ...	104	— v. Tancred (prior to 1798) ...	596
— v. Loscombe (1860) ...	71	— v. Theobald (1890) ...	14
— v. Loyd (1895) ...	59, 119	— v. Thetford Corpn. (1860) ...	649
— v. Malkin (1846) ...	58, 119	— v. Thynne (1914) ...	23
— v. Mander (1896) ...	89, 109, 114	— v. Toronto General Trusts Corpn.	
— v. Mangles (1839) ...	55	(Can.) ...	114, 115
— v. Manners (Lady) (1815) ...	70, 71	— v. Upton (1866) ...	93, 94
— v. Maule (1886) ...	92	— v. Wack (1899) ...	28
— v. Maxwell (Ir.) ...	58	— v. Wade (1910) ...	59, 87
— v. Mercers' Co., Re St. Paul's School		— v. Waghorn (1909) ...	13
(1870) ...	342	— v. Walker, Re Reversionary Interest	
— v. Metcalfe (1851) ...	57, 71	Society, Ltd.'s Petition (1896) ...	19
— v. Middleton (Lord) (1858) ...	83, 86	— v. Walthamstow Local Board (1878) ...	593
— v. Milne (1914) ...	46	— v. Walthamstow Urban District	
— v. Mitchell (1881) ...	93, 105	Council, Walthamstow Sewage	
— v. Montagu (Lord) (1904) ...	25	Question (1895) ...	593
— v. Montefiore (1888) ...	83, 84, 85	— v. Watson (1917) ...	10
— v. ——— (1888) ...	47	— v. Wendt (1895) ...	14
— v. Munby (1858) ...	59	— v. Wilkinson (1859) ...	423
— v. Munro (1845) ...	371	— v. Wimbledon House Estate Co., Ltd.	
— v. ——— (1848) ...	371	(1904) ...	198
— v. Murdock (1852) ...	448	— v. Winans (1901) ...	65
— v. Murray (1904) ...	15, 16	— v. Wolverton (1897) ...	90, 91
— v. ——— (Ir.) ...	118	— v. Wood (1828) ...	71
— v. Napier (1851) ...	63	— v. ——— (1897) ...	14
— v. Nash (1836) ...	65	— v. Worrall (1895) ...	12



# TABLE OF CASES.

xxxix

	PAGE
A.-G. v. Wyndham (1862) ...	56
— v. Wynford (Lord) (1854) ...	69
— v. Wynne (Ir.) ...	602, 603
— v. Yelverton (1861) ...	88, 92, 93, 107
A.-G. for Ireland v. Rathdonnell (Ir.)	91, 92, 102, 107
A.-G. for Manitoba v. Winnipeg Electric Ry. Co. (Can.) ...	184
A.-G. for Ontario v. Brown (Can.) ...	111
— v. Lee (Can.) ...	108
— v. Newman (Can.) ...	99, 102
— v. Stuart (Can.) ...	106
A.-G. for Trinidad & Tobago v. Eriché (1893)	231
A.-G. to Prince of Wales v. Collom (1916) ...	370
Auhin Ah Seing v. Ahmed Mahomed (Ind.)	489
Auldjo (Doe d.) v. Hollister (Can.) ...	576
Ault v. Armstrong (Can.) ...	464
Austin v. Davey (1844) ...	462
— v. Ward (1824) ...	520
— v. — (1825) ...	520
Australia Hotel Co., Ltd. v. Moore (Aus.) ...	277
Automatic Weighing Machine Co. v. Combined Weighing & Advertising Machine Co. (1889) ...	445, 447
Avanasi Gounden v. Nachammal (Ind.) ...	201
Avery, <i>Re</i> , Pinsent v. Avery, Wright v. Marghiloman (1913) ...	8, 9, 30, 34
— v. Cayuga (Can.) ...	486
Avril v. Mordant (1834) ...	534
— v. Warwick, Sheriff (1834) ...	534
Awdry v. Cayley, <i>Re</i> Cayley (1904) ...	5, 48
Axmann v. Lund (1874) ...	331
Ayer v. Aden (1605) ...	555
Ayre v. Aden (1605) ...	555
Ayrey v. Davenport (1807) ...	223
Ayscough v. Sheed, Thomson & Co. (1923) ...	239
— v. — (1924) ...	239
Ayshford v. Murray (1870) ...	513
Ayyavayar v. Virasami Mudal (Ind.) ...	633

## B.

Baby v. Foott, Sheriff (Can.) ...	532
Bachkurst v. Clinkard (1690) ...	506
Backhouse v. Mellor (1859) ...	460
— v. Siddle (1878) ...	570, 645
Bacon, <i>Ex p.</i> , <i>Re</i> Bond (1881) ...	158
— (Doe d.) v. Brydges (Lady) (1843) ...	192
— v. Ford, <i>Re</i> Kensington (Lord) (1885)	568, 569
Badar Bee v. Habib Merican Noordin (1909)	168, 169
Badart's Trusts, <i>Re</i> (1870) ...	99, 101, 102
Badeley v. Consolidated Bank (1886) ...	219
— v. — (1888) ...	219, 630, 645
Badenach v. Inglis (Can.) ...	162
Badger v. Torosoff (Can.) ...	674, 675
Badische Anilin Und Soda Fabrik v. Isler (1906) ...	299
Badman v. Pugh (1843) ...	431
Baggaley (Doe d.) v. Hares (1833) ...	274
Bagge v. Whitehead (1892) ...	492, 546
Bagley v. Curtis (Can.) ...	379
Bagnall v. Carlton (1877) ...	648
Bagot v. Williams (1824) ...	153
Bagshaw v. Farnsworth (1860) ...	482
Bagshawes, Ltd. v. Deacon (1898) ...	510
Bahadur Singh v. Ram Bahadur (Ind.) ...	332
Bahir Das Chakravarti v. Nobin Chunder Pal (Ind.) ...	309
Bai Kúvar v. Vendidas Gangarám (Ind.)	478, 479
Bai Meherbai v. Maganchand (Ind.) ...	187
Baij Nath Goenka v. Padmanand Singh (Ind.)	163

	PAGE
Bailey v. Imperial Bank (Can.) ...	627
— v. Tindall (1853) ...	113
Bailey (W. H.) & Son, Ltd. v. Holborn & Frascati, Ltd. (1914) ...	344
Bailey's Trusts, <i>Re</i> (1869) ...	570
Baillie v. Dickson (Can.) ...	392
Baily v. Boulton (1851) ...	80
— v. Bunning (1866) ...	525
Bain & Leslie, <i>Re</i> (Can.) ...	269
Bainbrigge v. Baddeley (1847) ...	144, 217, 218
Baines v. Chadwick, <i>Re</i> Fearnside (1903)	30, 31
Baird v. Mount (Scot.) ...	320
— v. Thompson (Ir.) ...	426, 427
Bake v. French (1907) ...	205
Baker v. Booth (Can.) ...	199
— v. McKay (Can.) ...	580
— v. Saunders (1860) ...	586, 587
— (Goodright d.) v. Sturdy (1729)	587, 589
— v. Tynte (1860) ...	652
— v. Wells (1845) ...	546
Bakhir Mohammed v. Doorga Churn Shaha (Ind.) ...	494
Balambhat v. Narayanbhat (Ind.) ...	168
Balby-with-Hexthorpe District Council v. Millard (1903) ...	229
Bald v. Hagar (Can.) ...	485
Baldwin, <i>Re</i> , <i>Ex p.</i> Foss (1858) ...	481
— v. Irvine (Ir.) ...	149
— v. Timbrell (1842) ...	654
Bales v. Wingfield (1833) ...	513
Balfour's Executors v. Inland Revenue (Scot.)	40
Balkis Consolidated Co., Ltd., <i>Re</i> (1888) ...	244
Balkishan v. Kishan Lal (Ind.) ...	151
Ball v. Ball (1838) ...	531
— v. Cathcart (Can.) ...	145
Ballam v. Price & Payne (1818) ...	583
Ballantyne v. Mackinnon (1896) ...	161, 165, 172
— v. Mutual Life Insurance Co. of New York (Aus.) ...	277
Ballarat & Chiltern Gold Mining Co. v. Cleeland (Aus.) ...	268
Ballhausen v. Mitchell (Aus.) ...	620
Balls v. Pink (1845) ...	476, 477, 503, 508, 510
— v. Thick (1845) ...	476
Balson v. Meggat (1836) ...	529
Bancroft v. Bancroft & Rumney (1864) ...	142
Bandon (Earl) v. Becher (1835) ...	230
Bank of Australasia v. Adams (N.Z.) ...	315
— v. Mercantile Finance, Trustees & Agency Co. of Australia, Ltd. (Aus.) ...	424
Bank of British North America v. Jarvis, Sheriff (Can.)	473
— v. Matthews (Can.) ...	666
— v. Moore (Can.)	570
Bank of Commerce v. Rolston (Can.) ...	483
Bank of England, <i>Ex p.</i> , <i>Re</i> South American & Mexican Co. (1895) ...	145, 147
Bank of England (Doe d.) v. Chambers (1836)	331
Bank of England v. Vagliano Brothers (1891)	400
Bank of Hamilton v. Beach (Can.) ...	632
— v. Boyd (Can.) ...	676
Bank of Hindustan, China & Japan, <i>Re</i> , Campbell's Case, Hippisley's Case, Alison's Case (1873) ...	160, 182
Bank of Ireland (Governor & Co.) v. Evans' Charities Trustees (1855) ...	400, 401
Bank of Liverpool, <i>Re</i> (Can.) ...	570
Bank of Montreal v. De Latre (Can.) ...	386
— v. McTavish (Can.) ...	487
— v. Shirreff (Can.) ...	608
— v. Thompson (Can.) ...	562
Bank of New Zealand v. Fleming (N.Z.) ...	293
— v. Logan (N.Z.) ...	391

## TABLE OF CASES.

	PAGE		PAGE
Bank of Nova Scotia Assessment, <i>Re</i> (Can.)	487	Barrs v. Jackson (1845)	165
Bank of Ontario, <i>Re</i> (Can.)	440, 486, 487	Barry v. Eccles (Can.)	582
Bank of Ottawa v. Stamco, Ltd. (Can.)	302	Barsi v. Farcas & Nadge (Can.)	624
Bank of Toronto v. Adames (Can.)	476, 508, 510	Barston v. Trutch (1835)	429, 581
— v. Burton (Can.)	622	Bartlett v. Charles, <i>Re</i> Eyton (1890)	179, 662
Bank of Upper Canada v. Glass (Can.)	473	— v. House Furnishing Co. (Can.)	542, 543
— v. Lizars (Can.)	217	— v. Stinton (1866)	463
— v. Macfarlane (Can.)	555	Barton, <i>Ex p.</i> , <i>Re</i> National Steam Fuel Co. (1859)	348
— v. Miller (Can.)	576	Barton v. Gill (1843)	532
— v. Shickluna (Can.)	487	Barton's Case, <i>Re</i> National Patent Steam Fuel Co. (1859)	334, 348
— v. Wallace (Can.)	643, 644	Barwicke v. Gybson (1612)	263
Bank of Victoria v. Brown (Aus.)	337	Basset v. Bennett (1767)	164
Bankart v. Houghton (1860)	371	Baswantapa Shidapa v. Ranu & Malkhana (Ind.)	367
Bankruptcy Notice, A, <i>Re</i> (1924)	292	Batchellor v. Lawrence (1861)	583
Banks v. Bank of New Zealand (N.Z.)	320	Batchelor v. Hunt (1851)	360
— v. Braithwaite (1862)	80	— v. Vyse (1834)	513
— v. Hartland, <i>Re</i> Dixon Hartland (1911)	38	Bate v. Laurence (1844)	391
— v. —, <i>Re</i> Hartland (1911)	38	— v. Payne (1848)	68, 72
— v. Newton (1847)	314	— v. Payne (or Pane) (1849)	68, 72, 451
— v. Wilson (N.Z.)	229	Bateman (Lady) v. Faber (1898)	273, 274
Banku Behary Sanyal v. Syama Churn Bhutta-charjee (Ind.)	445	Bateman v. Freston (1861)	581
Bannister v. Bannister (N.Z.)	226	— v. Ross (Countess) (1813)	237, 238
Banque Jacques-Cartier v. Banque d'Epargne de la Cité et du District de Montreal (1887)	334, 336	Bates, <i>Re</i> , <i>Ex p.</i> Bates (1841)	321
Bansi Lal v. Dhapo (Ind.)	230	— v. Bates (1884)	640
— v. Mercer (Ind.)	634	— v. Beaufort (Duke) (1862)	564
Baptist v. Baptist (Can.)	164	— v. Brothers (1853)	259
Bapu v. Bhabani (Ind.)	173	— (1854)	259, 565
Baraclough v. Greenough (1867)	383, 384	— v. Pilling (1826)	458
Barber v. Cooper, <i>Re</i> Nesfield (1914)	38, 105	Bath v. Bath (1901)	658, 659
— v. McCuaig (2) (Can.)	200	— (1902)	658, 659
— v. Mitchell (1834)	519	Bath (Earl) v. Bradford (Earl) (1754)	574
Barclay v. Whyte Te Hong (Aus.)	228	Bath's (Marquis) Settlement, <i>Re</i> , Thynne v. Stewart (1914)	32
Barehead v. Hall (1840)	606	Batten (Doe d.) v. Murless (1817)	491
Barham v. Lee (1834)	377	Bauchop v. Port Chalmers Corpn. (N.Z.)	327
Baring v. Clagett (1802)	155	Bawan Das v. Mul Chand (Ind.)	635
— Royal Exchange Assurance Co (1804)	155, 156	Baxendale v. Bennett (1878)	139, 401
Barkat-un-Nissa v. Fazl Haq (Ind.)	230	Baxter, <i>Re</i> Baxter v. Baxter (1898)	37
Barker, <i>Re</i> (1861)	93	— v. Kennedy (Can.)	390
— v. Allan (1859)	325	Bayley v. Bayley (1859)	594, 595, 597
— v. Bourn (1599)	470, 580	— v. Bishop (1803)	68, 69
— v. Braham & Norwood (1773)	467	— v. Bradley (1848)	257
— v. Bremner (Aus.)	621	— v. Potts (1838)	600
— v. England & Wales Tithe Comrs. (1843)	210, 211	— v. Tindal (1853)	113
— v. Lavery (1885)	449, 450	Bayliff's v. Servant's Case (1627)	547
— v. St. Quintin (1844)	443	Bayly v. Bayly (1859)	594, 595, 597
— v. Tabor (Can.)	378, 379	— v. Bunning (1666)	525
— v. Weedon (1834)	430	Bayne v. Eastern Trust Co., Ltd. (Can.)	340, 341
Barksdale v. Gilliat (1818)	77	Baynton v. Seal (1844)	617
Barnard v. Freeman (Can.)	627	— (1845)	617
— v. Leigh (1815)	531, 534, 535, 539	Bays v. Ruttan (Can.)	537
— v. Rieudeau (Can.)	348	Bayyan Naidu v. Suryanarayana (Ind.)	164
Barnardiston v. Soame (1676)	191	Beach v. Graves (Can.)	644
— v. — (1689)	191	Beacon v. Peck (1719)	439, 440
Barnes v. Harding (1857)	558	Beadon v. Capital Syndicate, Ltd. (1912)	221
— v. Keane (1850)	243, 244	Beak v. Tyrrell (1688)	154, 155
Barnett v. Eastman (1898)	632	Bealy v. Sampson (1688)	511
— v. Lucas (Ir.)	217	Beam v. Merner (Can.)	388, 389
Barnum v. Beckwith (Can.)	450	Bean v. Flower (1895)	158
Baron v. Drewry (Can.)	393	Beard v. Egerton (Ind.)	633
Barr Smith, <i>Re</i> , Martin v. Barr Smith (Aus.)	29, 30	Beardsley v. Beardsley (1899)	
Barrack v. McCulloch (1856)	487, 488	Bearns v. Perchard (Nfld.)	
— v. Newton (1841)	581	Beasley v. Chapman (Ir.)	587
Barraclough v. Greenhough (1867)	383, 384	— v. Roney (1891)	630
Barratt v. Price (1833)	581	Beath v. Anderson (Aus.)	558, 576
Barrett v. Partington (1839)	424	Beattie v. Ebury (Lord) (1873)	447
Barrette v. Canadian Bank of Commerce (Can.)	164	Beaty v. Hackett (Can.)	642
Barrington, <i>Re</i> (Can.)	327	Beaubier v. Lloyd (Can.)	632, 636
— v. Huissiers Corpn. (Can.)	547	Beauchamp v. Messer (Can.)	322
Barrowman v. Fader (Can.)	669	Beauchemin v. Fournier (Can.)	623, 624
Barrs v. Jackson (1842)	165	Beaudry v. Montreal Corpn. (1858)	376
		Beaufort (Duke) v. Bates (1862)	564



## TABLE OF CASES.

xli

	PAGE		PAGE
Beaufort (Duke) v. Patrick (1853) ...	396	Bensley v. Burdon (1826) ...	254, 256, 282
Beaumont, <i>Re</i> , Woods v. Beaumont (1910) ...	674	— v. — (1830) ...	254, 256, 282
Beavan v. Dawson (1830) ...	544	Benson v. Connor (Can.) ...	552
— v. Oxford (Earl) (1855) ...	568	Benton v. Thornhill (1816) ...	496
— v. — (1856) ...	567	Benwell v. Oakley (1809) ...	606
Beaver v. Master in Equity of the Supreme Court of Victoria (Aus.) ...	120	Berard v. Bruneau (Can.) ...	284
Beaver Lumber Co., Ltd., <i>Re</i> (Can.) ...	420	Bergin v. Hamilton (Can.) ...	535
Bebington's Tenancy, <i>Re</i> , Bebington v. Wildman (1921) ...	398	— v. Pindar (Can.) ...	469
Beck v. Pierce (1889) ...	224	Bergman v. Treslove (1835) ...	661
Becker v. Earl's Court, Ltd. (1911) ...	448	Bermondsey Vestry v. Ramsey (1871) ...	226
Beckett v. Bradley (1844) ...	286, 287	Bernardi v. Motteux (1781) ...	155
— v. Grimthorpe (Lord), <i>Re</i> Grimthorpe (Lord) (1908) ...	33	Bernina, The (1886) ...	206, 207
— v. Ramsdale, <i>Re</i> Hodgson (1885) ...	219	Berrington v. Evans (1831) ...	146
Beckford v. Montague (1796) ...	581	Berrisford v. Milward (1740) ...	374
— v. Welby (1797) ...	529	Berry v. Adamson (1827) ...	581
Beckley v. Scott & Co. (Ir.) ...	211	— v. Gaukroger (1903) ...	27, 28, 40, 43
Beckx v. Jones (Aus.) ...	318, 319	— v. Shead (Aus.) ...	415
Bedard v. Spencer Grain Co., Ltd. (Can.) ...	364	— v. Wheeler (1662) ...	438
Beddington, <i>Re</i> , Micholls v. Samuel (1900) ...	34	Bertram v. Massey Manufacturing Co. (Can.) ...	389
Bedford v. Forbes (1843) ...	567	— v. Wood (S. Af.) ...	159
— v. Kirkpatrick (1878) ...	76, 77	Bertrand v. Magnusson (Can.) ...	493
Bedford & Cambridge Ry. Co. v. Stanley (1862) ...	358	Berwick Corpn. v. Shanks (1826) ...	429
Bedford County Case, Blackwell's Case (1785) ...	319	Bescoby v. Hamilton Water Comrs. (Can.) ...	622
Beeby (Osmond) v. Khitish Chandra Acharya Chowdhury (Ind.) ...	384	Bessey v. Windham (1844) ...	277, 465, 497, 498
Beech, <i>In the Goods of</i> (1904) ...	27	Best v. Pembroke (1873) ...	619
Beecham, <i>Re</i> , Woolley v. Beecham (1923) ...	37	Bethune v. R. (Can.) ...	115
Beemabai v. Yamunabai (Ind.) ...	160	Bettyes v. Thompson (1838) ...	580
Beere v. Fleming (Ir.) ...	211	Bevan v. Jones (1850) ...	469
Beeston (Doe d.) v. Bikker (1860) ...	456, 457	Bexley Heath Ry. Co. v. North (1894) ...	140, 141
— v. White (1819) ...	463	Beynon v. Garrat & Venables (1824) ...	537
Beetham v. Bell (N.Z.) ...	42	Bhaishanker Nanabhai v. Morarji Keshavji & Co. (Ind.) ...	160
— v. Holmes, <i>Re</i> Holmes (N.Z.) ...	6, 27, 29, 83	Bhikabhai Ratanchand v. Bai Bhuri (Ind.) ...	215
— v. Levin (N.Z.) ...	42, 43	Bhinji Govindji v. Monohar Das (Ind.) ...	504
Beever v. Marler (1898) ...	345	Bhojrub Chunder Roy v. Madhub Chunder Sen (Ind.) ...	635
Behrens v. Sieveking (1837) ...	200	Bice v. Jarvis (1885) ...	621, 623
Belair v. Banque d'Hochelaga (Can.) ...	482, 527	Bicknell v. Wetherell (1841) ...	176, 433, 434
Belch v. Manitoba & North-Western Ry. Co. (Can.) ...	317	Bigelow v. Sprague (Can.) ...	378
Bell, <i>In the Goods of</i> (1871) ...	116	Bigelow & Kinsman v. Westman (Can.) ...	648
—, <i>Re</i> (Can.) ...	483, 484, 494	Bigford v. Squirrell (Can.) ...	528
—, <i>Re</i> , Carter v. Stadden (1886) ...	657	Bigge v. Barhays (1846) ...	176
— v. Black & Morrison (Scot.) ...	150	Bignold v. Giles (1858) ...	73
— v. Buchanan (Can.) ...	535	Bikker v. Beeston (1860) ...	456, 457
— v. Denver (1886) ...	416	Bilke v. Havelock (1813) ...	613
— v. Hart (Can.) ...	535	Bill v. Richards (1857) ...	293, 294
— v. Hutchison (1844) ...	487	Billings v. Rapelje (Can.) ...	432, 433, 436
— v. Marsh (1903) ...	304, 402	Billson v. Crofts (1873) ...	260
— v. Master in Equity of the Supreme Court of Victoria (1877) ...	116, 124	Birch, <i>Re</i> , Roe v. Birch (1884) ...	354
— v. Nicholls, <i>Ex p.</i> Richards (Can.) ...	611	— v. Somerville (Ir.) ...	380, 381
— v. Peel (Can.) ...	362	Birchall v. Pugin (1875) ...	644
— v. Stroud, <i>Re</i> Stroud's Will (Aus.) ...	122	Bircham v. Springfield, <i>Re</i> Dalrymple (1901) ...	82
— v. Vickers (1863) ...	315, 316	Bird v. Appleton (1800) ...	155
— v. Victoria Supreme Court (Master in Equity of) (1877) ...	116, 124	— v. Folger (Can.) ...	473
— v. Wermore (Can.) ...	500	— v. Grainger, <i>Re</i> Stoddart (1916) ...	37
Bellcairn, The (1885) ...	144	— v. Keep (1918) ...	239, 240
Bellhouse v. Mellor (1859) ...	460	— v. Littlehales (1743) ...	602
Bengal, The (1859) ...	203	— v. Wretton (1858) ...	675, 676
Benham v. Keane (1861) ...	568	Birkenhead, etc. Junction Ry. Co. v. Dimmack (1858) ...	462
Beni Ram v. Kundan Lal (Ind.) ...	310	Birmingham Banking Co. (Official Liquidators) v. Carter (1872) ...	661
— v. Nanhu Mal (Ind.) ...	162	Birmingham Corpn. v. Allsopp (S.) & Sons, Ltd. (1918) ...	216
Beninger v. Thrasher (Can.) ...	582	Birmingham Estates Co. v. Smith (1880) ...	201
Benjamin v. Foot (Can.) ...	583	Birt v. Stephenson (1839) ...	539
Bennefield v. Birdsell (Can.) ...	624	Biscop v. White (1600) ...	477
Bennett v. Goude (1853) ...	374	Bishnu Priya Chowdhurani v. Bhaba Sundari Debya (Ind.) ...	162, 163
— v. Thompson (1833) ...	438	Bishop's Waltham Ry. Co., <i>Re</i> (1866) ...	578, 579
Bennoch v. M'Kail (Scot.) ...	349	Bissen Chand v. Rajendro Kishore Singh (Ind.) ...	308
Bennoyer v. Brace (1698) ...	427	Bissicks v. Bath Colliery Co., Ltd., <i>Ex p.</i> Bissicks (1878) ...	609

	PAGE		PAGE
Bissill v. Bradford & District Tramway Co., Ltd. (1893) ...	389	Bonang Gold Mining Co., Ltd., <i>Re</i> , Chipendale's Case (Aus.) ...	327
Bithray, <i>Re</i> (1889) ...	579	Bond, <i>Re</i> , <i>Ex p.</i> Bacon (1881) ...	158
Bjorkman v. Kimberley (Lord), <i>Re</i> Currie (1888) ...	127, 128	—, <i>Re</i> , <i>Ex p.</i> Capital & Counties Bank, Ltd. (1911) ...	443
Black, <i>Ex p.</i> (Can.) ...	631	— v. McClay (Aus.) ...	567
— v. Allan (Can.) ...	376	Bonham v. Sarnor, The (Can.) ...	159
— v. Bank of Nova Scotia (Can.) ...	394, 395	Bonner v. Wilkinson (1822) ...	252
— v. Cullen (Scot.) ...	336, 337	Bonnett v. Ritchie (Can.) ...	547
— v. Dominion Fire Proofing Co. (Can.) ...	201	Bonomalee Nag v. Koylash Chunder Dey (Ind.) ...	187, 188
— v. Hazen (Can.) ...	665	Bonomali Mozumdar v. Woomesh Chunder Bundhopadhya (Ind.) ...	545
— v. McKean & Co., Ltd. (Can.) ...	209	Bonthorne v. Maude (N.Z.) ...	391
— v. Reynolds (Can.) ...	400, 401, 512	Booker v. Brook (Can.) ...	489
— v. Shaw (Can.) ...	637	Boomer v. King (Can.) ...	531
— v. Wiebe (Can.) ...	342	Booth, <i>Re</i> , Pleace v. Booth (1916) ...	21
Black Eagle Gold Mining Co., <i>Re</i> (Can.) ...	609	— v. Alcock (1873) ...	286
Blackburn v. Gummerson (Can.) ...	577	— v. Eagle (N.Z.) ...	348
Blackburne v. Stratton (Ir.) ...	528	— v. Trail, <i>Re</i> Hayson (1883) ...	632, 633, 677
Blackburne v. Stratton (Ir.) ...	528	Booth's Trusts, <i>Re</i> (Scot.) ...	124
Blackham's Case (1709) ...	237	Borden v. Sumner (Can.) ...	410, 419
Blackman v. Fysh (1892) ...	672	Borough v. Whichcote (1732) ...	187
Blackmore v. Cumberford (1680) ...	240	Borton v. Howe (N.Z.) ...	333
Blacksell (Doe d.) v. Tomkins (1809) ...	281, 290	Boshof Municipality v. Boshof Kerkerad (S. Af.) ...	183
Blackwell's Case, Bedford County Case (1785) ...	319	Bosquet, <i>Re</i> (Aus.) ...	527, 555
Blackwood v. R. (Aus.) ...	119	Boston Fruit Co. v. British & Foreign Marine Insurance Co. (1906) ...	315
Blades v. Arundale (1813) ...	509, 510	Bostwick v. Shortis (Can.) ...	675
Blagrove (Doe d.) v. Stephens (1850) ...	272	Boswell v. Coaks (1887) ...	431
Blain v. Granby Corpn. (Can.) ...	549	— v. Pettigrew (Can.) ...	338, 339
Blair v. Clark (1908) ...	641	— v. Piper (Can.) ...	621
— v. Lyall (Scot.) ...	167	Botsford's Will, <i>Re</i> (Can.) ...	113
Blake v. Gale (1886) ...	337	Botten v. Tomlinson (1847) ...	540
— v. Jarvis (Can.) ...	638, 665	Bouch v. Sevenoaks Ry. Co. (1879) ...	629
— v. O'Kelly (Ir.) ...	210	Boucher v. Wiseman (1595) ...	525
— v. White (1839) ...	650	Bouchette v. Anderson (Can.) ...	313
Blakely Ordnance Co., Ltd., <i>Re</i> , Coates' Case (1876) ...	652	Boulton v. Boulton (Can.) ...	253
Blakemore v. Glamorganshire Canal Co. (1835) ...	189	— (Doe d.) v. Fergusson (Can.) ...	576
Blakie v. McLennan (Can.) ...	526	— v. R. (N.Z.) ...	326
Blaksley's Trusts, <i>Re</i> (1883) ...	663	— v. Smith (Can.) ...	552
Blanchard, Garnishee, Grant v. Kelly (Can.) ...	636	Bourne, <i>Re</i> , Martin v. Martin (1893) ...	29, 127
Blanchard v. Cawthorne (1831) ...	668	Bouthillier v. Central Vermont Ry. Co. (Can.) ...	208, 209
Blanchenay v. Burt (1843) ...	468	Bowden v. Beauchamp (1740) ...	144
Bland v. Low, <i>Re</i> Low (1893) ...	452, 453	— v. Horne (1831) ...	143
— v. —, <i>Re</i> — (1894) ...	452, 453	Bower, <i>Re</i> , Airey v. Bower (1886) ...	450
Blantyre (Lord) v. Wemyss (Earl) (Scot.) ...	173	— v. Cooper (1843) ...	585
Blaxland v. Grattan (Aus.) ...	559, 560	Bowerman, <i>Re</i> , <i>Ex p.</i> Vining (1836) ...	356
Blinkhorne v. Brenchley (N.Z.) ...	278	—, <i>Re</i> , Porter v. Bowerman (1908) ...	6, 33, 43
Bliss v. Putnam (1843) ...	75	Bowes, <i>Re</i> , Strathmore v. Vane (1907) ...	75
Blissett, <i>Re</i> (Aus.) ...	107	— v. Foster (1858) ...	363
Bloomenthal, <i>Ex p.</i> , <i>Re</i> Veuve Monnier et ses Fils, Ltd. (1896) ...	291, 292	Bowles v. Baker (1910) ...	427
— v. Ford (1897) ...	291, 292	Bowling & Welby's Contract, <i>Re</i> (1895) ...	153, 158
Bloomley v. Grinton (Can.) ...	245	Bowman v. Royston (1835) ...	287
Bloxam v. Hopkinson (1859) ...	654	— v. Taylor (1834) ...	248, 249, 252, 254, 257
Bluck v. Elliot (1673) ...	166	Bowra v. Rhodes (1862) ...	74, 75
Bluikley v. Lord, Hulton & Tickel (1838) ...	552	Bowring v. Pritchard (1811) ...	429
Blumenthal v. Wilson (1849) ...	534	Bowsse v. Cannington (1610) ...	140
Blumfield's Case (1596) ...	439	Boxer, <i>Re</i> , Morris v. Woore (1910) ...	38
Blunket v. Freeman (1729) ...	557	Boyd v. A.-G. for British Columbia & A.-G. for Ontario (Can.) ...	98, 99
Blunt's Trust, <i>Re</i> (1862) ...	661	— v. Belton (Ir.) ...	374, 376
Blyth, <i>Ex p.</i> , Hood Barrs v. Heriot (1896) ...	675	— v. Haynes (Can.) ...	622, 637
— v. Fladgate (1891) ...	223	— v. Hind (1857) ...	303
Boaden v. Horne (1831) ...	143	Boylan v. Bloxsome (N.Z.) ...	634, 647, 648
Board v. Board (1873) ...	330	Boyle v. Boyle (1688) ...	195
Bodger v. Arch (1854) ...	128	Brace v. Marlborough (Duchess) (1728) ...	572, 573
Boileau v. Rutlin (1848) ...	165, 179, 180	— v. Pennoyer (1698) ...	427
Bole, <i>Re</i> (Can.) ...	163	Brace McKay & Co., Ltd. & Prince Edward Island Mutual Fire Insurance Co., <i>Re</i> (Can.) ...	636
Bolen v. Varro (Can.) ...	628	Bradburn v. Hall (Can.) ...	558
Bolland v. Young (1904) ...	653		
Bollard v. Spring (1887) ...	228		
Bolster, <i>Re</i> (Can.) ...	113, 114		
Bolton v. Bolton (1876) ...	430, 431		
— v. Gladstone (1804) ...	156		
— v. — (1809) ...	156		
Bolton Estates Act, 1863, <i>Re</i> (1904) ...	24, 33		

# TABLE OF CASES.

xlili

	PAGE		PAGE
Bradford v. Young, <i>Re</i> Falconar's Trusts (1884) ...	450	Brockville v. Sherwood (Can.) ...	497
Bradford & Sons v. Price Brothers (1923) ...	399	Brockville & Ottawa Ry. Co. v. Canada Central Ry. Co. (Can.) ...	607
Bradley v. Bailey (1834) ...	432	Brockville School Trustees v. Brockville Town (Can.) ...	386
Bradley (George d.) v. Wisdom (1759) ...	590	Brockwell v. Lock (1695) ...	677
Bradley v. Wyndham (1743) ...	473	Brograve v. Watts (1599) ...	598
Bradley & Cohn, Ltd. v. Ramsay & Co. (1912) ...	222	Brook v. Emerson (1906) ...	445
Bradshaw v. McMullan (Ir.) ...	139, 142	Brooke v. Haymes (1868) ...	73, 278
— v. Vaughton (1860) ...	227	Brookes, <i>Ex p.</i> , Whitfield v. Prickett (1842) ...	658
Brady v. S. A. Turf Club (S. Af.) ...	334	Brookler v. Security National Insurance Co. of Canada (Can.) ...	628
Braham v. Burchell (1826) ...	329	Brooks v. Greathed (1820) ...	598
Brain v. Herrick (1894) ...	655	— v. Hodgkinson (1859) ...	580
Braithwaite v. Marriott (1862) ...	607	— v. Hodson (1844) ...	433
Bramsdon v. Parker (1885) ...	614	— v. Palmer (Can.) ...	477
Brandling v. Plummer (1857) ...	267	Brooksby v. Watts (1815) ...	338
Brandlyn v. Ord (1738) ...	143	Broome v. Wooton (1605) ...	221
Brandon v. Brandon (1861) ...	342	Brough v. Eisenberg (1849) ...	382
— v. Michelham (1919) ...	137, 138	Broughton v. Stamp Duties Comr. (1899) ...	129
Brandon's Will, <i>Re</i> (N.Z.) ...	7	— v. Wilkerson (1880) ...	478
Brasch v. Stamp Duties Comr. (N.Z.) ...	122	Brown, <i>Ex p.</i> (1892) ...	238
Braun v. Braun (Can.) ...	318	—, <i>Ex p.</i> , <i>Re</i> Hastings (1892) ...	602
— v. Davis (Can.) ...	642	—, <i>Ex p.</i> , <i>Re</i> Smith (1888) ...	417, 617
Bray v. Hooker (1784) ...	601	—, <i>Re</i> (1868) ...	596
— v. Johnston (N.Z.) ...	607	—, <i>Re</i> , Llewellyn v. Brown (1900) ...	650
Braybroke (Lord) v. Inskip (1803) ...	254, 255	—, <i>Re</i> , Turnbull v. Royal National Lifeboat Institution (1916) ...	32, 36
Braybrooke (Lord) v. A.-G. (1861) ...	83, 86, 94, 95, 106, 110	— v. Advocate-General (1852) ...	50
Brazill v. Johns (Can.) ...	380	— v. A.-G. (1898) ...	18, 104
Breadalbane (Earl) v. Lord Advocate (Scot.) ...	92	— v. Bamford (1841) ...	648, 654
Brearcliff v. Dorrington (1850) ...	656	— v. Bennet (N.Z.) ...	399
Bremner, <i>Re</i> , <i>Ex p.</i> Harper (1875) ...	215, 216	— v. Booth (1690) ...	190
— v. Barnes (Nfld.) ...	634	— v. Brook (1902) ...	444, 446
Brennan v. Finnis (1850) ...	539	— v. Brown (Aus.) ...	174
Brent v. Hughes (1847) ...	431	— v. — (Can.) ...	460, 583
Brereton v. Edwards (1888) ...	648, 650, 653, 654, 655, 658	— v. Butcher (Aus.) ...	127
Breton v. Cole (1698) ...	480	— v. Cooper (Aus.) ...	481
Brett v. Clowser (1880) ...	342	— v. Copley (1844) ...	546
Brewer v. Jones (1855) ...	615	— v. Davenport (1857) ...	380
— v. Yorke (1882) ...	450	— v. Fidelity Oil & Gas Co., Ltd., & Macdonald (Can.) ...	624
Brewster, <i>Re</i> , Butler v. Southam (1908) ...	130	— v. Glenn (1851) ...	475
— v. Prior (1886) ...	316	— v. Howard (1701) ...	190
Bridge v. Tattersall (1857) ...	533	— v. Hudson (Can.) ...	582
Bridgwater's Settlement, <i>Re</i> , Partridge v. Ward (1910) ...	285	— v. Jarvis (1836) ...	581
Briggs, <i>Re</i> , Richardson v. Bantoft (1914) ...	37, 38	— v. Jones (1846) ...	466
— v. Laurie (1847) ...	511, 546	— v. Laurence (Can.) ...	298
Brighton Livery Stables Co., <i>Re</i> (1885) ...	447	— v. McGuffin (Can.) ...	631
Brijbhokun Lal Awastee v. Mahadeo Dobey (Ind.) ...	179	— v. Maurice, <i>Re</i> Maurice (1896) ...	130
Brill v. Grand Trunk Ry. Co. (Can.) ...	365	— v. Partelow (Can.) ...	433
Bringloe v. Goodson (1839) ...	138	— v. Porrott (1841) ...	487
Brinsmead v. Harrison (1871) ...	584	— v. Shuker (1832) ...	560
— v. — (1872) ...	221, 584	— v. Smith (1875) ...	112, 113, 115
Briscoe, <i>Re</i> , Royds v. Briscoe (1910) ...	32, 82	— v. — (Can.) ...	461
— v. Stephens (1824) ...	232	— v. Thomas (Can.) ...	631
Bristed v. Wilkins (1843) ...	655, 656	— v. Thorpe (1841) ...	374
Bristol (Earl) v. Wilsmore (1823) ...	555	— v. Wootton (1605) ...	221
Bristol & North-Somerset Ry. Co., <i>Re</i> (1869) ...	579	— v. Wright (Can.) ...	512, 513
Bristol Corpn. v. Sinnott (1918) ...	371, 372, 393	— v. Yates (Can.) ...	234
Bristow, <i>Re</i> (Ir.) ...	673, 674	Brown's Trustees v. Gow (Scot.) ...	78
— v. Wright (1781) ...	524	Brown's Trustees, Montgomerie, etc. v. Paton's Trustee, Alexander (Scot.) ...	246, 247
Bristow's (Bp.) Case (1584) ...	561	Browne v. Brookfield (Can.) ...	311
Bristowe v. Fairclough (1840) ...	202, 203	— v. Burton (1847) ...	251
British Investors Corpn., Ltd., <i>Re</i> (1897) ...	451	— v. Hammond (1738) ...	432, 434
British Mercantile Bank, <i>Ex p.</i> , European Bank v. Fox (1866) ...	643	Bruce, <i>Re</i> (1832) ...	62
British Pacific Trust Co. v. Baillie (Can.) ...	234	— v. Ponsonby (Lord) (Ir.) ...	263, 264
Brittain v. Kinnaird (1819) ...	195	Brun v. Hutchinson (1844) ...	608
Britten v. Wait (1832) ...	592, 593	Brune (Doe d.) v. Martyn (1828) ...	139
Britton v. Cole (1698) ...	465, 466, 467, 480	Brune v. Thompson (1841) ...	192
Broad Cove Coal Co., <i>Re</i> (Can.) ...	590	Bruner v. Moore (1904) ...	371
Brock v. McLean (Can.) ...	582	Brunsdon v. Humphrey (1884) ...	207
— v. Ruttan (Can.) ...	487	Brunswick (Duke) v. Slowman (1849) ...	508, 509, 547
Brockbank v. Myers (1836) ...	574, 579		



	PAGE
Brunton v. Neale (1844) ... ..	571
— v. New South Wales Stamp Comrs. (Aus.) ... ..	23
Brunton's Claim, <i>Re</i> Hercules Insurance Co. (1874) ... ..	388, 389
Bryan v. Freeman (Can.) ... ..	580
— v. Mansion (1857) ... ..	73, 74
Bryans v. Nix (1839) ... ..	320
Bryant v. Bull (1878) ... ..	667
— v. Torkington (1897) ... ..	425
Bryden v. Jackson (Nfld.) ... ..	535
Brydges v. Walford (1817) ... ..	541
Bryon v. Metropolitan Saloon Omnibus Co. (1859) ... ..	424
Bryson v. Rosser Municipality (Can.) ... ..	645
Buchan (Earl) v. Lord Advocate (1909) ... ..	111, 112
Buchanan v. Frank (Can.) ... ..	608
— v. Riddle (Aus.) ... ..	77
Buckenham v. Francis (1825) ... ..	543
Buckingham (Duke) v. Breadalbane (Mar- quis) (Scot.) ... ..	358
Buckland v. Gibbins (1863) ... ..	586
— v. Johnson (1854) ... ..	222, 584
Buckmaster v. Meiklejohn (1853) ... ..	451, 453
Budan v. Ramchandra Bhunjgaya (Ind.) ... ..	171, 172
Buffalo & Lake Huron Ry. Co. v. Corbett (Can.) ... ..	495
Builder v. Kerr (Can.) ... ..	637
Bulkirám Nathurám v. Gujarat Mercantile Assocn., Ltd. (Ind.) ... ..	151
Bull v. Bryant (1878) ... ..	667
— v. Faulkner (1847) ... ..	572, 574, 575
— v. — (1848) ... ..	572, 574, 575
— v. King (Can.) ... ..	531
Bull (Henry) & Co. v. Murphy (Aus.) ... ..	665
Bullen v. Ansley & Smith (1807) ... ..	609
Buller v. Anson, <i>Re</i> Anson (1915) ... ..	42
Bulley v. Bulley (1874) ... ..	363, 364
Bulloch v. Beaton (Scot.) ... ..	79
Bunbury v. Matthews (1844) ... ..	615, 616
Bunting v. Lepingwell (1585) ... ..	237
Bunyard v. Seabrook (1858) ... ..	526, 527
Burchell v. Pugin (1875) ... ..	644
— v. Thompson (1920) ... ..	318, 319
Burdett v. Hay (1863) ... ..	206
— v. Rockley (1682) ... ..	602, 605
Burdick v. Garrick (1870) ... ..	447
Burdon v. Flower (1839) ... ..	150
— v. Kennedy (1757) ... ..	490, 491, 560
Burgess v. Richardson (1861) ... ..	397
— v. Tully (Can.) ... ..	529
Burgis v. Constantine (1908) ... ..	364
Burgoyne & Co., Ltd. v. Godfree & Co. (1904) ... ..	366
Burk (Doe d.) v. Cormier (Can.) ... ..	269
Burke v. Crosbie (Ir.) ... ..	148, 149
Burkill, <i>Re</i> , Godfrey v. Burkill (1873) ... ..	601
Burn, <i>Ex p.</i> , <i>Re</i> Moulson (1814) ... ..	323, 324
Burnand v. Rodocanachi (1882) ... ..	281
Burne v. Robinson (Ir.) ... ..	591
Burnham v. Meyers (Can.) ... ..	520
— (Doe d.) v. Simmonds (Can.) ... ..	577
Burns v. Christianson (Can.) ... ..	492
— v. Irving (1876) ... ..	648
Burr v. Freethy (1822) ... ..	528, 529
Burrell & Sons v. Read (1894) ... ..	642, 643
Burrowes, <i>Re</i> (Can.) ... ..	381
— v. Lock (1805) ... ..	308, 309
Burrows v. Cottrell (1830) ... ..	81
Burton v. Bellhouse (Can.) ... ..	526
— v. Fitzgerald (1737) ... ..	155
Bushby v. Ellis (1853) ... ..	143
— v. Guardian Assurance Co., Ltd. (S. Af.) ... ..	393
Bussun Lall Shookul v. Chunder Dass (Ind.) ... ..	164

	PAGE
Butcher (Doe d.) v. Musgrave (1840)	262
Butler v. Butler (1801)	442, 474
— v. — (1893)	142
— v. — (1894)	142
— v. Forbes (Can.)	552, 553
— v. Rashfield (1751)	592, 596
— v. Rosenfeldt (Can.)	583
— v. Southam, <i>Re</i> Brewster (1908)	130
Butterfield v. Jackson (Can.)	445
Butts v. Bilke & Havelock (1817)	191, 444, 445
Byne v. Currey (1834)	76
Bynoe v. Bank of England (1902)	198
Byrne v. Chatham Town (Can.)	390
— v. Hutchinson (Ir.)	611
— v. Nowlan (Nfld.)	627
Byron v. Phillips (1722)	466
C.	
Cabana v. Bank of Montreal (Can.)	399
Cachalia v. Harberer & Co. (S. Af.)	148
Cadell v. Smith (1791)	601
Cadle v. Moody (1861)	139
Cadogan v. Kennett (1776)	499, 500
— v. Lyric Theatre, Ltd. (1894)	669
Cadogan's (Earl) Settlements, <i>Re</i> , Richmond	
— v. Lambton (1911)	41
Caermarthen (Marquess) v. Hawson (1730)	598, 605
Caffrey v. Phelps (Can.)	651, 652
Cahill, <i>Re</i> (Aus.)	661
Cahoon v. Morrow (Can.)	490
Cahuac v. Durie (Can.)	511
Caillaud v. Estwick (1794)	487, 496, 497
Caine v. Palace Steam Shipping Co. (1907)	139, 197, 240
Caird v. Moss (1886)	172, 329
Cairncross v. Lorimer (1860)	291, 328, 366
— v. Vander Westhuizen (S. Af.)	620
Cairney v. Back (1906)	638, 639, 641, 642
Caisse v. Tharp (Can.)	622
Calcraft v. Swann (1741)	460
Calcutta Trades Assocn. v. Ryland (Ind.)	633
Calder v. International Harvester Co. of America & International Harvester Co. of Canada, Ltd. (Can.)	212, 213
Caldwell v. Badger (Can.)	608
Caledonian Gold-Mining Co. v. Manners (N.Z.)	401
Callanane v. Campbell (1871)	99
Callow v. Hick (Can.)	620, 621, 633
— v. Howle (1847)	359
— v. Jenkinson (1851)	186
Calne Ry. Co., <i>Re</i> (1870)	579
Calvart v. Horsfall (1803)	587
Calvert v. Bovill (1798)	155
— v. Sebbon (or Severne) (1838)	79
Calypso, The (1856)	236
Cambefort v. Chapman (1887)	220, 221
Cambrian Ry. Co., <i>Ex p.</i> , <i>Re</i> Manchester & Milford Ry. Co. (1880)	488
Cameron v. Adams (Can.)	669
— v. Allen (Can.)	643
— v. Gibson (Can.)	481
— v. Lightfoot (1778)	467
— v. Lount (Can.)	550
— v. Perrin (Can.)	526
— v. Reynolds (1776)	555
— (Doe d.) v. Robinson (Can.)	576
Campbell, <i>Re</i> (1902)	7, 45, 46
—, <i>Re</i> (N.Z.)	112
— v. Delihanty (Can.)	577
— (Doe d.) v. Hamilton (Can.)	576
— " Inghy (1856)	252

## TABLE OF CASES.

xlv

	PAGE		PAGE
Campbell v. Ingilby (1857) ...	253	Carter v. Hughes (1858) ...	440, 559, 573, 610
— v. Morrison (Scot.) ...	321	— v. James (1844) ...	170, 181
— v. R. (Aus.) ...	124	— v. Mahon (Ir.) ...	649
Campbell & Co. v. Brass (1891) ...	376	— v. Stadden, <i>Re</i> Bell (1886) ...	657
Campbell & Ruttan, <i>Re</i> (Can.) ...	576	— v. Warne (1830) ...	356, 357
Campbell's Case (1873) ...	160, 182	Carthew (Doe d.) v. Brenton (1830) ...	147
Campbell's Estate, <i>Re</i> (Can.) ...	100	Cartwright v. Balzo (Duc Del), <i>Re</i> Orford	
Campion v. Palmer (Ir.) ...	620	(Countess) (1896) ...	41
— v. Turton (N.Z.) ...	481	— v. McPherson (Can.) ...	338
Canada Cotton Co. v. Parmalee (Can.)	621, 626, 641	Case v. Godin (Can.) ...	433
Canada Landed Credit Co. v. Canada Farmers'		Case (J. I.) Co. v. Preston (Can.) ...	171
Mutual Stock Insurance Co. (Can.) ...	392	Case Thresher Machine Co. v. Sing (Can.) ...	631
Canada Law Book Co. v. — (Can.) ...	494	Case Threshing Machine Co. v. Wermiger	
— v. Butterworth & Co.		(Can.) ...	324, 325
(Can.) ...	326	Casey v. McCall (Can.) ...	265
— v. Fieldhouse (Can.) ...	492	Casgrain v. Leblanc (Can.) ...	184
Canada Permanent Loan & Savings Co. v.		Casler v. Ransom (Can.) ...	215
East Selkirk School District (Can.) ...	623	Cassamally Jairajbhai v. Sir Currimbhoy	
Canadian Bank of Commerce v. Crouch (Can.)	644	Ebrahim (Ind.) ...	282
— v. Holiski (Can.) ...	493, 571	Casselman v. Casselman (Can.) ...	312
— v. Middleton		Castellain v. Thompson (1862) ...	508
(Can.) ...	647	Castle v. Ruttan (Can.) ...	70
— v. Nelson (Can.) ...	632	— v. Warland (1863) ...	
— v. Tasker (Can.) ...	510	Castner Kellner Alkali Co. v. Commercial De-	
Canadian Breweries, Ltd. v. Allard (Can.) ...	182	velopment Corp'n.	
Canadian Moline Plow Co. v. Clement (Can.)	658	(1899) ...	448
Canadian Pacific Ry. Co. v. Continental Oil		v. Commercial De-	
Co. (Can.) ...	320	velopment Corp'n. (1900) ...	448
Canadian Railway Accident Co. v. Williams		Castrique v. Imrie (1861) ...	197
(Can.) ...	565, 566	— v. — (1870) ...	197
Canham's Estate v. Master, The (S. Af.)	89, 90	Cater v. Chignell (1850) ...	553
Cann v. Knott (Can.) ...	493	Cathcart, <i>Ex p.</i> , <i>Re</i> Deakin (1900) ...	595, 597
Cannam v. Farmer (1849) ...	324	—, <i>Ex p.</i> , <i>Re</i> Lumley (1894) ...	595
Cannon v. Pack (1714) ...	560	Cattell v. Corral (1839) ...	322
Canterbury Corp'n. v. Cooper (1909) ...	296	Cattlin v. Kernot (1858) ...	583
Capdevielle, <i>Re</i> (1864) ...	63, 99	Caudwell v. Colton (1851) ...	595
Cape of Good Hope Bank v. Melle (S. Af.)	391	Cavanagh v. Whitechurch (George), Ltd.	
Capital & Counties Bank, Ltd., <i>Ex p.</i> , <i>Re</i>		(1900) ...	295
Bond (1911) ...	443	Cave, <i>Re</i> , Mainland v. Cave (1892) ...	674
Cardwell v. Lucas (1836) ...	244, 245	— v. Fleetwood (1829) ...	439, 440
Carey v. Toronto Corp'n. (Can.) ...	262	— v. Mills (1862) ...	138, 139
Carlile v. Parkins (1822) ...	512	Cavil v. Smith (1791) ...	601
Carlin v. Conroy (Ir.) ...	435, 436	Cawdor (Lord) v. Lewis (1835) ...	368
Carlisle v. Garland (1831) ...	511, 512	Cayley, <i>Re</i> , Awdry v. Cayley (1904) ...	5, 48
Carlisle & Cumberland Banking Co. v. Bragg		Cazet de la Borde v. Othon (1874) ...	584, 585
(1911) ...	400, 402	Central Bank of Canada v. Ellis (Can.)	633, 669
Carlson v. Farlar (1845) ...	577	Central Bank v. McKeen (Can.) ...	613
Carman v. Mott (Can.) ...	582, 583	Central South African Rys. v. James (S. Af.)	315
Carmichael v. Anstruther (Scot.) ...	177	Chadwick v. Holt (1856) ...	648
Carnarvon (Earl) v. Villebois (1844) ...	143	— v. Manning (1896) ...	294, 310
Carpenter v. Buller (1841) ...	235, 254, 280, 287, 316	— v. Stamps Comr. (Aus.) ...	45
Carr Claimant, Duncan v. Cashin (1875) ...	498, 499	Chajju v. Umrao Singh (Ind.) ...	168
Carr v. Goslington (1730) ...	523	Chalmers v. Machray (Can.) ...	184
— v. London & North Western Ry. Co. (1875) ...	288, 289, 291, 299, 301, 304, 328, 401	— v. Piggott (Can.) ...	517
— v. Montefiore (1864) ...	452	Chamberlain (Rees d.) v. Lloyd (1811) ...	256
— v. Roberts (1831) ...	122, 123	Chamberlain & Sproat v. Wall & Lloyd (1920) ...	664
— v. Royal Exchange Assurance Corp'n.		Chambers, <i>Re</i> (N.Z.) ...	11, 12
(1864) ...	445, 452	—, <i>Re</i> , <i>Ex p.</i> Chambers (1835) ...	335
Carrall v. Bank of Montreal (Can.) ...	287	— v. Coleman (1841) ...	531, 532
Carrett v. Smallpage (1808) ...	442	— v. Corbeau, Imperial Bank of Canada,	
Carritt v. Real & Personal Advance Co. (1889) ...	261	Garnishee (Can.) ...	647
Carroll v. Develin (Ir.) ...	580	— v. Kitchen (Can.) ...	462
— v. Erie County Natural Gas & Fuel Co.		Champneys v. Burland (1870) ...	571, 572, 573
(Can.) ...	210, 211	— v. — (1871) ...	571, 572, 573
— v. Parks (Ir.) ...	229	Chandler (Doe d.) v. Ford (1835) ...	264, 279
— v. Potter (Can.) ...	473	Chando Bibi, <i>Re</i> (Ind.) ...	450, 451
Carruthers v. Ardagh (Can.) ...	359	Chandos (Duchess) v. Brownlow (Ir.) ...	265
— v. Reynolds (Can.) ...	495	Chant v. Rhodes (N.Z.) ...	184
Carscaden v. Shore (Can.) ...	231	Chanter v. Borthwick (Scot.) ...	176, 177
Carscallen v. Moodie (Can.) ...	485	Chaplin v. Leveson-Gower, <i>Re</i> Sutherland	
Carter, <i>Re</i> , <i>Ex p.</i> Watson (1845) ...	663	(Duke) (1922) ...	21, 36
— v. Carter (1857) ...	280	Chapman v. Beecham (1842) ...	267
		— v. Bowlby (1841) ...	431, 436
		— v. Callis (1862) ...	630
		— v. Speller (1850) ...	518

	PAGE		PAGE
Chapman's Trusts, <i>Re</i> (1865) ...	93, 104, 105	City of London Insurance Co., Garnishees, <i>Shorey v. Baker</i> (Can.) ...	635, 636
Charitable Donations Comrs. <i>v.</i> Devereux (1842) ...	62, 63	City of Toronto & Toronto Ry. Co., <i>Re</i> (Can.)	447
Charlesworth's Trusts, <i>Re</i> , <i>Tew v. Briggs</i> (1912) ...	28	Civa Rau Nanaji <i>v.</i> Jevana Rau (Ind.) ...	404
Charlton <i>v.</i> A.-G. (1879) ...	86, 87, 93, 95	Claremont, <i>Re</i> (1923) ...	71
Charrington & Co., <i>Ex p.</i> , <i>Re Dickinson</i> (1888)	527, 528, 674	Clarence Ry. Co. <i>v.</i> Great North of England, etc. Ry. Co. (1845) ...	241
Charter <i>v.</i> Peeter (1598) ...	469	Clark, <i>Re</i> (Ir.) ...	18
Chasteauneuf <i>v.</i> Capeyron (1882) ...	490	—— <i>v.</i> Dawler (1891) ...	319
Chater <i>v.</i> Chignell (1850) ...	553	—— <i>v.</i> East & West India Dock Co., <i>Re</i> East & West India Dock Co. (1888) ...	488
Chatfield <i>v.</i> Berchtoldt (1872) ...	58, 65	—— <i>v.</i> Hume (1825) ...	356
—— <i>v.</i> Parker (1828) ...	571	—— <i>v.</i> Perry (1855) ...	628
Chatteris <i>v.</i> Young (1827) ...	81	—— <i>v.</i> Phinney (Can.) ...	389, 390
Chatterton, <i>Re</i> (1881) ...	380	Clark's Estate, <i>Re</i> (Can.) ...	108
—— <i>v.</i> Watney (1881) ...	623, 629, 639	Clarke, <i>Re</i> (1842) ...	195, 196
Cheatle <i>v.</i> Piddocke (1843) ...	424	——, <i>Re</i> (1898) ...	423
Cheda Lal <i>v.</i> Mulchand (Ind.) ...	482	——, <i>Re</i> (Aus.) ...	121
Cheese (Doe d.) <i>v.</i> Creed (1829) ...	566	—— <i>v.</i> Canadian National Ry. Co. (Can.)	450
Chekaluk <i>v.</i> Webster (Can.) ...	228, 229	—— <i>v.</i> Clarke (1873) ...	648
Chester (Goodtitle d.) <i>v.</i> Alker & Elmes (1757)	587	—— <i>v.</i> Clement & English (1796) ...	422
Chester <i>v.</i> Powell (1885) ...	448, 449	—— <i>v.</i> Creighton (Can.) ...	419
Chester (Dean & Chapter) <i>v.</i> Smelting Corpn., Ltd. (1902) ...	594	—— <i>v.</i> Hall (Ir.) ...	270
Cheston <i>v.</i> Gibbs (1843) ...	471, 545	—— <i>v.</i> Lockey (1696) ...	480
Chew Deb <i>v.</i> Davie (Can.) ...	647	—— <i>v.</i> Macdonald (Can.) ...	637, 638
Chew Lumber Co. <i>v.</i> Howe Sound Lumber Co. (Can.) ...	399	—— <i>v.</i> Midland & Great Western Ry. Co. (Ir.) ...	215
Chhaganlal <i>v.</i> Bai Harkha (Ind.) ...	139	—— <i>v.</i> Palmer (1829) ...	431
Chiandetti, <i>Re</i> , <i>Ex p.</i> Trustee (1921) ...	520, 521	—— <i>v.</i> Yorke (1882) ...	206
Chick <i>v.</i> Smith (1840) ...	427, 461	Clarkson & Forgie <i>v.</i> Wishart & Myers (Can.)	480, 481
Childers <i>v.</i> Wooler (1859) ...	551	Clatton, <i>Re</i> , Richardson <i>v.</i> Greaves (1861) ...	643
Childrens <i>v.</i> Saxby (1683) ...	550	Claxton <i>v.</i> Shibley (Can.) ...	372
Chilton <i>v.</i> Carrington (1855) ...	583	Claydon <i>v.</i> Finch (1873) ...	599
Chinnasami <i>v.</i> Hariharabadra (Ind.)	153, 154	Clayton, <i>Ex p.</i> , <i>Re</i> Hendy (Aus.) ...	385
Chippendale's Case, <i>Re</i> Bonang Gold Mining Co., Ltd. (Aus.) ...	327	Cleghorn <i>v.</i> Des Anges (1819) ...	533, 535
Chisholm, <i>Re</i> , Goddard <i>v.</i> Brodie (1902)	41, 43	Clements, <i>Re</i> , <i>Ex p.</i> Clements (1901) ...	425
—— <i>v.</i> Morse (Can.) ...	201	——, <i>Re</i> , <i>Ex p.</i> Davis (1901) ...	425
Chitambar <i>v.</i> Krishnappa (Ind.) ...	577	——, <i>Re</i> , Clements <i>v.</i> Davis (1901) ...	425
Cholmondeley, <i>Re</i> (1832) ...	51, 60	Clemow, <i>Re</i> , Yeo <i>v.</i> Clemow (1900) ...	6, 31, 32
Cholmondeley (Earl) <i>v.</i> Clinton (Lord) (1817)	270, 277, 278	—— <i>v.</i> Geach (1870) ...	272
—— (1820) 270, 277, 278		Clerk <i>v.</i> Withers (1704) ...	426, 442, 508, 511, 528, 531, 541, 555, 556
—— (1821) 270, 277, 278		Clifford <i>v.</i> Phillips (1907) ...	153, 161, 165, 166, 239
—— <i>v.</i> ——— (1823) 278		—— <i>v.</i> ——— (1908) ...	153, 161, 165, 166, 239
Chowdhry Sheikh Wahed Ali <i>v.</i> Mullick Enayet Hossein Ali (Ind.) ...	422	—— <i>v.</i> Timms (1907) ...	153, 161, 165, 166, 239
Christian <i>v.</i> Stamps Comrs. (Aus.) ...	119	—— <i>v.</i> ——— (1908) ...	153, 161, 165, 166, 239
Christie <i>v.</i> Casey (Can.) ...	632	Clifford's (Lord) Case (1726) ...	592, 596, 597
—— <i>v.</i> Secretan (1799) ...	155	Clifton <i>v.</i> Hooper (1844) ...	580
Christmas (Doe d.) <i>v.</i> Oliver (1829) ...	284	Clinch <i>v.</i> Smith (1840) ...	461
Christopherson <i>v.</i> Burton (1848) ...	472, 533	Clinton <i>v.</i> Clinton (1866) ...	594, 598
Christy <i>v.</i> Tancred (1842) ...	186	—— <i>v.</i> Sellars (Can.) ...	676
Chuha Mal <i>v.</i> Hari Ram (Ind.) ...	382	Clish <i>v.</i> Fraser (Can.) ...	354
Chunni <i>v.</i> Lala Ram (Ind.) ...	458	Clissold <i>v.</i> Cratchley (1910) ...	457, 458, 548, 551
Church <i>v.</i> Arnold (Aus.) ...	669	Clobery <i>v.</i> Exon (Bp.) (1692) ...	145
—— <i>v.</i> Dalton (Ir.) ...	270	Clough <i>v.</i> London & North Western Ry. Co.	
Churchill <i>v.</i> Bank of England (1843) ...	656	Cloutte <i>v.</i> Storey (1911) ...	150, 173
—— <i>v.</i> McRae & Cowie (Can.) ...	212	Clutterbuck <i>v.</i> Jones (1812) ...	556
—— <i>v.</i> Siggers (1854) ...	459	Clymer (Corbett d.) <i>v.</i> Nicholls (1851) ...	591
Chute, <i>Re</i> (N.Z.) ...	24, 26	Coales, <i>Re</i> (1841) ...	63
Ciceri <i>v.</i> Burino (Can.) ...	563	Coast Lumber Co. <i>v.</i> Bates (Can.) ...	280
Cicognia <i>v.</i> McHeather (Can.) ...	622	Coates <i>v.</i> Sandy (1841) ...	382
Cigala's Settlement Trusts, <i>Re</i> (1878)	101, 102	Coates' Case, <i>Re</i> Blakely Ordnance Co., Ltd. (1876) ...	652
Citizens' Bank of Louisiana <i>v.</i> First National Bank of New Orleans (1873) ...	309	Cobbe <i>v.</i> Heydon (1614) ...	422
Citizens Light & Power Co. <i>v.</i> St. Louis Town (Can.) ...	167	Cobbett, <i>Re</i> (1861) ...	433
City Bank of Sydney <i>v.</i> McLaughlin (Aus.) ...	334	—— <i>v.</i> Wheeler (1861) ...	580
City of London. See London (City).		Cobbold <i>v.</i> Chilver (1842) ...	430
City of London Insurance Co. <i>v.</i> Smith	387	Cobbold & Woolley <i>v.</i> Morgan (1888) ...	465
		Cochlin <i>v.</i> Massey-Harris (Can.) ...	508, 509
		Cochran <i>v.</i> Bell (Can.) ...	419
		Cochrane, <i>Re</i> (Ir.) ...	17, 45, 46
		—— <i>v.</i> Hamilton Provident Loan Society (Can.) ...	145



# TABLE OF CASES.

xlvi

	PAGE		PAGE
Cochrane v. Morrison (Can.) ...	675	Commercial Union Assurance Co. v. Margeson (Can.) ...	386
Cochrane Manufacturing Co. v. Lamon (Can.)	583	Commissaires d'École de la Paroisse de St. Boniface de Shawinigan v. Shawinigan Water Power Co. (Can.) ...	200
Cock v. Bliss (Can.) ...	644	Commonwealth Land, Building, Estate & Auction Co., Ltd., <i>Re, Ex p.</i> Hollington (1873) ...	465
Cockerell v. Essex (Earl), <i>Re</i> Johnston (1884)	78, 83, 105	Compania Naviera Vasconzada v. Burton & Co. (1906)	304
Cockram v. Welby (1877) ...	541	— v. Churchill & Sim (1906) ...	304
Cockrell v. Cockrell (1856) ...	61, 62	Companies Acts, <i>Re, Ex p.</i> Watson (1888)	274, 296
Cocks v. Great Western Ry. Co. (1886)	424, 425	Company, A, <i>Re</i> (1915) ...	428
— v. — (1887)	424, 425	Comyrre v. Brandling (1612) ...	571, 575
Codrington (or Coddington) v. Lloyd (1838)	467	Concha v. Concha (1886) ...	139, 153, 165, 170
Codville & Co. v. Haygarth (Can.) ...	323	Conder, <i>Ex p.</i> , <i>Re</i> Woodham (1887)...	482, 607
Coe, <i>Re</i> , Miles v. Presland (1840) ...	650	Condy v. Blaiberg (1891) ...	548
Coelenbier v. De Sommery, <i>Re</i> De Sommery (1912) ...	130	Coney, <i>Re</i> , Coney v. Bennett (1885)...	667
Coffin v. Gunner (1730) ...	427	Conn v. Garland (1873) ...	599
— v. Karbari Awat (Ind.) ...	200	Connecticut & Passumpsic Rivers Ry. Co. v. Morris (Can.) ...	513, 514
Coggs v. Bernard (1703) ...	504	Connell v. Miller (Can.) ...	437, 438
Cogswell (Doe d.) v. Smith (Can.) ...	589	Connolly v. McLeod (Can.) ...	268
Cohen v. Beadell (1891) ...	658	Cannon v. Ballinten (Scot.) ...	490
— v. De las Rivas, <i>Ex p.</i> Durham Sheriff (1891) ...	610, 611	Connor v. McKay (N.Z.) ...	146
— v. Hale (1878) ...	624	— v. West (1770) ...	586
Cole v. Bank of Montreal (Can.) ...	242	Connor & Olley v. Belfast Water Comrs. (Ir.)	326, 327
— v. Davies (1698) ...	475, 476	Connors v. Egli & Bartschi (Can.) ...	624
— v. Frost (1844) ...	603	Conolly v. Conolly (Ir.) ...	169
— v. Green (1671) ...	140	Conradi v. Conradi (1868) ...	138, 141
— v. Hindson (1795) ...	420	Consolidated Bank v. Bickford (Can.)	608, 612, 613
— v. Terry (1861) ...	615	Const v. Barr (1826) ...	596
Coleman v. De Lissa (Aus.) ...	575	Contant v. Chapman (1842) ...	306, 307
— v. Dunlap (Can.) ...	520, 521	Cook, <i>Ex p.</i> , <i>Re</i> Gunsbourg (1920) ...	225, 584
— v. North (1898) ...	294	— v. Cook (1890) ...	571, 596
— v. Rawlinson (1858)...	490, 517	— v. — (Can.) ...	347, 348
Coles v. Coates (1840)...	608	— v. Credit Valley Ry. Co. (Can.) ...	594
Coles' Will, <i>Re</i> (1869)...	80	— v. Culverhouse, <i>Re</i> Culverhouse (1896)	29
Collett v. Foster (1857) ...	468	— v. North British Ry. Co. (Scot.) ...	353
Colley v. Hardy (1829) ...	531	— v. Palmer (1827)...	541, 542
Collier v. Walters (1873) ...	185, 186	Cooke v. Birt (1814) ...	477, 543
Collingridge v. Paxton (1851) ...	486, 487	— v. Cholmondeley (1849) ...	51
Collingwood & Ramsey v. Several Defendants (1865) ...	185, 189	— v. Peace (1844)...	462
Collins v. Beaumont (1839) ...	439, 582	— v. Rickman (1911) ...	178
— v. Cave (1858)...	206	— v. Sholl (1793) ...	154
— v. Evans (1844) ...	581	— v. Turner (1850) ...	51
— v. Gough (1785) ...	210	Cookes v. Bellamy (1864) ...	283
— v. Smith (1896) ...	404	Cookson v. Fryer (1858) ...	512, 517
— v. Yewens (1839) ...	581	Coole, <i>Re</i> , Coole v. Flight (1920) ...	330, 331
Colls v. Coates (1840) ...	608	Coolidge v. Bank of Montreal (Can.)	417, 418, 419
Colonial Assurance Co., Garnishee, Hartt v. Edmonton Laundry Co. (Can.)	628, 640, 642	Coombe v. Trist (1835) ...	71
Colonial Bank of Australasia v. Cooper (Aus.)	496	Coomer v. Latham (1847) ...	375
Colonial Bank of New Zealand v. Bennet (N.Z.) ...	399	Coope v. Cresswell (1866) ...	317, 318
Colonial Government v. Bonner (S. Af.) ...	321	Cooper, <i>Re</i> (1889) ...	578, 579
Colonial Securities Co. v. Taylor (Can.) ...	538	— v. Brayne (1858) ...	637, 638
Colquhoun's Trustees v. Abercromby (Scot.)	25, 26	— v. Cooper (1876) ...	447
— v. Inland Revenue (or Lord Advocate) (Scot.) ...	22, 23	— v. Day (1817) ...	81
Colston v. Berends (1835) ...	430, 431	— v. Griffin (1892) ...	652
— v. Gardner (1681) ...	602	— v. Hill (1859) ...	612
Columbia Graphophone Co. v. Union Bank of Canada (Can.) ...	399	— v. Jenkins (1864) ...	657
Columbine v. Bright (1847) ...	582	— v. Lawson (1889) ...	624
Combined Weighing & Advertising Machine Co., <i>Re</i> (1889) ...	639	— v. Molsons Bank (Can.) ...	234
Commercial Bank v. McDonell (Can.) ...	437	— v. Reilly (1829) ...	668
— v. Vankoughnet, Reed & Osborne (Can.) ...	422	— v. — (1830) ...	668
— v. Van Norman (Can.) ...	608	— v. Rowe (1811) ...	434
Commercial Bank Corpn. of India & the East, Ltd., <i>Re</i> , Fernandes' Case (1870) ...	120	— v. Shepherd (1846) ...	225
Commercial Bank Corpn. of India & the East, <i>Re</i> , Jones' Claim (1868) ...	342	— v. Taylor (1844) ...	181
Commercial Bank of Australia, Ltd. v. Skinner (Aus.) ...	292	— v. Trewby (or Truby) (1860) ...	113
Commercial Loan & Trust Co. v. Macaw (Can.)	...	— v. Waller (1834) ...	580
		Cooper & Allen's Contract for Sale to Harlech, <i>Re</i> (1876) ...	87, 89, 90, 91, 106, 111, 114
		Cooper & Harlech, <i>Re</i> (1876)...	89, 90
		Cope v. Breslin (Ir.) ...	40

	PAGE		PAGE
Copeland v. Mape (Ir.) ...	603, 604	Cox v. Cannon (1838) ...	365
Coppell v. Smith (1791) ...	619	— v. Dublin City Distillery (No. 2) (Ir.)	162, 163
Coppelo v. Brown (1834) ...	580	— v. Dublin City Distillery Co., Ltd. (No. 3)	189
Coppendale v. Bridgen (1759) ...	532	(Ir.) ...	318
— v. Debonaire (1757) ...	436	— v. Seeley (Can.) ...	41
Coppey v. Lear (Can.) ...	631	Coxwell's Trusts, <i>Re</i> , Kinloch-Cooke v. Public	271
Coppin v. Gunner (1730) ...	427	Trustee (1910) ...	191
Coram v. Wheten (Can.) ...	266	Cracknall v. Janson (1879) ...	652
Corbet (Sir Miles) v. Rookwood (1597) ...	469	Craddock v. Owen (1854) ...	652
Corbett v. Hopkirk (Can.) ...	253	Cragg v. Taylor (1866) ...	161
— v. Lewin (1884) ...	584	— v. — (1867) ...	244
— v. McKenzie (Can.) ...	610	Craig v. Bentinck (N.Z.) ...	594, 604
— d. Clymer v. Nicholls (1851) ...	591	— v. Brown (or Paton) (Scot.) ...	509
Corbould v. Kennedy, <i>Re</i> Kennedy (1917) ...	38, 82	— v. Craig (1896) ...	466, 467
Corelli v. Smith (Can.) ...	327	— v. — (Can.) ...	244
Coren v. Barne (1889) ...	636	— v. Giberson (Can.) ...	670
Coriton v. Thomas (1620) ...	559	Craig & Leslie, <i>Re</i> (Can.) ...	302
Cormick v. Ronayne (Ir.) ...	624	Craine v. Colonial Mutual Fire Insurance Co.,	517
Cormier v. Mattinson (Can.) ...	499	Ltd. (Aus.) ...	524, 525
Cornish v. Abington (1859) ...	290, 291, 300, 314, 328	Cramer v. Murphy (Ir.) ...	304, 305
— v. Searell (1828) ...	600, 601	Crane v. Clark (Can.) ...	518
Cornwallis, <i>Re</i> (1856) ...	69	— v. Wallasey Corpn. (1912) ...	461
Corona Lumber Co., Ltd. v. Brereton (Can.) ...	510	Crane & Sons v. Ormerod (1903) ...	111, 112
Corpe v. Glynn (1832) ...	421, 422	Cranston v. Blair (Can.) ...	8
— v. Muldrock (N.Z.) ...	610	Crawford, <i>Re</i> (Can.) ...	420
Corp. of British Investors, Ltd., <i>Re</i> (1897) ...	451	—, <i>Re</i> (N.Z.) ...	592
Corrall v. Cattell (1839) ...	322	— v. Satchwell (1744) ...	439, 440
Corrants' Case (1575) ...	267	Crawley v. Clarke (1791) ...	514
Corrigal v. London & Blackwall Ry. Co.	377	— v. Lidgeat (1614) ...	175
(1843) ...	514, 515	Crawshaw v. Harrison (1894) ...	289
Corsbie v. Case Threshing Machine Co. (Can.) ...	231, 232	Crawter v. Marvin, <i>Re</i> Marvin (1905) ...	612
Cossitt v. Sydney Town (Can.) ...	676	Creagh v. Blood (Ir.) ...	209
Costa Rica Republic v. Strousberg (1880) ...	370	Creagh & Williams, <i>Re</i> (Aus.) ...	606, 607
Cotching v. Bassett (1862) ...	319, 320	Creaven v. Miller (N.Z.) ...	31
Coté v. Stadacona Insurance Co. (Can.) ...	465, 466, 467	Creditors' Relief Act, <i>Re</i> , <i>Re</i> Ward &	159, 160
Cotes v. Michill (1681) ...	214	Dominion Purebred Stock Co. (Can.) ...	619
Cotter v. Barrymore (Earl) (1733) ...	670	Creed, <i>Re</i> , Thomas v. Hudson (1905) ...	294
— v. Osborne (Can.) ...	497	Creelman v. Stewart (Can.) ...	608
Cotton v. Boyd (Can.) ...	100	Cremetti v. Crom (1879) ...	431, 533
— v. R. (Can.) ...	622, 645	Cresswell v. Jeffreys (1912) ...	145, 181
— v. Vansittart (Can.) ...	487	Cresswell v. Hunt (Can.) ...	197
Cottrell, <i>Re</i> , <i>Ex p.</i> Smyth (Ir.) ...	320	Crew v. Dallas (Can.) ...	599
Coughlan v. National Construction Co. (Can.) ...	602	Cribb v. Freyberger (1919) ...	620
Coulston v. Gardiner (1681) ...	367	Crippen, <i>In the Estate of</i> (1911) ...	34
Coulter v. Equity Fire Insurance Co. (Can.) ...	228	Crispin v. Cumano (1869) ...	346
Counsell v. Counsell (Aus.) ...	297	Crist, <i>Re</i> , Minger v. Anderson (Can.) ...	40, 129
County of Gloucester Bank v. Rudry Merthyr	416	Crocker, <i>Re</i> , Crocker v. Crocker (1916) ...	573
Steam & House Coal Colliery Co. (1895) ...	297	— v. Fothergill (1819) ...	573
Coupland v. Beedell (N.Z.) ...	416	Croft, <i>Re</i> , Deane v. Croft (1892) ...	247, 249, 257, 333
Courage v. O'Shea, <i>Re</i> O'Shea's Settlement	655	— v. Lumley (1855) ...	247, 249, 257, 333
(1895) ...	560	— v. — (1858) ...	602
Court (Doe d.) v. Tupper (Can.) ...	622	Crofts v. Middleton (1855) ...	152
Courtis v. Johnson, Diamond, Garnishee	77, 79	— v. — (1856) ...	592, 594, 595, 597
(1855) ...	487	Cronmire v. Maccolla (1893) ...	442
Courtoy v. Vincent (1823) ...	386	Crook, <i>Re</i> , <i>Ex p.</i> Southampton Sheriff (1894) ...	471, 513
— v. — (1852) ...	306, 307	— v. Wright (1825) ...	548, 549
Cousineau v. City of London Fire Insurance	160	Crooks v. O'Grady (Can.) ...	535
Co. (Can.) ...	182	Croom & Arthur v. Stewart & Co. (Scot.) ...	358
Coutant v. Chapman (1842) ...	675	Cropper v. Smith (1883) ...	444, 446, 447
Covert v. Janzen (Can.) ...	618, 620, 623, 625	— v. — (1884) ...	272, 273, 301
Cowan v. Affie (Can.) ...	578	— v. — (1885) ...	272, 273, 301
Cowan & Co. v. Carlill (1885) ...	350	Crosley v. Arkwright (1788) ...	533
Cowans' Estate, <i>Re</i> , Rapier v. Wright (1880) ...	355	Cross v. Barnes (1877) ...	485, 503
Cowbridge Ry. Co., <i>Re</i> (1868) ...	110	— v. Glode (1797) ...	500
Cowell v. Watts (1850) ...	7, 8, 25	Cross & Co. v. Matthews & Wallace (1904) ...	223, 224
Cowle v. Cowin (I. of M.) ...	439	Crosse v. General Reversionary & Investment	328
Cowley (Earl), <i>Re</i> (1866) ...	7, 8	Co. (1853) ...	358, 359
— v. Inland Revenue Comrs.	599	— v. Wandsworth Board of Works (1898) ...	
(1899) ...	560		
Cowley v. Lydeot (1614) ...			
Cowley's (Earl) Estate, <i>Re</i> (1898) ...			
Cowper v. Taylor (1848) ...			
Cox v. Barnsly (1613) ...			

## TABLE OF CASES.

xlix

	PAGE		PAGE
Crossley Brothers, Ltd. v. Lee (1908) ...	485	D'Arcy v. White & Wilson (Can.) ...	590
Crossman v. R. (1886) ...	13	Darling v. Hill (1736) ...	523
— v. Shears (Can.) ...	375	Darnell v. Hunter (1871) ...	265, 277
Crosswaite v. Gage (Can.) ...	263	Dart v. Citizens' Insurance Co. (Can.) ...	378
Crow v. Robinson (1862) ...	69	Dartford Brewery Co., Ltd. v. Moseley (1906) ...	587
Crowder v. Long (1828) ...	509	Dartmouth (Lady) v. Roberts (1812) ...	143, 189
Crowe v. Buchanan (Can.) ...	473, 494, 495	Darveau v. Cyprien (Can.) ...	489
— v. Price (1889) ...	668	Dascomb v. Heacocks (Can.) ...	582
Crowther v. Ramsbottom (1798) ...	472	Dashwood v. Bithazey (1729) ...	601
Crozer v. Pilling (1825) ...	464, 582	Dashwood (Sheriff of London) v. Manlove (1891) ...	547, 548
Cruickshank v. Northern Accident Insurance Co., Ltd. (Scot.) ...	387, 388	Dattatraya Rayaji Páí v. Shridhar Náráyan Páí (Ind.) ...	369
Crump, <i>Re, Ex p.</i> Crump (1891) ...	419	Dauber v. Barnes (1862) ...	618
— v. Bonsor (1847) ...	536	D'Auvergne v. Cooper (1899) ...	658
Cubitt v. Gamble (1919) ...	458	Davenport v. Davies (1836) ...	317
Cuddon v. Cuddon (1876) ...	109, 112	— v. Nelson (1814) ...	313
Cullen v. A.-G. for Ireland (Ir.) ...	65	— (Doe d.) v. Rhodes (1843) ...	587
— v. Wemyss (Scot.) ...	345	David v. Rees (1904) ...	647
Culloden v. McDowell (Can.) ...	526	Davidge v. Kirby (Can.) ...	666
Culverhouse, <i>Re, Cook v.</i> Culverhouse (1896) ...	29	Davidson v. Allen (Ir.) ...	523
— v. Wickens (1868) ...	646	— v. Belleville & North Hastings Ry Co. (Can.) ...	211
Culverson v. Melton (1840) ...	677	— v. Grange (Can.) ...	461
Cumming v. Alguire (Can.) ...	561	— v. Hastings (Marchioness) (1838) ...	597
Cummings v. Cooke (Aus.) ...	621	— v. Reynolds (Can.) ...	480
Cummins v. Perkins (1899) ...	670	— v. Wilkinson & Chandler (Can.) ...	638
Cunigunda (otherwise Crippen), <i>In the Estate of</i> (1911) ...	197	Davidson's Will, <i>Re, Perpetual Executors &amp; Trustees Assocn. of Australia v.</i> Davidson (Aus.) ...	40
Cunliffe v. Morehouse (Can.) ...	452	Davies, <i>Re, Ex p.</i> Williams (1872) ...	434, 435
Cunningham v. Morse (Can.) ...	526, 527	— v. Burton (1829) ...	331
Curlewis v. Bird (1842) ...	612, 613	— v. Bush (1825) ...	281, 283
— v. Laurie (1848) ...	543	— (Doe d.) v. Creed (1829) ...	566
Curlews v. Butts (1831) ...	605	— v. Davidson (Can.) ...	616, 617
Curling v. Townshend (Marquis) (1816) ...	665	— v. Davies, <i>Re</i> Hole (1905) ...	114
— v. Walters (1871) ...	265, 277	— d. Povey v. Doe (1773) ...	591
Currie, <i>Re, Bjorkman v.</i> Kimberley (Lord) (1888) ...	127, 128	— v. Edmonds (1843) ...	610, 611
Currie's Will, <i>Re</i> (Aus.) ...	117	— v. Fowler (1873) ...	127
Curtis v. Mayne (1842) ...	612	— v. Jenkins (1843) ...	465
Cushing v. Fortin (Can.) ...	164	— v. McMillan (Can.) ...	234, 453
Custance v. Bradshaw (1845) ...	118	— v. Monkhouse (1729) ...	202
Cuthbert v. McAller (N.Z.) ...	399	— v. Sear (1869) ...	349, 350
Cuthbertson v. Irving (1860) ...	270	— v. Witts, <i>Re</i> Hole (1906) ...	42
D.			
Daby v. Gehl (Can.) ...	376, 377, 511, 558	Davies Brewing & Malting Co. v. Smith (Can.) ...	472
Dacosta & Villa Real (1734) ...	237	Davis, <i>Ex p.</i> , <i>Re</i> Clements (1901) ...	425
Dacres (Lady) v. Chute (1683) ...	597, 601	— v. Browne (1851) ...	157
Daily Telegraph Newspaper Co. v. Cohen (Aus.) ...	327	— v. Hedges (1871) ...	176
Dakers v. Lilburn (1865) ...	76	— v. Hughes (1797) ...	379
Dakin v. De Mesnil (1867) ...	421	— v. M'Nab (Can.) ...	460
Dale v. Birch (1813) ...	541	— v. McSherry (Can.) ...	383
Dalgleish v. Hodgson (1831) ...	156	— v. Marlborough (Duke) (1819) ...	566
DalGLISH, <i>Re</i> (Aus.) ...	117	— v. Montefiore (Aus.) ...	245
Dallin, <i>Re</i> (Can.) ...	493	— v. Morton (1913) ...	144, 233
Dallow v. Garrold (1884) ...	644	— v. O'Brien (Can.) ...	390
Dalrymple, <i>Re, Bircham v.</i> Springfield (1901) ...	82	— v. Shapley (1830) ...	460
— v. Mullen (Can.) ...	461	— v. Tankerville (Lord) (1843) ...	480
Dalton v. Fitzgerald (1897) ...	282	Davis (Thomas) & Son v. Andrews (1884) ...	426
Dalton Overseers v. North Eastern Ry. Co. (1900) ...	174	Davis & Toronto City, <i>Re</i> (Can.) ...	389
Daly v. Dublin, Wicklow & Wexford Ry. Co. (Ir.) ...	207	Davison, <i>Ex p.</i> , (1896) ...	229
— v. Marshall (N.Z.) ...	322	— v. Schwartz (Can.) ...	499
— v. Victoria (State of) (Aus.) ...	123	Davlátá v. Ganesh Shástri (Ind.) ...	457, 458
Dalye v. Robertson (Can.) ...	516, 560	Davonport to Randall (N.Z.) ...	116
Damer v. Busby (Can.) ...	582	Davy (Doe d.) v. Haddon (1783) ...	238
Damodar Das v. Sheoram Das (Ind.) ...	151	Dawkins v. Tatham (1829) ...	79
Dámodar Parsotam v. Ishvar Jethá (Ind.) ...	479	Dawler v. Barnes (1862) ...	618, 677
Dancer v. Hastings (1826) ...	249, 250	Dawson, <i>Re, Ex p.</i> Dawson (1899) ...	492, 512, 520
Daniel v. M'Carthy (Ir.) ...	629	—, <i>Re, Dawson v.</i> Middlesex Sheriff (1899) ...	492
Daniel (Doe d.) v. Woodroffe (1849) ...	152, 153	— v. Gregory (1845) ...	234
Daniels v. Gompertz (1842) ...	582	— v. Malley (Ir.) ...	627
		— v. Middlesex Sheriff, <i>Re</i> Dawson (1899) ...	492
		— v. Moffat (Can.) ...	661



## TABLE OF CASES.

	PAGE		PAGE
Dawson v. Wood (1810) ...	497	De Peyrecave v. Nicholson (1894) ...	678
Day v. Bisbitch (1595) ...	484	De Quetteville v. De Quetteville (1905) 29, 30, 48	
— v. Rutledge (Can.) ...	449	Derbyshire & Staffordshire, etc. Ry. Co. v.	
— v. Sharp (1846) ...	339, 340	Bainbrigge (1852) ...	569
— v. Turnell, <i>Re</i> Higgins (1885) ...	112	De Rechberg v. Beeton (1888) ...	104
Day's Trusts, <i>Re</i> (1883) ...	659	De Renzy v. Ahlfeld (N.Z.) ...	303
Deakin, <i>Re</i> , <i>Ex p.</i> Cathcart (1900) ...	595, 597	De Ros' Trust, <i>Re</i> , Hardwicke v. Wilmot	
Dean v. Gray (Can.) ...	169	(1885) ...	260, 264, 268
— v. Whittaker (1824) ...	501, 502	De Rosaz, <i>Re</i> , Rymer v. De Rosaz (1886) ...	77
Deane v. Croft, <i>Re</i> Croft (1892) ...	40, 129	Desbrow v. Crommie (1729) ...	600
Deans, <i>Re</i> (N.Z.) ...	27	De Sommers, <i>Re</i> , Coelenbier v. De Sommers	
Dearborn, <i>Ex p.</i> (Can.) ...	628	(1912) ...	130
Death v. Harrison (1870) ...	212	Detillin v. Gale (1799) ...	592
De Bingham v. London Life Assn., Ltd.,		Deutsche Bank (London Agency) v. Beriro &	
(1915) ...	428	Co. (1895) ...	313
Debi Rai v. Gokal Prasad (Ind.) ...	382, 383	De Veber v. Colling (Can.) ...	460
Debtor, A, <i>Re</i> , [1912] 1 K. B. 53. ...	453	De Veber (Doe d.) v. De Veber (Can.) ...	580
—, <i>Re</i> , [1912] 3 K. B. 242 ...	443, 447	Devenish v. Johnstone (S. Af.) ...	529
—, <i>Re</i> (1919) ...	429	Dever v. Wiley (Can.) ...	466
Debtor (No. 206 of 1920), <i>Re</i> (1920) ...	429	Devereux v. Underhill (1667) ...	589
Debtor, A, <i>Re</i> , <i>Ex p.</i> Judgment Creditor		Devi Prasad v. Lewis (Ind.) ...	634
(1902) ...	437	Devonshire, The, The Seacombe (1912) ...	422
—, <i>Re</i> , <i>Ex p.</i> Smith (1902) ...	437, 443, 507, 508	Devonshire (Owners) v. Leslie (Owners)	
Debtor's Summons, A, <i>Re</i> (Ir.) ...	429	(1912) ...	422
De Burgho's Estate, <i>Re</i> (Ir.) ...	226	Devrav Krishna v. Halambhai (Ind.) ...	205
De Bussche v. Alt (1878) ...	391	Dewar & Sons, Ltd. v. Winder (1895) ...	213
De Coppett v. Barnett (1901) ...	543	Dewhurst v. Clarkson (1854) ...	238
Deeley v. Lloyds Bank, Ltd. (1910) ...	343	De Winton v. Brecon Corpn. (No. 2) (1860) ...	621, 622
— v. — (1912) ...	343	De Wolf v. Carvill (Can.) ...	489
— v. Perkes (1896) ...	186, 187	De Zouche v. Cooke (Can.) ...	514, 545, 546
Deeley's Patent, <i>Re</i> (1895) ...	186, 187	Dhani Ram Shara v. Bhagirath Shaha (Ind.) ...	169
Deemes v. Panston (1731) ...	508	Dhanpat Rai v. Guranditta Mal (Ind.) ...	368, 369
Deerhurst, <i>Re</i> , <i>Ex p.</i> Seaton (1891) ...	395, 396	Dharam Kunwar v. Balwant Singh (Ind.) ...	306
Deering v. Gibbon (Can.) ...	526	Dhondo Balkrishna Kanitkar v. Raoji (Ind.) ...	395, 396
De Freyne (Lord) v. Inland Revenue Comrs.		Dhunjabhoy Cowasji Umrigar v. Lisboa (Ind.) ...	449
(I)		Dhurum Dass v. Mussoorie Savings Bank	
Defries, <i>Re</i> , Norton (or Nordon) v. Levy		(Ind.) ...	528
(1883) ...	190, 235	Diamond, Garnishee, Courtis v. Johnson	
— v. Creed (1865) ...	471, 472	(1855) ...	622
De Galve (Countess) v. Gardner, <i>Re</i> Anglesey		Diamond v. Coleman (Can.) ...	184
(Marquis) (1903) ...	657	Dibbens, <i>Ex p.</i> , <i>Re</i> Shadwell Waterworks	
De Hart v. De Jongh (S. Af.) ...	300	Co. (1869) ...	375
De Hoghton, <i>Re</i> , De Hoghton v. De Hoghton		Dicas v. Warne (1833) ...	437
(1896) ...	54	Dick v. Dhunji Jaita (Ind.) ...	219
Deighton v. Greenville (1693) ...	572, 575	— v. Dover (1850) ...	381
De Lancey, <i>Re</i> (1869) ...	95, 96, 115	— v. Hughes (Can.) ...	642
—, <i>Re</i> (1870) ...	95, 96	— v. Lambert (Can.) ...	211
— v. Inland Revenue Comrs. (1869) ...	95, 96, 115	Dick's Settlement, <i>Re</i> (Aus.) ...	123
— v. R. (1872) ...	70	Dickens v. Dickens (1862) ...	594
Delaney v. Moore (Can.) ...	440	Dickenson, <i>Re</i> , <i>Ex p.</i> Moore (1888) ...	527, 528
De Leeuw, <i>Re</i> , Jakens v. Central Advance &		Dickinson, <i>Re</i> , <i>Ex p.</i> Charrington & Co.	
Discount Corpn. (1922) ...	190, 191	(1888) ...	527, 528, 674
De Lissa v. Asher (Aus.) ...	359	— v. Robertson (Can.) ...	476
Delmar v. Freemantle (1878) ...	540	— v. Smith (1813) ...	599, 603
Delorme v. Cusson (Can.) ...	169	Dickson v. Dickson (Can.) ...	162
De Medina v. Grove (1847) ...	458, 459, 540	— v. Van Hummell (Can.) ...	640
De Mesnil v. Dakin (1867) ...	421	Dighton v. Greenvil (1693) ...	572, 575
De Metton v. De Mello (1810) ...	365	— v. — (1699) ...	572, 575
De Moleyns' Case (1356) ...	559	Dignan, <i>Re</i> (N.Z.) ...	26
De Montmort v. Broers (1887) ...	148, 149	Dillon v. MacDonald (N.Z.) ...	211
De Mora v. Concha (1885) ...	170	Dillon (Lord) v. Plaskett (1828) ...	557, 565, 566
Dempster v. Elliott (Can.) ...	623, 640	Dillon v. Raleigh Township (Can.) ...	376
Den v. Abingdon (Lord) (1780) ...	566	Dingwall v. McBean (Can.) ...	184
Deniss & Glass (Can.) ...	464	Dinkar Ballal Chakradev v. Hari Shirdhar	
Denn v. White (1797) ...	186	Apte (Ind.) ...	163
Denne, <i>Re</i> (Aus.) ...	40	Dinobundhu Shaw Chowdhry v. Jogmaya	
Dennett v. Kirkpatrick (1826) ...	338	Dasi (1901) ...	563
Dennis v. Whetham (1874) ...	471, 472, 473, 512, 542	Dinsmore v. Philip (Can.) ...	254, 255
Dent v. Dnet (1867) ...	596	Dionissis v. R., The Laura (1865) ...	326, 327, 328
Denton v. Godfrey (1847) ...	583	Dissett (Doe d.) v. McLeod (Can.) ...	511
Denton & Goddard's Case (1584) ...	251	Ditch v. Ditch (Can.) ...	855
De Pass v. Capital & Industries Corpn. (1891) ...	636	Dixon, <i>Re</i> , Penfold v. Dixon (1902) ...	6, 30, 34

# TABLE OF CASES.

li

	PAGE		PAGE
Dixon v. Lamare (1871) ... ..	394, 395	Doe d. Lushington v. Landaff (Lord Bp.) (1807) ... ..	252, 272
— v. Mackay (Can.) ... ..	513	— v. Langs (Can.) ... ..	166
— v. Rowe (1876) ... ..	598, 599	— d. Lyon v. Legè (Can.) ... ..	516
— v. Smith (1818) ... ..	603	— d. Williams v. Lloyd (1839) ... ..	277, 279
— v. Winch (1900) ... ..	361	— v. — (1840) ... ..	277, 279
— v. Wrench (1869) ... ..	652, 653	— d. McDonald v. Long (Can.) ... ..	199
Dixon Hartland, Re, Banks v. Hartland (1911) ... ..	38	— d. Stevens v. Lord (1839) ... ..	464
Dobb v. Dobb (Henry), Ltd. (1918) ... ..	429	— d. Gillespie v. Macaulay (Can.) ... ..	268
Dobson, Watson & Co., Re (Aus.) ... ..	432	— d. Tiffany v. McCreen (Can.) ... ..	244
Dod v. Coleman (1841) ... ..	556	— d. Stewart v. M'Donald (Can.) ... ..	242
Dodd v. Vail (Can.) ... ..	312	— d. Elmsley v. McKenzie (Can.) ... ..	434, 577
Doddington's Case, Hall d. Doddington v. Peart (1594) ... ..	266	— d. Thompson v. McKenzie (Can.) ... ..	512
Dodson (J.), Re, Re Dodson (A. L. P.), Gibson v. Dodson (1907) ... ..	31	— d. Dissett v. McLeod (Can.) ... ..	511
Doe, Re (Can.) ... ..	83	— d. Harley v. McManus (Can.) ... ..	576
— d. Roberts v. Barry (1844) ... ..	558	— d. Hyde v. Manchester Corpn. (1851) ... ..	262
— d. Jessup v. Bartlet (Can.) ... ..	437, 557	— d. Brune v. Martyn (1828) ... ..	139
— v. Baxter (Can.) ... ..	338	— d. Meyers v. Meyers (Can.) ... ..	577
— d. Beeston v. Bikker (1860) ... ..	456, 457	— d. Thompson v. Mirehouse (1833) ... ..	588
— d. Morgan v. Bluck (1813) ... ..	585	— d. Batten v. Murless (1817) ... ..	491
— d. James v. Brawn (1821) ... ..	516	— d. Butcher v. Musgrave (1840) ... ..	262
— d. Spafford v. Breakenridge (Can.) ... ..	269	— d. Hennesy v. Myers (Can.) ... ..	283
— d. Carthew v. Brenton (1830) ... ..	147	— d. Christmas v. Oliver (1829) ... ..	284
— d. Armstrong v. Bridges (Can.) ... ..	329, 330	— d. Evans v. Owen (1831) ... ..	571
— v. Brown (Can.) ... ..	269	— d. Roberts v. Parry (1844) ... ..	558
— d. Doherty v. Brown (Can.) ... ..	245, 246	— v. Power (Can.) ... ..	242
— d. Spafford v. Brown (Can.) ... ..	516	— d. Winckley v. Pye (1795) ... ..	372
— d. Bacon v. Brydges (Lady) (1843) ... ..	192	— d. Davenport v. Rhodes (1843) ... ..	587
— d. Nepean v. Budden (1822) ... ..	289	— d. Roberts v. Roberts (1819) ... ..	277
— d. Freeland v. Burt (1787) ... ..	262	— v. Robicheau (Can.) ... ..	318
— d. Taggart v. Butcher (1815) ... ..	500	— d. Cameron v. Robinson (Can.) ... ..	576
— d. Laurason v. Canada Co. (Can.) ... ..	562	— d. Pate v. Roe (1807) ... ..	588
— d. Mitchinson v. Carter (1798) ... ..	490, 491	— d. Holt v. Roe (1830) ... ..	510
— v. Carter (1799) ... ..	491	— d. Lambert v. Roe (1835) ... ..	590
— v. Challis (1851) ... ..	303	— d. Martin v. Roe (1835) ... ..	590
— d. Bank of England v. Chambers (1836) ... ..	331	— d. Thomson v. Roe (1835) ... ..	590
— d. Burk v. Cormier (Can.) ... ..	269	— d. Malarchy v. Roe (1840) ... ..	590
— d. Cheese v. Creed (1829) ... ..	566	— d. Mullarky v. Roe (1840) ... ..	590
— d. Davies v. Creed (1829) ... ..	566	— d. Parr v. Roe (1841) ... ..	565
— d. Holmes v. Davies (1818) ... ..	586	— d. Pitcher v. Roe (1841) ... ..	469, 589
— d. Foster v. Derby (Earl) (1834) ... ..	187	— d. Lloyd v. Roe (1842) ... ..	469, 588
— d. De Veber v. De Veber (Can.) ... ..	580	— d. Howson v. Roe (1852) ... ..	590
— d. Richardson v. Dickson (Can.) ... ..	576	— d. Hudson v. Roe (1852) ... ..	590
— v. Donston (1818) ... ..	516	— d. Mathews v. Roe (Can.) ... ..	428
— d. Lewis v. Ellis (1841) ... ..	588	— d. Lumley v. Scarborough (Earl) (1835) ... ..	249
— d. Marchant v. Errington (1839) ... ..	275	— d. Strode v. Seaton (1835) ... ..	283
— d. Phillips v. Evans (1833) ... ..	562	— d. Stratford v. Shail (1844) ... ..	590
— d. Richards v. Evans (1847) ... ..	124	— d. Shelton v. Shelton (1835) ... ..	245, 253
— d. Boulton v. Fergusson (Can.) ... ..	576	— d. Smith v. Shuter (Can.) ... ..	576
— d. Chandler v. Ford (1835) ... ..	264, 279	— d. Burnham v. Simmonds (Can.) ... ..	577
— d. McGregor v. Grant (Can.) ... ..	535	— d. Leeming v. Skirrow (1837) ... ..	272
— d. Hussey v. Gray (Can.) ... ..	186	— d. Westmoreland v. Smith (1827) ... ..	491
— d. Hull v. Greenhill (1821) ... ..	562	— d. Cogswell v. Smith (Can.) ... ..	589
— d. Masson v. Griffith (Can.) ... ..	511	— d. Blagrove v. Stephens (1850) ... ..	272
— d. Groves v. Groves (1847) ... ..	311, 386	— d. Gaisford v. Stone (1846) ... ..	267, 270
— d. Davy v. Haddon (1783) ... ..	238	— v. Thorn (1813) ... ..	516
— d. Moffat v. Hall (Can.) ... ..	576	— d. Miller v. Tiffany (Can.) ... ..	262, 576
— d. Campbell v. Hamilton (Can.) ... ..	576	— d. Blacksell v. Tomkins (1809) ... ..	281, 290
— d. Whittington v. Hards (1851) ... ..	590, 591	— v. Trye (1839) ... ..	581
— d. Baggaley v. Hares (1833) ... ..	274	— d. Court v. Tupper (Can.) ... ..	560
— d. Norfolk (Duke) v. Hawke (1802) ... ..	575, 576	— d. Ogle v. Vickers (1836) ... ..	281
— d. Hazen v. Hazen (Can.) ... ..	555, 556, 561, 576	— d. Thomas v. Walker (1843) ... ..	248, 255
— d. Tindale v. Hemming (1826) ... ..	271	— d. Forster v. Wandlass (1797) ... ..	588
— d. Auldjo v. Hollister (Can.) ... ..	576	— d. North v. Webber (1837) ... ..	272
— d. Levy v. Horne (1842) ... ..	268, 275, 281	— v. Wetmore (Can.) ... ..	281, 282
— d. Preece v. Howells (1831) ... ..	244	— d. Vernon v. White (Can.) ... ..	563
— v. Huddart (1835) ... ..	235	— d. Williams v. Williams (1834) ... ..	590, 591
— d. Kerr v. Jamieson (Can.) ... ..	576, 577	— d. Drapers' Co. v. Wilson (1819) ... ..	586
— d. Wigan v. Jones (1830) ... ..	562, 563	— v. Wilson (1821) ... ..	281, 282
— d. Hughes v. Jones (1842) ... ..	507, 517	— v. Wood (1819) ... ..	126
— d. Hellyer v. King (1851) ... ..	588	— d. Daniel v. Woodroffe (1849) ... ..	152, 153
— d. Eyre v. Lambly (1798) ... ..	310	— v. Wright (1839) ... ..	151, 164
		— d. R. v. York (Archbp.) (1849) ... ..	588
		Dogget v. Roe (1688) ... ..	589
		Doherty (Doe d.) v. Brown (Can.) ... ..	245, 246

	PAGE		PAGE
Doherty v. Nelson (Ir.) ... ..	505, 506	Duggan v. Kitson (Can.) ... ..	490
Doidge v. Royal Templars of Temperance (Can.) ... ..	341, 342	Dumbell v. Isle of Man Ry. Co. (1880) ...	631
Doker v. Hasler (1825) ... ..	533	Dumergue v. Rumsey (1863) ... ..	484, 485
Dolbell v. Stamps Comr. (N.Z.) ... ..	26	Dummer v. — (1711) ... ..	557
Dollery v. Whaley (Can.) ... ..	550	v. Pitcher	
Dolphin v. Layton (1879) ... ..	622, 623	Dunbar v. Hoskins (J. S.) Lumber Co., Ltd. (Can.) ... ..	404
Dominion Cold Storage Co., <i>Re</i> (Can.) ...	415	Dunbar-Bullar, <i>Re</i> (Ir.) ... ..	23
Dominion Grange Mutual Fire Assurance Asscn. v. Bradt (Can.) ... ..	387	Duncan v. Cashin, Carr Claimant (1875)	498, 499
Dominion Permanent Loan Co. v. Morgan (Can.) ... ..	399	Duncan's Trustee v. M'Cracken (Scot.) ...	99
Dominion Transport Co. v. General Supply Co. (Can.) ... ..	302	Duncannon (Viscount) v. Manchester (Duke), <i>Re</i> Manchester (Dowager Duchess) (1912)	17, 27, 44, 47
Dominion Trust Co., Ltd. v. Masterton (Can.)	166	Dundas v. Dutens (1790) ... ..	481, 487, 599
Dominion Type Co. v. Graves (Can.) ...	644	v. Hamilton & Milton Road (Can.) ... ..	593, 594
Dominion Type Founding Co. v. Nagle (Can.)	613	v. Waddell (1880) ... ..	188, 189
Don v. Law (Can.) ... ..	495	Dundas' Trustees v. Dundas' Trustees (Scot.)	47,
(Can.) ... ..	495	Dunedin Co-operative Meat Supply Co., <i>Re</i> , <i>Ex p.</i> Wright, Stephenson & Co. (N.Z.)	346
Donaldson v. Thompson (1808) ... ..	156	Dunedin Co-operative Meat Supply Co., Ltd. v. Hudson (N.Z.) ... ..	315
Donegall v. Templemore (Ir.) ... ..	280	Dunkley v. Scribnor (1815) ... ..	601
Donkin v. Crombie (Can.) ... ..	484	Dunlop v. Haney (Can.) ... ..	159, 167
Donlan v. Brett (1829) ... ..	458	Dunn v. Moose Jaw City (Can.) ... ..	292, 302
Donnison v. Employers' Accident & Live Stock Insurance Co. (Scot.) ... ..	386	Dunn's Trustees v. Dunn (Scot.) ... ..	48
Donohoe v. Mullarkey (Ir.) ... ..	649	Dunster v. Glengall (Earl) (Ir.) ... ..	651
Dorab Ally Khan v. Khajah Moheecooddeen's Executors (Ind.) ... ..	544, 545	Dunston v. Paterson (1857) ... ..	301
Doran v. Moore (Ir.) ... ..	523	Duppa, <i>Re</i> , Fowler v. Duppa (1912) ...	70
Doughty v. Stiles (1673) ... ..	572	Durga Das Khan v. Ishan Chandra Dey (Ind.)	344
Douglas, <i>In the Will of</i> (Aus.) ... ..	40	Durham Sheriff, <i>Ex p.</i> , Cohen v. De las Rivas (1891) ... ..	610, 611
v. Congreve (1836) ... ..	77	Durrant v. Holdsworth (1886) ... ..	361
Douglass v. Bradford (Can.) ... ..	475, 476	Dussault v. Tanguay (Can.) ... ..	200, 201
v. Ward (Can.) ... ..	460	Duvergier v. Fellows (1830) ... ..	365
Doulan v. Brett (1829) ... ..	458		
Doutre & Sharply (Can.) ... ..	492	Dwar Buksh Sirkar v. Fatik Jali (Ind.) ...	427
Dove v. Dove (1784) ... ..	585	Dwarika Mohun Das v. Luckhimoni Dasi (Ind.) ... ..	628
Dover v. Child (1876) ... ..	228	Dwarka Das v. Akhay Singh (Ind.) ... ..	179, 180
Dow v. Dibblee (Can.) ... ..	482	Dwarka Dass v. Rai Sita Ram (Ind.) ...	515
Dowler v. Duffy (Can.) ... ..	643	Dyet, <i>Re</i> , Morgan v. Dyet (1902) ... ..	48
Dowling, <i>Re</i> , Dowling v. Fenwick (1913) ...	29	Dyne v. Costobadie (1853) ... ..	259
Downes v. Ship, <i>Re</i> Scottish & Universal Finance Bank, Ltd. (1868) ... ..	348	Dyte v. St. Pancras Board of Guardians (1872) ... ..	306
Downie v. Summerson, <i>Re</i> Summerson (1899)	343		
Downs v. Cooper (1841) ... ..	290, 313, 362	E.	
Doyle v. Bergin (Can.) ... ..	532	Eade v. Winsor & Son (1878) ... ..	641
v. Leyds (S. Af.) ... ..	368	Eades v. Maxwell (Can.) ... ..	419
D'Oyly, <i>Re</i> , Vertue v. D'Oyly (1917) ...	35, 36	Eadus v. Dougall (Can.) ... ..	551
Drake, <i>Ex p.</i> , <i>Re</i> Ware (1877) ... ..	584	Eales v. Lambert (1850) ... ..	151
Mitchell (1803) ... ..	11, 52, 60, 118	Early v. Benbow (1846) ... ..	76
Drapers' Co. v. Hadder (1892) ... ..	197	Earp v. Satchell (1843) ... ..	606
(Doe d.) v. Wilson (1819) ... ..	586	East & West India Dock Co., <i>Re</i> , Clark v. East & West India Dock Co. (1888) ...	488
Drawbridge v. London, Chatham & Dover Ry. Co., <i>Ex p.</i> Grissell (1867) ... ..	579	East India Co. v. Vincent (1740) ... ..	369
Dresden, <i>Re</i> , Lindo v. London Hospital (1910) ... ..	76, 78	East Indian Ry. Co. v. Sispal Lal (Ind.) ...	320
Dresser v. Johns (1859) ... ..	626	East London Hospital for Children v. Cobbett (Aus.) ... ..	26
Drevor v. Mawdesley (1836) ... ..	661	East London Waterworks Co. v. Foulkes	363
Drew, <i>Re</i> , Marry v. Drew (Ir.) ... ..	33	East London Waterworks Co. v. Foulkes (1894) ... ..	363
<i>Ex p.</i> Martin (1891) ... ..		East Nissouri Township v. Horseman (Can.)	307
v. Willis, <i>Ex p.</i> Martin (1891) ... ..		East of England Bank, <i>Re</i> (1865) ... ..	664
Drewe v. Lainson (1840) ... ..	473, 507, 519	Hall (1864) ... ..	595, 596
Drought v. Eustace (Ir.) ... ..	265	Eastern Rand Exploration Co., Ltd. v. Nel	
Drury Lowe's Marriage Settlement, <i>Re</i> , <i>Ex p.</i> Sitwell (1888) ... ..	111	Eastmure v. Laws (1839) ... ..	202
Ducy v. Stevens (Aus.) ... ..	465, 466	Easton, <i>Re</i> (1840) ... ..	381
Dueber Watch Case Manufacturing Co. v. Taggart (Can.) ... ..	223	(1886) ... ..	366
Duff Development Co. v. Kelantan Government (1923) ... ..	618, 619		
Duffill v. Spottiswoode (1828) ... ..	501, 502		
Duffner v. Bowyer (1924) ... ..	233		
Duffus v. Creighton (Can.) ... ..	510		
v. Meadows (1870) ... ..	114		



# TABLE OF CASES.

lii

	PAGE		PAGE
Easton's Case (1840) ... ..	381	Emberley v. Trevanion (1860) ... ..	188
Eastwood v. McKenzie (Can.) ... ..	535	Emerson v. Niagara Navigation Co. (Can.)...	217
Eaton, <i>Re</i> (1840) ... ..	381	Emerson Town v. Forrester (Can.) ... ..	160
—, <i>Re</i> (1865) ... ..	82	Emma Silver Mining Co. v. Lewis & Son	
— v. Lake (1888)... ..	397	(1879) ... ..	446
Ebbetts v. Conquest (1900) ... ..	204, 205	Empire Accident & Surety Co., <i>Re</i> , Faill's	
Edborg v. Imperial Timber & Trading Co.		Case (Can.) ... ..	390
(Can.) ... ..	356	Empire Coal & Tramway Co., Ltd. v.	
Eddowes v. Argentine Loan & Mercantile		Patrick (Can.) ... ..	362
Agency Co., Ltd. (1890) ... ..	181	Empire Sash & Door Co. v. McGreevy (Can.)	625,
Edevain v. Cohen (1889) ... ..	235		645
Edge v. Kavanagh (Ir.) ... ..	517	Empringham v. Short (1844)... ..	603, 604
Edgeworth v. Inland Revenue Comrs. (Ir.)...	23	Empson v. Bathrust (1622) ... ..	612
Edinburgh Life Assurance Co. v. Clark (Can.)	170	Empson's Case, <i>Re</i> Victoria Permanent	
Edison General Electric Co. v. Edmonds		Benefit Building, Investment & Freehold	
(Can.)... ..	160	Land Society (1870) ... ..	254, 278, 279
Edmands v. Best (1862) ... ..	359, 360	Endrizzi v. Peto & Beckley (Can.) ... ..	494
Edmanson v. Thompson & Blakey (1861) 300, 301		England v. Newfoundland Government &	
Edmond v. Ross (1821) ... ..	437	Henderson (Nfld.) ... ..	354
Edmonston v. Harrison (1853) ... ..	659	Englehart v. Dunbar (1833) ... ..	433
Edmonton Mortgage Co. v. Gross (Can.) ... ..	474	Ennis v. Rochford (Ir.) ... ..	188, 189
Edmunds v. Edmunds (1904) 625, 626, 634, 638		Epstein v. King William's Town Borough	
— v. Wallingford (1884) ... ..	554	Council (S. Af.) ... ..	298
— v. — (1885) 191, 192, 364, 554		Erode Manikkoth Krishnan Nair v. Puthie-	
— v. Watson (1816) ... ..	529	deth Chembakkoseri Krishnan Nair (Ind.)	528
Edmundson v. Thompson & Blakey (1861)... 300,		Errington v. Ward (1803) ... ..	592
	301	Erving v. Peters (1790) ... ..	175
Edridge v. Edridge (1818) ... ..	664	Esau Ahmed v. Jassim Binsaff (Ind.) ... ..	490
Edwards, <i>Re</i> , <i>Ex p.</i> Edwards (1840) ... ..	338	Esnouf v. Gurney (Can.) ... ..	501, 502
— v. Aberayron Mutual Ship Insur-		Essex Sheriff, <i>Ex p.</i> , <i>Re</i> Finch (1891) ... ..	611
ance Society (1876) ... ..	331	—, <i>Re</i> , Terrell v. Fisher (1862) ... ..	475
— v. Bridges (1818) ... ..	500	Etchells v. Lovatt (1821) ... ..	531
— v. Edwards (1876) ... ..	672	Eteen v. Pollard (1917) ... ..	429
— v. — (Can.) ... ..	647	Ethier v. Labelle (Can.) ... ..	376
— v. Evans (1843) ... ..	545	European & North American Ry. Co. v.	
— v. Farebrother (1828) ... ..	500	McLeod (Can.) ... ..	487
— v. Lang (Ir.) ... ..	381	European Bank v. Fox, <i>Ex p.</i> British	
— v. Omellhallum (1639) ... ..	269, 270	Mercantile Bank (1866) ... ..	643
— v. Rogers (1640) ... 183, 184, 187, 188		European Bank, Ltd. v. Fox, <i>Ex p.</i> General	
— v. Smyth, <i>Re</i> Smyth (1918) ... ..	28, 35	Estates Co., Ltd. (1866) ... ..	643
Edwards & Co. v. Picard (1909) 666, 669, 670		Evans, <i>Ex p.</i> , <i>Re</i> Watkins (1879) 572, 666, 667,	
Egan v. Buller (Aus.) ... ..	614		670, 672
Egmont's (Earl) Settled Estates, <i>Re</i> , Lefroy		—, <i>Re</i> (1835) ... ..	55
v. Egmont (1912) ... ..	105	—, <i>Re</i> (1865) ... ..	82
Eisdell v. Coningham (1859) ... ..	644	—, <i>Re</i> , <i>Ex p.</i> Salaman (1916) ... ..	307, 308
Ekins v. Brown (1854) ... ..	124	— v. Bicknell (1801) ... ..	308
Elam v. Phillips, <i>Re</i> Snape (1915) ... ..	35	— v. Congdon (Nfld.) ... ..	454
Elford's Will, <i>Re</i> (Aus.) ... ..	126	— v. Davies (1843) ... ..	530, 535
Elias v. Black (Scot.) ... ..	462	— v. Evans (1843) ... ..	530
Elise, The (1859) ... ..	193	— v. — (1844) ... ..	193
Elk Lumber Co. v. Crow's Nest Pass Coal		— v. Halifax City (Can.) ... ..	403
Co. (Can.) ... ..	360, 361	— v. Hughes (1823) ... ..	186
Ellard v. Phelan (Ir.) ... ..	104	— v. Huntsville Town (Can.) ... ..	662
— v. Warren (1681) ... ..	602	— v. Lloyd (1889) ... ..	671
Ellesmere (Earl) v. Inland Revenue Comrs.		— v. Main Colliery Co., Ltd. (1914) ... ..	428
(1918) ... ..	24	— v. Manero (1841) ... ..	432, 610
Elliot, <i>Re</i> (Aus.) ... ..	568, 575	— v. Nichol (1841) ... ..	320, 321
—, <i>Re</i> (Can.) ... ..	114	— (Doe d.) v. Owen (1831) ... ..	571
— v. Capell (Can.) ... ..	619, 620	— v. Powel (1696) ... ..	317
Elliott v. Elliott (Can.) ... ..	214	— v. Roberts (1826) ... ..	482
— v. Forrester (Can.) ... ..	632	— v. Robertson Orr (N.Z.)	
Ellis v. Deane (Ir.) ... ..	355, 380	— v. Smallcombe, <i>Re</i> Agriculturists'	
— v. Griffith (1846)... ..	426, 427	Cattle Insurance Co. (1868) ... ..	333
— v. Jackson (1664) ... ..	580	— v. Stephen (Aus.) ... ..	481
Ellis & Renfrew, <i>Re</i> (Can.) ... ..	139	Eve, <i>Re</i> , Hall v. Eve (1917) ... ..	37
Elmsley, <i>In the Goods of</i> , Spencer & Spencer		Evelyn v. Haynes (1782) ... ..	170, 234
v. Williams (1871) ... ..	185	Everard v. Aston (1717) ... ..	192
Elmsley (Doe d.) v. McKenzie (Can.) 434, 577		Everarghim v. Leonard (Can.) ... ..	149, 536
Elves v. Pratt (Can.) ... ..	481	Everitt v. Lynds (Can.) ... ..	326, 538, 539
Elwell v. Jackson (1884) ... ..	624, 638	Everth v. Hannam (1815) ... ..	156
— v. — (1885) ... ..	624, 638	Ewart v. Jones (1845)... ..	580
Elwes, <i>Re</i> (1858) ... ..	109, 110	Ewin, <i>Re</i> (1830) ... ..	63
Elwood v. Bullock (1844) ... ..	430	Ewing v. Lockhart (Can.) ... ..	580
Emamooddeen Showdaghur v. Futteh Ali		— v. Wallace (Scot.) ... ..	384
(Ind.)... ..	169	Ewing's Trustees v. Mathieson (Scot.)	58, 115

	PAGE		PAGE
<i>Exchange Bank v. Barnes</i> (Can.) ...	318	<i>Feeny, Re</i> (Ir.) ...	24
— <i>v. Springer</i> (Can.) ...	318	<i>Feistel v. King's College, Cambridge</i> (1848) ...	659
<i>Execution Act, Re, Schmit v. Erickson</i> (Can.) ...	569	<i>Fell v. Parkin</i> (1882) ...	356, 357
<i>Exley v. Dey</i> (Can.) ...	621	<i>Fellows v. Thornton</i> (1884) ...	425, 426, 617, 618
<i>Eynde v. Gould, Ex p. Yorkshire Sheriff</i> (1882) ...	552	<i>Fenerty v. Halifax City</i> (Can.) ...	
<i>Eyre, Re</i> (1907) ...	24	<i>Fennell v. Dempsey</i> (Ir.) ...	435
<i>Eyre (Doe d.) v. Lambly</i> (1798) ...	310	<i>Fenner v. Blake</i> (1900) ...	374
— <i>v. M'Dowell</i> (1861) ...	570	<i>Fenny v. Durrant</i> (1817) ...	558
— <i>v. Monro</i> (1857) ...	53	<i>Fenton, Re</i> (1835) ...	82
<i>Eyres v. Taunton</i> (1633) ...	566	— <i>v. Lowther</i> (1787) ...	599
<i>Eyton, Re, Bartlett v. Charles</i> (1890) ...	179, 662	— <i>v. Simcoe County</i> (Can.) ...	339, 340
F.		<i>Fenwick v. Laycock</i> (1841) ...	505
<i>Fahey v. Tobin</i> (Ir.) ...	661, 662	<i>Ferguson, Re, Turner v. Bennett, Turner v. Carson</i> (Can.) ...	329
<i>Faill's Case, Re Empire Accident &amp; Surety Co.</i> (Can.) ...	390	— <i>v. Amos</i> (Can.) ...	434
<i>Fair (T. J.) &amp; Co. &amp; Livingston v. Wardstrom</i> (Can.) ...	547	— <i>v. Carman</i> (Can.) ...	637, 639
<i>Fairchild v. Crawford</i> (Can.) ...	420	— <i>v. Carrington</i> (1828) ...	317
<i>Fairclough &amp; Sons v. Manchester Ship Canal Co.</i> (No. 2) (1897) ...	591	— <i>v. ———</i> (1829) ...	317
<i>Fairfax's Settlement, Re, Ex p. Stamps Comrs.</i> (Aus.) ...	117, 118	— <i>v. R.</i> (Aus.) ...	124
<i>Fairfield Shipbuilding &amp; Engineering Co., Ltd. v. Gardner, Mountain &amp; Co., Ltd.</i> (1911) ...	313	— <i>v. Wilson</i> (1866) ...	356
<i>Fairley, Re</i> (1922) ...	521	<i>Fergusson's Case, Re Phillip-Stephen Photo Litho &amp; Typographic Process Co., Ltd.</i> (Aus.) ...	310, 311
<i>Fairtitle d. Mytton v. Gilbert</i> (1787) ...	274, 296	<i>Fermor v. Phillips</i> (1817) ...	581
<i>Faithfull v. Ewen</i> (1878) ...	657	<i>Fernandes' Case, Re Commercial Bank Corpn. of India &amp; the East, Ltd.</i> (1870) ...	120
<i>Fakir Chand Ghose v. Hira Lal Seal</i> (Ind.) ...	383, 384	<i>Fernside, Re, Baines v. Chadwick</i> (1903) ...	30, 31
<i>Fakuruddeen Mahomed Assan v. Bengal, Official Trustee</i> (Ind.) ...	415, 416	<i>Ferrer v. Beale</i> (1701) ...	208
<i>Falcke v. Scottish Imperial Insurance Co.</i> (1886) ...	336, 337	<i>Ferrer's Case</i> (1599) ...	200
<i>Falconar's Trusts, Re, Bradford v. Young</i> (1884) ...	450	<i>Ferrers v. Arden</i> (1599) ...	200
<i>Falk, Re</i> (Aus.) ...	120	<i>Ferres v. Wignoll</i> (1596) ...	207
<i>Falle v. Le Sueur &amp; Le Huquet</i> (1859) ...	341	<i>Fetter v. Beale</i> (1701) ...	208
<i>Fallis v. Wilson</i> (Can.) ...	625, 638	<i>Feversham v. Emerson</i> (1855) ...	235
<i>Fallon v. Anderson</i> (1792) ...	547	<i>Few v. Backhouse</i> (1838) ...	202
<i>Farebrother v. Ansley</i> (1808) ...	552	<i>Ffooks v. South Western Ry. Co.</i> (1853) ...	333
— <i>v. Worsley</i> (1831) ...	538	<i>Fiddey, Re, Jones v. Frost</i> (1872) ...	273
<i>Farely v. Evanson</i> (N.Z.) ...	277, 278	<i>Field, Ex p.</i> (1841) ...	664
<i>Farmeloe v. Bain</i> (1876) ...	323	— <i>v. Smith</i> (1837) ...	520
<i>Farmer v. Compton</i> (1625) ...	392	<i>Field &amp; Allan v. Gordon</i> (Scot.) ...	625
— <i>v. Ellice</i> (Can.) ...		<i>Fieldhouse v. Croft</i> (1804) ...	486
— <i>v. Grand Trunk Ry. Co.</i> (Can.) ...	321	<i>Finance Act, 1894, &amp; Studdert, Re</i> (Ir.) ...	20, 21
<i>Farnham v. Thorn</i> (1849) ...	363	<i>Finance Minister v. Farrar's Estate</i> (S. Af.) ...	25
<i>Farquharson v. Seton</i> (1828) ...	166, 167	— <i>v. Minnaar's Executor</i> (S. Af.) ...	10, 11
<i>Farquharson Brothers &amp; Co. v. King &amp; Co.</i> (1902) ...	289, 304, 360	<i>Financial Assocn. of India &amp; China, Ltd. v. Pránjivandás Harjivandás &amp; Bhagvandás Purshotamdás</i> (Ind.) ...	526
<i>Farr v. Arderly</i> (Can.) ...	462	<i>Finch, Re, Ex p. Essex Sheriff</i> (1891) ...	611
— <i>v. Newman</i> (1792) ...	498, 505, 510	— <i>v. Smith, Re Ainsworth</i> (1915) ...	75
<i>Farrant v. Thompson</i> (1822) ...	484, 517	— <i>v. Winchelsea</i> (Earl) (1719) ...	525
<i>Farrar v. Beswick</i> (1836) ...	496	<i>Finlay v. R.</i> (Aus.) ...	118
— <i>v. Geldenhuis Main Reef Gold Mining Co., Ltd.</i> (In Liquidation) (S. Af.) ...	307	<i>Finney v. Hinde</i> (1879) ...	647, 648, 654
— <i>v. Hutchinson</i> (1839) ...	404	<i>Fire Valley Orchards, Ltd. v. Sly</i> (Can.) ...	328
<i>Farrer v. Brooks</i> (1673) ...	427, 525	<i>Firmin v. Public Trustee</i> (N.Z.) ...	266
— <i>v. St. Catharine's College, Cambridge</i> (1873) ...	79	<i>Fischer v. Seafeld</i> (Earl) (Scot.) ...	75
<i>Farrow v. Mayes</i> (1852) ...	417	<i>Fish, Ex p.</i> (Can.) ...	522
— <i>v. Tobin</i> (Can.) ...	199	— <i>Re, Lea v. Fish</i> (1897) ...	43
<i>Farwell v. Seale</i> (1849) ...	73	<i>Fisher v. Baldwin</i> (1853) ...	446, 453
<i>Faulder v. Silk</i> (1811) ...	240	— <i>v. Brierley</i> (No. 2) (1861) ...	76
<i>Faversham v. Emerson</i> (1855) ...	235	— <i>v. Carruthers</i> (1736) ...	460
<i>Fawcett v. Canadian Pacific Ry. Co.</i> (Can.) ...	451	— <i>v. Cook</i> (Can.) ...	634, 668
<i>Fazal Shau Khan v. Gafar Khan</i> (Ind.) ...	381	— <i>v. Daniels</i> (Can.) ...	583
<i>Fearnside, Re, Baines v. Chadwick</i> (1903) ...	30, 31	— <i>v. Grand River Lumber Co.</i> (Can.) ...	453
<i>Featherston v. McDonell</i> (Can.) ...	353	— <i>v. Magnay</i> (1843) ...	382, 421
<i>Federal Bank v. Kretschmann</i> (Aus.) ...	508	— <i>v. Ogle</i> (1808) ...	156
		— <i>v. Patton</i> (Can.) ...	583
		— <i>v. Samuda</i> (1808) ...	175
		— <i>v. Woodstock</i> (Can.) ...	372
		<i>Fishmongers' Co. v. Booth</i> (1843) ...	180
		— <i>v. Robertson</i> (1843) ...	180
		— <i>v. Staines</i> (1843) ...	180
		<i>Fisken v. Brooke</i> (Can.) ...	496
		— <i>v. McMullen</i> (Can.) ...	575
		— <i>v. Marshall</i> (Can.) ...	624
		— <i>v. Wride</i> (Can.) ...	595

## TABLE OF CASES.

lv

	PAGE		PAGE
Fitch v. Bissie (1805) ...	267	Foster, <i>Ex p.</i> , <i>Re</i> Harrison (1860) ...	338
Fitt v. Bryant (1883) ...	640	- <i>Re</i> , <i>Thomas v.</i> Foster (1897) ...	34
Fitter v. Veal (1701) ...	208	- <i>v.</i> Beall (Can.) ...	317
Fitzgerald v. Green (S. Af.) ...	185	- <i>v.</i> Blackstone (1833) ...	497
<i>v.</i> ...		- <i>v.</i> Blakelock (1826) ...	614
(1872) ...	622	- <i>v.</i> Cockerell (1835) ...	497
Fitzgibbon v. Duggan (Can.) ...	577	<i>l.) v.</i> ...	
Fitzhardinge (Lord), <i>Re</i> , Fitzhardinge (Lord)		<i>v.</i> Hilton (1831) ...	509
<i>v.</i> Jenkinson (1899) ...	41	<i>v.</i> Jackson (1615) ...	437, 438,
Fitzherbert v. Waterhouse (N.Z.) ...	77, 78, 81, 82	... 72	
Fitzpatrick, <i>Ex p.</i> (Can.) ...	493	— <i>v.</i> Mentor Life Assurance Co. (1854) ...	247, 248
— <i>v.</i> Waring (Ir.) ...	628	— <i>v.</i> Smith (Can.) ...	525, 530
Fitzrandolph v. Shanly (Can.) ...	631	Fowler v. Ashford (1881) ...	535, 536
Fitzsimmons v. Jones (Can.) ...	545	<i>v.</i> Duppa, <i>Re</i> Duppa	
Flahavan v. Gamble (Nfld.) ...	447	Fox v. Burbidge (1829) ...	520
Flatau & Co. v. Sawyer (1892) ...	312	— <i>v.</i> Star Newspaper Co. (1900) ...	150
Flaxman v. Pettitt, <i>Re</i> Pettitt (1894) ...	78	Foxwell v. Van Grutten (1897) ...	240
Fleetwood's Case (1610) ...	560, 577	Foy v. Bell (1811) ...	395
Flegg v. Prentis (1892) ...	673	France v. Campbell (1841) ...	487
Fleming v. Hall (Can.) ...	611	Francis v. Nash (1734) ...	480, 483, 486
<i>v.</i> ...		Francklin's Charity, <i>Re</i> (1829) ...	65
Fleming's Case, <i>Re</i> National Provincial Life		Francklyn v. Colhoun (1819) ...	601
Assurance Society (1871) ...	269	<i>v.</i> Thornhill (1819) ...	601
Fletcher v. Bethom (1893) ...	318	Frankland, <i>Re</i> (1872) ...	619
<i>v.</i> Farrer (1614) ...	267	Franklin v. Hodgkinson (1846) ...	437
<i>v.</i> Pendray (Can.)		Frape, <i>Re</i> , <i>Ex p.</i> Perrett (No. 2) (1894) ...	379
Fletcher's Estate v. Fletcher's Estate (S. Af.)	61, 62, 99	Fraser v. Bacon (Can.) ...	582
Flitters v. Alfrey (1874) ...	165	<i>v.</i> Croft (Scot.) ...	40
Flower v. Herbert (1751) ...	337, 338	<i>v.</i> ...	511
Flowerdew v. Laing (Scot.) ...	345	<i>v.</i> Jenkins (Can.)	
Floyd v. Bethill (1617) ...	587	<i>v.</i> Kirkpatrick (Can.)	
Floyer v. Bankes (1863) ...	83, 102, 103, 104, 105	<i>b.)</i> ...	209
Fludyer, <i>Re</i> , Wingfield v. Erskine (1898) ...	115	<i>v.</i> Pendlebury	
Foley (Lady), <i>Re</i> (1898) ...	20	<i>v.</i> Sutherland (Can.)	
Foley v. Burnell (1779) ...	493	<i>v.</i> ...	
— <i>v.</i> — (1785) ...	493	Fredericks v. North-West Thresher Co. (Can.)	476, 493
— <i>v.</i> Verigin Rural Telephone Co.		... 577	
(Can.) ...	568,	Freeland (Doe d.) v. Burt (1787) ...	262
Foligno v. Martin (1852) ...	246, 247	Freeman v. Blewitt (1701) ...	467
Follett v. Jefferyes (1850) ...	599	<i>v.</i> ...	299, 300, 303, 328, 399, 404, 543, 544
Follows, <i>Re</i> , <i>Ex p.</i> Follows (1895) ...	530	<i>v.</i> Read (1860) ...	379
Foncier Franco Belge v. Imperial Bank of		<i>v.</i> ...	
Canada & Supple (Can.) ...	429	French, <i>Re</i> (Can.) ...	309, 310
Fontaine v. Payette (Can.) ...	167	<i>v.</i> Balfe (Ir.) ...	645
Foot v. Rastall (1682) ...	208	<i>v.</i> Gething, Gething Claimant (1922) ...	499, 500
Foote v. Berkley (1666) ...	252, 262, 283	<i>v.</i> Howie	
Footner v. Sturgis (1852) ...	577, 578	<i>v.</i> Martin (Can.) ...	
Forbes v. Connolly (Can.) ...	601	Friary, Holroyd & Healey's Breweries, Ltd.	
<i>v.</i> Steven (1870) ...	57,	<i>v.</i> Singleton (1899) ...	395
Ford, <i>Re</i> , <i>Ex p.</i> Ford (1886) ...	431, 436	Fricker v. Van Grutten (1896) ...	469
— <i>v.</i> Leche (1837) ...	581	Frontenac Municipal Council v. Chestnut	
— <i>v.</i> Ruxton (1844) ...	77	(Can.) ...	245
— <i>v.</i> Stuart (1852) ...	259	Froud v. Froud (1920) ...	173
— <i>v.</i> Tynte (1864) ...	158	Fryar v. Barnard (1724) ...	596
Fordyce v. Bridges (1848) ...	193	— <i>v.</i> Vernon (1725) ...	596
Foreman v. McNamara (Aus.) ...	227	Fryer v. Bernard (1724) ...	596
Forest v. Chapman (1671) ...	558	<i>v.</i> Morland (1876) ...	84, 85, 87, 92, 97, 103, 104
Forin v. Wagner (Can.) ...	669	Fuggle v. Bland (1883) ...	668, 671
Forristal v. McDonald (Can.) ...	388	Fuller v. Earle (1852) ...	651
Forster v. Baker (1910) ...	427, 435	Fullerton v. Brydges (Can.) ...	261
— <i>v.</i> Cookson (1841) ...	524	<i>v.</i> Ibbitson (Can.) ...	222
— (Doe d.) v. Wandlass (1797) ...	588	Fultz v. McNeil (Can.) ...	382
Forsters Case (1615) ...	437, 438		
Forsyth, <i>Re</i> (1865) ...	260, 281		
Forth v. Norfolk (Duke) (1820) ...	562		
Fortitudo, The (1815) ...	236		
Fortrey v. Fortrey (1690) ...	561		
Fortune v. Johnson (1651) ...	589		
— <i>v.</i> Orr (1894) ...	272		
Foss, <i>Ex p.</i> , <i>Re</i> Baldwin (1858) ...	481		



	PAGE		PAGE
Fulwood's Case (1591) ... ..	558	General Finance, Mortgage & Discount Co. v. Liberator Permanent Benefit Buildin Society (1878) ... ..	243, 247, 264
Furness, Withy & Co., Ltd. v. Hall (J. & E.), Ltd. (1909) ... ..	213	General Horticultural Co., <i>Re, Ex p.</i> White- house (1886) ... ..	629, 630, 638
Furniss v. Lewis (S. Af.) ... ..	372	Genge v. Wachter (Can.) ... ..	624
Futcher v. Hinder (1858) ... ..	581	George d. Bradley v. Wisdom (1759) ... ..	590
G.		Geraghty v. Sharkey (Ir.) ... ..	624
Gabriele & Power v. Jackson Mines, Ltd. (Can.) ... ..	641	Gerse v. Taylor (N.Z.) ... ..	352
Gaikwar Sikar v. Ghandi (Ind.) ... ..	450	Gethin, <i>Re, Ex p.</i> Nixon (Ir.) ... ..	654
Gaire v. Goodman (1805) ... ..	381	Gething Claimant, French v. Gething (1922) ... ..	499, 500
Gaisford (Doe d.) v. Stone (1846) ... ..	267, 270	Geyer v. Aguilar (1798) ... ..	155
Gajrajmati Teorain v. Akbar Husain (Ind.) ... ..	462	Ghclabhai v. Bai Javer (Ind.) ... ..	151
Galbraith v. Fortune (Can.) ... ..	523	Ghela Ichharam v. Sankalchand Jetha (Ind.) ... ..	173
——— v. Grimshaw (1910) ... ..	618	Ghent v. McColl (Can.) ... ..	618, 675
Galbraith Estate, <i>Re</i> (Can.) ... ..	114	Ghost's Trusts, <i>Re</i> (1883) ... ..	268
Gale v. Canadian Iron & Steel Co. (Can.) ... ..	577	Gibb, <i>Re</i> (Aus.) ... ..	123
Gallagher v. Gallagher (Can.) ... ..	583	Gibbins v. Buckland (1863) ... ..	586
Galland, <i>Re</i> (1886) ... ..	661	——— v. Phillips (1828) ... ..	507, 543
Gallard, <i>Re, Ex p.</i> Gallard (1897) ... ..	351	Gibbs, <i>Re, Thorne v.</i> Gibbs (1898) ... ..	47
———, <i>Re, Gallard v.</i> Stretton's Executors (1897) ... ..	351	——— v. Cruikshank (1873) ... ..	207
Galt v. Saskatchewan Coal Co. (Can.) ... ..	379	——— v. Flight (1853) ... ..	416
Gamble v. Rees (Can.) ... ..	252, 253	——— v. Ralph (1845) ... ..	150
Game v. Symms (1608) ... ..	188	Giberson v. Toronto Construction Co. (Can.) ... ..	302
Gandy v. Gandy (1885) ... ..	329	Gibson v. Chaters (1800) ... ..	457
Ganesh Jagannath Dev v. Ramchandra Ganesh Dev (Ind.) ... ..	163	——— v. Dodson, <i>Re</i> Dodson (J.), <i>Re</i> Dod- son (A.L.P.) (1907) ... ..	31
Ganesh Lala v. Bapu (Ind.) ... ..	253, 254	——— v. Le Temps Publishing Co. (Can.) ... ..	382
Ganges Manufacturing Co. v. Sourujmull (Ind.) ... ..	343	——— v. Minet (1791) ... ..	276, 277
Garand v. Mancotel (Can.) ... ..	634	Gibson's Case (1822) ... ..	435
Garden v. Neily (Can.) ... ..	480, 495	Gilbert v. Endean (1878) ... ..	378, 379, 418
Gardner, <i>Re</i> (Aus.) ... ..	40	——— v. Stiles (Can.) ... ..	583
——— v. Cover (1835) ... ..	436	——— v. Whalley (1835) ... ..	529, 530
——— v. Kloefer (Can.) ... ..	340	Gilburn v. Rack (1657) ... ..	422
——— v. London, Chatham & Dover Ry. Co., <i>Ex p.</i> Grissell (1867) ... ..	579	Gilchrist, <i>Re</i> (Can.) ... ..	662
——— v. London, Chatham & Dover Ry. Co., Drawbridge v. London, Chatham & Dover Ry. Co., <i>Ex p.</i> Grissell (1867) ... ..	579	——— v. Herbert (1872) ... ..	336
Gardom v. Lee (1865) ... ..	358	Gilding v. Eyre (1861) ... ..	459
Garland v. Carlisle (1834) ... ..	511, 512	Giles v. Grover (1832) ... ..	507, 526, 527
——— v. ——— (1837) ... ..	511, 512	——— v. Hamer (1879) ... ..	638
——— v. Stamp Duties (Minister of) (N.Z.) ... ..	66, 67	——— v. Kruyer (1921) ... ..	673
Garnet v. Alberta Newspapers, Ltd. (Can.) ... ..	535	——— v. Nathan (1814) ... ..	192, 502
Garraway v. Harrington (1620) ... ..	573	Gill v. Continental Gas Co. (1872) ... ..	652
Garrett v. Dryden (1845) ... ..	534	——— v. Jose (1856) ... ..	611
Garstin v. Asplin (1815) ... ..	501	Gillespie (Doe d.) v. Macaulay (Can.) ... ..	268
——— v. Garstin (1865) ... ..	377	——— v. Nickerson (Can.) ... ..	610
Gartshore v. Gore Bank (Can.) ... ..	446	——— v. Russel (Scot.) ... ..	210
Gascoigne v. Gascoigne (1918) ... ..	277	Gillies v. Colton (Can.) ... ..	338
——— v. Stut (1870) ... ..	577	Gillman, Spencer & Co. v. Carbutt & Co. (1889) ... ..	294, 323
Gascoyne v. Chandler (1755) ... ..	395	Gillott v. Aston (1842) ... ..	457, 460
Gaskell v. Marshall (1831) ... ..	505	Gilmer, <i>Re</i> (Ir.) ... ..	483
Gatehouse v. Reith (1721) ... ..	583	Gilmour v. Hall & Platt (Can.) ... ..	445
Gates v. Bent (Can.) ... ..	483	Gingell v. Gifford (1846) ... ..	311
Gault's, Ltd. v. Christopherson (Can.) ... ..	531, 532	Girdlestone v. Brighton Aquarium Co. (1879) ... ..	230
Gaunt v. Wainman (1836) ... ..	248	Giriya Chettiar v. Sabapathy Mudaliar (Ind.) ... ..	232
Gavan v. Wright (1886) ... ..	417	Girouard v. Grand Trunk Pacific Ry. Co. (1.) ... ..	580
Gavin, <i>Re</i> (Ir.) ... ..	520	Giroux v. Plamondon (Can.) ... ..	476, 496, 527
Gawler v. Chaplin (1848) ... ..	480, 514, 523	Gladstone v. Padwick (1871) ... ..	612
Gaya Prasad Misr v. Randhir Singh (Ind.) ... ..	164	Glasbrook v. David & Vaux (1905) ... ..	439, 440, 557
Geen v. Fagg (1905) ... ..	148	Glascock v. Morgan (1664) ... ..	164, 165
——— v. Herring (1905) ... ..	148	Glasgow, Airdrie & Monklands Junction Ry. Co. v. Drew (Scot.) ... ..	165
——— v. Humphries (1905) ... ..	148	Glasgow & South-Western Ry. Co. v. Boyd & Forrest (Scot.) ... ..	564
——— v. Mackintock (1905) ... ..	148	Glass v. Freckleton (Can.) ... ..	186
Geffen v. Lavin (Can.) ... ..	636	——— v. Grant (Can.) ... ..	324
Geils v. Geils (Scot.) ... ..	217	Glassford, Cook & Co. v. Moore & Co. (Aus.) ... ..	494, 498, 500, 543
Geisse v. Taylor (1905) ... ..	618	Glasspoole v. Young (1829) ... ..	660, 662
Gelding v. Eyre (1861) ... ..	459, 580	Glazbrook v. Gillatt (1846) ... ..	419
General Estates Co., Ltd., <i>Ex p.</i> , European Bank, Ltd. v. Fox (1866) ... ..	643	Gleeson v. Domville (Can.) ... ..	428
		Globe Trust, Ltd., <i>Re</i> (1915) ... ..	361
		Glossop v. Colman (1815) ... ..	538
		——— v. Pole (1814) ... ..	

## TABLE OF CASES.

lvii

	PAGE		PAGE
Gloucester Sheriff, <i>Ex p.</i> (1831) ...	532	Gould v. Bacup Local Board (1881) ...	358
Gloucestershire Banking Co. v. Edwards (1887) ...	541	— v. Webb (1855) ...	235, 236
Glynn v. Dunlop (Can.) ...	581	— v. White (Can.) ...	510
Gnanambal v. Parvathi (Ind.) ...	184	Gour Monee Debea v. Krishna Chunder Sannyal (Ind.) ...	253
Goatley v. Jones (No. 1) (1909) ...	564	Gourlay, <i>Re, Ex p.</i> Abbott (1880) ...	564
— v. — (No. 2) (1909) ...	564	Gourmoni Dabee v. Jugut Chandra Audhikari (Ind.) ...	173
Gobind Mohun Chuckerbutty v. Sheriff (Ind.)	214	Govind Vaman v. Sakharam Ramchandra (Ind.) ...	343
Goddard v. Brodie, <i>Re</i> Chisholm (1902) ...	41, 43	Gowan v. Wright (1886) ...	417
— v. Smith (1872) ...	356	Gowans v. Barnet (Can.) ...	675
— v. Thompson (1878) ...	444, 446	Gowans-Kent Western, Ltd. v. Assiniboia Club (Can.) ...	359
Goddard's Case (1584) ...	251	Gowenlock v. Ferry (Can.) ...	380
Godfrey v. Burkill, <i>Re</i> Burkill (1873) ...	601	Gower v. Gower (1783) ...	263, 264
— v. Watson (1747) ...	574, 575	Grady v. Tierney (Can.) ...	366
Godwin v. Stone (1869) ...	383	Graf v. Lingerell (Can.) ...	480
Gold, <i>Re</i> (1871) ...	260, 281	Graham, <i>Re</i> (Aus.) ...	121, 122
Goldberg & Adler v. Blumberg (S. Af.) ...	624	— v. Bourque (Can.) ...	622
Goldie v. Gunston (1816) ...	156	— v. Connell (1850) ...	651
Golding v. Mackie (Can.) ...	583	— v. Drummond (1896) ...	506
Goldrei, Foucard & Son v. Sinclair & Russian Chamber of Commerce in London (1918) ...	221, 222, 223	— v. Keble (1820) ...	169, 170
Goldring v. National Mutual Life Assn. of Australasia, Ltd. (Aus.) ...	162	— v. Maxwell (1814) ...	169
Goldschmidt v. Oberrheinische Metallwerke (1906) ...	667	— v. Nelson (Can.) ...	576
Goldsmid v. Raphael (1836) ...	544, 545	— v. Wickham (1863) ...	53
Goldsmith v. Goldsmith (1846) ...	601, 602	Grainger v. Taunton (1836) ...	441
Goodall, <i>Re</i> Goodall v. Goodall (1895) ...	118	Grand Trunk Ry. Co. v. McMillan (Can.) ...	162
Goode, <i>Re</i> (Aus.) ...	353	Grand Trunk Ry. Co. & Eastern Townships Bank (Can.) ...	488
— v. Langley (1827) ...	615	Grandvill v. Dighton (1693) ...	572, 575
Goodenough, <i>Ex p.</i> , Walmsley v. Mundy (1884) ...	674	Granger v. Taunton (1836) ...	441
Gooding, <i>Re</i> (1851) ...	582, 583	Grant, <i>Re</i> , Nevinson v. United Kingdom Temperance & General Provident Institution (1915) ...	26, 41
Goodlock v. Cousins (1897) ...	518	— v. Bagge (1802) ...	429, 441
Goodman v. Chase (1818) ...	582	— v. Banque Franco-Egyptienne (1878) ...	449, 452
— v. Pocock (1850) ...	203	— v. Great Western Ry. Co. (Can.) ...	450
— v. Robinson (1886) ...	620	— v. Kelly, Blanchard, Garnishee (Can.) ...	636
Goodright d. Russell v. Noright (1738) ...	590	— v. Kennedy (Can.) ...	619
— d. Baker v. Sturdy (1729) ...	587, 589	— v. Robertson (Can.) ...	490
Goodtitle d. Chester v. Alker & Elmes (1757) ...	587	— v. Wainman (1836) ...	248
— d. Murrell v. Badtitle (1841) ...	586	— v. Wilson (Can.) ...	484
— v. Bailey (1777) ...	243, 263	Gray, <i>Re</i> , Gray v. Gray (1896) ...	29, 39, 40
— v. Morse (1789) ...	188, 289, 290	— v. Chaplin (1826) ...	354
Goodyere v. Ince (1610) ...	557, 577	— v. Dalgety & Co., Ltd. (Aus.) ...	162
Goon Gan v. Moore (Can.) ...	145	— v. Fortune (Can.) ...	550
Gopal v. Lavet (Ind.) ...	621	— v. Gray, <i>Re</i> Gray (1896) ...	29, 39, 40
Gopu Kolandavelu Chetty v. Sami Royar (Ind.) ...	163	— v. Hoffar (Can.) ...	623, 632
Gordon v. Cheltenham & Great Western Union Ry. Co. (1842) ...	334	— v. McCallum (Can.) ...	341
— v. Clyne (1839) ...	271, 272	— v. MacLennan (Can.) ...	392
— v. Harper (1796) ...	501	— v. North British Ry. Co. (Scot.) ...	217
— v. James (1885) ...	266	— v. Purdy (Can.) ...	623
— v. Jennings (1882) ...	632, 633	— v. Stone & Funnell (1893) ...	657
— v. Robinson (Can.) ...	142	Grean's Goods, <i>Re</i> (Ir.) ...	580
— v. Rumble (Can.) ...	545	Great Luxembourg Ry. Co. v. Magnay (No. 2) (1858) ...	340
— v. Seabrooke (Can.) ...	633	Great North of England, Clarence & Hartlepool Junction Ry. Co. v. Clarence Ry. Co. (1845) ...	241
— v. Sommerville (Can.) ...	580	Great North-West Central Ry. Co. v. Charlebois (1899) ...	147
Gordon & Co. v. Kirk & Co. (Ir.) ...	429	Great Northern Construction Co. v. Hyde & Scott (Can.) ...	188
Gore v. Bowser (1855) ...	483	Great Northern Ry. Co. v. Tahourdin (1883) ...	488
— v. Gofton (1725) ...	523, 610	Great West Life Assurance Co. v. Whitchelow (Can.) ...	647
— v. Lloyd (1844) ...	522	Great West Saddlery Co., <i>Re</i> , Newlands v. Higgins (Can.) ...	254
Gort (Viscountess) v. Clark (1868) ...	370	Greathead v. Bromley (1798) ...	175, 211
Gosden v. Dotterill (1832) ...	77	Greeff's Trustee v. Fourie's Executor (S. Af.) ...	424
Gosling v. Conder (1850) ...	340	Green v. Cobden (1836) ...	597
Goss v. Guardian Insurance Co. (Nfld.) ...	247	— v. Cooke (Aus.) ...	337
Gossain Money Puree v. Guru Pershad Singh (Ind.) ...	450	— v. Croft (1792) ...	66
Gossling v. McBride (Can.) ...	583		
Goubot v. De Crouy (1833) ...	582		
Goucher v. Clayton (1865) ...	146		
Goudie, <i>Re, Ex p.</i> Official Receiver (1896) ...	665, 670, 671		
—, <i>Re</i> , Official Receiver v. Strand (1896) ...	665		

	PAGE		PAGE
Green v. Glassbrook (1835) ... ..	532	Gurney v. Rawlins (1836) ... ..	121
— v. James (1840) ... ..	139	Gururajammah v. Venkatakrishnama Chetti (Ind.) ... ..	199
— v. Manitoba Assurance Co. (Can.) ...	387	Guthrie v. Wood (1816) ... ..	496
— (Right d.) v. Proctor (1768) ... ..	263	Guthrie & Larnach Woodware Co. v. Morgan (N.Z.) ... ..	642
— v. Stevens (1857) ... ..	502	Gutta Saramma v. Maganti Raminedu (Ind.)	211
Greenaway v. Hart (1854) ... ..	249	Guy v. Grand Trunk Ry. Co. (Can.) ...	377
Greenhalgh v. Manchester & Birmingham Ry. Co. (1838) ... ..	370	Gwaller v. Chaplin (1848) ... ..	523
Greenish v. White (1861) ... ..	301, 302	Gwilliam v. Barker (1815) ... ..	481, 482
Greenshield v. Pritchard (1841) ... ..	581	Gwin v. Backus & Draper (Can.) ... ..	629
Greenshields v. Harris (1842) ... ..	581	Gwyn v. Neath Canal Co. (1868) ... ..	259, 260
Greensill, Re (1872) ... ..	622	Gwynne v. Grand Trunk Ry. Co. (Can.)	613
Greenvil v. Dighton (1693) ... ..	572, 575	— v. Rees (Can.) ... ..	628
Greenwood, Re (1869) ... ..	69, 70, 82, 115	Gyfford v. Woodgate (1809) ... ..	456, 529
—, Re (N.Z.) ... ..	26		
—, Re, Sutcliffe v. Gledhill (1901) ...	640		
— v. Bancroft (Can.) ... ..	328		
— v. Crown Prince Gold-Mining Co. (N.Z.) ... ..	308		
Greenwood Estate, Re (Can.) ... ..	340		
Greer, Re, Napper v. Fanshawe (1895)	619		
Gregg v. Holland, Re Holland (1902) ...	275		
— v. Wells (1839) ... ..	372, 373		
Gregoire v. Markham Co. (Can.) ... ..	487		
Gregory v. Cotterell (1855) ... ..	528, 546		
— v. Jones (1844) ... ..	532		
— v. Molesworth (1747) ... ..	209		
Gregson v. McTaggart (1808) ... ..	226		
Gresham Life Assurance Society v. Crowther (1915) ... ..	285, 310		
Greville v. Greville (No. 2) (1859) ...	72, 75		
Grey (Earl) v. A.-G. (1900) ... ..	12, 13		
Gribble v. Webber, Re Webber (1896)	29, 47		
Grier, Re, Napper v. Fanshawe (1895)	619		
Griffith v. Thomas (1860) ... ..	157, 158		
Griffiths, Re (1845) ... ..	65, 66		
Grimsby v. Webster (1860) ... ..	662		
Grimshawe v. Burnham (Can.) ... ..	374, 485		
Grimthorpe, In the Goods of (1905) ...	27		
Grimthorpe (Lord), Re, Beckett v. Grim- thorpe (Lord) (1908) ... ..	33		
Grip Printing & Publishing Co. of Toronto v. Butterfield (Can.) ... ..	388		
Grissell, Ex p., Drawbridge v. London, Chatham & Dover Ry. Co. (1867)	579		
—, Ex p., Gardner v. London, Chatham & Dover Ry. Co. (1867) ... ..	579		
Grome (or Groom) v. Grome (or Groom) (1623) ... ..	546, 547		
Gross v. Mihm & Dundas (Can.) ... ..	625		
Grove v. Aldridge (1832) ... ..	533		
Groves (Doe d.) v. Groves (1847) ... ..	311, 386		
Grubb, Re, Ex p. Sims (1877) ... ..	611		
Grundy v. Townsend (1888) ... ..	153		
Grunnell v. Welch (1906) ... ..	361, 362		
Guardian Assurance Co. v. Avonmore (Ir.)	242		
Guavers v. Fountain (1687) ... ..	592		
Gude v. Mumford (1837) ... ..	80		
Guegain v. Langis (Can.) ... ..	242		
Guest v. Cowbridge Ry. Co. (1868) ...	558, 570, 578		
— v. Warren (1854) ... ..	209		
Guichon v. Fisherman's Cannery Co. (Can.)	403		
Guidici v. Kinton (1843) ... ..	214		
Guildford Municipal Council v. Traylen (Aus.) ... ..	391, 392		
Gunamani Dasi v. Pran Kishori Dasi (Ind.)	459		
Gungabishen Bhugut v. Roghoonath Ojah (Ind.) ... ..	167, 168		
Gunn, In the Goods of (1884) ... ..	55, 58, 118		
—, Re, Harvey v. Gunn (1916) ... ..	35		
— v. Burgess (Can.) ... ..	496, 515		
Gunsbourg, Re, Ex p. Cook (1920) ...	225, 584		
—, Re, Ex p. Trustee (1920) ... ..	225, 584		
Gurdhar Manordas v. Dayabhai Kalabhai (Ind.) ... ..	201		



## TABLE OF CASES.

lix

	PAGE		PAGE
Hamblyn v. Ley (1743) ...	603, 604	Harper v. McIntyre (1908) ...	670
Hambro v. Burnand (1904) ...	361	— v. Morley (1838) ...	80
Hamer v. Giles (1879) ...	638	— v. Powell (Can.) ...	555
— v. Laing (Can.) ...	212	Harper's Settlement, <i>Re</i> , Williams v. Harper (1919) ...	285
Hamill v. Lilley (1887) ...	446	Harries v. Hooper (1847) ...	255
— v. Murphy (Ir.) ...	284	Harriman v. Harriman (1909) ...	137, 166
Hamilton, <i>Re</i> (1885) ...	561	Harrington v. Garraway (1617) ...	573
— v. Bouek (Can.) ...	510	— v. — (1618) ...	573
— v. Brogden (1891) ...	668	Harris, <i>Re</i> (1852) ...	59
— v. Bryson (Can.) ...	476	— v. Beauchamp Brothers (1894) ...	665
— v. Chisholm (Can.) ...	485	— v. Booker (1827) ...	562, 573
— v. Dalziel (1774) ...	529	— v. Cordingley & Molsons Bank (Can.) ...	642
— v. Geraghty (Aus.) ...	369	— v. Davison (1846) ...	566
— v. Lord Advocate (1920) ...	96, 107	— v. Dunn (Can.) ...	218, 219
— v. Lumsden (Scot.) ...	278	— v. Harris (Can.) ...	636
— v. McCuaig (Can.) ...	493	— v. Howe (Earl) (1861) ...	66
— v. McDonald (Can.) ...	636	— v. Jewell (1883) ...	419
— v. Stewiacke Valley Ry. Co. & Dickie (Can.) ...	675, 676	— v. Loyd (1839) ...	440, 441
— v. Wright (Scot.) ...	243, 393	— v. Malloch (Can.) ...	484
Hamilton & Port Dover Ry. Co. v. Gore Bank (Can.) ...	611	— v. Meyers (Can.) ...	604
Hamilton Provident & Loan Society v. Gilbert (Can.) ...	562, 563	— v. Mulkern (1875) ...	171
Hamilton's Estate, <i>Re</i> (Ir.) ...	110	— v. Pugh (1827) ...	562
Hamlyn v. Lee (1743) ...	603, 604	— v. Willis (1855) ...	241
Hammond v. Nairn (1841) ...	434, 606	Harris Scarfe & Co., Ltd. v. Brownlie Brothers (Aus.) ...	385, 386
— v. Schofield (1891) ...	219	Harris' Trustees v. Harris (Scot.) ...	43, 44, 114, 115
Hamon v. Jermyn (Lord) (1697) ...	441, 442	Harrison, <i>Re</i> , <i>Ex p.</i> Foster (1860) ...	338
Hampton, <i>Re</i> , Hampton v. Mawer (1918) ...	5	—, <i>Re</i> , Johnstone v. Blackburn & East Lancashire Royal Infirmary (1918) ...	15
Hancock v. Somes (1859) ...	227	— v. Ames (1850) ...	371
Hancock & Co. (N.Z.), Ltd v. Johnstone ...	399	— v. Borwell (1839) ...	75
Hanger v. Fry (1593) ...	440	— v. Bowden (1661) ...	557
Hanley v. McMasters (Aus.) ...	166	— v. Forster (1836) ...	511
Hanna v. Frooks (Can.) ...	492	— v. Paynter (1840) ...	474, 475, 481
— v. McKenzie (Can.) ...	457	— v. Preston (Can.) ...	265
Hannaford v. Hunn (1825) ...	238	— v. Southampton Corpn. (1853) ...	241
Hannay v. Fraser (Can.) ...	321, 322	— v. Timmins (1838) ...	422
Hansard v. Lethbridge (1891) ...	453	Harrison & Bottomley, <i>Re</i> (1899) ...	561, 571, 572, 579
Hanson v. Blakey (1828) ...	460	Harrison's Succession Duty, <i>Re</i> (1872) ...	110
— v. Roberdeau (1792) ...	385	Harrogate Corpn. v. Dickinson (1903) ...	398
Hansraj Lakhmidas v. Lalji Anandji (Ind.) ...	214, 215	— v. — (1904) ...	398
Harbert's Case (1584) ...	566	Harrup v. Bayley (1856) ...	340, 396
Hardigan v. Graham (Can.) ...	197	Hart v. Cohen (S. Af.) ...	465
Harding v. Ambler (1838) ...	279	— v. Dubrule (Can.) ...	628
— v. Cardiff Township (Can.) ...	358	— v. Great West Securities & Trust Co., Ltd. (Can.) ...	287
— v. Ferne (1677) ...	513	— v. Greer (No. 2) (Can.) ...	636
— v. Francis (1831) ...	580	— v. M'Namara (1817) ...	153, 154, 192
— v. Harding (1861) ...	54, 56, 97	— v. Weatherley (1835) ...	441
— v. Holden (1841) ...	436, 437	Hartland, <i>Re</i> , Banks v. Hartland (1911) ...	38
— v. Queensland Stamps Comrs. (Aus.) ...	83, 84	Hartlepool Gas & Water Co. v. West Hartlepool Harbour & Ry. Co. (1865) ...	352
Hardistey v. Barney (1696) ...	492	Hartley, <i>Re</i> , Nuttall v. Whittaker (1892) ...	671
Hardwicke (Earl), <i>Ex p.</i> , <i>Re</i> Royston & Hitchin Railway Company's Act, 1846 (1852) ...	374, 375	— v. Hymans (1920) ...	389, 390
Hardwicke v. Wilmot, <i>Re</i> De Ros' Trust (1885) ...	260, 264, 268	— v. Shemwell (1861) ...	619, 620
Hargrave v. Hargrave (1857) ...	567	— v. Stead (1824) ...	519
— v. Ward (1697) ...	479	Hartt v. Edmonton Laundry Co., Colonial Assurance Co., Garnishee (Can.) ...	628, 640, 642
Hari Annaji v. Vasudev Janardan (Ind.) ...	168	Harty v. Watson (N.Z.) ...	302
Harley v. Harley (Ir.) ...	476, 489	Harvey v. Gunn, <i>Re</i> Gunn (1916) ...	35
— (Doe d.) v. McManus (Can.) ...	576	— v. Harvey (1681) ...	601
Harmar v. Davis (1817) ...	321	— v. Lawrence (Can.) ...	335
Harmer v. Cowan (Can.) ...	547	— v. Parton (Can.) ...	368
— v. Gouinlock (Can.) ...	548	— v. Silzer (Can.) ...	498
Harold v. Stewart (Can.) ...	430, 431	— v. Wilde (1872) ...	189, 190
Harper, <i>Ex p.</i> , <i>Re</i> Bremner (1875) ...	215, 216	Harwood v. Phillips (1663) ...	557
—, <i>Re</i> , Harper v. Harper (Aus.) ...	40	Hassenclever, <i>Re</i> (1785) ...	592
— v. Cameron (Can.) ...	145, 146	Hastings, <i>Re</i> , <i>Ex p.</i> Brown (1892) ...	602
— v. Dick, Kerr & Co. (1921) ...	194, 195	Hastings (Marquis) v. Beavan (1862) ...	653
— v. Harper, <i>Re</i> Harper (Aus.) ...	40	Hastings County v. Ponton (Can.) ...	339
— v. McIntyre (1907) ...	670	Hatch, <i>Re</i> , Hatch v. Hatch (1916) ...	35, 36
		— v. Rowland (Can.) ...	527

	PAGE		PAGE
Hatfield v. Canadian Pacific Ry. Co. (Can.)	292, 302	Hendricks & Soeker v. Atkins (S. Af.)	327
Hatrick v. Nicol (N.Z.)	246	Hendy, <i>Re, Ex p.</i> Clayton (Aus.)	385
Hatton, <i>Re, Webb v. Stenton</i> (1883)	625	Hennell v. Strong (1856)	123
—— v. Haywood (1874)	563, 571, 572, 573, 672	Hennesy (Doe d.) v. Myers (Can.)	283
Hawkins v. Crook (1747)	605	Henniker (Lord) v. A.-G. (1852)	52, 60
—— v. Gathercole (1855)	565	Henry v. Commercial Bank of Canada (Can.)	552, 608
—— v. Maltby (1869)	349	—— v. Mitchell (Can.)	547
—— v. Paterson (Can.)	675	Henshaw v. Pleasance (1777)	239
Hawksbee v. Hawksbee (1853)	329, 330	Henty, <i>In the Estate of</i> (Aus.)	123
Hawksley v. Gowan (1864)	660	—— v. R. (Aus.)	120
Hawtry v. Butlin (1873)	486	Hepworth v. Sanderson (1831)	454, 582
Hay v. Drake (Can.)	613	Herbert v. Cook (1782)	240
—— v. Fairlie (1826)	61	—— v. Cowie Brothers & Co. (Scot.)	351
—— v. Paterson (Can.)	581	Hercules Insurance Co., <i>Re, Brunton's Claim</i> (1874)	388, 389
—— v. Stamps Comr. (Aus.)	125, 126	Herman v. Royal Exchange Shipping Co. & Patton, Junr., & Co. (1884)	332
Haycock v. Yeates (1732)	558	Hermann v. French (Aus.)	261
Hayden v. Barton (Ir.)	617	Hermitage v. Tomkins (1699)	249
Hayes v. Harshaw (Can.)	201, 202	Hernaman v. Bowker (1856)	515
—— v. Wilson & Richardson (Can.)	403	Herod v. Ferguson (Can.)	217
Haygarth's Trusts, <i>Re</i> (1883)	104	Herries v. Jamieson (1794)	422
Haymes v. Cooper (1864)	657	Herring v. Dorell (1840)	583
Hayne v. Maltby (1789)	277, 281, 284	Herschfield v. London, Brighton & South Coast Ry. Co. (1876)	295
Haynes v. Haynes (1853)	80	Hertford (Marquis), <i>Re</i> (1842)	663
Hayson, <i>Re, Booth v. Trail</i> (1883)	632, 633, 677	——, <i>Re, Hertford (Marquis) v. Suisse</i> (1843)	663
Hayter v. Beall (1881)	674	Hertfordshire Sheriff, <i>Ex p., Re Mackenzie</i> (1899)	534
Haythorn v. Bush (1834)	496	Hervey v. Alexander (Can.)	476
Hayton v. Wolfe (1621)	316, 317	Hescott's Case (1694)	612
Hazeldine's Trusts, <i>Re</i> (1908)	168	Hetherington, <i>Re</i> (Can.)	493
Hazen v. Bryson (Can.)	328	Heward v. Heward (Can.)	453
—— (Doe d.) v. Hazen (Can.)	555, 556, 561, 576	—— v. R. (Aus.)	123, 124
Head v. Godlee (1859)	340, 341	Heward Milling Co. v. Barrett (Can.)	625
Heald v. Smith (1837)	520	Hewat v. Davenport (Ir.)	650, 651
Heale v. Knight (1853)	55, 56	Hewitson (or Hewetson) v. Fabre (1888)	382
Heane v. Rogers (1829)	302, 303, 306, 364, 365	Hewitt v. Corbett (Can.)	533
Heany v. Parker (Can.)	353	—— v. Macquire (1851)	466, 467
Heath v. Crealock (1874)	255	—— v. Pigott (1831)	532, 533
—— v. Heath (1874)	557	—— v. Spiers & Pond, Ltd. (1896)	549
—— v. Philp (1875)	615	Hewlett v. Allen & Sons (1892)	342, 343
—— v. Weaverham Overseers (1894)	179	—— v. ——— (1894)	342, 343
Heaver v. Fulham Borough Council (1904)	398	—— v. London County Council (1908)	389
Hebblethwaite v. Peever (1892)	419	Hews v. Pyke (1832)	424
Heck v. Knapp (Can.)	395	Hexon v. Hamilton (Can.)	536
Hedde v. Baikie (Scot.)	210	Heydon's Case (1584)	559, 560
Heden v. Wolfe (1621)	316, 317	Hichins v. Kilkenny, etc. Ry. Co. (1850)	534
Hedges v. Jordan (1836)	582	Hicklin, <i>Re, Public Trustee v. Hoare</i> (1914)	28
Heeman v. Evans (1841)	534	Hickman v. Poyns (1605)	222
Heenan v. Dewar (Can.)	369, 446	Hicks v. Keat (1840)	74, 128
—— v. Evans (1841)	534	Hiddingh v. Denysen (S. Af.)	159
Heiron's Estate, <i>Re, Hall v. Ley</i> (1879)	530, 535	Hide v. Pettit (1667)	592
Helbrooke v. Beaumont (1579)	556	Hieron's Estate, <i>Re, Hall v. Ley</i> (1879)	530
Hele v. Bexley (Lord) (1853)	558, 559, 571, 575	Higgie v. Wilkinson (N.Z.)	293
Hellam v. Grave (1675)	166	Higgins, <i>Ex p., Re Tyler</i> (1858)	218
Hellyer (Doe d.) v. King (1851)	588	——, <i>Re, Day v. Turnell</i> (1885)	112
Helm v. Crossin (Can.)	433	—— v. Livingstone (1816)	362
Helmore v. Smith (No. 2) (1886)	446	Higginson v. Martin & Hadley (1677)	232
Helps v. Hereford (1819)	284	Hildyard v. Baker (1833)	434, 559
Helsham v. Blackwood (1851)	197, 198	Hill v. Atkinson (1816)	49, 71
Heming v. Wilton (1832)	213, 214	—— v. Bentinck (N.Z.)	232
Henchett v. Kimpson (1762)	522, 523	—— v. Clifford (1907)	153, 161, 165, 166, 239
Henderson, <i>Re, Ex p. Shaw</i> (1884)	506, 507	—— v. ——— (1908)	153, 161, 165, 166, 239
—— v. Fortune (Can.)	311, 544	—— v. Dundee, Perth & Aberdeen Ry. Junction Co. (Scot.)	345
—— v. Henderson (1843)	174, 211	—— v. Manchester & Salford Water Works Co. (1831)	259, 268, 277
—— v. ——— (1844)	174, 175	—— v. Saunders (1825)	275
—— v. Montreal Trust Co. (Can.)	105	—— v. Tebb (1805)	464
—— v. Perry (Can.)	580	Hillas, <i>Re</i> (Ir.)	70, 71
—— v. Rogers (Can.)	643	Hilliard v. Hanson (1882)	554
Henderson & Co. v. Williams (1895)	365	Hills v. Laming (1853)	257, 258
Henderson & Farrar's Trustees v. Evans (N.Z.)	432		
Henderson Roller Bearings, Ltd., <i>Re</i> (Can.)	521		
Hendon Paper Works Co. v. Sunderland Assessment Committee (1915)	325, 326, 398		

## TABLE OF CASES.

lxi

	PAGE		PAGE
Hills v. Rowland (1853) ... ..	452	Holland v. Bovyer (Can.) ... ..	438
— v. Webber (1901) ... ..	667, 670	— v. Clark (1842) ... ..	216
Hillyard v. Grantham ( <i>circa</i> 1727) ... ..	237	— v. Dauntzey (1623) ... ..	422
Hilton, <i>Re, Ex p.</i> March (1892) ... ..	177	— v. Downe (1589) ... ..	158
— v. Macdonell (Can.) ... ..	535	— v. Lee (1623) ... ..	422
Himayat Hussain v. Jai Devi (Ind.) ... ..	415	— v. Ley (1620) ... ..	518, 559
Hindley v. Haslam (1878) ... ..	171, 172	Holland & Bonis' Case (1587) ... ..	158
Hinnerley v. Gould (Can.) ... ..	437	Holland & Franklin's Case (1589) ... ..	158
Hinton v. Braine (1676) ... ..	317	Hollick, <i>Re</i> (Ind.) ... ..	634
— v. Crane (1676) ... ..	317	Hollier v. Laurie (1846) ... ..	553
Hippisley's Case (1873) ... ..	160, 182	Hollings v. Kingsbury (1848) ... ..	317
Hira Singh v. Ganga Sahai (Ind.) ... ..	248	Hollington, <i>Ex p., Re</i> Commonwealth Land, Building, Estate & Auction Co., Ltd. (1873)	465
Hirsch v. Coates (1856) ... ..	631	Hollinshead v. Hazleton (1916) ... ..	633
Hirschfeld v. London, Brighton & South Coast Ry. Co. (1876) ... ..	295	Holmes, <i>Re</i> (N.Z.) ... ..	29
Hitchin v. Campbell (1772) ... ..	208	—, <i>Re, Beetham v. Holmes</i> (N.Z.) ... ..	6, 27, 29, 83
Hitchins v. Kilkenny Ry. Co. (1850) ... ..	534	— v. Carter (Can.) ... ..	
Hoare, <i>Re, Hoare v. Owen</i> (1892) ... ..	673	— v. Clifton (1839) ... ..	385, 537
— v. Kingsbury Urban Council (1912) ... ..	296, 297	(Doe d.) v. Davies (1818) ... ..	586
— v. McCarthy (Aus.) ... ..	302	— v. Elnitts (1842) ... ..	455
— v. Niblett (1891) ... ..	219	— v. Millage (1893) ... ..	666, 669, 671
— v. Owen, <i>Re Hoare</i> (1892) ... ..	673	— v. Newlands (1844) ... ..	500
Hoare, Wilson & Co. v. St. Olave's Union Assessment Committee (1890) ... ..	383	— v. Sayer Milward (1878) ... ..	328
Hobbs v. Henning (1865) ... ..	138, 156	Holmes Case (1609) ... ..	239
— v. Howell (Can.) ... ..	633	Holt v. Jarvis (Can.) ... ..	542
— v. Wayet (1887) ... ..	389, 662, 663	— v. Markham (1923) ... ..	305
Hobs (or Hobbs) v. Norton (1682) ... ..	316	— (Doe d.) v. Roe (1830) ... ..	510
Hobson, <i>Re</i> (1886) ... ..	397	Holtby, <i>Re</i> (1889) ... ..	417
— v. Holt (1850) ... ..	518	— v. Hodgson (1889) ... ..	417, 626
— v. Neale (1853) ... ..	5, 56	Holton v. Lloyd (Ir.) ... ..	575
— v. Shand (Can.) ... ..	452	Home, Sheriff, <i>Re</i> (Can.) ... ..	613
— v. Shannon (Can.) ... ..	643	Honner v. Morton (1828) ... ..	255
— v. Shearwood (1845) ... ..	659	Hood v. North Eastern Ry. Co. (1870) ... ..	394
— v. Thelluson (1867) ... ..	527, 542	Hood Barrs, <i>Ex p., Re Lumley</i> (1894) ... ..	600
Hochelaga Bank & Montreal, Portland & Boston Ry. Co. (Can.) ... ..	488	— v. Cathcart (1894) ... ..	600
Hockin v. Whellams (Can.) ... ..	493	— v. — (1895) ... ..	561, 570
Hockley v. Ansah (1896) ... ..	643	— v. —, <i>Re Lumley</i> (1894) ... ..	595, 600
Hodder v. Williams (1895) ... ..	478	— v. Heriot, <i>Ex p. Blyth</i> (1896) ... ..	675
Hodder & Tolley, Ltd. v. Cornes (N.Z.) ... ..	656, 657, 658	Hook v. Bengal Administrator-General (Ind.) ... ..	161, 169
Hodgens v. Hodgens (Ir.) ... ..	648, 652	Hooker v. Jarvis (Can.) ... ..	526
Hodges v. Callaghan (1857) ... ..	462	Hookham v. Mayle (1906) ... ..	443
— v. Fincham (1875) ... ..	428	Hoole v. Roberts (1848) ... ..	662
Hodgkinson v. Whalley (1831) ... ..	435, 436	Hooley Hill Rubber & Chemical Co., Ltd. v. Royal Insurance Co., Ltd. (1920) ... ..	295
Hodgson, <i>Re, Beckett v. Ramsdale</i> (1885) ... ..	219	Hooley Hill Rubber & Chemical Co. & Royal Insurance Co., <i>Re</i> (1920) ... ..	295
— v. Forster (1822) ... ..	150	Hooper v. Holden (Aus.) ... ..	210
— v. Gascoigne (1821) ... ..	482	— v. Hooper (1825) ... ..	234
Hodgworth v. Crawley (1742) ... ..	79	— v. Lane (1857) ... ..	467
Hodson v. Walker (1872) ... ..	187, 188, 189, 194	Hooper & Erie & Huron Ry. Co., <i>Re</i> (Can.) ... ..	297, 298
Hoe's Case (1600) ... ..	454, 516, 558	Hope, The (1866) ... ..	314, 315
Hoffe's Estate Act, 1885, <i>Re</i> (1900) ... ..	285	Hope v. Cumming (Can.) ... ..	485
Hoffman v. Crerar (Can.) ... ..	424	— v. Dickson (Scot.) ... ..	335
Hogan v. Morrissey (Can.) ... ..	316, 317	— v. Gloucester Corpn. (1855) ... ..	170, 171
Hogg v. Maxwell (1867) ... ..	397	— v. Graves (Can.) ... ..	556
— v. Scott (1874) ... ..	347	Hopewell v. Barnes, <i>Re Prince</i> (1876) ... ..	653, 658
— v. Skeen (1865) ... ..	361	Hopkins v. Adcock (1772) ... ..	438, 439
Hogg (James) Sons & Co., Ltd. v. McClughin (Ir.) ... ..	650	— v. Great Northern Ry. Co. (1848) ... ..	350
Holden, <i>Ex p.</i> (1863) ... ..	567	— v. Hopkins (1914) ... ..	144
—, <i>Re, Ex p.</i> ... ..	567	Hopton v. Robertson (1884) ... ..	418
— v. King (1876) ... ..	227	Horn v. Coleman (1856) ... ..	73
Holder, <i>Ex p.</i> (1833) ... ..	311, 312	Horne v. Pountain (1889) ... ..	649
—, <i>Re</i> (1890) ... ..	579	Hornor v. Heath (1856) ... ..	276
Holding v. Elliott (1860) ... ..	324	Horrex, <i>Re</i> (1910) ... ..	27, 44
Holdsworth v. Lancashire & Yorkshire Insur- ance Co. (1907) ... ..	331, 332	Horrocks v. Stubbs (1896) ... ..	210
Holdway v. Ray (1863) ... ..	540, 542	Horseman v. Grand Trunk Ry. Co. (Can.) ... ..	319
Hole, <i>Re, Davies v. Davies</i> (1905) ... ..	114	Horsley v. Cox (1869) ... ..	619, 620
—, <i>Re, — v. Witts</i> (1906) ... ..	42	Horton, <i>Re, Horton v. Perks, Horton v. Clark</i> (1884) ... ..	257, 426, 427, 525
Holford v. Platt (1618) ... ..	144	— v. Ruesby (1686) ... ..	
Holgate v. Kay (1844) ... ..	317	— v. Westminster Improvement Comrs (1852) ... ..	259, 274, 277, 279
Holland, <i>Re</i> (Can.) ... ..	113		
—, <i>Re, Gregg v Holland</i> (1902) ... ..	275		



	PAGE		PAGE
Horwood v. Murdoch (Aus.)	496, 497	Hume v. Burton (Ir.) ...	140
Hosack v. Robins (1917)	658	Humphries v. Humphries (1910)	177, 178
— v. — (No. 2) (1918)	655	Humphrys v. Pratt (1831)	547
Hotham v. Bright (Can.)	494	Hungerford v. Becher (Ir.)	254, 275
Hough v. Edwards (1856)	643	Hunniford v. Horwood (Aus.)	575
— v. Windus (1884)	564	Hunsberry v. Kratz (Can.)	627
Houghton v. Bankart (1861)	371	Hunt, <i>Ex p.</i> , <i>Re</i> Shapland (1874)	606
— v. Rushby (1686)	426, 427, 525	— v. Clifford (1884)	514
Houlditch v. Corbett (Can.)	532	— v. Coles (1715)	562
— v. Desanges (1818)	502	— v. Cook (W. H.), Ltd. (1922)	194
Houlston v. Woodall (1884)	416	— v. Fensham (1884)	514
House, <i>Ex p.</i> , <i>Re</i> May (1885)	214	— v. Hooper (1844)	473, 474
Houstoun v. Houstoun (1831)	74	— v. Kendrick (1772)	434, 580
— v. Sligo (Marquis) (1885)	182, 236	— v. McArthur (Can.)	378
Houtaling v. Cuttle (Can.)	583	— v. Pasman (1815)	433
Hovill v. Stephenson (1830)	392	— v. Passmore (1833)	432
Howard v. Hudson (1853)	138, 303	— v. Pit (1681)	490, 498
— v. Prince (1847)	116, 126	— v. Priest (1778)	604
— v. Sadler (1893)	652	— v. Stevens (1810)	116
— v. Shrewsbury (Earl) (1867)	270	Hunter, <i>Re</i> (Can.)	486
Howard's Case (1589)	158	— v. Birney (Can.)	170, 171
Howe, <i>Re</i> , Wilkinson v. Ferniehough (1910)	81	— v. Collins (Can.)	642
Howe (Earl) v. Kingscote, <i>Re</i> Howe's (Earl)		— v. Fleming (Scot.)	352
— Settled Estates (1903)	43	— v. Greensill, Fitzgerald v. Greensill,	
— v. Lichfield (Earl) (1866)	111	— Paget, Garnishee (1872)	622
— v. — (1867)	75, 111	— v. Stewart (1861)	201
Howe v. Martin (Can.)	649, 650	— v. Vanstone (Can.)	166
— v. Oliver (1908)	222	— v. Walters (1871)	265, 277
Howe's (Earl) Settled Estates, <i>Re</i> , Howe		Huntly (Marchioness) v. Gaskell (1905)	151
(Earl) v. Kingscote (1903)	43	Hurlbert v. Cathcart (1896)	425
Howell v. Metropolitan District Ry. Co.		Hurrey v. Bank of New South Wales (N.Z.)	293, 302
(1881)	622, 626, 646	Hussey (Doe d.) v. Gray (Can.)	186
Howitt v. Rickaby (1841)	385	Hustler v. Raines (1695)	208
Howlett v. Tarte (1861)	138, 146	Hutcheson v. Halkett (Scot.)	385
Howson (Doe d.) v. Roe (1852)	590	Hutchings v. Cunningham (Aus.)	649
— v. Trant (1873)	579	Hutchings v. Ruttan (Can.)	538
Hoyes v. Creery (Fraternal Order of Eagles)		Hutchinson, <i>Re</i> , <i>Ex p.</i> Plowden (1885)	655
(Can.)	632	— v. Humbert (1841)	607
Huddersfield Banking Co., Ltd. v. Lister		— v. Johnston (1787)	472, 473, 506
(Henry) & Son, Ltd. (1895)	147	Hutchison v. Anderson's Trustees (Scot.)	278, 329
Huddleston v. Asbugg (1675)	140	— v. Birch (1812)	479, 581
Hudland v. Povy (1661)	267	— v. Muldrock (N.Z.)	173
Hudson, <i>Re</i> (Ir.)	520	Hutt v. Morell (1849)	179
—, <i>Re</i> , Spencer v. Turner (1911)	7, 10, 34	— v. Shaw (1887)	623, 624
— v. Fletcher (Can.)	543, 544	Hutton v. Cooper (1851)	520
— v. Harrison (1821)	349	— v. Ras Steam Shipping Co Ltd.	
— v. Lee (1589)	208	(1905)	240
— (Doe d.) v. Roe (1852)	590	— v. Ras Steam Shipping Co Ltd.	
— v. Walker (1872)	187, 188	(1907)	240
Hudson's Bay Co. v. Hazlett (Can.)	481	— v. Thompson (1846)	471
Huestis (Wallace) Greystone Co. v. Foxwell		Hyam v. Freeman (1890)	624
(Can.)	383	Hyde v. Chapin Co. (Can.)	522
Huffer v. Allen (1866)	140, 145, 458, 466	— v. Forster (1748)	605
Huggins v. York-Buildings Co. (1740)	217	— v. Greenhill (1746)	605
Hughes v. Cornelius (1682)	154	— v. Hyde (1888)	597, 600
— (1823)	186	— v. Lindsay (Can.)	214
(Doe d.) v. Jones (1842)	507, 517	— (Doe d.) v. Manchester Corpn. (1851)	262
v. Lumley (1854)	140, 567, 568	Hy-Grade Coal Co., Ltd., Garnishee (Can.)	636
(Trading as Duroline Oil Co.) v.		Hymas v. Ogden (1905)	584
McDonnell & Co. (Ir.)	429	Hynes v. Feehan (Nfld.)	632
v. Metropolitan Ry. Co. (1877)	310		
— v. Rees (1838)	555, 556		
— v. — (Can.)	234		
— v. Seanor (1870)	373		
— v. Towers (Can.)	484, 486		
Huit v. Cogan (1596)	559		
Hulbert & Crowe v. Cathcart (1894)	591, 593, 595		
— v. — (1896)	425, 591, 593, 595		
Hulkes v. Day (1840)	656, 659, 661		
Hull (Doe d.) v. Greenhill (1821)	562		
Hull & Hornsea Ry. Co., <i>Re</i> , <i>Ex p.</i> Robinson			
& Young (1866)	578, 579		
Hulme's Case (1609)	239		
Humblestone v. Welham (1847)	147		

## I.

I. v. K. (1884)	669
Ibbotson v. Whitworth (1876)	463
Ideal Bedding Co., Ltd. v. Holland (1907)	653
Ihaka Te Rou v. Love (N.Z.)	377
Ile de Ceylan, The (1922)	614
Illingworth v. Manchester & Leeds Ry. Co.	
(1840)	370, 371
Imperial Bank v. Western Supply & Equip-	
ment Co. (Can.)	631
Imperial Bank of Canada, Garnishee,	
Chambers v. Corbeau (Can.)	647

## TABLE OF CASES.

lxiii

	PAGE		PAGE
Imperial Bank of Canada <i>v.</i> Miller (Can.) ...	642	Jackson, <i>Re</i> (N.Z.) ...	123
— <i>v.</i> Motton (Can.) ...	634,	—, <i>Re, Ex p.</i> Smith (1814) ...	362
	635, 668	— <i>v.</i> Barrow (1826) ...	572
Imperial Brewers <i>v.</i> Gelin (Can.) ...	403	— <i>v.</i> Charing Cross Bridge Co. (1851) ...	215
Imperial Elevator & Lumber Co. <i>v.</i> Hillman		— <i>v.</i> Federal Comr. of Taxation (Aus.) ...	22
(Can.) ...	403	— <i>v.</i> Forbes (1832) ...	61
— <i>v.</i> Hodel		— <i>v.</i> Gisling (1742) ...	235
(Can.) ...	610	— <i>v.</i> Hill (1838) ...	442
Imperial Elevator Co. <i>v.</i> Shere (Can.) ...	467, 493	— (1839) ...	442
Imperial Mercantile Credit Assocn. <i>v.</i> Cole-		— <i>v.</i> Irwin & Billings Co., Ltd. (Can.) ...	357,
man (1871) ...	469		358
Imperial Mercantile Credit Assocn. (Liquida-		— <i>v.</i> Jackson (1834) ...	430
tors) <i>v.</i> Coleman (1873) ...	469	— <i>v.</i> Jacob (1837) ...	374, 393
Imray <i>v.</i> Magnay (1843) ...	472, 473, 533	— <i>v.</i> Knutsford Urban Council (1914) ...	344
Ind, Coope & Co., Ltd. <i>v.</i> Kidd (1894) ...	674	— <i>v.</i> Rossiter (Ir.) ...	—
India (Empress) <i>v.</i> Amar Nath (Ind.) ...	581	— <i>v.</i> Stamps Comr. (N.Z.) ...	—
Inecto, Ltd., <i>Re</i> (1922) ...	240, 241	Jacobs <i>v.</i> Humphrey (1834) ...	513, 545, 546
Ingalls <i>v.</i> Reid (Can.) ...	332	— <i>v.</i> Morris (1902) ...	402
Inglis' Will, <i>Re</i> (N.Z.) ...	7, 26	— <i>v.</i> Robb (Can.) ...	549
Ingram <i>v.</i> Gillen (Ir.) ...	225	Jacques <i>v.</i> Harrison (1884) ...	590
— <i>v.</i> Taylor (Can.) ...	498	Jaffray <i>v.</i> Simpson (Scot.) ...	121
Inkson <i>v.</i> Jeeves (1863) ...	377	Jagadbandhu Saha <i>v.</i> Radha Krishna Pal	
Inland Revenue <i>v.</i> Dicks' Trustees (Scot.) ...	57, 58	(Ind.) ...	139
— <i>v.</i> Heywood-Lonsdale's Trus-		Jaganatha <i>v.</i> Gangi Reddi (Ind.) ...	373, 374
tees (Scot.) ...	46	Jagu Babaji <i>v.</i> Balu Laxman (Ind.) ...	160, 161
— <i>v.</i> Marr's Trustees (Scot.) ...	24	Jaikaran Bharti <i>v.</i> Raghunath Singh (Ind.) ...	458
Inland Revenue Comrs. <i>v.</i> Alexander's Trus-		Jakens <i>v.</i> Central Advance & Discount	
tees (Scot.) ...	19	Corpn., <i>Re</i> De Leeuw (1922) ...	190, 191
— <i>v.</i> Gordon's Execu-		Jalasutram Lakshminarain <i>v.</i> Bommadevera	
tors (Scot.) ...	61	Venkata Narasimha Naidu (Ind.) ...	160
— <i>v.</i> Harrison (1874) ...	110	Jamadar Singh <i>v.</i> Serazuddin Ahamad	
— <i>v.</i> Holloway (1917) ...	44	Chowdhury (Ind.) ...	175, 176
— <i>v.</i> Le Marchant		Jamaitunnissa <i>v.</i> Lutfunnissa (Ind.) ...	176
(1876) ...	110, 111	Jameison <i>v.</i> Fredericton City (Can.) ...	—
— <i>v.</i> Priestley (1901) ...	7, 8, 20	James (Doe d.) <i>v.</i> Brawn (1821) ...	516
— <i>v.</i> Scott's Trustees		— <i>v.</i> Dore (1744) ...	604
(Scot.) ...	7, 8, 15	— <i>v.</i> Landon (1585) ...	281
Innes <i>v.</i> East India Co. (1856) ...	632, 633	— <i>v.</i> McGibney (Can.) ...	—
Insinger <i>v.</i> Cunningham (Can.) ...	453	James W. Elwell, The (1921) ...	489, 490
International Harvester Co. <i>v.</i> Leeson (Can.) ...	184	James' Case (1584) ...	281
— <i>v.</i> McCurrach		Janaki Ahmal <i>v.</i> Kamalathammal (Ind.) ...	175
(Can.) ...	419	Jane, The, <i>Re</i> (Can.) ...	319
International Mining Syndicate <i>v.</i> Stewart		Janes <i>v.</i> Whitbread (1851) ...	252
(Can.) ...	390	Janki Das <i>v.</i> East Indian Ry. Co. (Ind.) ...	486, 629
International Paper Co. <i>v.</i> Spicer (Aus.) ...	360	Jaques <i>v.</i> Caesar (1670) ...	581
International Tea Stores Co. <i>v.</i> Hobbs (1903) ...	263	Jardine <i>v.</i> Hope (Can.) ...	349, 350
Inter-Ocean Real Estate Co. <i>v.</i> White (Can.) ...	482	Jarmain <i>v.</i> Hooper (1843) ...	544, 549
Irish Land Commission <i>v.</i> O'Neill (Ir.) ...	429	Jarman's Estate, <i>Re</i> , Leavers <i>v.</i> Clayton	
— <i>v.</i> Ryan (Ir.) ...	146	(1878) ...	—
Irvine, <i>Re</i> (Can.) ...	620	Jarvis <i>v.</i> Commercial Bank (Can.) ...	547, 548
Irving <i>v.</i> Boyd (Can.) ...	599	— <i>v.</i> Miller (Can.) ...	534, 535
— <i>v.</i> Cuthbertson (1860) ...	270	Jasoda Deye <i>v.</i> Kirtibash Das (Ind.) ...	434
— <i>v.</i> Heaton (1836) ...	430	Jay <i>v.</i> Johnstone (1893) ...	419
Irwell <i>v.</i> Eden (1887) ...	675	Jayson <i>v.</i> Rash (1705) ...	613
Irwin <i>v.</i> Grey (1867) ...	141	Jeanes <i>v.</i> Wilkins (1749) ...	517, 526
— <i>v.</i> Nesbit (Ir.) ...	648	Jeff Davis, The (1867) ...	644, 645
Isaacs <i>v.</i> Skellorn (Aus.) ...	326	Jefferies <i>v.</i> Sheppard (1820) ...	541
Isaacs & Sons <i>v.</i> Salbstein (1916) ...	225, 226	Jefferson <i>v.</i> Dawson (1673) ...	571
Isbester <i>v.</i> Ray, Street & Co. (Can.) ...	199	Jefferys (Right d.) <i>v.</i> Bucknell (1831)	—
Ishan Chunder Bandopadhyaya <i>v.</i> Indro Narain			249, 255,
Gossami (Ind.) ...	459	Jeffries <i>v.</i> Alexander (1860) ...	50
Ishri Dat <i>v.</i> Mewa Lal (Ind.) ...	643	Jeffris <i>v.</i> Tomlinson (1886) ...	675
Island Amusement Co. <i>v.</i> Quagliotti (Can.) ...	527	Jeffries <i>v.</i> Reynolds, <i>Ex p.</i> Reynolds (1882) ...	654
Isle of Wight Ferry Co., <i>Re</i> (1865) ...	578	Jeffs, <i>Ex p.</i> , R. <i>v.</i> Brisbane Police Magistrate	
Iswaram Pillai <i>v.</i> Sonnivaveru Taragan (Ind.) ...	306	(Aus.) ...	228
Ives <i>v.</i> Lucas (1823) ...	465	Jelks <i>v.</i> Hayward, Hackney Furnishing Co.	
Iveson <i>v.</i> Winnipeg (Can.) ...	327	Claimants (1905) ...	—
Ivory <i>v.</i> Cruickshank (1875) ...	584	Jellett <i>v.</i> Anderson (Can.) ...	419
Izod <i>v.</i> Lamb (1830) ...	498, 501	— <i>v.</i> Erratt (Can.) ...	575, 576
		— <i>v.</i> Powell (Can.) ...	575, 576
		— <i>v.</i> Scottish Ontario & Manitoba Land	
		Co. (Can.) ...	575, 576
		— <i>v.</i> Wilkie (Can.) ...	575, 576
		Jellicoe <i>v.</i> Wellington Loan Co. (N.Z.)	
		Jenings <i>v.</i> Florence (1857) ...	—

J.

Jack <i>v.</i> Bonnell (Can.) ...	231
— <i>v.</i> Green & Sea Point Municipality	
(S. Af.) ...	346



	PAGE		PAGE
Jenkins v. Merthyr Tydvil Urban District Council (1899) ...	229	Jones v. Howells (1843) ...	116
— v. Robertson (1867) ...	148	— v. — (1845) ...	116
Jenkinson, <i>Re</i> (1857) ...	88, 92, 93, 107	— v. Jaggar (1886) ...	147, 417
Jennens v. Handford (1844) ...	456	— v. Jenner (1856) ...	618
Jennings & Long v. Hunt & Beard (Nfld.)	199	— v. Jones (1874) ...	202
Jensen v. Sheppard (Can.) ...	581	— v. — (1879) ...	658
Jersey (Earl) v. Uxbridge Union Rural Sanitary Authority, <i>Re</i> Uxbridge Rural Sanitary Authority (1891) ...	565	— v. — (1880) ...	140
Jervis, <i>Re</i> (1885) ...	621	— v. — (Aus.) ...	252
— v. Wolferstan (1874) ...	53	— v. Kearney (Ir.) ...	282
Jessop v. Crawley (1850) ...	553	— v. Lewis (1919) ...	161, 162, 163, 166, 188
Jessup (Doc d.) v. Bartlet (Can.) ...	437, 557	— v. Littledale (1837) ...	324
Jeves v. Shadwell (1865) ...	63, 97, 99	— v. Morley (1697) ...	541
Jewell v. — (1816) ...	243, 267	— v. Nixon (1831) ...	152
— v. Broad (Can.) ...	139	— v. Reynolds (1836) ...	164
Jewsbury (or Jewesbury) v. Mummary (1872)	177	— v. Schofield (Can.) ...	532
Jezeph v. Ingram (1817) ...	497	— v. Seaton (Can.) ...	379
Jhinka v. Baldeo Sahai (Ind.) ...	343, 344	— v. Smith (1867) ...	550
Jillard v. Pendikonsky (Nfld.) ...	631	— v. Thompson (1858) ...	625, 626
Joachimson v. Swiss Bank Corp'n. (1921)	639, 640	— v. Williams (1817) ...	256
Joannis Vatis, The (No. 2) (1922) ...	470, 490	— v. — (1841) ...	380, 381, 454, 455, 468
Jobin-Marrin Co. v. Betts (Can.) ...	481	— v. Williams, Gittens & Co. (1887)	623, 638
Johanesson v. Canadian Pacific Ry. Co. (Can.)	182	— v. Wint (1858) ...	234
Johanson v. City Mutual Life Assurance Society (Aus.) ...	319	— v. Wood (1812) ...	537, 538
John Abell Co. v. Hornby (Can.) ...	311, 312	Jones & Co. v. Coventry (1909) ...	635
John & Mary, The (1859) ...	206	Jones & Judgments Act, 1864, <i>Re</i> (1895) ...	669
Johns v. Pink (1900) ...	559, 560, 572, 573, 574, 575	Jones Brothers (Holloway), Ltd. v. Woodhouse (1923) ...	372, 502
— v. Rivers (N.Z.) ...	368	Jones' Claim, <i>Re</i> Commercial Bank Corp'n. of India & the East (1868) ...	342
Johnson v. Blumenthal (1877) ...	399, 400	Jones' Trust, <i>Re</i> (1852) ...	72
— v. Burgess (1873) ...	602	Joralde v. Parker (1861) ...	439
— v. Chalmers (Can.) ...	642	Jordan v. Binckes (1849) ...	420, 471
— v. Chippindall (1828) ...	601	Jorden v. Money (1854) ...	292, 293, 294, 308
— v. Credit Lyonnais Co. (1877) ...	399, 400	Joselyne, <i>Ex p.</i> , <i>Re</i> Watt (1878) ...	639, 640
— v. Crocker (Can.) ...	475	Joseph v. Jones (1884) ...	367
— v. Diamond (1855) ...	627, 628, 629, 647	— v. Lyons (1884) ...	367
— v. Hadley, <i>Re</i> Hadley (1909) ...	31	— v. Pidcock (1884) ...	367
— v. Harris (Can.) ...	542	— v. Tyndall (1843) ...	654
— v. Henry (Can.) ...	454	— v. Webb (1884) ...	367
— v. Leigh (1815) ...	581	— v. Wellington Corp'n. (N.Z.) ...	164
— v. Logan (Can.) ...	495	Joseph's Estate, <i>Re</i> (N.Z.) ...	25
— v. Pickering (1908) ...	476, 477, 487, 527	Joss v. Fairgrieve (Can.) ...	425
— v. Strcete (1694) ...	481	Jost v. McNeill (Can.) ...	427
— v. Tanner (Can.) ...	494	Jousiffe v. Bayley (1866) ...	554
Johnson Brothers v. Hewitt (Can.) ...	187	Jowett v. Watts (Can.) ...	637
Johnston, <i>Re</i> , Cockerell v. Essex (Earl) (1884)	78, 83, 105	Joy, <i>Re</i> , Lalor v. Jones (Ir.) ...	124
— v. Clarke (Can.) ...	339	Joyce v. Walker (1850) ...	421
— v. McKenna (Can.) ...	419, 587	Judgment Creditor, <i>Ex p.</i> , <i>Re</i> A Debtor (1902) ...	437
— v. Rice (Can.) ...	620	Juggurnath Sahoo v. Shah Mahomed Hossein (Ind.) ...	348
— v. Sowden (Can.) ...	577	Junkin v. Strong (Can.) ...	367
Johnstone v. Blackburn & East Lancashire Royal Infirmary, <i>Re</i> Harrison (1918) ...	15	Jupp v. Cooper (1879) ...	535
— v. Bucknall (Ir.) ...	619	Jury v. Jury (Can.) ...	583
— v. Harrowby (Earl) (1859) ...	81	Justice v. Gower (1843) ...	542, 543
Jolley, <i>Re</i> , Neal v. Jolley (1901) ...	33, 43		
Jolly v. Arbuthnot (1859) ...	250		
Jollymore v. Acker (Can.) ...	342, 343		
Joly v. Swift (Ir.) ...	200		
Jones, <i>Ex p.</i> , <i>Re</i> Williams (1880) ...	475		
—, <i>Ex p.</i> , <i>Re</i> Wilson (1916) ...	332		
—, <i>Re</i> , <i>Ex p.</i> Kelly (Can.) ...	631		
— v. Atherton (1816) ...	506, 507		
— v. Bailey (1853) ...	578		
— v. Bodeenor (1697) ...	403, 404		
— v. Bow (1692) ...	237		
— v. Brown (1835) ...	363		
— v. Clayton (1815) ...	537		
— v. Davis (1847) ...	462		
— v. Fraser (Can.) ...	389		
— v. Frost, <i>Re</i> Fiddey (1872) ...	273		

## K.

Kailas Chandra Roy v. Hira Lal Seal (Ind.)	383, 384
Kala Mea v. Harperink (Ind.)	511
Kalahasti Estate (Manager of Courts of Wards) v. Ramasami Reddi (Ind.)	380
Kalamazoo, The (1851)	236
Kali Krishna Tagore v. Secretary of State for India (Ind.)	210
Kalyánbhai Dipchand v. Ghanashamlál Jadunathji (Ind.)	427
Kanagappa v. Sokkalinga (Ind.)	367, 368
Kanahai Lal v. Suraj Kunwar (Ind.)	234
Kandasami v. Nagalinga (Ind.)	257
Kandiyl Cheriya Chandu v. Calicut Zamorin (Ind.)	168

# TABLE OF CASES.

lxv

	PAGE		PAGE
Kandoth Mammi v. Neelancherayil Abdu Kalandan (Ind.) ... ..	381	Ketchum v. Giberson (Can.) ... ..	531
Kaneen v. Mellish (Can.) ... ..	343	———— v. Smith (Can.) ... ..	287
Kanhaya Lal v. National Bank of India		Kevers v. Michell (1876) ... ..	453
Kannyalal Pundit v. Cuttack Collector (Ind.)	424	Kewney v. Attrill (1886) ... ..	428
Karim Mahomed Jamal v. Rajooma (Ind.)	173	Khevraj Jusrup v. Lingaya (Ind.) ...	374
Karst v. Cook (Can.) ... ..	499	Kidd & Clements v. Docherty (Can.)	481, 482, 526
Karuthan v. Subramanya (Ind.) ... ..	660	Kidd & Gibbon's Contract, <i>Re</i> (1893)	113, 114
Kashinath Parsharam v. Gouravabai (Ind.)	124	Killops v. Porter (Can.) ... ..	676
Kassa Mal v. Gopi (Ind.) ... ..	451, 452	Kilpatrick v. Stone (Can.) ... ..	484, 485
Katama Natchiar v. Shivagunga (Rajah) (1863) ... ..	153	Kilpin v. Kilpin (1834) ... ..	75
Kaufman v. Campeau (Can.) ... ..	478	Kilroy v. Simpkins (Can.) ... ..	318
Kaulbach v. Cook (Can.) ... ..	560	Kincaid v. Kincaid (Can.) ... ..	670, 671
———— v. Spidle (Can.) ... ..	586	———— v. McGill (N.Z.) ... ..	312
Kaunsilla v. Chandar Sen (Ind.)	576	Kinderley v. Jervis (1856) ... ..	505, 560
Kavanagh v. Phelon (Can.) ... ..	612	Kindersley v. Chase (1801) ... ..	155
Kay v. Smith (1856) ... ..	299	King, <i>Re</i> , Travers v. Kelly (1904) ...	44, 47, 48
Kaye v. Cunningham (1820) ... ..	604	———— v. Ballett (1691) ... ..	562
Kayley v. Hothersall (1925) ... ..	425, 427	———— v. Birch (1842) ... ..	461, 462
Keal v. Smith (1882) ... ..	548	———— v. Flatau (Aus.) ... ..	327
Keane v. O'Brien (Ir.) ... ..	181	———— v. Hall (N.Z.) ... ..	366
———— v. Reynolds (1853) ... ..	196, 197	———— v. Harrison (1812) ... ..	458
Keate v. Clopton (1666) ... ..	557	———— v. Hoare (1844) ... ..	218, 223
———— v. Phillips (1881) ... ..	285, 286	———— v. Milne (1823) ... ..	606
Keats v. Conolly (1915) ... ..	617, 618	———— v. Norman (1847) ... ..	192, 193
Keefer v. Hawley (Can.) ... ..	434, 583	———— v. Persevall (1616) ... ..	267
———— v. Merrill (Can.) ... ..	582	———— v. Smith (1900) ... ..	266, 277
Keen v. Reynolds (1853) ... ..	196, 197	———— v. United Collieries, Ltd. (Scot.)	327
Keenan, <i>Re</i> (Can.) ... ..	576	King & Coke's Case (1639) ... ..	581
———— v. Osborne (Can.) ... ..	487	King's Trusts, <i>Re</i> (Ir.) ... ..	105
Keene v. Dilke (1849) ... ..	544	Kingdon & Wilson, <i>Re</i> (1902) ... ..	6, 127
Keightley v. Birch (1814) ... ..	515, 534	Kingley v. Smith (Can.) ... ..	466
Keith v. Butler & Foster (Aus.) ... ..	631	Kingsdale v. Mann (1703) ... ..	589
———— v. Gancia (R.) & Co., Ltd. (1904)	324, 404	Kingsford v. Merry (1856) ... ..	379
Kekewich v. Kekewich (1909) ... ..	42	Kingston v. Booth (Ir.) ... ..	333
Kelantan Government v. Duff Development Co. (1923) ... ..	618, 619	———— v. Cowbridge Ry. Co. (1871) ...	668
Keleher v. McGibbon (Can.) ... ..	424	———— v. O'Shea (Can.) ... ..	536
Kelly, <i>Ex p.</i> , <i>Re</i> Jones (Can.) ... ..	631	———— v. Salvation Army (Can.) ... ..	160
———— v. Bentinck (N.Z.) ... ..	161	Kingston Corpn. v. Shaw (Can.) ... ..	523
———— v. Browne (Ir.) ... ..	539	Kingston's (Duchess) Case (1776) ...	159, 160, 164, 173, 198, 209, 230, 237
———— v. Kelly (Aus.) ... ..	198	Kininmonth, <i>Re</i> (Aus.) ... ..	125
———— v. Lawrence (1864) ... ..	421	Kinloch-Cooke v. Public Trustee, <i>Re</i> Coxwell's Trusts (1910) ... ..	41
———— v. Rider (1895) ... ..	626	Kinnear v. Silver (Can.) ... ..	242
Kempe v. Goodall (1705) ... ..	287	Kinnersley v. Orpe (1780) ... ..	192
Kempland v. Macauley (1791) ... ..	473	Kinney (Assignee) v. Dudman (Can.) ...	453
Kendall v. Hamilton (1879) ... ..	218, 219	Kinney v. Fisher (Can.) ... ..	162
Kenlis (Lord) v. Hodgson (1895) ... ..	70, 71	Kinnis, <i>Ex p.</i> , <i>R. v.</i> Hastings JJ. (1897) ...	229
Kenn's Case (1606) ... ..	237	———— v. Graves (1898) ... ..	229
Kennedy, <i>Re</i> , Corbould v. Kennedy (1917)	38, 82	Kinsey v. Kinsey (1754) ... ..	141
———— v. Moodie (Can.) ... ..	615	Kinsman v. Onderdonk (Can.) ... ..	644, 645
———— v. Wise (Scot.) ... ..	197, 198	Kintore (Countess Dowager) v. Kintore (Earl) (1886) ... ..	336
Kennett v. Westminster Improvement Comrs. (1855) ... ..	618, 629, 637	Kippax v. Kippax (1891) ... ..	557
Kenny v. A.-G. (Ir.) ... ..	66	Kirby, <i>Re</i> , <i>Ex p.</i> Leeds Banking Co. (Official Liquidator) (1866) ... ..	578
Kensington (Lord), <i>Re</i> , Bacon v. Ford (1885)	568, 569	———— v. Denby (1836) ... ..	479
Kent, <i>Ex p.</i> , <i>Re</i> Metropolitan Railway Company, Tower Hill Extension Act, <i>Re</i> Rawlins' Estate (1871) ... ..	661	———— v. Dillon (1824) ... ..	
———— v. Transvaalsche Bank (S. Af.) ...	512	Kirchhoffer v. Stanbury (Can.) ... ..	263
Kepp v. Wiggett (1850) ... ..	247, 255	Kirk, <i>Re</i> , Kirk v. Kirk (1882) ... ..	52
Kerbey v. Denby (1836) ... ..	479, 543, 581	———— v. Purchase (Ir.) ... ..	607
Kering Rupchand & Co. v. Murray (Ind.) ...	633	Kirkby v. Dillon (1824) ... ..	667
Kerr v. Bain (Can.) ... ..	516, 517	Kirkpatrick v. Bedford (1878) ... ..	76, 77
———— v. Fullerton (Can.) ... ..	641	Kirkwood's Estate, <i>Re</i> (Ir.) ... ..	267
———— (Doe d.) v. Jamieson (Can.) ... ..	576, 577	Kirpa Dayal v. Rani Kishori (Ind.) ...	450
———— v. Preston Corpn. (1876) ... ..	334	Kishan Sahai v. Aladad Khan (Ind.) ...	384
Kershaw, <i>Re</i> (Aus.) ... ..	123	Kishory Mohun Roy v. Mahomed Mujaffar Hossein (Ind.) ... ..	188
———— v. Smith (Alfred John) & Co., Ltd. (1913) ... ..	305	Kissock v. Jarvis (Can.) ... ..	268, 495
Kershaw, Leese & Co. v. Stockport Overseers (1923) ... ..	178	Kist v. Atkinson (1809) ... ..	176
		Kitchen v. Campbell (1772) ... ..	208
		———— v. Irvine (1858) ... ..	490
		Klauber v. Weill (1901) ... ..	623
		Klinck v. Greer (Can.) ... ..	139
		Klug, <i>Re</i> , Klug v. Klug (1918) ... ..	75, 76

	PAGE		PAGE
Knechtel Furniture Co. v. Ideal House Furnishers (Can.) ... ..	302	Lamont's Case (1836) ... ..	252
Knight v. Clarke (1885) ... ..	586	Lampen v. Kedgewin (1875) ... ..	152
— v. Coleby (1839) ... ..	436	Lamy & Drapeau (Can.) ... ..	187
— v. Criddle (1807) ... ..	486	Lancashire & Yorkshire Ry. Co., London & North Western Ry. Co. & Graeser, Ltd. v. MacNicol (1918) ... ..	300, 402
— v. Fergusson (1839) ... ..	258	Lancashire Waggon Co. v. Fitzhugh (1861) ... ..	501
— v. Knight (1856) ... ..	599	Lancaster v. Fielder (1726) ... ..	440
— v. Simmonds (1896) ... ..	384, 385	Land v. Burn (Can.) ... ..	535
Knights v. Wiffen (1870) ... ..	312	Land Credit Co. of Ireland v. Fermoy (Lord), <i>Ex p. Munster</i> (1870) ... ..	418, 422
Knott End Railway Act, 1898, <i>Re</i> (1901) ... ..	488	Landrum v. Macmartin (Can.) ... ..	555
Knowbridge v. Chittleborough (1849) ... ..	580	Landry v. Bathurst Lumber Co. (Can.) ... ..	362, 363
Knowles v. Adams (Can.) ... ..	495	Lands of Isle of Wight Ferry Co., <i>Re</i> (1865) ... ..	578
— v. Jessop, <i>Re</i> Townend (1914) ... ..	77	Lane v. Taylor (Aus.) ... ..	465
— v. Palmer (1589) ... ..	438, 440	Lang v. Purves (1862) ... ..	352, 353
Knox v. Patutahi Road Board (N.Z.) ... ..	327	— v. Webb (Aus.) ... ..	123
Koksilah v. R. (Can.) ... ..	167	Langdale Chemical Manure Co. v. Ginty (Ir.) ... ..	670
Kolchmann v. Meurice (1903) ... ..	658	Langelier v. Charlebois (Can.) ... ..	393
Konápá Bin Mahádápá v. Janárdan Sukdev (Ind.) ... ..	516	Langford v. Foot (1832) ... ..	313
Kondasawmy Pillay v. Kristnasawmy Pillay (Ind.) ... ..	...	Langham & Langham Hotel Co., Ltd., <i>Re</i> (1890) ... ..	113
Kondeti Kama Row v. Nukamma (Ind.) ... ..	230	Langley v. Oxford (Earl) (1836) ... ..	156, 157
Kotchie v. Golden Sovereigns, Ltd. (1898) ... ..	507	Langmead v. Maple (1865) ... ..	208
Koursk, The (1923) ... ..	221	Langstaff Estate, <i>Re</i> (Can.) ... ..	430
— (1924) ... ..	221	Langton v. Horton (1842) ... ..	490
Koyyana Chittemma v. Doosy Gavaramma (Ind.) ... ..	...	Lanyon v. Toogood (1844) ... ..	494, 495
Krishnabai v. Hari Govind (Ind.) ... ..	146, 147	La Pointe v. Grand Trunk Ry. Co. (Can.) ... ..	327
Krishnabhupati Devu v. Vikrama Devu (Ind.) ... ..	308	Laraiti v. Ram Dial (Ind.) ... ..	164
Kristal v. Rowell (S. Af.) ... ..	401	Larnach v. Sievwright (N.Z.) ... ..	358, 359
Kristo Indro Saha v. Huromonee Dossee (Ind.) ... ..	...	Laroche v. Wasbrough & Mailand (1788) ... ..	432
Kronprinz (Cargo Owners) v. Kronprinz (Owners), The Ardandhu (1887) ... ..	143	Lart, <i>Re</i> , Wilkinson v. Blades (1896) ... ..	190, 329
Kunhi Moidin Kutti v. Ramen Unni (Ind.) ... ..	528	Larue (G.) & Co. v. Procurator-General, The Annie Johnson (1921) ... ..	195
Kupu Rau v. Venkataramyyar (Ind.) ... ..	382	Lash v. Meriden Britannia Co. (Can.) ... ..	379
Kurratulain Bahadur (Mirza) v. Peara (Saheb) (Ind.) ... ..	162	Late v. McLean (Can.) ... ..	482
L.		Latimer v. Batson (1825) ... ..	517
Labrosse v. Choquette (Can.) ... ..	420	Lauder v. Millar (Scot.) ... ..	335, 336
Lackington v. Atherton (1844) ... ..	303	Laura, The, Dionissis v. R. (1865) ... ..	326, 327, 328
Lacon v. Barnard (1826) ... ..	207, 208	Laurason (Doe d.) v. Canada Co. (Can.) ... ..	562
— v. De Groat (1893) ... ..	589	Laurie v. Clutton (1852) ... ..	53
Ladbroke v. Crickett (1788) ... ..	489	Laver v. Fielder (1862) ... ..	205
Ladd v. Burwell (Can.) ... ..	455	Lavergne v. Hooper (Ind.) ... ..	373
Ladhabhai Lakhmsi v. Jamsetji Jijibhoy (Ind.) ... ..	344	Law, <i>Re</i> , Law v. Law (1905) ... ..	148
Laferriere v. Cadieux (Can.) ... ..	381, 382	Lawes v. Codrington (1831) ... ..	436
Laicon v. Barnard (1826) ... ..	207, 208	Lawler v. Robertson (1858) ... ..	223
Laidlaw v. Blackwood (Scot.) ... ..	184, 225, 226	Lawless v. Lane (S. Af.) ... ..	346
Laidlay v. Lord Advocate (1890) ... ..	120, 121, 122	Lawrence v. Anderson (Can.) ... ..	247
Laing v. Matthews (Can.) ... ..	577	— v. Baldock (1838) ... ..	659
Lainson v. Tremere (1834) ... ..	254, 255	Lawrie, Petitioner (Scot.) ... ..	43, 44
Laird v. Birkenhead Ry. Co. (1859) ... ..	350, 367, 370	Laycock v. Lee & Fraser (Can.) ... ..	356
Lake v. Billers (1698) ... ..	465	Lea v. Fish, <i>Re</i> Fish (1897) ... ..	43
— v. Brutton (1856) ... ..	279	— v. Lacon (1605) ... ..	431
Lake of the Woods Milling Co. v. Collin (Can.) ... ..	623, 626	Leach v. Buchanan (1802) ... ..	311
Lákshmiabái Bápuji Oka v. Mádhavráv Bápuji Oka (Ind.) ... ..	420	— v. Leach, <i>Re</i> Smyth (1898) ... ..	122
Lakshmishankar Deveshankar v. Vishnuram (Ind.) ... ..	146	Leader, The (1868) ... ..	641, 645, 646
Lala Beni Ram v. Kundan Lal (1899) ... ..	369, 370	Leader v. Danvers (1798) ... ..	555
Lalor v. Jones, <i>Re</i> Joy (Ir.) ... ..	124	Leahy v. Dancer (Ir.) ... ..	575
Lamare v. Dixon (1873) ... ..	394, 395	Leavers v. Clayton, <i>Re</i> Jarman's Estate (1878) ... ..	79
Lamb, <i>Re</i> (1889) ... ..	6, 127	Leavesley, <i>Re</i> (1891) ... ..	649, 650, 655, 657
— v. Colonial Secretary (S. Af.) ... ..	161	Leavitt v. Parks (Can.) ... ..	170
Lambert v. Hutchinson (1844) ... ..	660	Lechmere v. Fletcher (1833) ... ..	220
— (Doe d.) v. Roe (1835) ... ..	590	— v. Thorowgood (1688) ... ..	525
Lambert's Estate, <i>Re</i> , Stanton v. Lambert (1888) ... ..	127	Lechmore v. Toplady (1690) ... ..	208, 525
Lambkin v. Ontario Marine & Fire Insurance Co. (Can.) ... ..	386	Leconfield, <i>Re</i> , Wyndham v. Leconfield (1904) ... ..	21, 109
		Ledbetter v. Salt (1828) ... ..	321
		— v. Scott (1828) ... ..	321
		Lee, <i>Re</i> (Can.) ... ..	106
		— v. Aylesbury Urban District Council (1902) ... ..	593
		— v. Credit Valley Ry. Co. (Can.) ... ..	213, 214
		— v. Dangar, Grant & Co. (1892) ... ..	435, 508, 547, 611, 617



## TABLE OF CASES.

lxvii

	PAGE		PAGE
Lee v. Gansel (1774) ...	478	Linch v. Hooke (1704) ...	252
— v. Harrison (Can.) ...	567	Lindo v. London Hospital, <i>Re</i> Dresden (1910) ...	76, 78
— v. Howes (Can.) ...	461, 511	Lindon v. Sharp (1843) ...	179, 180
— v. Joseph (Aus.) ...	127, 128	Lindsay (M'Gregor's Trustee) v. Cox (Scot.) ...	318
— v. Lacon (1605) ...	...	Lindsay v. Oriental Bank at Columbo (1860) ...	505
— v. McMahon (Can.) ...	348	Lindsay Petroleum Co. v. Hurd (1874) ...	347
— v. Neuchatel Asphalte Co (1886) ...	205	Linehan's Lessee v. Anthony (Ir.) ...	588
— v. Rumilly (1891) ...	549	Lines v. Grange (Can.) ...	544
— v. Sumner (Can.) ...	637	Liney v. Rose (Can.) ...	431
Lee Cheong, <i>Re</i> , <i>Re</i> Succession Duty Act (Can.) ...	101	Linton v. Wilson (Can.) ...	429, 430, 528, 529
Leeds (Duke) v. Amherst (Earl) (1846) ...	367	Lister v. Pickford (1865) ...	350
Leeds Banking Co. (Official Liquidator), <i>Ex p.</i> , <i>Re</i> Kirby (1866) ...	578	Litchfield v. Blenheim Corpn. (N.Z.) ...	287
Leeds Banking Co., <i>Re</i> (1866) ...	470	Little v. Magle (Can.) ...	477, 478
Leeming (Doe d.) v. Skirrow (1837) ...	272	Littledale's Trustees v. Lord Advocate (Scot.) ...	99
Lefeuntun v. Véronneau (Can.) ...	556	Liverpool & North Wales S.S. Co., Ltd. v. Mersey Trading Co., Ltd. (1909) ...	137
Lefroy v. Egmont, <i>Re</i> Egmont's (Earl) Settled Estates (1912) ...	105	Liverpool Corpn. v. Chorley Waterworks Co ...	213
Legg v. Evans (1840) ...	480, 494, 503	Livesey v. Harding (1855) ...	157
— v. Mathieson (1860) ...	563	Llangerniew Parish v. Cwm Parish (1844) ...	181
Leggott v. Great Northern Ry. Co. (1876) ...	207, 218	Llevellyn v. Mackworth (1740) ...	368
— v. Western (1884) ...	658	Llewellyn v. Brown, <i>Re</i> Brown (1900) ...	650
Legrange v. Marais (S. Af.) ...	607	Llewelyn v. Washington, <i>Re</i> Maddock (1901) ...	30
Lehane v. Porteus (Can.) ...	649, 670	— v. —, <i>Re</i> — (1902) ...	30
Leicester (Earl) v. Perry (1783) ...	210	Lloyd v. Ashdown (Can.) ...	622
Leicester & Co. v. Cherryman (1907) ...	226	— v. Poole (1831) ...	379, 380
Leinster v. Stabler (Can.) ...	164	— (Doe d.) v. Roe (1842) ...	469, 588
Leippi v. Frey (Can.) ...	497, 498, 499, 500	— v. Say & Seal (Viscount) (1711) ...	152
Lekas v. Zappas (Can.) ...	630	Lloyd's Bank, Ltd. v. Medway Upper Navigation Co. (1905) ...	672
Le Marchant v. Inland Revenue Comrs. (1876) ...	110, 111	Lock v. Norborne (1687) ...	187
Lemoine v. Giroux (Can.) ...	457	Locke v. Kahutia (N.Z.) ...	270
— v. Raymond (Can.) ...	555	— v. McConkey (Can.) ...	475, 523
Lendall & Pinfold's Case (1584) ...	222	Lockley v. Pye (1841) ...	515
Lenthall v. Gazzard (Aus.) ...	227	Lockwood v. Nash (1856) ...	637
Leonard v. Simpson (1835) ...	145	Lockyer v. Ferryman (1877) ...	199, 200
— v. Wharton (Can.) ...	445	Loder v. St. Albans (Duke), <i>Re</i> St Albans (Duke) (1900) ...	45, 48
Leroux (Neale d.) v. Parkin (1794) ...	369	Logan v. Fairlie (1825) ...	61
Leslie, <i>Re</i> , <i>Ex p.</i> Leslie (1856) ...	314	— v. — (1835) ...	61
Leslie & Co. v. Works Comrs. (1914) ...	367, 368	Lor's Policies, <i>Re</i> (1916) ...	17, 22
Letchmere v. Thorowgood (1688) ...	525	Lomas v. Graves & Co. (1904) ...	650
Lethbridge v. A.-G. (1907) ...	5, 16, 18	Lomax v. Ashworth (1846) ...	267
Letsom v. Bickley (1816) ...	429	Lombard, <i>Re</i> (Ir.) ...	19
Levasseur v. Beaulieu (Can.) ...	530	Londesborough (Lord) v. Somerville (1854) ...	81, 82
— v. Mason & Barry (1891) ...	397, 398, 664, 665, 666, 672	London v. James (1584) ...	281
Leventhorpe v. Palmer, <i>Re</i> Palmer (1912) ...	32	London & Canadian Loan & Agency Co. v. Merritt (Can.) ...	592, 593, 599
Leveridge, <i>Re</i> , Spain v. Lejoindre (1901) ...	44, 48	London & Canadian Loan & Agency Co. v. Morphy (Can.) ...	601, 602
— v. Forty (1813) ...	424	London & Canadian Loan & Agency Co. v. Morris Rural Municipality (Can.) ...	623
Levi v. Abbott (1849) ...	509, 535, 549	London & County Banking Co., Ltd. v. Fulford (1886) ...	366
Levy (or Levi) v. Hale (1859) ...	539, 556	London & Manchester Plate Glass Co., Ltd. v. Heath (1913) ...	343, 344
— (Doe d.) v. Horne (1842) ...	268, 275, 281	London, Bombay & Mediterranean Bank v. Burjori Sorabji Lywatta (Ind.) ...	175
Lewes v. Codrington (1831) ...	436	London Corpn. v. London Joint Stock Bank (1881) ...	...
— v. Morgan (1829) ...	574	— v. Metropolitan Ry. Co. (1872) ...	349
Lewin, <i>Ex p.</i> (Can.) ...	389	— v. Sandon (1872) ...	349
Lewis, <i>Re</i> , Lewis v. Lewis (1904) ...	295, 301	London Financial Assocr. v. Stevens (1873) ...	563
—, <i>Re</i> , — v. Smith (1900) ...	48	London General Omnibus Co., Ltd. v. Pope (1922) ...	224
— v. Alcock (1838) ...	539	London Joint Stock Bank v. London Corpn. (1875) ...	646
— v. Clifton (1854) ...	303, 328	London Joint Stock Bank v. London Corpn. (1880) ...	646
— (Doe d.) v. Ellis (1841) ...	588	London (City) Sewers Comrs. v. Gellatly (1876) ...	...
— v. Gompertz (1837) ...	464	London Sheriff (Dashwood) v. Manlove (1691) ...	457, 458
— v. Holmes (1847) ...	455		
— v. Lewis (1680) ...	605		
— v. —, <i>Re</i> Lewis (1904) ...	295, 301		
— v. Morris (1834) ...	435, 464		
— v. Musgrove (1844) ...	534		
— v. Smith, <i>Re</i> Lewis (1900) ...	48		
Li Din v. Chow Toy Dong (Can.) ...	612		
Liggott v. Western (1884) ...	658		
Like v. Howe (1806) ...	338		
Lilford (Lord) v. A.-G. (1867) ...	106		
Limmer Asphalte Paving Co., Ltd. v. F— (1888) ...	636		

# TABLE OF

	PAGE		PAGE
London Union Guardians v. Acocks (1860)...	227, 228	Lothian (Marquis) v. Garforth (1799) ...	597
London Wharfing & Warehousing Co., <i>Re</i> (1885) ...	433	Lothian v. Henderson (1803)...	155
London's Case (1591) ...	281	Louch v. Peters (1834) ...	80
Londonderry (Marchioness) v. Baker (1861) ...	204	Loucks v. McSloy (Can.) ...	339
Long v. Gowlett (1923) ...	200, 201	Lough v. Coleman (Can.) ...	550
— v. Long (1852) ...	59	Love & Bilodeau, <i>Re</i> (Can.) ...	571
— v. — (Can.) ...	418	Lovegrove v. White (1871) ...	443
— v. Watkinson (1852) ...	59	Loveitt v. Hill (1836) ...	581
Longdill v. Jones (1816) ...	541	Lovelace, <i>Re</i> (1859) ...	93, 101, 102
Longman v. Bath Electric Tramways, Ltd. (1905) ...	402	Loveless (Chapman's Executor) v. Ratcliff (1864) ...	589
Longmead v. Maples (1865) ...	208	Lovell v. Gibson (Can.) ...	338
Longmore v. McArthur & Co. (Can.) ...	221	Lovely v. White (Ir.) ...	640, 641
Longworth v. Yelverton (Scot.) ...	153	Lovering v. City of London & Southwark Subway Co. (1891) ...	380
Lonsdale (Earl) v. Berchtholdt (Countess) (1857) ...	396	Lovett v. Lovett (1898) ...	253, 254, 275, 310
Lord v. Colvin (1867) ...	117, 118, 124, 125	Lovick v. Crowder (1828) ...	471, 473, 474, 475, 542
Lord Advocate v. Ailsa (Marquis) (Scot.) ...	108	Lovitt v. A.-G. for Nova Scotia (Can.) ...	114
— v. Bogie (1894) ...	59, 119	Low, <i>Re</i> , Bland v. Low (1893) ...	452, 453
— v. Buccleuch (Duke) (Scot.) ...	108	—, <i>Re</i> , — v. — (1894) ...	452, 453
— v. Christie's Trustees (Scot.) ...	107	— v. Bouverie (1891) ...	136, 137, 295
— v. Constable's Trustees (Scot.) ...	83, 89	— v. Macgill (1864) ...	373
— v. Fife (Earl) (Scot.) ...	102	Lowe v. Horwarth (1865) ...	227
— v. Fleming (1897) ...	13, 87, 96	Lowell v. Gibson (Can.) ...	416
— v. Fotheringham (Scot.) ...	26	Lowery v. Laskin (Can.) ...	200
— v. Freckleton's Judicial Factor (Scot.) ...	67, 68	Lowson v. Canada Farmers' Mutual Fire Insurance Co. (Can.) ...	419, 420
— v. Galloway (Scot.) ...	51, 52	Lowten v. Colchester Corpn. (1817) ...	594, 597, 598
— v. Gibson (Scot.) ...	99	Lowthal v. Tonkins (1740) ...	507, 525, 526, 527
— v. Glasgow (Earl) (Scot.) ...	110	Loyal Prince of Wales Lodge v. Sinfield (Can.) ...	263
— v. Gordon (Scot.) ...	91, 107	Loyd v. Allen, <i>Re</i> Tinkler (1917) ...	36, 37
— v. Graham (Scot.) ...	95	— v. Mansell (1722) ...	230
— v. Gunning's Trustees (Scot.) ...	8, 9	Lucas v. Harris (1886) ...	634, 635, 668
— v. Hagart's Executors (Scot.) ...	126	— v. Martin (1888) ...	231
— v. Harvey's Trustees (Scot.) ...	20	— v. Nockells (1833) ...	507, 526
— v. Henderson's Trustees (Scot.) ...	25	— v. Parsons (1847) ...	535
— v. Jaffrey (1921) ...	63, 99	— v. Peacock (1846) ...	660, 661
— v. Jamieson (Scot.) ...	85	Lucy v. Wood (1884) ...	635, 636
— v. Lyell (Lord) (Scot.) ...	18, 19	Ludford, <i>Re</i> , Official Receiver v. Warwickshire Sheriff (1884) ...	609
— v. Macalister (1924) ...	107	Lumley, <i>Re</i> , <i>Ex p.</i> Cathcart (1894) ...	595
— v. M'Culloch (Scot.) ...	107	—, <i>Re</i> , <i>Ex p.</i> Hood Barrs (1894) ...	600
— v. Macdonald (Scot.) ...	97	—, <i>Re</i> , Hood Barrs v. Cathcart (1894) ...	595, 600
— v. Macfarlane's Trustees (Scot.) ...	118	— v. Nevil (1650) ...	587
— v. Mackenzie's Trustees (Scot.) ...	20	— (Doe d.) v. Scarborough (Earl) (1835) ...	249
— v. M'Kersies (Scot.) ...	97	Lumsden v. Burnett (1898) ...	510
— v. Maclachlan (Scot.) ...	25	Lunt v. Estabrooks (Can.) ...	434
— v. Marshall (Fraser's Trustee) (Scot.) ...	107	Lush's Trusts, <i>Re</i> (1869) ...	307
— v. Meiklam, etc. (Scot.) ...	55, 56, 139	Lushington (Doe d.) v. Landaff (Lord Bp.) (1807) ...	252, 272
— v. Miller's Trustees (Scot.) ...	78	Lyall v. Lyall (1872) ...	100, 101, 102
— v. Moncreiffe (Montgomery's Trustees) (Scot.) ...	85, 86	— v. Paton (1856) ...	62
— v. Moray (Countess) (1905) ...	5, 42	Lyddon v. Moss (1859) ...	351, 352
— v. Nisbet's Trustees (Scot.) ...	58	Lyell's Will, <i>Re</i> (N.Z.) ...	26
— v. Pringle (Scot.) ...	125	Lyman v. Brethron (Can.) ...	433
— v. Reid's Executors (Scot.) ...	51	Lynch, <i>Re</i> (N.Z.) ...	123
— v. Roberts' Trustees (Scot.) ...	83	— v. Wood (N.Z.) ...	415
— v. Robertson (1897) ...	87	Lynch's Lessee v. Lynch (Ir.) ...	289
— v. Sidgwick (Scot.) ...	102, 103, 104	Lynott v. Seely (Can.) ...	377, 378, 433
— v. Stevenson (1869) ...	87	Lyon (Doe d.) v. Legè (Can.) ...	516
— v. Stewart (1902) ...	47	— v. Perkins (Can.) ...	338
— v. — (Scot.) ...	25, 46, 47	— v. Reed (1844) ...	289, 290
— v. Stewart's Trustees (Scot.) ...	44, 45	Lyons (J. L.) & Co. v. May & Baker, Ltd. (1923) ...	300
— v. Wilson (Scot.) ...	13, 14	Lyric Theatre London, Ltd. v. L.T., Ltd. & Cyril Theatrical Syndicate, Ltd. (1914) ...	428
— v. Wood's Trustees (Scot.) ...	25, 46	Lyster v. Bromley (1632) ...	608
Lorimer v. Lule (1819) ...	463	— v. Dolland (1792) ...	483
Losh, Wilson & Bell v. Martin (Scot.) ...	387		
Lossing v. Jennings (Can.) ...	476, 477		

## M.

Maberley v. Woodstock Municipality (S. Af.)	296
M'Allister v. Day (Can.)	265, 266
MacAllister v. Rochester (Bp.) (1880)	296



# TABLE OF CASES.

lxix

	PAGE		PAGE
M'Alpine v. Studholme (Scot.)	77	McGowan v. Gilchrist (Can.)	535
McAnnany v. Turnbull (Can.)	565	McGrath v. Hardy (1838)	235
MacArthur v. Argyll County Council (Scot.)	184	McGregor (Doe d.) v. Grant (Can.)	535
McArthur v. Cool (Can.)	546	M'Gregor's Trustee, Lindsay v. Cox (Scot.)	318
— v. Macdonnell (Can.)	642	Machu v. London & South-Western Ry. Co. (1848)	323
Macarthur Onslow v. Stamps Comr. (Aus.)	124	McHugh v. Union Bank of Canada (Can.)	242
Macaulay v. Marshall (Can.)	183, 184	McIlwee & Sons v. Foley Brothers, Welsh & Stewart (Can.)	445
— v. Rumball (Can.)	631	McInnes v. McGaw (Can.)	669, 670
M'Auliffe v. Bicknell (1835)	319, 320	McInnis v. Getsman (Can.)	276
McBride v. Parnell (Can.)	265	McIntosh v. Demeray (Can.)	581
McCabe v. Middleton (Can.)	617	— v. Jarvis (Can.)	183
— v. Thompson (Can.)	563, 564	Macintyre v. Connell (1851)	651
McCallum, Re (Aus.)	127	McIntyre v. East Williams Mutual Fire Insurance Co. (Can.)	387
—, Re (N.Z.)	383	— v. Faubert (Can.)	577
M'Cance v. London & North Western Ry. Co. (1864)	323	— v. Stata & Crysler (Can.)	508
McCann v. Eastwood (Can.)	531	— v. Sutherland (Can.)	580
M'Carthy, Re (Ir.)	523	Mack v. Postle (1894)	660
— v. Cork Steam Packet Co. (Ir.)	447	McKay v. Bonnett (Can.)	298
— v. Goold (Ir.)	599	— v. Crocker (Can.)	466
McCarthy v. Low (Can.)	557	— v. Fee (Can.)	212
McConnel v. Murphy (1873)	317	— v. McKay (Can.)	312, 313
M'Cormack v. Melton (1834)	432	— v. Prohar (No. 2) (Can.)	642
McCormick v. Anderson (Can.)	527	Mackay v. Prohar & Paine (Can.)	163
— v. Melton (1834)	464	McKay v. Tait (Can.)	622
M'Cormick v. Parry (1852)	503	McKean v. Jones (Can.)	162
McCornish v. Melton (1834)	464	McKee v. Woodruff (Can.)	438
McCraney v. McLeod (Can.)	623	McKenney v. Spence (Can.)	453
McCready v. Alberta Clothing Co. (Can.)	639, 640	Mackenzie, Re, Ex p. Hertfordshire Sheriff (1899)	534
M'Creery v. Bennett (Ir.)	668	M'Kenzie v. British Linen Co. (1881)	348, 349, 376, n.
McCutcheon v. Campbell (N.Z.)	441	Mackenzie v. Forbes (1870)	57, 65
McDade d. O'Connor v. Dafoe (Can.)	576	McKenzie v. McNaughton (Can.)	432
McDermott v. McDermott (Can.)	588	Mackenzie v. Monarch Life Assocn. Co. (Can.)	327, 328
McDiarmid v. Hughes (Can.)	269	McKenzie v. Sommers (Can.)	174, 175
McDonald, Re (Can.)	99, 434	Mackenzie v. William Gray & Sons Co., Ltd. (Can.)	403
Macdonald v. Bank of Vancouver (Can.)	365	McKenzie & Co. v. Walker (Aus.)	621
McDonald v. Cameron (Can.)	517	Mackey, Re (Can.)	113
— v. Curry (Can.)	612	Mackie v. Smith (1812)	432, 434
— v. Gillis (Can.)	203	— v. Warren (1828)	463, 464
— (Doe d.) v. Long (Can.)	199	McKindsey v. Armstrong (Can.)	623
— v. McFarlane & Gore (N.Z.)	261	Mackinnon v. Beals (Can.)	493, 494
Macdonald v. O'Toole (Ir.)	668	McKinnon v. Coffin (Can.)	642
M'Donald v. Stuart (Scot.)	209	— v. Ewing & McIntosh (Can.)	139
McDonald v. Sullivan (Can.)	632	— v. McKinnon (Can.)	337
Macdonald v. Tacquah Gold Mines Co. (1884)	630	Mackintosh v. Dunn (Aus.)	445
McDonald v. Weeks (Can.)	362	— v. Smith & Lowe (1865)	165
McDonald (A.) Co. v. Cushing (Can.)	610	— v. Stuart (1864)	353
Macdonald's Trustees v. Aberdeen Corp'n. (Scot.)	78	— v. Weir (Scot.)	199
McDonell v. McDonell (Can.)	516	Macklem v. Durrant (Can.)	548
— v. McMaster (Can.)	246	Mackley v. Smith (1856)	439, 440, 577
MacDonnell, Re (Ir.)	512	McLachlan, Re (Can.)	417
M'Donnell v. Walshe (Ir.)	574, 575	MacLaine v. Gatty (1921)	390, 391
M'Donogh v. Davies (Ir.)	653	M'Laren v. Liddell's Trustees (Scot.)	353, 354
McDougall v. Gagnon (Can.)	570	McLaughlin v. Freehill (Aus.)	183
— v. Griffin (Can.)	463, 464	— v. R. (Aus.)	125
— v. Inglis (Can.)	660	McLean, Re (N.Z.)	26
MacDougall v. Knight (1890)	205, 206	— v. Beatty (Can.)	644
MacDougall v. Waddell (Can.)	472, 481	— v. Bruce (Can.)	618, 620, 628, 669
Macdougall & Co. v. Penticton Municipality (Can.)	390	— v. Buffalo & Lake Huron Ry. Co. (Can.)	319
M'Dowall v. Hollister (1855)	622, 629	— v. Clark (Can.)	361
McDowell v. Real, Re Real (N.Z.)	199	— v. Fisher (Can.)	561
M'Evoy v. Drogheda Harbour Comrs. (Ir.)	293	— v. Loo Gee Wing (Can.)	320
McFadden v. Kerr (Can.)	626, 627	— v. McKay (Can.)	580
Macfarland v. Owen (Can.)	628	— v. McLeod (Can.)	643
Macfarlane v. Allan (Can.)	878	Maclean v. Vaughan (1876)	444, 446
— v. Lord Advocate (Scot.)	70	Maclean's Trusts, Re (1874)	85
Macfie v. Hutchinson (Can.)	633	McLellan v. Milmore (Can.)	466
MacFisheries, Ltd. v. Harrison (1924)	291, 301, 305	MacLennan v. Gray (Can.)	383
— & Brand (Can.)	623		
McGilvray v. Gibbons (Can.)	465		

	PAGE		PAGE
McLeod v. Bellars (Can.) ...	580	Manchester (Dowager Duchess), <i>Re</i> , Dun-	
Macleod v. Buchanan (1864) ...	660	cannon (Viscount) v. Manchester (Duke)	
M'Leod v. Drummond (1810) ...	505	(1912) ...	17, 27, 44, 47
McLeod v. Fortune (Can.) ...	457	Manchester & Liverpool District Banking	
— v. McLeod (Can.) ...	619	Co. v. Parkinson (1888) ...	666
— v. Power (1898) ...	220	Manchester & Milford Ry. Co., <i>Re</i> , <i>Ex p.</i>	
— v. Wadland (Can.) ...	316	Cambrian Ry. Co. (1880) ...	488
McManaway v. Cleland (N.Z.) ...	484	Manchester & Oldham Bank, Ltd. v. Cook	
McManus v. Blakeney (Can.) ...	298	(W.A.) & Co. (1883) ...	360
McMartin v. McKinnon (Can.) ...	582	Manchester Corpn. v. Hampson (1887) ...	144
McMaster, <i>Re</i> , Perpetual Trustees, Estate &		Manchester Mills Case (1757) ...	190
Agency Co. of New Zealand,		Manchharam v. Kalidas (Ind.) ...	230
Ltd. v. McMaster (N.Z.) ...	31	Manders v. Williams (1849) ...	497
— v. Phipps (Can.) ...	568	Mandeville v. Nicholl (Can.) ...	438
— v. Radford (Can.) ...	445	Mangalathammal v. Narayanswami Aiyar	
McMeckan, <i>Re</i> , <i>Ex p.</i> Oliver (Aus.) ...	637	(Ind.)... ...	163
McMillan v. Munro (Can.) ...	284	Mangena v. Wright (1909) ...	172
McMullan v. Bradshaw (Ir.) ...	464, 465	Mangles v. Dixon (1852) ...	373, 374
McMurdo, <i>Ex p.</i> , <i>Re</i> Sedgwick (1888) ...	655	Mangniram v. Syed Muhammad Mehdi Hos-	
McMurrich v. Thompson (Can.) ...	436	sein Khan (Ind.) ...	168
McNab v. Coward, Hy-Grade Coal Co., Ltd.,		Manisty v. Kenealy (1876) ...	238
Garnishee (Can.) ...	636	Manitoba Investment Assocn. v. Watkins	
— v. Oppenheimer (Can.) ...	610	... ...	333
McNabb v. Oppenheimer (Can.) ...	583	Manitoba Mortgage & Investment Co. v.	
McNally v. Stephens (Can.) ...	582	Daly (Can.) ...	340
M'Nat v. Hamilton (Scot.) ...	187	Manitoba Oil Products, Ltd. v. Langenburg	
McNichol v. McPherson (Can.) ...	577	Village (Can.) ...	476
Macnicoll v. Parnell (1887) ...	668, 669	Manning v. Mullins (Can.) ...	668
M'Niven v. Hunter (Scot.) ...	302, 303	— v. Robinson (Can.) ...	75
M'Nulty, <i>Re</i> (Ir.) ...	670	Manning's Case (1609) ...	516
M'Phelim v. Larson (Can.) ...	379	Mansel-Lewis v. Lees (or Rees) (1910) ...	315
McPherson v. Sutherland (Can.) ...	452	Manton v. Cantwell (Ir.) ...	270
— v. Temiskaming Lumber Co., Ltd.		— v. Manton (1870) ...	599, 600
(1913) ...	527	Manufacturers Lumber Co. v. Pigeon (Can.)	625
Macpherson Fruit Co. v. Hayden (Can.) ...	625	Maple Leaf Lumber Co. v. Caldbrick & Pierce	
McQueen v. McQueen (Can.) ...	149	(Can.)... ...	511, 514
McRae v. Frooks (Can.) ...	492	Mapleson v. Sears (1911) ...	633
M'Roberts v. Carter (Aus.) ...	161	March, <i>Ex p.</i> , <i>Re</i> Hilton (1892) ...	177
McRoberts v. Hamilton (Can.) ...	609	— v. Lee (1870) ...	574
— v. Johnson (Aus.) ...	611	Marchant (Doe d.) v. Errington (1839) ...	275
McWilliams v. Bailey (Can.) ...	661	Marcus, <i>Re</i> , Marcus v. Marcus (1887) ...	77
McWilliams' Estate, <i>Re</i> (Can.) ...	415	Margarison v. Waller, <i>Re</i> Waller (1916) 46, 48, 81,	
Madden v. McInnes (Can.) ...	445	82	
Maddison v. Alderson (1883) ...	293, 294	Margeson v. Commercial Union Assurance	
Maddock, <i>Re</i> , Llewelyn v. Washington (1901) ...	30	Co., Ltd. (Can.) ...	298
—, <i>Re</i> , — v. — (1902) ...	30	Marker v. Marker (1851) ...	180, 306, 335
Madeley v. Greenwood (1897) ...	610	Marks v. Booth (1891) ...	632, 633, 638
Madell v. Thomas & Co. (1891) ...	244	Marlay, <i>Re</i> , Rutland (Duke) v. Bury (1915) ...	30, 33
Maden v. Veevers (1842) ...	331	Marler v. Tommas (1873) ...	275
Madrid Bank, <i>Re</i> , Wilkinson's Case (1867) ...	354	Marlow v. Yager & Canadian Pacific Ry.	
Maganlal Mulji v. Doshi Mulji (Ind.) ...	458	Co. (Can.) ...	621
Magnus v. National Bank of Scotland (1888) ...	143, 144	Marples v. Hartley (1861) ...	619, 620
Magrath v. Hardy (1838) ...	235	Marriage v. Skiggs, <i>Re</i> Skiggs (1859) ...	519
— v. Reichel (1887) ...	189	Marris v. Burton (1840) ...	79, 80
Mahabir Pershad Singh v. Macnaghten (Ind.) ...	175	Marry v. Drew, <i>Re</i> Drew (Ir.) ...	33
Mahdo Das v. Ramji Patak (Ind.) ...	628, 629	Marsden v. Sambell (1880) ...	355, 356, 357
Mahomed Mozuffer Hossein v. Kishori		Marsh v. Huron College (Can.) ...	339
Mohun Roy (Ind.) ...	363	— v. Lee (1870) ...	574
Mahommed Zohuruddeen v. Mahommed		— v. Webb (Can.)... ...	269, 270
Noorooddeen (Ind.)... ...	648	Marshall, <i>Re</i> , <i>Ex p.</i> Marshall (1841)... ...	279
Mahon v. Miles (1881)... ...	606	— v. Gibbings (Ir.) ...	184
Mahoney v. Duggan (Ir.) ...	65	— v. Hicks (1847) ...	616
Mahony v. Blake (Ir.) ...	556	— v. Houghton (Can.) ...	149
Mail Printing Co. v. Devlin (Can.) ...	359	— v. James (1905) ...	642
Maile v. Mann (1848) ...	615	— v. Lord Advocate (Scot.) ...	126
Main v. McInnis (Can.) ...	633	Marshall Estate & Succession Duty Act, <i>Re</i>	
Mainland v. Cave, <i>Re</i> Cave (1892) ...	674	(Can.) ...	108
Mair v. Holton (Can.) ...	319	Marshall Wells Alberta Co., Ltd. v. Alliance	
Malarchy (Doe d.) v. Roe (1840) ...	590	Trust Co. (Can.) ...	569
Malloch v. Plunkett (Can.) ...	517	Marsham, <i>Re</i> , <i>Ex p.</i> Playford (1863) ...	75
Mallock v. Galton (1735) ...	166	Marston v. Phillips (1863) ...	225
Maloney v. Trustees, Executors & Agency		Martin, <i>Ex p.</i> , Drew v. Lewis (1891) ...	654
Co., Ltd. (Aus.) ...	347	—, <i>Ex p.</i> , — v. Willis (1891) ...	654
Malzard v. Huie, Reed & Co. (Nfld.) ...	627	—, <i>Re</i> (Ir.) ...	118

## TABLE OF CASES.

lxxi

	PAGE		PAGE
<b>Martin v. Barr Smith, Re Barr Smith (Aus.)</b> ...	29, 30	<b>Mercer v. Lawrence (1878)</b> ...	426
— <b>v. Kerridge (1733)</b> ...	596	<b>Merchants Bank of Canada v. Amundsen, Re Amundsen Estate &amp; Merchants Bank of Canada (Can.)</b> ...	571
— <b>v. Martin, Re Bourne (1893)</b> ...	29, 127	<b>Merchants Bank v. Campbell (Can.)</b> ...	608, 609
— <b>v. Nadel (1906)</b> ...	637	<b>Merchants Bank of Canada v. McLeod (Can.)</b> ...	342
— <b>v. National Union Fire Insurance Co. (Can.)</b> ...	399	<b>Merchants Bank v. Monteith (Can.)</b> ...	217
— <b>(Doe d.) v. Roe (1835)</b> ...	590	<b>Merchants Bank of Canada v. Price (Can.)</b> ...	527, 567, 568
— <b>v. Sharp (1844)</b> ...	609, 610	— <b>v. Winnipeg Fur Co. (Can.)</b> ...	332
— <b>v. Smith (1858)</b> ...	571	<b>Mercier v. Barrette (Can.)</b> ...	167
— <b>v. Wilks (1583)</b> ...	560	<b>Meredith v. Flaxman (1831)</b> ...	550
<b>Martin &amp; Co. v. Midland Ry. Co. (1893)</b> ...	228	— <b>v. Wilson (1893)</b> ...	384
<b>Martin &amp; Varlow, Re (1894)</b> ...	579	<b>Merriman v. Newman (1872)</b> ...	615
<b>Martineau, Re (1884)</b> ...	59	<b>Merritt, etc., Society, Ltd. v. Young (Can.)</b> ...	390
<b>Martyn v. Kelly (Ir.)</b> ...	621	<b>Merry v. Nickalls (1873)</b> ...	447, 449
— <b>v. Podger (1770)</b> ...	465	<b>Merryweather, Re (1851)</b> ...	365
<b>Marvin, Re, Crawter v. Marvin (1905)</b> ...	175	<b>Mersey Ry. Co., Re (1888)</b> ...	488
<b>Marylebone Vestry v. London Sheriff (1900)</b> ...	524	<b>Metallic Roofing Co. v. Jose (Can.)</b> ...	451
<b>Maryon-Wilson, Re, Wilson v. Maryon-Wilson (1900)</b> ...	47, 48	<b>Metcalf v. Scholey (1807)</b> ...	483
<b>Masilamania Pillai v. Tiruvengadam Pillai (Ind.)</b> ...		<b>Meters, Ltd. v. Metropolitan Gas Meters, Ltd. (1907)</b> ...	591
<b>Mason v. Andes Insurance Co (Can.)</b> ...	392	<b>Metropolitan Loan &amp; Savings Co. v. Mara (Can.)</b> ...	675
— <b>v. Bickle (Can.)</b> ...	388	<b>Metropolitan Ry. Co. v. London Corp'n. (1872)</b> ...	349
— <b>v. Muggeridge (1856)</b> ...	675	<b>Metropolitan Railway Company, Tower Hill Extension Act, Re, Re Rawlins' Estate, Ex p. Kent (1871)</b> ...	661
— <b>v. Paynter (1841)</b> ...	588	<b>Metscoffen v. Gunner (1730)</b> ...	427
<b>Masper v. Brown (1876)</b> ...	227	<b>Metters v. Brown (1863)</b> ...	276
<b>Massey, Re, Ram v. Massey (1920)</b> ...	7	<b>Mewa Kuwar v. Hulas Kuwar (Ind.)</b> ...	247
— <b>v. Ewen (Can.)</b> ...	606	<b>Mexborough, Re, Savile v. Mexborough (1902)</b> ...	33
<b>Massey's Lessee v. Ejector (Ir.)</b> ...	589, 590	<b>Mexborough (Earl) v. Savile (1903)</b> ...	33
<b>Massey-Harris Co. v. Molland (Can.)</b> ...	521	<b>Meyer v. Cockburn (1850)</b> ...	329
<b>Massie v. Toronto Printing Co. (Can.)</b> ...	632	<b>Meyer &amp; Co., Ltd. v. Sze Hai Tong Banking &amp; Insurance Co., Ltd. (1913)</b> ...	360
<b>Masson (Doe d.) v. Griffith (Can.)</b> ...	511	<b>Meyers v. Blackburn (Can.)</b> ...	373
<b>Master in Equity of Supreme Court of Victoria v. Pearson (Aus.)</b> ...	124, 125	— <b>v. Meyers (Can.)</b> ...	591, 592, 604
<b>Masterman v. Malin (1831)</b> ...	451	— <b>(Doe d.) v. Meyers (Can.)</b> ...	577
— <b>v. Price (1847)</b> ...	376	— <b>v. Rawson (1860)</b> ...	423
<b>Masters v. Stanley (1840)</b> ...	486, 487	<b>Meynell v. Surtees (1855)</b> ...	368
<b>Mathews (Doe d.) v. Roe (Can.)</b> ...	428	<b>Meyrick, Re, Meyrick v. Hargreaves (1897)</b> ...	28, 33, 34
<b>Matson v. Swift (1845)</b> ...	118	<b>Michael v. Michael (N.Z.)</b> ...	234
<b>Matthew v. Osborne (1853)</b> ...	235	— <b>v. Myers (1843)</b> ...	147
<b>Maudslay, Sons &amp; Field, Re, Maudslay v. Maudslay, Sons &amp; Field (1900)</b> ...	673	<b>Michau &amp; De Villiers v. Rousseau &amp; Rousseau (S. Af.)</b> ...	137
<b>Maurice, Re, Brown v. Maurice (1896)</b> ...	130	<b>Michaud v. Montreal City (1923)</b> ...	369, n., 373
<b>Maxwell v. Hogg (1867)</b> ...	397	<b>Michie v. Reynolds (Can.)</b> ...	518, 611, 616
— <b>v. Kelsy (Ir.)</b> ...	604	<b>Micholls v. Samuel, Re Beddington (1900)</b> ...	34
— <b>v. Scarfe (Can.)</b> ...	521	<b>Micklethwait, Re (1855)</b> ...	84, 110
<b>May, Re, Ex p. House (1885)</b> ...	214	<b>Mico v. Morris (1885)</b> ...	232
— <b>v. Christie (1815)</b> ...	365	<b>Middleton v. Hall (1601)</b> ...	175
<b>Maybery v. Mansfield (1846)</b> ...	615	— <b>v. Pollock, Ex p. Wetherall (1876)</b> ...	316
<b>Maynard v. Bennett (Nfld.)</b> ...	344	— <b>v. Shelly (1628)</b> ...	559
— <b>v. Eaton (1874)</b> ...	148	— <b>v. Sylvester (Manucaptors of) (1664)</b> ...	
<b>Mayne v. Walter (1782)</b> ...	155	<b>Midland Ry. Co. v. Martin &amp; Co. (1893)</b> ...	228
<b>Mead v. Creary (Can.)</b> ...	627	<b>Midland Waggon Co. v. Potteries Ry. Co. (1880)</b> ...	
<b>Meade v. Cheyney (1591)</b> ...	437, 535	<b>Milburn v. Newton Colliery, Ltd. (1908)</b> ...	593
<b>Meadow Farm, Ltd. v. Imperial Bank of Canada (Can.)</b> ...	548	<b>Mildmay v. Smith (1671)</b> ...	539, 540
<b>Meadows v. Kingston (Duchess) (1775)</b> ...	237	<b>Miles v. Furber (1873)</b> ...	363, 375
<b>Meares, Re (Aus.)</b> ...	127	— <b>v. Harris (1862)</b> ...	609
<b>Mears v. Pretoria Estate &amp; Market Co., Ltd. (S. Af.)</b> ...		— <b>v. McIlwraith (1883)</b> ...	301
<b>Mecca Cafes, Ltd. (In Liquidation) v. Webner (S. Af.)</b> ...	328	— <b>v. Presland, Re Coe (1840)</b> ...	650
<b>Meddowcroft v. Huguenin (1844)</b> ...	241	— <b>v. R. (1897)</b> ...	10
<b>Meers, Ex p. (Aus.)</b> ...	227, 228	— <b>v. Rose (1814)</b> ...	164
<b>Meggitt v. Schuster (1863)</b> ...	421	<b>Mill v. Montrose Magistrates (Scot.)</b> ...	332, 333
<b>Mehra v. Devi Ditta Mal (Ind.)</b> ...	168	<b>Millar v. Thompson (Can.)</b> ...	627, 641
<b>Mellin v. Pedley (1879)</b> ...	458	<b>Millear, Re (Aus.)</b> ...	118, 119
<b>Mellish v. Brantford Town Council (Can.)</b> ...	279	<b>Miller, Ex p., Miller v. Smith (Can.)</b> ...	503
— <b>v. Buffalo, Brantford &amp; Goderich Ry. Co. (Can.)</b> ...	629		
<b>Mendez &amp; Villa Real (1734)</b> ...	237		
<b>Menzies, Petitioner (Scot.)</b> ...	43		
<b>Mercantile Investment &amp; General Trust Co. v. River Plate Trust, Loan &amp; Agency Co. (1892)</b> ...	669		



	PAGE		PAGE
Miller v. Administrator-General of Bengal (Ind.) ...	99	Montgomery & Co. v. De Bulmes (1898)	443, 444
— v. Corbett (Can.) ...	200	Montgomery & Wrights, Ltd., <i>Re</i> (Can.) ...	527
— v. Douglas (1886) ...	316	Montreal & St. Lawrence Light & Power Co. v. Robert (1906) ...	297
— v. Huddleston (1882) ...	600	Montreal Corp'n. v. Bélanger (Can.) ...	393
— v. Miller (1870) ...	596	— v. McGee (Can.) ...	207, 208
— v. Mynn (1859) ...	630	Montreal Trust Co. v. Robert (Can.) ...	348
— v. Oliver & Boyd (Scot.) ...	345	Monypenny v. Bristow (1832) ...	335
— v. Parnell (1815) ...	436	Mooney v. Maughan (Can.) ...	550, 551, 552
— v. Smith, <i>Ex p.</i> Miller (Can.) ...	503	Moore, <i>Ex p.</i> , <i>Re</i> Dickenson (1888) ...	527, 528
— v. Thomas (Can.) ...	537, 538	—, <i>Re</i> (1849) ...	659
— (Doe d.) v. Tiffany (Can.) ...	262, 576	—, <i>Re</i> , Moore v. Moore (1901) ...	30
— v. Weldon (Can.) ...	234, 326, 612	— v. Anderson (1735) ...	511
Miller & Co. v. Solomon (1906) ...	483	— v. Blake (1816) ...	484
Miller's Trusts, <i>Re</i> (1858) ...	659	— v. Clark (Can.) ...	526
Miller-Morse Hardware Co., Ltd. v. Smart (Can.) ...	649	— v. Flanagan (1920) ...	225
Mills v. Fox (1887) ...	310, 321	— v. Magan (1846) ...	430, 432
— v. Kelly (Can.) ...	187	— v. Moore, <i>Re</i> Moore (1901) ...	30
— v. McLean (Can.) ...	467	— v. Peachey (1892) ...	642, 643
— v. Mills (Can.) ...	569	— v. Roper (Can.) ...	631
Milner v. Marriot (Can.) ...	636	Moose Mountain Lumber & Hardware Co. v. Hunter (Can.) ...	499
— v. Rawlings (1867) ...	521	Moot v. Gibson (Can.) ...	669
Milton v. Eldrington (1554) ...	507, 555	Mordaunt Brothers v. British Oil & Cake Mills, Ltd. (1910) ...	301
Minaker v. Ash (Can.) ...	255	Moreau v. Polley (1847) ...	660
Minalal Shadiram v. Kharsetji (Ind.) ...	230	Morel Brothers & Co. v. Westmorland (Earl) (1904) ...	224
Minet v. Gibson (1789) ...	276, 277	Moreland v. Leigh (1816) ...	530, 542
Minger v. Anderson, <i>Re</i> Crist (Can.) ...	620	Morgan, <i>Ex p.</i> , <i>Re</i> Simpson (1876) ...	281
Mink v. Jarvis (Can.) ...	546	—, <i>Re</i> , Pillgrem v. Pillgrem (1881) ...	505, 506
Minshall v. Lloyd (1837) ...	485	— (Doe d.) v. Bluck (1813) ...	585
Minter v. Kent, Sussex & General Land Society (1895) ...	671	— v. Blyth (1891) ...	223
Mirza Kurratulain Bahadur v. Nawab Nuzhat-ud-Dowla Abbas Hossein Khan (Ind.) ...	234	— v. Couchman (1853) ...	294, 295
Mitchel v. Reynolds (1711) ...	242, 243, 244	— v. Dyet, <i>Re</i> Dyet (1902) ...	48
Mitchell, <i>Re</i> (Aus.) ...	615	— v. Elford (1876) ...	449
— v. De Vesey (1892) ...	654	— v. Hart (1914) ...	666
— v. Draper (1803) ...	602	— v. Rowlands (1872) ...	204
— v. Holland (Can.) ...	268, 269	Morgan's Patent Anchor Co., Ltd. v. Morgan (1876) ...	265, 266
— v. Lee (1867) ...	632	Morice v. Chapman (Can.) ...	546
— v. Lemm (Hong Kong) ...	169	Morison v. London County & Westminster Bank, Ltd. (1913) ...	400
— v. Mitchell (Can.) ...	332	— v. London County & Westminster Bank, Ltd. (1914) ...	400
Mitchinson (Doe d.) v. Carter (1798) ...	490, 491	Morison & Milne v. Massa (Scot.) ...	377
Mitten v. Wright (Can.) ...	340	Mority v. Stephan (1888) ...	658
Modhusudun Shaha Mundul v. Brae (Ind.) ...	169	Morland v. Pellatt (1829) ...	508
Moffat (Doe d.) v. Hall (Can.) ...	576	Morley, <i>Ex p.</i> , <i>Re</i> White (1873) ...	162
Moffatt, Garnishce, Morse Town v. Lyone (Can.) ...	632	— v. Jones (1698) ...	541
Moffatt, <i>In the Will of</i> (Aus.) ...	127	Morris v. Baker (1903) ...	587
Mohori Bibee v. Dharmodas Ghose (1903) ...	301	— v. Boulton (Can.) ...	608
Mohr v. Parks (Can.) ...	642	— v. Confederation Life Assocn. (Can.) ...	354
Moir's Trustees v. Lord Advocate (Scot.) ...	126	— v. Jones (1823) ...	558, 560
Mold v. Wheatcroft (1859) ...	369	— v. Livie (1842) ...	78
— v. — (1860) ...	369	— v. Manesty (1845) ...	650
Molineux v. Fulgam (1622) ...	587, 589	— v. Robinson (1824) ...	226
— v. Lacon (1604) ...	557	— v. Salberg (1889) ...	549, 555
— v. Rigges (1604) ...	557	— v. Woore, <i>Re</i> Boxer (1910) ...	38
Molony v. Cruise (Ir.) ...	668	Morrish v. Murrey (1844) ...	581, 582
Molsons Bank v. McMeekin, <i>Ex p.</i> Sloan (Can.) ...	531, 532, 533	Morrison, <i>Re</i> Morrison v. Morrison (1910) ...	32
Monajan v. Kashi Nath Panday (Ind.) ...	420, 421	— v. Rees (Can.) ...	461
Mondel v. Steel (1841) ...	175, 176	— v. Steer (Can.) ...	322
Mones v. McCallum (Can.) ...	672	— v. Taylor (Can.) ...	613
Money v. Jordan (1852) ...	292, 293	— v. Universal Marine Insurance Co. (1873) ...	355, 356, 365
Moneyppenny v. De Massy (Ir.) ...	430	Morrow v. Bellamy (Aus.) ...	427, 428
Monins v. Smith (1841) ...	556	— v. Lancashire Insurance Co. (Can.) ...	392
Monk v. Bartram (1891) ...	446, 451	Morse v. Faulkner (1792) ...	285
— v. Lawlor (Ir.) ...	595	— v. Morse (1846) ...	597
Monkman & Gordon, <i>Re</i> (Can.) ...	518, 519	Morse Town v. Lyone, Moffatt, Garnishce (Can.) ...	632
Montague v. Davies, Benachi & Co. (1911) ...	614	Mortimore v. Cragg, <i>Re</i> Surrey Sheriff (1878) ...	609
Montefiore v. Behrens (1865) ...	655	Morton v. Black (Scot.) ...	326
Montgomerie, etc. (Brown's Trustees) v. Alexander (Paton's Trustee) (Scot.) ...	246, 247	— v. Cowan (Can.) ...	427, 428
Montgomery v. Hellyar (Can.) ...	300		

## TABLE OF CASES.

lxxiii

	PAGE	N.	PAGE
Morton v. Woods (1869) ... ..	250		
Moscato v. Lawson (1835) ... ..	150		
Moses v. Crafter (1831) ... ..	124		
Moss v. Anglo-Egyptian Navigation Co. (1865) ... ..	201		
— v. London & North Western Ry. Co. (1874) ... ..	397		
Mott v. Gray (Can.) ... ..	539, 540		
— v. Mills (1827) ... ..	338		
Moubray's Trustees v. Moubray (Scot.) ...	183		
Mould v. Williams (1844) ... ..	197		
Moulson, <i>Re, Ex p.</i> Burn (1814) ... ..	323, 324		
Mount Royal Milling Co. v. Kwong Man Yuen & Leamy (Can.) ... ..	641		
Mountcashell's Estate (Ir.) ... ..	321		
Mouys v. Leake (1799) ... ..	432		
Mowat v. Provident Savings Life Assurance Society (Can.) ... ..	351, 352		
Mucklow & Johnson's Contract, <i>Re, Traunweiser v. Johnson</i> (Can.) ... ..	564		
Muhammad Ahmad v. Zahur Ahmad (Ind.) ...	168		
Muir v. Carter (Can.) ... ..	169		
— v. Munro (Can.) ... ..	419, 420, 510		
Muir Estate, <i>Re</i> (Can.) ... ..	100, 101		
Muir's Executors v. Craig's Trustees (Scot.)	336		
Muirhead v. Loban (Can.) ... ..	457		
Mul Chand v. Ram Ratan (Ind.) ... ..	434		
Mules v. Jennings (1853) ... ..	283		
Mulholland v. Harman (Can.) ... ..	669		
Mullane v. Ahern (Ir.) ... ..	590		
Mullarky (Doe d.) v. Roe (1840) ... ..	494		
Mullens v. Armstrong (Can.) ... ..	514		
Mullet v. Challis (1851) ... ..	445		
Mullin v. Provincial Construction Co. (Can.)	312, 313		
Mullinson v. Carver (1843) ... ..	476		
Multan Chand Kanyalal v. Bank of Madras (Ind.) ... ..	159, 182		
Mumford v. Arcadia Powder Co. (Can.) ...	203, 204		
Mundar Bibi v. Baij Nath Prasad (Ind.) ...	464		
Munesh Narain Singh (Rajah) v. Kishanund Misi (Ind.) ... ..	535		
Munk v. Cass (1841) ... ..	338		
— v. Clark (1833) ... ..	338		
— v. — (1835) ... ..	512		
Munn's Maizena, Ltd., <i>Re</i> (Aus.) ... ..	418, 422		
Munster, <i>Ex p.</i> , Land Credit Co. of Ireland v. Fermoy (Lord) (1870) ... ..	219, 221, 222, 359		
— v. Cox (1885) ... ..	221, 222, 359		
— v. Railton (1883) ... ..	613		
Murchie v. Fraser (Can.) ... ..	392		
— v. Victoria Insurance Co. (N.Z.) ... ..	293		
Murman v. Minchin (S. Af.) ... ..	550		
Murphy v. Goldman (Aus.) ... ..	40		
Murray, <i>Re</i> (Aus.) ... ..	227		
— v. Fitzpatrick (Ir.) ... ..	498		
— v. Johnston (Can.) ... ..	232		
— v. McCallum (Can.) ... ..	378		
— v. Wilson (1752) ... ..	586		
Murray & M'Master (Thompson's Trustees) v. Muir (Scot.) ... ..	260		
Murrell (Goodtitle d.) v. Badtittle (1841) ...	260		
— v. Goodyear (1859) ... ..	260		
— v. — (1860) ... ..			
Musadee Mahomed Cazum Sherazee v. Meerza Ally Mahomed Shoosty (1854) ... ..	598, 604		
Mushadee Mahomed Cazum Sherazee v. Meerza Ally Mahomed Shoosty (1851) ...	200		
Mussamat Subjan Bibi v. Skeikh Sariatulla (Ind.) ... ..	548		
Mussumat Mahbuban v. Mussumat Raheemun (Ind.) ... ..	527, 528		
Muthusami Naidu v. Alagia Manavala Simmala Raja (Ind.) ... ..	635		
Myers v. Rawson (1860) ... ..	423		
Mytton (Fairtitle d.) v. Gilbert (1787) ...	274, 296		
N. A. T. & T. Co. v. Seaton (Can.) ... ..	632, 633		
Nabi Muhammad v. Jwala Prasad (Ind.) ...	209, 210		
Nabin Chandra Mazumdar v. Mukta Sundari Debi (Ind.) ... ..	184		
Nadin v. Battie & Wardle (1804) ... ..	583		
Naganna v. Venkatappayya (Ind.) ... ..	151		
Nagengast v. Miller (Can.) ... ..	636		
Nail v. Punter (1832) ... ..	117		
Nairn Estate, <i>Re</i> (Can.) ... ..	108		
Nanchand v. Vithu (Ind.) ... ..	151		
Nanda Kumar Howladar v. Ram Jiban Howladar (Ind.) ... ..	230		
Nanu v. Raman (Ind.) ... ..	211		
Napper v. Fanshawe, <i>Re</i> Greer (or Grier) (1895) ... ..	619		
Narasimhulu v. Adiappa (Ind.) ... ..	493		
Narayana Pattar v. Gopalakrishna Pattar (Ind.) ... ..	172, 173		
Narayanan Chetty v. Kannammai Achi (Ind.)	151		
Narsingdas v. Rahimanbhai (Ind.) ... ..	300		
Nash v. Allen (1843) ... ..	610		
— v. Armstrong (1861) ... ..	204		
— v. Dickenson (1867) ... ..	609, 612		
— v. McCartney (Can.) ... ..	460		
— v. Nixon (1843) ... ..	610		
— v. Pease (1878) ... ..	635		
Natal Bank v. Langerman (S. Af.) ... ..	345, 346		
Natal Land, etc. Co. v. Good (1868) ... ..	194		
Nath Mal Das v. Tajammul Hussain (Ind.) ...	186, 187		
Nathan, <i>Re, R. v.</i> Inland Revenue Comrs. (1884) ... ..	129		
— v. Ell (N.Z.) ... ..	648		
Nathans v. Giles (1814) ... ..	192, 502		
National Bank of Australasia v. Brock (Aus.)	261		
National Bank v. Cullen (Ir.) ... ..	425		
National Bank of New Zealand v. Jones (N.Z.) ... ..	425, 426		
National Co. for Distribution of Electricity by Secondary Generators, Ltd. v. Gibbs (1900) ... ..	205		
National Co. for Distribution of Electricity by Secondary Generators, Ltd. v. Gibbs (1901) ... ..	205		
National Electric Manufacturing Co. v. Manitoba Electric & Gas Light Co. (Can.)	642		
National Exchange Co. v. Drew (Scot.) ...	164		
National Patent Steam Fuel Co., <i>Re, Barton's Case</i> (1859) ... ..	334, 348		
National Provincial Life Assurance Society, <i>Re, Fleming's Case</i> (1871) ... ..	260		
National Steam Fuel Co., <i>Re, Ex p.</i> Barton (1859) ... ..	348		
National Trust Co. v. Canadian Order of Foresters (No. 2) (Can.) ... ..	390		
— v. Stancul (Can.) ... ..	493		
National Trustees, Executors & Agency Co. v. O'Hea (Aus.) ... ..	127		
Native Guano Co. v. Sewage Manure Co. (1888) ... ..	447		
Natural Gas Light & Appliance Co., <i>Re</i> (Can.)	475		
Naunihal Bhagat v. Rameshar Bhagat (Ind.)	370		
Neal v. — (1744) ... ..			
— v. Jolley, <i>Re</i> Jolley (1901) ... ..	595, 602		
Neale v. Bealing (1744) ... ..	337		
— v. East London Municipality (S. Af.) ...	369		
— d. Leroux v. Parkin (1794) ... ..	666		
Neate v. Marlborough (Duke) (1838) ... ..	142		
Neave v. Weather (or Wrather) (1842) ...	511, 531, 532, 555, 556		
Needham v. Bennet (1669) ... ..	142		
— Bremner (1866) ... ..	217		
— v. Fraser (1845) ... ..			



	PAGE		PAGE
Neesom v. Clarkson (1842) ...	352	Nisbett's Trustees v. Learmonth (Scot.) ...	68
Neil v. Almond (Can.) ...	558	Nixon, <i>Ex p.</i> , <i>Re</i> Gethin (Ir.) ...	654
Neison v. Walters, <i>Re</i> Walters (1889) ...	181	—, <i>Re</i> (1886) ...	579
— v. —, <i>Re</i> — (1890) ...	181	Noel v. Bewley (1829) ...	284
Nelson v. Couch (1863) ...	201, 236	— v. Henley (Lord) (1819) ...	76
— v. Gurney (Can.) ...	480	— v. Laverdiere (Can.) ...	492
— v. Nelson (1870) ...	153	— v. Noel (1823) ...	76
— v. — (Can.) ...	592, 598	Nohren v. Auten & Markham (Can.) ...	630, 636
— v. Robins, <i>Re</i> Robins (1888) ...	80, 81	Nolan v. Annabella Gold Mining Co. (Aus.) ...	139
— v. Roy (Can.) ...	434, 580	Norburn v. Hilliam (1870) ...	150
— v. Stocker (1859) ...	273	— v. Norburn (1894) ...	665
Nenuphar (Owners) v. Annot Lyle (Owners) (1886) ...	448	Norcott v. Norcott (1702) ...	146
Nepean (Doe d.) v. Budden (1822) ...	289	Nordon v. Levy, <i>Re</i> Defries (1883) ...	190, 235
Nerlich v. Malloy (Can.) ...	536	Norendra Nath Pahari v. Bhupendra Narain Roy (Ind.) ...	163
Nesfield, <i>Re</i> , Barber v. Cooper (1914) ...	38, 105	Norfolk (Duke) (Doe d.) v. Hawke (1802) ...	575, 576
Nestler v. Dominion Meat & Cattle Ranching Co. (Can.) ...	445	— v. Leicester (1836) ...	428
Nevill v. Inland Revenue Comrs. (1924) ...	22, 23, 24	Norfolk's Case (1667) ...	244
— v. —, <i>Re</i> Abergavenny (Marquess) (1923) ...	22, 23	Norris v. Williams (1833) ...	395
Neville v. Cartwright (1896) ...	41	North v. Ansell (1731) ...	267, 353
— v. Wilkinson		— v. Miles (1808) ...	537
Nevinson v. United Kingdom Temperance & General Provident Institution, <i>Re</i> Grant (1915) ...	26, 41	— (Doe d.) v. Webber (1837) ...	272
Nevitt v. McMurray (Can.) ...	284	North American Loan Co. v. Mah Ten (Can.) ...	636
New Brighton Tramway Co. v. Knight (N.Z.) ...	404	North British Bank v. Collins (1852) ...	277
New Brunswick (Receiver-General of) v. Hayward (Can.) ...	110, 111	North Dufferin Election, <i>Re</i> (Can.) ...	380
New Brunswick (Province of), Provincial Secretary Treasurer v. Robinson (Can.) ...	107	North Eastern 100A. Steamship Insurance Assocn. v. Red "S" S.S. Co. (1906) ...	304
New South Wales Stamp Duties Comrs. v. Perpetual Trustee Co., Ltd. (Aus.) ...	117	North Eastern Ry. Co. v. Dalton Overseers (1898) ...	174
New York Breweries Co. v. A.-G. (1899) ...	121, 126, 128	— v. Dalton	174
New York Life Insurance Co. & Fullerton, <i>Re</i> (Can.) ...	481	North Ontario Election Case, Wheeler v. Gibbs (Can.) ...	453
Newall v. Elliot (1863) ...	138, 171	North Vancouver District v. Tracy (Can.) ...	341
Newcastle (Duke), <i>Re</i> , <i>Ex p.</i> Padwick (1869) ...	483	North Western Rubber Co., Ltd. & Hüttenbach & Co., <i>Re</i> (1908) ...	378
Newfoundland Steam Whaling Co., Ltd. v. Newfoundland Government (Nfld.) ...	354, 355	Northern Loan & Land Co. v. Lichtscheindl (N.Z.) ...	334, 335
Newington v. Levy (1870) ...	143, 177	Northumberland (Duke) v. A.-G. (1905) ...	84, 87, 91, 109, 112
Newis v. General Accident Fire & Life Assurance Corp'n. (Aus.) ...	319	— v. Bowman (1887) ...	367
Newland v. Horseman (1881) ...	154	Norton v. Crick (Aus.) ...	580
Newlands v. Higgins, <i>Re</i> Great West Saddlery Co. (Can.) ...	254	— v. Levy, <i>Re</i> Defries (1883) ...	190,
Newman v. Cardinal (1862) ...	495	Norval v. Canada Southern Ry. Co. (Can.) ...	447
— v. Merriman (1872) ...	615	Norwich Corp'n. v. Gill (1831) ...	429
— v. Rook (1858) ...	641	Norwich Equitable Fire Assurance Society, <i>Re</i> , Royal Insurance Co.'s Claim (1887) ...	334, 335
Newnham v. Law (1794) ...	432	Nott v. Sands (1883) ...	619
Newsome v. Flowers (1861) ...	375	Nottawasaga Corp'n. v. Hamilton & North Western Ry. Co. (Can.) ...	169
Newton, <i>Ex p.</i> (1855) ...	197	Nowlin v. St. John Corp'n. (Can.) ...	522, 523
— v. Askew (1848) ...	660	Nugent v. Gifford (1738) ...	505
— v. Foley (Can.) ...	519	Nundo Kumar Nasker v. Banomali Gayan (Ind.) ...	368
— v. Liddiard (1848) ...	303	Nundo Lall Bhattacharjee v. Bidhoo Mookhy Debee (Ind.) ...	171
— v. Weekes (1848) ...	256	Nunn's Estate, <i>Re</i> (Ir.) ...	117
Niadar Mal v. Raunak Husain (Ind.) ...	164	Nutt v. Sol Syndicate, Ltd. (1902) ...	226
Nichol v. Pedlar & Johnston (Can.) ...	577, 578	Nuttall v. Whittaker, <i>Re</i> Hartley (1892) ...	671
Nicholls v. McNeil (Can.) ...	499		
— v. Rosewarne (1859) ...	651, 652		
Nicholson v. Harrison (1856) ...	299		
— v. Hooper (1838) ...	372		
— v. Temple (Can.) ...	543, 544		
Nickall v. Crawford (Can.) ...	437		
Nickle v. Douglas (Can.) ...	488		
Nickson v. Thomas (1815) ...	264		
Nicol v. Boyn (1833) ...	430		
Nicoll v. Canadian Bank of Commerce (Can.) ...	510		
Nilmony Mookhopadhyaya v. Aimunissa Bibee ...	229, 230		
— v. Nilvaru (Ind.) ...	151		

	PAGE		PAGE
O'Donovan v. Dillon (Ir.)	638	Owens v. Shield (1884)	629
— v. Goggin (Ir.)	666, 670	Oxford's (Earl) Case (1615)	368, 369
O'Dowd v. Kirwan (Ir.)	536		
O'Driscoll v. Manchester Insurance Com- mittee (1915)	634		
Official Receiver, <i>Ex p.</i> , <i>Re</i> Goudie (1896)	665, 670, 671		
—, <i>Ex p.</i> , <i>Re</i> Rogers (1911)	606		
—, <i>Ex p.</i> , <i>Re</i> Webster (1907)	646, 647		
— v. Strand, <i>Re</i> Goudie (1896)	665		
— v. Warwickshire Sheriff, <i>Re</i> Ludford (1884)	609		
Ogden v. Hesketh (1849)	544		
Ogilvie, <i>Re</i> (1871)	578, 579		
— v. West Australian Mortgage & Agency Corp'n. (1896)	349		
Ogle (Doe d.) v. Vickers (1836)	281		
O'Grady, <i>Re</i> , O'Grady v. Wilmot (1915)	31		
—, <i>Re</i> , — v. — (1916)	31		
— v. Synan (Ir.)	210		
— v. Wilmot, <i>Re</i> O'Grady (1915)	31		
— v. —, <i>Re</i> — (1916)	31		
Oldfield v. Preston (1861)	104		
O'Leary's Estate, <i>Re</i> (Ir.)	78, 79		
Olive, The (1859)	646		
Oliver, <i>Ex p.</i> , <i>Re</i> McMeckan (Aus.)	637		
— v. Bank of England (1902)	137, 301		
— v. Nautilus Steam Shipping Co. (1902)	318		
— v. — (1903)	318		
Olliver v. King (1856)	352		
Olsen v. Desjarlais (Can.)	448		
Omelaughland v. Hood (1639)	269		
Omritolall Dey, <i>Re</i> (Ind.)	583		
O'Neill v. Coffin (Aus.)	40		
O'Neill, Ltd., <i>Re</i> (Ir.)	109, 110		
Onslow's Trusts, <i>Re</i> (1875)	649		
Ontario & Minnesota Power Co. v. R. (1925)	331		
Ontario Bank v. Haggart (Can.)	642		
Ontario Silver Co. v. Tasker (Can.)	613, 614		
Ontario Treasurer v. Pattin (Can.)	97, 98		
Onward Building Society v. Smithson (1893)	247, 248, 277, 295		
Oppert v. Beaumont (1887)	443, 444		
Oranje Nassau, The (1921)	651		
Ord v. Ord (1923)	136, 152, 160, 170		
Orford (Countess), <i>Re</i> , Cartwright v. Balzo (Duc Del) (1896)	41		
Orford (Earl), <i>Re</i> , Neville v. Cartwright, Cart- wright v. Balzo (Duc del) (1896)	41		
Oriental Hotel Co., Ltd. v. Thomson (Aus.)	267		
Orlebar, <i>Re</i> , Wynter v. Orlebar (1908)	31		
Ormerod v. Foskett (1796)	614		
Ormes v. Beadel (1860)	357, 358		
Orsali v. Aubry (Can.)	634		
Osborne v. Kerr (Can.)	513		
— v. Robison (Aus.)	466		
O'Shea's Settlement, <i>Re</i> , Courage v. O'Shea (1895)	655		
Oshey v. Hicks (1610)	251		
Osmond Beeby v. Khitish Chandra Acharjya Chowdhury (Ind.)	384		
Oswald v. Rykert (Can.)	436		
Otago & Southland Investment Co., Ltd. v. Burns (N.Z.)	173		
Otago Harbour Board v. Spedding (N.Z.)	279		
Otto v. Lindford (1881)	446		
Ottos Kopje Diamond Mines, Ltd., <i>Re</i> (1893)	137		
Ouellet v. Rochette (Can.)	187		
Oulton v. Hewson (Can.)	581		
Outram v. Morewood (1803)	185, 187		
Overton v. Harvey (1850)	203, 204		
Oviat v. Vyner (1889)	431, 436		
Owen v. Griffith (1749)	574		
— v. Pritchard (1876)	530, 535		

	PAGE		PAGE
Partap Singh v. Delhi & London Bank, Ltd. (Ind.)	670	Penoyer (or Pennoyer) v. Brace (1898)	420, 427
Partington v. A.-G. (1869)	119, 120, 125	Pentney v. Lynn Paving Comrs. (1865)	344, 345
— v. Carrington (1859)	333, 334	Penton v. Brown (1664)	478
— v. Hawthorne (1888)	223	People's Building & Loan Assocn. v. Stanley (Can.)	415
Partridge v. Foster (1864)	569, 570	People's Life Insurance Co. v. Tattersall (Can.)	387
— v. National Insurance Co. of Australasia (Aus.)	642	Peppit v. North British Insurance Co. (Can.)	452, 453
— v. Ward, <i>Re</i> Bridgwater's Settlement (1910)	285	Percival v. R. (1864)	125
Parvata v. Digambar (Ind.)	434	— v. Stamp (1853)	479, 518, 543
Parvati v. Kisansing (Ind.)	576	Perfect v. Lane (1861)	325
Pasmore v. Wilkinson (1835)	455	Perkins v. Bradley (1842)	664
Pasupati Lutchmia v. Pasupati Muthambhatlu (Ind.)	415	— v. Plympton (1831)	463
Pasupati Nath Bose v. Nanda Lal Bose (Ind.)	445	Perkinson v. Gilford (1639)	541
Patchell v. Colonial Investment & Loan Co. (Can.)	586, 587	Perpetual Executors & Trustees Assocn. of Australia v. Davidson, <i>Re</i> Davidson's Will (Aus.)	40
Patching v. Dubbins (1853)	381	Perpetual Trustee Co., Ltd. v. Mackenzie (Aus.)	40
Pate (Doe d.) v. Roe (1807)	588	Perpetual Trustee Co., Ltd. v. Mitchell (Aus.)	40
Paterson, <i>Ex p.</i> , <i>Re</i> Transfer of Land Statute (Aus.)	438	Perpetual Trustee Co. v. Stamps Comr. (Aus.)	122
— v. Todd (Can.)	576	Perpetual Trustees, Estate & Agency Co. of New Zealand, Ltd. v. McMaster, <i>Re</i> McMaster (N.Z.)	31
Patterson v. McKellar (Sheriff) (Can.)	509, 510, 526	Perrett, <i>Ex p.</i> , <i>Re</i> Frape (No. 2) (1894)	379
— v. Thomas (Can.)	538	Perrin & Guildford, <i>Ex p.</i> , Warburton v. Hill (1854)	657, 658
— v. Turner (Can.)	184	Perring v. Tucker (1829)	359
— v. Wolland (N.Z.)	648	Perry v. Lawless (Can.)	302
Pattison v. Campbell (Scot.)	199	— v. Meddowcroft (1846)	241
— v. Tingley (Can.)	465	— v. Tuomey (Ir.)	66
Paul v. Henderson (Scot.)	382	— v. Woolcock (Aus.)	318
Pavie v. Hall (1661)	267	Perry's Executors v. R. (1868)	119, 124
Payne v. Drewe (1804)	474, 507, 527, 533	Perryman v. Dinham (1641)	596
— v. Grey, <i>Re</i> Stamford & Warrington (Earl) (1910)	39	— v. Jardine (Can.)	531, 606
— v. R. (Aus.)	121	Peru Republic v. Weguelin (1876)	446, 447
Peace & Waller, <i>Re</i> (1883)	671	Pestanji Cursetji Shroff, <i>Re</i> (Ind.)	483
Pearce, <i>Re</i> (1857)	66	Peter v. Stirling (1878)	64, 130
—, <i>Re</i> (Aus.)	26, 27	Peterson v. Bitulithic & Contracting Co. (Can.)	263
— v. Boulton (N.Z.)	326	Peto v. Blades (1814)	515
— v. Chaplin (1846)	328	— v. Welland Ry. Co. (Can.)	668
— v. Holmes (N.Z.)	261, 262	Petrie v. Nuttall (1856)	194
— v. Johns (1897)	666	Pettitt, <i>Re</i> , Flaxman v. Pettitt (1894)	78
Pearreth v. Marriott (1882)	157	Peyton, <i>Re</i> (1861)	87, 110
Pearl Life Assurance Co. v. Greenhalgh (1909)	198, 243, 261, 262, 332	Peyton & Inland Revenue Comrs., <i>Re</i> (1861)	87
— v. Johnson (1909)	198, 243, 261, 262, 332	Phelan v. O'Donnell & Thompson (Nfld.)	199
Pearl Mill Co. v. Ivy Tannery Co. (1919)	398	Phelps v. Prothero (1855)	180, 181
Pearse, <i>Re</i> (Can.)	128	— v. St. Catharines & Niagara Central Ry. Co. (Can.)	668
— v. Brooke (1870)	658	Philco Publishing Co. v. Nolan (Ir.)	428
— v. Dobinson (1865)	141, 142	Philion v. Bisson & Graham (Can.)	484
— v. — (1867)	141, 142	Philips v. Biron (1722)	466
— v. Morrice (1834)	253, 267	— v. Bury (1696)	238
— v. Pearse (1838)	120	— v. Dickenson (Can.)	540, 555
— v. — (1853)	81	— v. Morgan (1821)	556
Pease v. Chaytor (1863)	207	— v. Thompson (1684)	525
— v. Tudge (Can.)	515, 534	Phillip-Stephen Photo Litho & Typographic Process Co., Ltd., <i>Re</i> , Fergusson's Case (Aus.)	310, 311
Peat v. Clayton (1906)	663	Phillips v. Bacon (1808)	545
— v. Moran (Ir.)	652, 653	— v. Birch (1842)	430
Peers v. Carrall (Can.)	494	— v. Canterbury (Viscount) (1843)	607
Pegg v. Campbell (Can.)	461	— v. Eamer (1795)	321, 322, 537
Pegler v. Gillatt, <i>Re</i> Anderson (1905)	330	— (Doe d.) v. Evans (1833)	562
Pelham (Lord) v. Harley (Lord) (1713)	598	— v. General Omnibus Co. (1880)	460
— v. Newcastle (Duchess) (1713)	592, 597, 598, 599, 604	— v. Jones, Davis, etc. (1846)	583
Pelton v. Temple (Can.)	388	— v. Soqaka (S. Af.)	504
Pelunsky v. Beiles (S. Af.)	593	— v. Tanner (1829)	433, 434
Pemberton, <i>Re</i> , Pemberton v. Royal Hospital for Incurables (1907)	667	— v. Ward (1863)	219
Penang Foundry Co., Ltd. v. Gardiner (Scot.)	328	Phillpotts v. Phillpotts (1850)	277, 279
Penfold v. Dixon, <i>Re</i> Dixon (1902)	6, 30, 34	Phoenix Assurance Co., Ltd. v. Berechree (Aus.)	361, 362
Pennell v. Franklin, <i>Re</i> White (1898)	53	Phosphate Sewage Co. v. Molleson (1879)	211, 212
Pennington v. Cave (1917)	645		
Penny Lumber Co., <i>Re</i> (Can.)	611, 612		



## TABLE OF CASES.

lxxvii

	PAGE		PAGE
Pickard v. A.-G. (1840) ...	60	Ponnappa Pillai v. Pappuvayyengar (Ind.)	514
— v. Sears (1837) ...	290, 328, 372, 552, 553	Ponting v. Huddart, Parker & Co., Ltd. (Aus.) ...	326
— v. Tims (Can.) ...	646, 647	Ponton v. Daly (Can.) ...	170
Pickavance v. Pickavance (1901) ...	144	— v. Winnipeg City (Can.) ...	342
Picton v. Cullen (Ir.) ...	668	Poole v. Guise (1887) ...	572, 574, 575
Piddle v. Comyn (1309) ...	150	Poole Corp'n. v. Whitt (1846) ...	561, 562
Pidgeon v. Martin (Can.) ...	392	Poole's Case (1703) ...	485
Pierce v. Evans (1835) ...	315	Pope, <i>Re</i> (1886) ...	570, 571, 572, 578, 672
— v. Johns (1717) ...	138	— v. Ward (1785) ...	598, 599
— v. Palmer (Can.) ...	379, 380	Popham v. Cahoon (Can.) ...	626
— v. Thompson (Can.) ...	500	Popple v. Sylvester (1882) ...	205
Pierson v. Altrincham Urban Council (1917)	299	Poreshnath Mukerjee v. Anathnath Deb (Ind.) ...	306
— v. Tavernor (1616) ...	588	Poromanand Khasnabish v. Khepoo Paramaniok (Ind.) ...	458
Pigg v. Tow Law Overseers (Weardale Union) (1923) ...	345	Porte v. Williams (1911) ...	27, 43
Piggott v. Stratton (1859) ...	309, 310	Porter v. Bowerman, <i>Re</i> Bowerman (1908)	6, 33, 43
Pigott, <i>Re</i> (1833) ...	72	— v. Flintoff (Can.) ...	544
—, <i>Re</i> (1851) ...	659	— v. Moore (1904) ...	298
Pike, <i>Re</i> (1902) ...	664	— v. O'Connell (Can.) ...	449, 453, 454
—, <i>Re, Ex p. Pike</i> (Aus.) ...	33, 34	— v. Viner (1815) ...	582
Pilbrow v. Pilbrow's Atmospheric Ry. Co. (1848) ...	258	— v. Wotton (1884) ...	606
Pilet, <i>Re, Ex p. Toursier</i> (A.) & Co. & Berkeley (1915) ...	248	Porter's Estate, <i>Re</i> (Can.) ...	128
Pillgrem v. Pillgrem, <i>Re</i> Morgan (1881)	505, 506	Portlock v. Gardner (1842) ...	353
Pilling v. Stewart (Can.) ...	494	Portman (Viscount), <i>Re</i> , Portman v. Portman (Viscount) (1924) ...	38, 39
Pim v. Coyle (Ir.) ...	219	Potter, <i>Re</i> (N.Z.) ...	25
Pimm, <i>Re, Sharpe v. Hodgson</i> (1904)	37, 48	— v. Carroll (Can.) ...	526
Pinches v. Harvey (1841) ...	462	— v. Hamilton (Scot.) ...	190
Pinhorn v. Souster (1852) ...	275, 276	Potts, <i>Re, Ex p. Taylor</i> (1893) ...	671
Pinjault & Symmes (Can.) ...	196, 197	— v. Dutton (1845) ...	470
Pinnock Brothers v. Lewis & Peat, Ltd. (1923) ...	239	— v. Leask (Can.) ...	456, 457
Pinsent v. Avery, <i>Re</i> Avery (1913) ...	8, 9, 30, 34	— v. Nixon (Ir.) ...	265
Piper v. Canadian Bank of Commerce (Can.)	323, 324	— v. Warwick & Birmingham Canal Navigation Co. (1853) ...	563
— v. Geary (N.Z.) ...	346	Poulett (Earl) v. Hood (1866) ...	105
Pipher v. Whitchurch Township (Can.) ...	161	Poulton v. Adjustable Cover & Boiler Block Co. (1908) ...	154, 187, 233
Pirbhay Ramjee v. Rodgers (S. Af.) ...	631	— v. Moore (1915) ...	256, 285
Pirie v. Stewart (Ir.) ...	612	Pourrier v. Harding (Can.) ...	440
Pit v. Hunt (1681) ...	490, 498	— v. Raymond (Can.) ...	481
Pitamber-Das v. Jambusar Town Municipality (Ind.) ...	390	Povey (Davies d.) v. Doe (1773) ...	591
Pitcher v. King (1844) ...	479, 480	Powell v. Harcourt (N.Z.) ...	150
— (Doe d.) v. Roe (1841) ...	469, 589	— v. Jewesbury (1878) ...	444
Pitt v. Hill & Broadway (1673) ...	166	— v. Peck (Can.) ...	453
— v. Hunt (1681) ...	490, 498	— v. Rees (1837) ...	215
— v. Woodham (1828) ...	354	— v. Watters (Can.) ...	372
Place v. Ashby (1831) ...	484	Powell's Trusts of Insurance in Customs Annuity & Benevolent Fund, <i>Re</i> (1856) ...	85
— v. Fagg (1829) ...	484, 485	Power, <i>Re, Re</i> Stone, Acworth v. Stone (1901) ...	30
Plant v. Urquhart (Can.) ...	142	—, <i>Re, Power v. Howell</i> (1898) ...	33
Platel v. Dowse (1838) ...	529	—, <i>Re, Power v. Stone, Acworth v. Stone</i> (1901) ...	30
Platt v. Routh (1840) ...	51, 52	— v. Fleming (Ir.) ...	551
Playfair v. Musgrove (1845) ...	491, 507, 508, 517	— v. Howell, <i>Re</i> Power (1898) ...	33
Playford, <i>Ex p., Re</i> Marsham (1863) ...	75	— v. Kenny (Ir.) ...	635
Pleace v. Booth, <i>Re</i> Booth (1916) ...	21	— v. R. (Aus.) ...	117
Pledal's Case (1567) ...	281	— v. Stone (1901) ...	30
Plenderleith, <i>Re</i> (1893) ...	650	Powlett (Earl) v. Lee (1852) ...	501
Plommer v. Webb & Cripp (1729) ...	141	Poyser v. Harrison (1869) ...	603
Plowden, <i>Ex p., Re</i> Hutchinson (1885) ...	655	Pragju Bhimbhai & Co.'s Trustee v. Desai (S. Af.) ...	184, 185
Plows v. Maughan (Can.) ...	498	Pratt v. Drake (Can.) ...	393
Pluck v. Digges (Ir.) ...	249, 250	— v. Inman (1889) ...	595, 605
Plumb v. McGannon (Can.) ...	263	Prayag Raj v. Sidhu Prasad Tewari (Ind.)	306, 576
Poë v. Spencer Cooper, <i>Re</i> Spencer Cooper (1908) ...	6, 33, 38	Preece (Doe d.) v. Howells (1831) ...	244
Polini v. Gray (1879) ...	449, 450	Prentice v. Harrison (1843) ...	408
Poliquin v. St. Boniface (Can.) ...	287	Prentiss v. Brennan (Can.) ...	595
Pollard, <i>Ex p. (Aus.)</i> ...	559	Prescott Election Case (Can.) ...	162
—, <i>Re, Ex p. Pollard</i> (1903) ...	591, 592, 602	Preston Corp'n. v. Biornstad, The Ratata (1898) ...	449
—, <i>Re, Ex p. Trustee</i> (1903) ...	591, 592		
—, <i>Re, Pollard v. Pollard</i> (1902) ...	600		
— v. Bell (1800) ...	155		
Pollock v. Goodwin's Trustees (Scot.)	459, 460		
— v. Holitzki (Can.) ...	493		





# TABLE OF CASES.

lxxix

	PAGE		PAGE
<i>R. v. Heffernan</i> (Can.) ... ..	378	<i>Radcliffe v. Anderson</i> (1860) ... ..	544
— <i>v. Hellier</i> (1851) ... ..	462	<i>Radford v. Merchants' Bank</i> (Can.) ... ..	186
— <i>v. Hertfordshire Sheriff</i> (1836) ... ..	530	<i>Radha Kanta Chakravarti v. Ramananda</i>	
— <i>v. Herts Sheriff</i> (1841) ... ..	558	<i>Shaha</i> (Ind.) ... ..	270
— <i>v. Hickling</i> (Inhabitants) (1845) ... ..	196	<i>Radhakisan Hakumji v. Balvant Ramji</i> (Ind.) ... ..	493
— <i>v. Hutchings</i> (1881) ... ..	232, 233	<i>Radhey Lal v. Mahesh-Prasad</i> (Ind.) ... ..	308, 309
— <i>v. Inland Revenue Comrs., Re Nathan</i>		<i>Rahmubhoy Hubibbhoy v. Turner</i> (Ind.) ... ..	221
(1884) ... ..	129	<i>Rajamannar v. Venkatakrishnayya</i> (Ind.) ... ..	356, 357
— <i>v. Jackson</i> (Can.) ... ..	195		
— <i>v. Jarvis</i> (Can.) ... ..	530, 535, 536	<i>Ram v. Massey, Re Massey</i> (1920) ... ..	7
— <i>v. Jetherell</i> (1757) ... ..	608	<i>Ram Chand v. Durga Parsad</i> (Ind.) ... ..	176
— <i>v. Jones</i> (1787) ... ..	455	<i>Ram Kumar Singh v. Ali Hussain</i> (Ind.) ... ..	221
— <i>v. ———</i> (1814) ... ..	555	<i>Ram Ratun Singh v. Shew Nandan Singh</i>	
— <i>v. ———</i> (1837) ... ..	339	(Ind.) ... ..	320
— <i>v. Kennedy</i> (1893) ... ..	140, 141	<i>Ram Saran v. Chatar Singh</i> (Ind.) ... ..	209
— <i>v. Kent Sheriff</i> (1814) ... ..	582	<i>Raman v. Kunhayan</i> (Ind.) ... ..	383
— <i>v. Knight</i> (1908) ... ..	555	<i>Ramanathan v. Ranganathan</i> (Ind.) ... ..	344
— <i>v. Laura, The</i> (1865) ... ..	326, 327, 328	<i>Ramanugra Narain v. Mahasundor Kunwa</i>	
— <i>v. Leeds</i> (Inhabitants) (1847) ... ..	181, 182	(Ind.) ... ..	199
— <i>v. Leicestershire Sheriff</i> (1850) ... ..	581	<i>Ramasami Aiyar v. Veerappa Chetty</i> (Ind.) ... ..	199
— <i>v. Leigh</i> (1839) ... ..	241	<i>Ramchandra Jivaji Tilve v. Khatal Ma-</i>	
— <i>v. Lilley, Ex p. Taylor</i> (1910) ... ..	314	<i>homed Gori</i> (Ind.) ... ..	201
— <i>v. Lovitt</i> (Can.) ... ..	100	<i>Ramchandra Narayan v. Narayan Mahadev</i>	
— <i>v. McDonald</i> (Can.) ... ..	430	(Ind.) ... ..	168
— <i>v. Matthews</i> (1797) ... ..	154	<i>Ramdhan Mitter v. Kailas Nath Dutt</i> (Ind.) ... ..	424
— <i>v. Maybury</i> (1864) ... ..	197	<i>Ramelson &amp; Levinson v. North-West Hide</i>	
— <i>v. Middlesex Sheriff</i> (1791) ... ..	519	& Fur Co. (Can.) ... ..	361
— <i>v. ———</i> (1814) ... ..	455	<i>Ramlakhan Rai v. Bakhtaur Rai</i> (Ind.) ... ..	383
— <i>v. Monmouth Sheriff</i> (1814) ... ..	556	<i>Ramsay v. Margrett</i> (1894) ... ..	499, 500
— <i>v. Norreys</i> (Ir.) ... ..	56, 57	<i>Ramsay's Settlement, Re</i> (1861) ... ..	86, 91, 92, 93
— <i>v. North Eastern Ry. Co.</i> (1901) ... ..	215		
— <i>v. Osbourne</i> (1818) ... ..	482	<i>Ramsbottom v. Buckhurst</i> (1814) ... ..	573
— <i>v. Parker</i> (Can.) ... ..	385	<i>Ramsden v. Dyson</i> (1866) ... ..	369
— <i>v. Patton</i> (Can.) ... ..	611	<i>Randall v. Lithgow</i> (1884) ... ..	626, 627, 640, 643
— <i>v. Perth Corpn.</i> (Can.) ... ..	339	<i>Ranga Rau v. Bhavayamma</i> (Ind.) ... ..	306
— <i>v. Pettigrew</i> (Ir.) ... ..	344	<i>Rango Jairam v. Balakrishna Vithal</i> (Ind.) ... ..	621
— <i>v. Pickman</i> (1797) ... ..	530, 531	<i>Ranken v. Boulton</i> (1846) ... ..	525
— <i>v. Polsky</i> (Can.) ... ..	440	<i>v. Harwood</i> (1846) ... ..	525
— <i>v. Potter</i> (Can.) ... ..	487	<i>Rankin v. Bell</i> (Can.) ... ..	611
— <i>v. Ramsay</i> (Can.) ... ..	381	<i>v. De Medina</i> (1845) ... ..	468
— <i>v. Roach &amp; London Guarantee &amp; Accident</i>		<i>v. McFadyen</i> (Can.) ... ..	645, 646
<i>Co., Ltd.</i> (Can.) ... ..	108, 109	<i>Ranney v. Morrow</i> (Can.) ... ..	621
— <i>v. Robinson</i> (1835) ... ..	608, 610	<i>Rapier v. Wright, Re Cowans' Estate</i> (1880) ... ..	618, 620, 623, 625
— <i>v. Royds</i> (1844) ... ..	350, 351		
— <i>v. S.</i> (Scot.) ... ..	328	<i>Rat Portage Lumber Co. v. Harty</i> (Can.) ... ..	626, 628
— <i>v. St. Katharine Dock Co.</i> (1832) ... ..	421, 422	<i>Ratan Rai v. Hanumandas</i> (Ind.) ... ..	209
— <i>v. St. Peter's, Droitwich</i> (Inhabitants)		<i>Ratata, The</i> (1897) ... ..	448, 449
(1847) ... ..	182	<i>Ratata, The, Preston Corpn. v. Biornstad</i>	
— <i>v. Sandwich Corpn.</i> (1846) ... ..	385, 386	(1898) ... ..	449
— <i>v. Scammonden</i> (Inhabitants) (1789) ... ..	266	<i>Ratcliff v. Tate</i> (1664) ... ..	588, 589
— <i>v. Seery</i> (Aus.) ... ..	195, 196	<i>Ratcliffe v. Burton</i> (1802) ... ..	478
— <i>v. Shrewsbury &amp; Hereford Ry. Co.</i> (1855) ... ..	380	<i>Rathborne v. Aldborough</i> (Lord) (Ir.) ... ..	357
— <i>v. Shropshire Union Co.</i> (1873) ... ..	364	<i>Rattenbury v. Fenton</i> (1833) ... ..	200
— <i>v. Smith</i> (Aus.) ... ..	128	<i>v. ———</i> (1834) ... ..	200
— <i>v. Solly</i> (1840) ... ..	396	<i>Rawlings v. Smith, Re Surfleet's Estate</i>	
— <i>v. Stamps &amp; Taxes Comrs.</i> (1846) ... ..	128	(1911) ... ..	158, 173
— <i>v. ———</i> (1849) ... ..	125, 126	<i>Rawlins' Estate, Re, Ex p. Kent, Re Metro-</i>	
— <i>v. Stamps Comrs.</i> (1844) ... ..	67, 68	<i>politan Railway Company, Tower Hill</i>	
— <i>v. Sussex JJ.</i> (1857) ... ..	387	<i>Extension Act</i> (1871) ... ..	661
— <i>v. Taafe</i> (Aus.) ... ..	383	<i>Rawlinson v. Oriel</i> (1688) ... ..	525
— <i>v. Tessier</i> (Can.) ... ..	139	<i>Rawson v. Samuel</i> (1841) ... ..	451
— <i>v. Tidderley</i> (1660) ... ..	385	<i>Rawstorne v. Wilkinson</i> (1815) ... ..	609
— <i>v. Toronto General Trusts Corpn.</i> (Can.) ... ..	99	<i>Ray v. Blair</i> (Can.) ... ..	434
— <i>v. Villers</i> (1810) ... ..		<i>v. Ray</i> (1815) ... ..	505
— <i>v. ———</i> (1823) ... ..		<i>Rayer, Re, Rayer v. Rayer</i> (1903) ... ..	41, 42, 105
— <i>v. W. de L.</i> (1364) ... ..	188	<i>Rayment v. Tuthill</i> (Aus.) ... ..	245
— <i>v. Whitney</i> (Inhabitants) (1835) ... ..	196	<i>Raynes v. Jones</i> (1841) ... ..	494
— <i>v. Wigand, Re Wigand</i> (1913) ... ..	597	<i>Read v. Freeman</i> (1860) ... ..	379
— <i>v. Williston</i> (Can.) ... ..	522	<i>Real, Re, McDowell v. Real</i> (N.Z.) ... ..	199
— <i>v. Woodward</i> (1699) ... ..		<i>Receiver-General of New Brunswick v. Hay-</i>	
— <i>v. (Doe d.) v. York</i> (Archbp.) (1849) ... ..		<i>ward</i> (Can.) ... ..	11
<i>Raban v. Plaistow</i> (1771) ... ..		<i>Reddaway (F.) &amp; Co., Ltd. v. Stevenson</i>	
<i>Rabbitts v. Woodward</i> (1869) ... ..		<i>(Robert) &amp; Brother, Ltd., &amp; Stevenson</i>	
<i>Rabkin &amp; Hoffman v. National Bank of South</i>		(1902) ... ..	351
<i>Africa, Ltd.</i> (S. Af.) ... ..	303	<i>Reddell v. Stowey</i> (1841) ... ..	545

	PAGE		PAGE
Reece, <i>Ex p.</i> (1851) ...	487	Ring v. Jarman (1872) ...	88
— v. Taylor (1852) ...	659, 660	Ripley v. Arthur & Co. (1902) ...	146
Reed v. Freeman (1860) ...	379	Risal Singh v. Balwant Singh (Ind.) ...	188
— v. Harrison (1778) ...	508	Risk Allah (Bey) v. Johnstone (1868) ...	451, 452
— v. Jackson (1801) ...	194	Risler v. Alberta Newspapers, Ltd. (Can.) ...	535
— v. Nutt (1890) ...	227, 233	Ritchie v. Malcolm (Ir.) ...	148, 154
— v. Thoyts (1840) ...	524	Rithet v. Beaven (Can.) ...	261
Rees v. De Bernardy (1896) ...	336	Rittinger v. McDougall (Can.) ...	632
Rees d. Chamberlain v. Lloyd (1811) ...	256	River Ribble Joint Committee v. Croston Urban District Council (1897) ...	147, 178
Reeves v. Capper (1838) ...	503	Rix, <i>Re</i> , Rix v. Rix (1912) ...	355
— v. Greene (Aus.) ...	261	Roach, <i>Re</i> (Can.) ...	115
— v. Konschur (Can.) ...	160	— v. McLachlan (Can.) ...	472
— v. Slater (1827) ...	421	— v. Trood (1876) ...	243
Reichel v. Magrath (1889) ...	189	Robarts v. Cuthbert (Scot.) ...	393
Reid v. Coleman (Can.) ...	365, 366	Roberts (Doe d.) v. Barry (1844) ...	558
— v. Creighton (Can.) ...	510	— v. Death (1881) ...	629, 641
— v. Standard Construction Co. (Can.) ...	292	— v. Gray (Can.) ...	526
Reliance Loan & Savings Co. v. Goldsmith (Can.) ...	440, 441	— v. Hartley (Can.) ...	566, 567, 569
Remmett v. Lawrence (1850) ...	473, 539	— v. Johnston (Aus.) ...	548
Remnant v. Hood (1860) ...	341	— v. Jones (1892) ...	631, 632
Rendell v. Grundy (1895) ...	676	— v. Madocks (1843) ...	167
Rennie v. Quebec Bank (Can.) ...	526	— v. — (1845) ...	167
— v. Young (1858) ...	368	— (Doe d.) v. Parry (1844) ...	558
Renwick v. Berryman (Can.) ...	166	— (Doe d.) v. Roberts (1819) ...	277
Repington, <i>Re</i> , Wodehouse v. Scobell (1904) ...	74, 75	— v. Security Co. (1897) ...	261
Retail Merchants' Assocn., Ltd., <i>Re</i> (Can.) ...	302	— v. Thomas (1794) ...	510
Reversionary Interest Society Ltd.'s Petition, <i>Re</i> , A.-G. v. Walker (1896) ...	19	— v. Toronto City (Can.) ...	622
Rewa Mahton v. Ram Kishen Singh (Ind.) ...	518	— v. Tunstall (1845) ...	393, 394
Reynolds, <i>Ex p.</i> , Jeffries v. Reynolds (1882) ...	654	Robertson, <i>Re</i> (Aus.) ...	125
— v. Ayres (Can.) ...	516	— v. Bannerman (Can.) ...	283
— v. Barford (1844) ...	529, 532	— v. Fortune (Can.) ...	508, 522
— v. Godlee (1859) ...	340, 341	— v. Keith (Aus.) ...	527
— v. McPhail (Can.) ...	447	— v. Meyers (Can.) ...	438
— v. Streeter (Can.) ...	457, 461	— v. Miller (Can.) ...	469
Reynolds' Vehicle & Harness Factory, Ltd., <i>Re</i> (S. Af.) ...	303	— v. Stallage (Lady) (1606) ...	237
Rhodes v. Hull (1857) ...	441, 463	Robin Hood Mills, Ltd. v. Harrison (Can.) ...	569
— v. Mostyn (Lord) (1853) ...	673	Robins, <i>Re</i> , Nelson v. Robins (1888) ...	80, 81
Ribble Joint Committee v. Croston Urban District Council (1897) ...	178	Robinson, <i>Re</i> (1837) ...	82
Rice v. Serjeant (1702) ...	506, 508	— v. Bergin (Can.) ...	473, 474
Richards, <i>Ex p.</i> , Bell v. Nicholls (Can.) ...	611	— v. Burbidge (1850) ...	654
— (Doe d.) v. Evans (1847) ...	124	— v. Canadian Northern Ry. Co. (Can.) ...	161
— v. Jenkins (1887) ...	307, 507, 508	— v. Cook (Can.) ...	375, 376
— v. Johnston (1859) ...	307, 312	— v. Duleep Singh (1878) ...	182
— v. Patterson (1841) ...	417, 418	— v. — (1879) ...	182
— v. Producers Rock & Gravel Co., Ltd. (Can.) ...	608	— v. Galland (1889) ...	416, 597
— v. Revitt (1877) ...	384	— v. Grange (Can.) ...	488, 536, 537
— v. Wood (Can.) ...	627, 628	— v. Peace (1838) ...	487, 651
Richardson v. Ardley (1869) ...	485	— v. Reynolds (Can.) ...	544
— v. Bantoft, <i>Re</i> Briggs (1914) ...	37, 38	— v. Robinson (1603) ...	218
— (Doe d.) v. Dickson (Can.) ...	576	— v. — (1877) ...	234
— v. Elmit (1876) ...	624, 626	— v. Searson (1843) ...	314
— v. Gray (Can.) ...	495	— v. Shirreff (Can.) ...	326
— v. Greaves, <i>Re</i> Clatton (1861) ...	643	— v. Tonge (1735) ...	564
— v. Inland Revenue Comrs. (Ir.) ...	15, 16	— v. Tyson (Aus.) ...	360
— v. Jackson (1737) ...	201	— v. Wood (1842) ...	660
— v. Trundle (1860) ...	529	— v. Wynne (Ir.) ...	584
— v. Webb (1884) ...	560	Robinson & Young, <i>Ex p.</i> , <i>Re</i> Hull & Hornsea Ry. Co. (1866) ...	578, 579
Richmond v. Lambton, <i>Re</i> Cadogan's (Earl) Settlements (1911) ...	41	Robinson's Case (1603) ...	218
Richter v. Laxton (1878) ...	617	Roblee v. Rankin (Can.) ...	645
Rickards v. Patterson (1841) ...	417, 418	Roblin v. Moodie (Can.) ...	544
Ricketts v. Ricketts (1891) ...	658	Robson v. Board (Aus.) ...	29
Rideal v. Fort (1856) ...	492, 545	— v. Smith (1895) ...	617, 646
Rideout v. Tibbits (Can.) ...	477	Rochdale Canal Co. v. King (1853) ...	373
Ridgway v. Davis (Ir.) ...	601	Rochester Corpn. v. Lee (1849) ...	209, 210
Ridout v. Fowler (1904) ...	672	— v. — (1852) ...	209, 210
Rigge v. Burbidge (1846) ...	183	Rock v. Layton (1700) ...	144, 145, 535
Right d. Jefferys v. Bucknell (1831) ...	243, 249, 255, 267, 282	Roden v. London Small Arms Co., Ltd. (1876) ...	367
Right d. Green v. Proctor (1768) ...	263	Rodenhiser v. Cragg (Can.) ...	500
		Rodger v. Comptoir D'Escompte de Paris (1871) ...	469
		Rodwell v. Phillips (1842) ...	482



## TABLE OF CASES.

lxxxi

	PAGE		PAGE
Roe v. Birch, <i>Re</i> Birch (1884) ...	354	Royal Trust Co. v. Baie de Chaleurs Ry. Co. (Can.) ...	376
— v. Davies (1878) ...	594	— v. British Columbia Finance Minister (Can.) ...	98
— d. Saul v. Dawson (1770) ...	587	Roycroft v. Uglum & Stephanson (Can.) ...	218
— v. Hammond (1877) ...	609	Royds v. Briscoe, <i>Re</i> Briscoe (1910) ...	32, 82
Roffey v. Bent (1867) ...	655	Royle v. Busby (1880) ...	615
Rogers, <i>Re</i> (1911) ...	606	Royston v. Eccleston (1623) ...	586
—, <i>Re</i> , <i>Ex p.</i> Official Receiver (1911) ...	606	Royston & Hitchin Railway Company's Act, 1846, <i>Re</i> , <i>Ex p.</i> Hardwicke (Earl) (1852) ...	374, 375
—, <i>Re</i> , <i>Ex p.</i> Sussex Sheriff (1911) ...	606	Rozal v. Lampen (1675) ...	152
—, <i>Re</i> , <i>Ex p.</i> Villars (1874) ...	511, 512, 514	Ruane v. West of Ireland Fisheries, Ltd. (Ir.) ...	429
— v. Burnham (Can.) ...	453	Rucker v. Pinney (1819) ...	601
— v. Hadley (1863) ...	230	Rudd v. Bowles (1912) ...	251
— v. Holloway (1843) ...	654	— v. Lascelles (1900) ...	308
— v. James (1816) ...	116	Ruel v. Consolidated European & North American Ry. Co. (Can.) ...	622, 623
— v. Kennay (1846) ...	503	Ruggles v. Beikie (Can.) ...	520
— v. Rogers (Aus.) ...	169, 170	Rukhmini v. Dhondo Mahadu (Ind.) ...	159
— v. Whiteley (1892) ...	627, 637, 638, 639	Rumsey v. Tufnell (1824) ...	607
— v. Wood (1831) ...	232	Runciman's Estate, <i>Re</i> (Can.) ...	353
Rogers Lumber Yards, Ltd. v. Stuart (Can.) ...	527	Runtz v. Longbourne (1892) ...	620
Rokkyer v. Australian Alliance Assurance Co. (N.Z.) ...	325, 326	Rush, <i>Re</i> (1870) ...	602
Rolfe v. Brown (1835) ...	446, 462	— v. Baker (1734) ...	552
Rolker v. Fuller (Can.) ...	456	— v. Clark (Can.) ...	403, 404
Rollason, <i>Re</i> , Rollason v. Rollason, Halse's Claim (1887) ...	504	Russel v. Bodvil (1660) ...	594
Rollefson Brothers Co. v. Olson & Mutual Life Assurance Co. (Can.) ...	521, 522	— v. Gillespie (Scot.) ...	210
Rolt v. White (1862) ...	375	Russell (Goodright d.) v. Noright (1738) ...	590
Roman Catholic Separate Schools, <i>Re</i> (Can.) ...	392, 393	Russell v. Rowe (Can.) ...	183
Rondeau, Le Grand & Co. v. Marks (1918) ...	492	— v. Waterford & Limerick Ry. Co. (Ir.) ...	211
Rook v. Wilmot (1590) ...	471	Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse (1923) ...	137, 138
Room v. Baird (Aus.) ...	161, 162	Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse (1925) ...	137, 138, 332, 333
Roose v. Jones (1844) ...	451	Ruston v. Hatfield (1819) ...	556
Roper v. Holland (1835) ...	313, 314	Rutherford, <i>Re</i> (Aus.) ...	117
Rose v. Tomblinson (1834) ...	580	— v. Nisbet's Trustees (Scot.) ...	187
Rosemount Gold Mining Syndicate, Ltd. (In Liquidation), <i>Re</i> (S. Af.) ...	303	Rutland (Duke) v. Bury, <i>Re</i> Marlay (1915) ...	30, 33
Rosenthal v. Rosenthal (Aus.) ...	117	Rutland's (Countess) Case (1605) ...	466, 580
Ross, <i>In the Goods of</i> (1877) ...	126	Ruttan v. Levisconte (Can.) ...	569, 577
—, <i>Re</i> (Can.) ...	525, 526, 615, 616	Ruttle v. Rowe (Can.) ...	460, 564
— v. Cameron (Can.) ...	437	Ryall v. Nelson, Sperry & White, Garnishees (Can.) ...	628
— v. Grange (Can.) ...	471	Ryan v. Grant (Aus.) ...	621, 622
— v. Hamilton (Can.) ...	537	— v. James (Can.) ...	461
— v. McMartin (Can.) ...	455	Rybot v. Peckham (1778) ...	474, 519
— v. Malone (Can.) ...	438	Ryerson's Estate, <i>Re</i> (Can.) ...	335
— v. R. (Can.) ...	110, 115	Ryland v. Alnutt (Can.) ...	500
— v. Ross' Trustees (Scot.) ...	40	Rymer v. De Rosaz, <i>Re</i> De Rosaz (1886) ...	77
— v. Shearer (1821) ...	663	Rymill v. Wandsworth District Board (1883) ...	640
— v. Sutherland (Can.) ...	313, 314		
— v. Webster (Can.) ...	581		
Rosset v. Hartley (1835) ...	178		
Rossiter v. Toronto Ry. Co. (Can.) ...	419		
Rothschild v. Fisher (1920) ...	436		
Roundy v. Salinas (Can.) ...	512		
Rouse v. Jones (1844) ...	451		
Rowbotham v. Wilson (1857) ...	286		
— v. — (1860) ...	286		
Rowe v. Ames (1840) ...	513		
— v. Bant (1751) ...	566		
— v. Jarvis (Can.) ...	420, 434, 435		
— v. Sinclair (Can.) ...	262, 263		
— v. Tapp (1821) ...	555, 556		
Rowland v. Veale (1774) ...	582		
Rowles v. Senior (1846) ...	551		
Rowley v. Ridley (1784) ...	592		
Rowntree v. Jacob (1809) ...	265		
Roy v. Fortin (Can.) ...	494		
Roy Rash Behary Lall v. Wajan (Ind.) ...	548		
Royal Bank of Canada v. Canada National Fire Insurance Co. (Can.) ...	488		
Royal Bank v. Hodgson (Can.) ...	623		
Royal British Bank v. Turquand (1856) ...	297		
Royal Insurance Co.'s Claim, <i>Re</i> Norwich Equitable Fire Assurance Society (1887) ...	334, 335		
		S.	
		Sabeans v. Edwards (Can.) ...	381
		St. Albans (Duke), <i>Re</i> , Loder v. St. Albans (Duke) (1900) ...	45, 48
		St. Boniface v. Kelly, Winnipeg (City) Garnishees (Can.) ...	636
		St. Charles v. Andrea (Can.) ...	630
		St. Christophe Corp'n. v. Arthabaska Corp'n. (Can.) ...	160
		St. Cyr v. Spencer Grain Co., Ltd. (Can.) ...	364, 365
		St. John's Corp'n. v. Smith (Can.) ...	269
		St. Mary, Islington Vestry v. Hornsey Urban Council (1900) ...	296, 376
		St. Marylebone Vestry v. London County Sheriff (1900) ...	524
		St. Michael's College v. Merrick (Can.) ...	630
		St. Paul's (Minor Canons) v. Crickett (1795) ...	210
		— v. — (1810) ...	210
		— v. — (1817) ...	210



	PAGE		
St. Paul's School, <i>Re</i> , A.-G. v. Mercers' Co. (1870)	342	Scarlett v. Hanson (1883)	...
Salaman, <i>Ex p.</i> , <i>Re</i> Evans (1916)	307, 308	Scarth, <i>Re</i> , <i>Ex p.</i> Scarth (1874)	... 584
— v. Donovan (Ir.)	... 641	— v. Scarth (1874)	... 584
Salisbury (Marquis) v. Ray (1860)	... 606	Scatcherd v. Equitable Fire Insurance Co. (Can.)	...
Salmon v. Watson (1819)	... 331	Schacfer v. Schrieber (Aus.)	...
— v. Webb & Franklin (1852)	... 246	Scheibel v. Fairbain (1799)	... 459, 460
Saloucci v. Woodmas (1784)	... 155	Schlapilis v. Misewitz (S. Af.)	... 229
Salt v. Cooper (1880)	... 671	Schlomann v. Dowker (Can.)	... 341
— v. Locker, <i>Re</i> Parker-Jervis (1898)	... 6, 41	Schlosser v. Colonial Investment & Loan Co. (Aus.)	... 570, 571
Salter v. Kidley (1688)	... 254	Schmit v. Erickson, <i>Re</i> Execution Act (Can.)	569
Saltoun (Lord) v. Advocate-General (1860)	83, 89, 91, 96	Scholefield v. Lockwood (No. 2) (1863)	... 278
Samis v. Ireland (Can.)	... 577	Schubz v. Dun (Scot.)	... 217
Sammon, <i>Re</i> (1838)	... 72, 74	Schumann v. Weatherhead (1801)	... 175
Sampson, <i>Re</i> , Sampson v. Sampson (1896)	625, 640	Schwepps v. Biscombe (W.) & Sons (1904)	453
— v. Seaton Ry. Co. (1874)	... 640	Schwepps, Ltd. v. Gibbens (1904)	... 453
Samuel v. Duke (1838)	... 466, 507, 526, 527	Scorell v. Boxall (1827)	... 481
— v. Swaythling, <i>Re</i> Swaythling (Lord) (1912)	... 21	Scott, <i>In the Goods of</i> (1900)	... 22
Sanders v. Hamilton (1907)	... 213, 217	—, <i>Re</i> (1900)	... 8, 17, 22, 24
— v. Kiddell (1835)	... 80	—, <i>Re</i> (1901)	... 22
— v. Powell (1664)	... 464, 552	—, <i>Re</i> , Scott v. Scott (1915)	... 130
Sanderson v. Baker & Martin (1772)	... 544	—, <i>Re</i> , — v. — (1916)	21, 22, 27, 28, 79
— v. Nestor (1826)	... 150	— v. Bennett (1871)	... 150
Sandford v. Porter & Waine (Ir.)	... 550	— v. — (Ir.)	... 182, 183
Sandon v. Jervis (1859)	... 582	— v. Burgess & Bathurst School Trustees (Can.)	... 531, 570
Sandwich Corp'n. v. R. (1847)	... 385, 386	— v. Chase Creek Lumber Co., Ltd. (Can.)	636
Sandys v. Hodgson (1839)	... 395	— v. Hastings (Lord) (1858)	... 656, 657
Sanger v. Sanger (1871)	... 649	— v. Lowe (1902)	... 233
Sansom v. Sansom (1879)	... 594	— v. McCaffrey (Can.)	...
Santa Clara (Owners) v. London & North-Western Ry. Co. (1886)	... 449	— v. Macdonald (Can.)	...
Sanyasi Baritya v. Artaswaro (Ind.)	... 168	— v. Macdonald, etc. (Scot.)	... 210
Sarat Chunder Dey v. Gopal Chunder Lala (1892)	... 300, n., 301, 337	— v. Morris, <i>Re</i> Scull (1917)	... 17, 27, 43
Sargents' Trusts, <i>Re</i> (Ir.)	... 481	— v. Peak Hill Goldfields, Ltd. (1908)	... 644
Sarkies v. Prosonomoyee Dossee (Ind.)	... 316	— v. Reynell (1856)	... 171
Sarson, <i>Re</i> , Public Trustee v. Sarson (1925)	37, 38, 79	— v. Scholey (1807)	... 483
Saskatchewan & Western Elevator Co. v. Bank of Hamilton (Can.)	... 320	— v. Scott, <i>Re</i> Scott (1915)	... 130
Saskatchewan Elevator Co. v. Arend (Can.)	493, 577	— v. —, <i>Re</i> — (1916)	21, 22, 27, 28, 79
Satish Chunder Rai Chowdhuri v. Thomas (Ind.)	... 545	— v. Shearman (1775)	... 153, 154
Sato v. Hubbard (Can.)	... 628, 637	— v. Spashett (1851)	... 661
Satyabadi Behara v. Harabati (Ind.)	... 213	Scottish & Universal Finance Bank, Ltd., <i>Re</i> , Downes v. Ship (1868)	... 348
Saul (Roe d.) v. Dawson (1770)	... 587	Scottish & Universal Finance Bank, Ltd., <i>Re</i> , Ship's Case (1865)	... 348
Saunders, <i>Re</i> , Saunders v. Gore (1898)	... 105	Scragg v. London City (Can.)	... 166
— v. Bridges (1819)	... 536	Scripture v. Gordon (Can.)	... 457
— v. Merryweather (1865)	... 249	Scriven v. Prince (1591)	... 585, 587
— v. Powell (1664)	... 464, 552	Scull, <i>Re</i> , Scott v. Morris (1917)	... 17, 27, 43
— v. Slack (1864)	... 421	Scully v. Madigan (Can.)	... 627
Saunderson v. Baker & Martin (1772)	... 544	Seabrook v. Young (Can.)	... 231
Savage v. Bentley (1904)	... 587	Seacombe, The, The Devonshire (1912)	... 422
— v. Foster (1723)	... 346, 373	Seagram v. Tuck (1881)	... 672, 673
— v. Jarvis (Can.)	... 581	Seal v. Hudson (1847)	... 615
Savarkar, <i>Ex p.</i> , R. v. Brixton Prison (Governor) (1910)	... 172, 173	Sealy, <i>Re</i> , Tomkins v. Tucker (1901)	... 76
Savile v. Jackson (1824)	... 201, 202	Seaman v. Seaman (Can.)	... 626, 630
— v. Mexborough, <i>Re</i> Mexborough (1902)	33	Searle v. Choat (1884)	... 445, 446, 674
Sawle v. Paynter (1822)	... 519, 551	Sears v. Meyers (Can.)	... 671
Sawyer Massey Co., Ltd. v. Ethier (Can.)	... 577	Searson v. Robinson (1843)	... 314
Saxon v. Castle (1837)	... 465	Seaton, <i>Ex p.</i> , <i>Re</i> Deerhurst (1891)	... 395, 396
Say & Seal's (Lord) Case (1711)	... 152	— v. Twyford (1870)	... 453
Say & Seale (Lord) v. Lloyd (1712)	... 152	Seay v. Sommerville Hardware Co., Ltd. (Can.)	... 670
Sayers v. Collyer (1884)	... 351	Seddon v. Tutop (1795)	... 211
— v. Findlay (Can.)	546, 547	— v. — (1796)	... 211
Sayre's Case (1617)	... 514	Sedgwick, <i>Re</i> , <i>Ex p.</i> McMurdo (1888)	... 655
Sayward v. Dunsmuir (Can.)	...	—, <i>Re</i> , <i>Ex p.</i> Sedgwick (1888)	... 655
Scarborough (Earl) v. Doe d Savile (1836)	249	Sedman v. Walker (1847)	... 548
Scarf v. Jardine (1882)	... 224, 355	Seelye v. Lancaster Mill Co. (Can.)	... 318
Scarfe v. Hallifax (1840)	... 542	Seery v. Temple (Can.)	... 498, 499
		Sehl v. Humphreys (Can.)	... 606
		Sellar v. Bright (Charles) & Co., Ltd. (1904)	651
		Selous v. Croydon Rural Sanitary Authority (1885)	... 593, 595, 597
		Selsey v. Rhoades (1827)	... 339, 353

## TABLE OF CASES.

. lxxxiii

	PAGE		PAGE
Semayne v. Gresham (1604) ...	477	Sheo Pershad Singh v. Saheb Lal (Ind.) ...	461
Semayne's Case (1604) ...	477, 478	Sheosagar Singh v. Sitaram Singh (Ind.) ...	160
Sergeson v. Sealey (1742) ...	240	Shephard, <i>Re</i> , Atkins v. Shephard (1889) ...	664, 666
Serjeant v. Brown (1843) ...	442, 443	Shepherd v. Beetham (1877) ...	127
Serrao v. Noel (1885) ...	212, 213	Shepherd v. Reddie (Scot.) ...	325, 345
Sessions v. Strachan (Can.) ...	642	——— v. Wheble (1838) ...	546
Seton v. Lafone (1887) ...	137, 299, 402	Sheppard v. Prance, <i>Re</i> Trinder (1911) ...	76
Setter v. Registrar (Can.) ...	204, 205	Sher Singh v. Daya Ram (Ind.) ...	384
Seva Ram v. Ali Bakhsh (Ind.) ...	292, 293	Shere, <i>Re</i> (Can.) ...	476
Sewell v. Burpe (Can.) ...	580	Sheridan v. Pingree (Can.) ...	580
——— v. Dray (Can.) ...	580	Sherwin v. Swindall (1844) ...	478
——— v. Thompson (Can.) ...	437, 580	Sherwood v. Clark (1846) ...	557, 558
Seydell v. Boltman (S. Af.) ...	424, 425	Shib Charan Lal v. Raghu Nath (Ind.) ...	173
Seyman v. Gresham (1604) ...	477	Shibu Rout v. Baban Rout (Ind.) ...	232
Seymour v. Brecon Corp'n. (1860) ...	621	Shierman v. Harris & Craske (Can.) ...	640
Shadgett v. Clipson (1807) ...	420	Ship's Case, <i>Re</i> Scottish & Universal Finance	
Shadwell v. Hutchinson (1831) ...	215	Bank, Ltd. (1865) ...	348
Shadwell Waterworks Co., <i>Re</i> , <i>Ex p.</i> Dibbens		Shippey v. Grey (1880) ...	644
(1869) ...	375	Shirley v. Ferrers (Earl) (1842) ...	53
Shaftesbury (Earl) v. Marlborough (Duke)		——— v. Shirley (Ir.) ...	280, 281
(1835) ...	81	——— v. Watts (1744) ...	483
Shah Callander, <i>The</i> , <i>Re</i> (Ind.) ...	490	——— v. Wright (1702) ...	582
Shair Mull v. Singaravelu (Ind.) ...	631	Shirreff v. Muirhead (Can.) ...	549
Shand v. Riely (N.Z.) ...	610	——— v. Vye (Can.) ...	523
Shankar Baksh v. Daya Shankar (Ind.) ...	144	Shoe Machinery Co., Ltd. v. Cutlan (1896) ...	179
Shanly v. Fitzrandolph (Can.) ...	314	Shoppee v. Nathan & Co. (1892) ...	616
——— v. Moor (Can.) ...	633	Shorey v. Baker, City of London Insurance	
Shannon v. Gore District Mutual Fire Insur-		Co., Garnishees (Can.) ...	635, 636
ance Co. (Can.) ...	335, 336	Shorland v. Govett (1826) ...	547
——— v. Hastings Mutual Insurance Co.		Showell & Co. v. Bouron (1883) ...	453
(Can.) ...	392	Shrewsbury (Earl) v. Trappes (1860) ...	447
——— v. Smith (Can.) ...	252	Shridhar Balkrishna v. Babaji Mula (Ind.) ...	230
Shapland, <i>Re</i> , <i>Ex p.</i> Hunt (1874) ...	606	Shropshire Union Railways & Canal Co. v. R.	
Sharman, <i>Re</i> , Wright v. Sharman (1901) ...	6, 33	(1875) ...	364
Sharpe v. Fortune (Can.) ...	523	Shuldham v. Boles (Ir.) ...	430
——— v. Hodgson, <i>Re</i> Pimm (1904) ...	37, 48	Shunguny Menon v. Kalampully Valia Nair	
Shattock v. Carden (1851) ...	532, 533	(Ind.) ...	
Shaw, <i>Ex p.</i> , <i>Re</i> Henderson (1884) ...	506, 507	Shuter v. Leonard (Can.) ...	540, 541
———, <i>Re</i> , Tucket v. Shaw (1895) ...	40	Shuttleworth v. Lonsdale (Earl) (1788) ...	592
——— v. Dennison (Can.) ...	487	Shyam Chand Koondoo v. Land Mortgage	
——— v. Hudson (1879) ...	658, 660	Bank of India (Ind.) ...	481
——— v. Jones-Ford, <i>Re</i> Stringer's Estate		Sieveking v. Behrens & Von Melle (1837) ...	200
(1877) ...	330	Simm v. Anglo-American Telegraph Co.	
——— v. Kirby (1888) ...	472, 510, 535	(1879) ...	136, 281, 298, 305
——— v. Maxwell (1795) ...	433	Simmonds v. Kinnaird (Lord) (1799) ...	599
——— v. Murtagh (Ir.) ...	574	Simmons v. Johnson (1818) ...	463
——— v. Neale (1855) ...	568	——— v. King (1845) ...	329
——— v. ——— (1858) ...	568	——— v. Storer (1880) ...	647
——— v. Shaw (Ir.) ...	624	Simms v. Hodder (Nfld.) ...	490, 513
——— v. Simpson (1697) ...	537, 538	——— v. Registrar of Probates (Aus.) ...	84, 85, 106
——— v. Tims (Can.) ...	563	Simon v. Sinclair (Can.) ...	169
——— v. Turbett (Ir.) ...	82	Simpson, <i>Re</i> , <i>Ex p.</i> Morgan (1876) ...	281
——— v. Western Canada Motor Car Co. (Can.) ...	661	——— v. Accidental Death Insurance Co.	
——— v. Wright (1796) ...	602, 605	(1857) ...	346, 347
Shaw & Mackinnon v. R. (Aus.) ...	117, 125	——— v. Chase (Can.) ...	623
Shaw's Case (1823) ...	195	——— v. Dominion Bank (Can.) ...	306
Shea v. Burchell (Can.) ...	587, 588	——— v. Fogo (1860) ...	517, 518
Shears & Alder, <i>Re</i> (Aus.) ...	527, 566	(1863) ...	517, 518
Sheather v. Holt (1722) ...	529	——— v. Heath (1839) ...	580, 581
Shedden v. A.-G. (1860) ...	139, 194	Simpson's Settlement, <i>Re</i> (N.Z.) ...	13, 44
——— v. Patrick (1854) ...	230	Sims, <i>Ex p.</i> , <i>Re</i> Grubb (1877) ...	611
Sheehy v. Muskerry (Lord) (1839) ...	231	——— v. Henderson (1844) ...	174, 175
Sheet Harbour Overseers v. Kennedy (Can.) ...	382	Simson v. Ingham (1823) ...	392
Sheets v. Tait (Can.) ...	268	Sinclair v. Daniell (N.Z.) ...	277
Sheffield (Earl) v. London Joint Stock Bank		Sinnott v. Bowden (1912) ...	645
(1888) ...	366	Sintzenick v. Lucas (1793) ...	165, 181
Sheffield Permanent Building Society, <i>Re</i> ,		Sissiboo Pulp Co. v. Carrier Lane Co (Can.) ...	569, 570
<i>Ex p.</i> Watson (1888) ...	296		
Sheik Budan v. Rámchandra Bhun Jgaya		Sitwell, <i>Ex p.</i> , <i>Re</i> Drury Lowe's Marriage	
(Ind.) ...	580	Settlement (1888) ...	111
Shelley v. New South Wales Deaf, Dumb &		Skedwin v. Lampen (1875) ...	152
Blind Institution (Aus.) ...	40	Skeffington v. Budd (1842) ...	353, 354
——— v. Wright (1737) ...	254	——— v. Whitehurst (1838) ...	353, 354
Shelton (Doe d.) v. Shelton (1835) ...	245, 253	Skiggs, <i>Re</i> , Marriage v. Skiggs (1859) ...	519
Sheo Mangal v. Musammatt Hulsa (Ind.) ...	183	Skipper v. Wade, <i>Re</i> Turnbull (1905) ...	48, 79

	PAGE		PAGE
Skipworth v. Green (1724) ...	263	Smith v. Nova Scotia (Province of), Provincial Treasurer (Can.) ...	101
Skottowe v. Young (1871) ...	68	— v. Osborne (1857) ...	257, 285
Skyring v. Greenwood (1825) ...	338, 339	— v. Otago Presbyterian Church Board of Trustees (N.Z.) ...	393
Slade, <i>Re</i> , Slade v. Hulme (1881) ...	594, 600	— v. Pawson (1855) ...	386, 387
— v. Hawley (1845) ...	534	— v. Pennell & Daley (Nfld.) ...	629
Slaght v. West (Can.) ...	549	— v. Prosser (1907) ...	400
Slater v. Hames (1841) ...	607	— v. Scott & Crandall (Can.) ...	366, 367
— v. Thomas (1834) ...	580	— (Doe d.) v. Shuter (Can.) ...	576
Slaterry v. Cooper (1900) ...	670	— v. Smith (1874) ...	418, 419
Slauenwhite v. Archibald (Can.) ...	498	— v. — (Can.) ...	433, 434, 512, 568
Sleeth v. Hurlbert (Can.) ...	184	— v. Smythe (Aus.) ...	269
Slemin v. Slemin (Can.) ...	635, 668	— v. South-Eastern Ry. Co. (1895) ...	453
Sligh v. Campbell (Can.) ...	580	— v. Spencer (Can.) ...	434
Slinger v. Davis (Can.) ...	645	— v. Strange (Can.) ...	223
Sloan, <i>Ex p.</i> , Molsons Bank v. McMeekin (Can.) ...	531, 532, 533	— v. Sydney (1870) ...	458
— v. Creasor (Can.) ...	208	— v. Turnbull (Can.) ...	480
Slowey v. Lodder (N.Z.) ...	396, 397, 398	— v. Van Buren (Can.) ...	625
Sly, <i>Re</i> (Aus.) ...	610	— v. Wallbridge (Can.) ...	234
— v. Campbell (Aus.) ...	221	— v. Whitlock (1886) ...	649
Slye's Case (1619) ...	555	— v. Youde (1860) ...	654
Smalcomb v. Buckingham (1697) ...	472, 474, 542	Smith's Trusts, <i>Re</i> (1864) ...	99
Smallbrooke v. Donnegal (Lord) (1795) ...	592, 597	Smither's Estate, <i>Re</i> (Can.) ...	306
Smallcomb v. Cross & Buckingham (1697) ...	472	Smyth, <i>Ex p.</i> , <i>Re</i> Cottrell (Ir.) ...	487
Smallcombe v. Olivier (1844) ...	533	—, <i>Re</i> , Edwards v. Smyth (1918) ...	28, 35
Smallcombe's Case, <i>Re</i> Agriculturists' Cattle Insurance Co. (1867) ...	333	—, <i>Re</i> , Leach v. Leach (1898) ...	122
Smallcorn v. London Sheriff (1697) ...	472	Snape, <i>Re</i> , Elam v. Phillips (1915) ...	35
Smalley v. Blackburn Ry. Co. (1857) ...	586	Sneary v. Abdy (1876) ...	616
Smart v. Hutton (1833) ...	546	Snoden v. Ramsey (1856) ...	519
— v. Miller (Can.) ...	620, 621, 630	Snow v. Bolton (1881) ...	594, 595, 599
Smethurst v. Hastings (1885) ...	336	Snowball v. Dixon (1841) ...	454
Smith, <i>Ex p.</i> , <i>Re</i> A Debtor (1902) ...	437, 443, 507, 508	Soames v. Barnardiston (1676) ...	191
—, <i>Ex p.</i> , <i>Re</i> Jackson (1814) ...	362	Société Générale du Commerce et De L'Industrie En France v. Farina (Johann Maria) & Co. (1904) ...	675
—, <i>Re</i> (Can.) ...	100, 107	Solicitor-General v. Law Reversionary Interest Society (1873) ...	83, 87, 90, 102, 106, 107, 108, 109, 111
—, <i>Re</i> , <i>Ex p.</i> Brown (1888) ...	417, 617	Solicitors, <i>Re</i> (Can.) ...	613
—, <i>Re</i> , Windle v. Williams (1858) ...	641	Soules v. Donovan (Can.) ...	470
— v. Allahabad Bank, Ltd. (Ind.) ...	630	South, <i>Re</i> (1874) ...	560
— v. Anderson (1828) ...	79	South American & Mexican Co., <i>Re</i> , <i>Ex p.</i> Bank of England (1895) ...	145, 147
— v. Archibald (Can.) ...	393	South British Fire & Marine Insurance Co. v. Ackhoonzada (Aus.) ...	228
— v. Armstrong (Can.) ...	415	South Eastern Ry. Co. v. Warton (1861) ...	280
— v. Baker (1873) ...	388	South Western Loan Co. v. Robertson (1881) ...	653
— v. Bellows (Can.) ...	535	Southampton Sheriff, <i>Ex p.</i> , <i>Re</i> Crook (1894) ...	471, 513
— v. Blyth (1891) ...	223	Southgate v. Montgomerie (Scot.) ...	159
— v. Bouchier (1734) ...	466	Southouse v. Newen (1730) ...	558
— v. Broadbent & Co. (1892) ...	614	Sowell v. Champion (1837) ...	677
— v. Cleghorn (Can.) ...	198	Spafford (Doe d.) v. Breakenridge (Can.) ...	269
— v. Cluxton (Can.) ...	394	— v. Brown (Can.) ...	516
— v. Cobourg & Peterborough Ry. Co. (Can.) ...	503	Spain v. Lejoindre, <i>Re</i> Leveridge (1901) ...	44, 48
— v. Colles (Aus.) ...	514	Spark v. Richards (1617) ...	528, 540, 541
— v. Cowell (1880) ...	670, 671	Sparks v. Younge (Ir.) ...	625
— v. Critchfield (1885) ...	554	Sparling v. Savage (Can.) ...	319
— v. Darlow (1884) ...	613, 614	Sparrow v. Bristol (Earl) (1813) ...	491
— v. Dickenson (1843) ...	324, 325	— v. Cornell (Aus.) ...	549, 550
— v. — (1844) ...	324, 325	— v. Mattersock (1633) ...	441
— v. Dorset (Earl) (1651) ...	589	Sparrowe v. Reed (1848) ...	329
— v. Effingham (Earl) (1844) ...	572, 573	Speake v. Richards (1617) ...	528, 540, 541
— v. — (1848) ...	572, 573	Spence v. Coleman (1901) ...	621, 622, 623
— v. Great Western Ry. Co. (Can.) ...	215	Spencer v. Ancoats Vale Rubber Co., Ltd. (1888) ...	594
— v. Haughn (Can.) ...	327	— v. Conley (Can.) ...	641
— v. Hughes (1871) ...	328	— v. Turner, <i>Re</i> Hudson (1911) ...	7, 10, 34
— v. Hurst (1845) ...	569	— v. Williams (1871) ...	185, 188, 189
— v. — (1852) ...	569	Spencer & Spencer v. Williams, <i>In the Goods</i> of Elmsley (1871) ...	185
— v. Jackson (1864) ...	437, 506	Spencer Cooper, <i>Re</i> , Poë v. Spencer Cooper (1908) ...	6, 33, 38
— v. Johnson (1835) ...	530		
— v. Kay (1859) ...	299		
— v. Keal (1882) ...	494, 548, 549, 551		
— v. Low (1739) ...	273		
— v. McCallum (Can.) ...	266		
— v. MacGillivray (Can.) ...	149		
— v. Mee (1844) ...	428		
— v. Merchants Bank of Canada (Can.) ...	200		
— v. Nichol (Can.) ...	389		



## TABLE OF CASES.

lxxxv

	PAGE		PAGE
Spencer's Case (1583) ...	573	Steer Brothers v. Graham (Nfld.) ...	634
Sperry & White, Garnishees, Ryall v. Nelson (Can.) ...	628	Steer's Estate, <i>Re</i> (Nfld.) ...	344, 345
Spiers v. R. (Can.) ...	229	Stent v. Wickens, Warburton v. Hill (1854) ...	656, 657, 658
Spokes v. Banbury Board of Health (1865) ...	593, 600	Stephens v. Toback (Can.) ...	492
Sprag v. Richardson (1700) ...	540	Stephens & Co. v. Allen (1921) ...	183
Springer v. Sommerville (1729) ...	427	Stern v. R. (1896) ...	121
Sprot's Trustees v. Lord Advocate (Scot.) ...	43	Stevens v. Hince (1914) ...	483
Sprunt v. Pugh (1878) ...	595	— (Doe d.) v. Lord (1839) ...	464
Squair v. Fortune (Can.) ...	503	— v. Mid-Hants Ry. Co. (1873) ...	563
Squire v. Huetson (1341) ...	504, 520	— v. Phelps (1875) ...	626
Sreenath Ghose v. Sahib Ram Roy (Ind.) ...	422	— v. Sheldon (Can.) ...	462
Srihari Banerjee v. Khitish Chandra Rai (Ind.) ...	173, 174	Stevenson v. Dickenson (1852) ...	495
Srinivasa Moorthy v. Venkata Varada Aiyangar (Ind.) ...	344	— v. Douglas (Can.) ...	519
Stacey v. Spratley (1858) ...	188	— v. Franklin (Can.) ...	438
— v. — (1859) ...	188	— v. Sanders (Can.) ...	358
Stacey Lumber Co. v. Cazier (Can.) ...	627	— v. Sexsmith (Can.) ...	453
Stacpoole v. Walsh (Ir.) ...	588	Steward v. Lombe (1820) ...	497
Stafford v. Bateman (1601) ...	480	— v. Williamson (1829) ...	452
— v. Clark (1824) ...	163, 164, 235	Stewart v. Brundage (Can.) ...	576
Stamford v. Davies (1680) ...	582	— v. Cowan (Can.) ...	547, 552
Stamford (Earl) v. Hobart (1665) ...	566	— v. Hazen (Can.) ...	436
Stamford & Warrington (Earl), <i>Re</i> , Payne v. Grey (1910) ...	39	— (Doe d.) v. M'Donald (Can.) ...	242
Stamp Duties Comr. v. Byrnes (Aus.) ...	122, 123	— v. McPhee (Can.) ...	311
— v. Lightoller (Aus.) ...	106	— v. North (Scot.) ...	352
— v. Salting (Aus.) ...	120	— v. Stewart (Scot.) ...	211, 212
— v. Stephen (Aus.) ...	117	— v. Todd (1846) ...	203
Stamper v. Hodson (1724) ...	435	Stewart & Matthews Co. v. Ross (Can.) ...	636
Stamps Comr. v. Hope (Aus.) ...	120, 121	Stewart's Trustees v. Lord Advocate (Scot.) ...	65
— v. Peat (N.Z.) ...	124, 125, 128	Stikeman v. Fummerton (Can.) ...	522
Stamps Comrs., <i>Ex p.</i> , <i>Re</i> Fairfax's Settlement (Aus.) ...	117, 118	Stimson v. Farnham (1871) ...	536, 537
Stamps Minister v. Townend (N.Z.) ...	12, 13	Stirling v. Ker (Scot.) ...	332
Stamton v. Suliard (1599) ...	613	— v. Norton (1915) ...	428
Stancomb v. Trowbridge Urban Council (1910) ...	591, 593	Stirling & Co. v. North (1913) ...	381, 382
Standard Bank v. Coetzee (S. Af.) ...	399	Stockdale v. Hansard (1840) ...	540
— v. Du Plooy (S. Af.) ...	399	Stoddart, <i>Re</i> , Bird v. Grainger (1916) ...	37
— v. Jacobsohn's Trustee (S. Af.) ...	420	Stokes, <i>Re</i> , Stokes v. Ducroz (1890) ...	57, 58, 65
Standard Bank of S.A. v. Kaplan (S. Af.) ...	401	Stone, <i>Re</i> , Acworth v. Stone, <i>Re</i> Power (1901) ...	30
Standard Property Investment Co., Ltd. v. Scott (Scot.) ...	429	— v. Godfrey (1854) ...	394
Standish v. Ross (1849) ...	520, 548	Stonehouse v. Ewen (1730) ...	558
Stanger Leathes v. Stanger Leathes (1882) ...	667	Storey v. Gallagher (Can.) ...	299
Stanhope v. Eavery (1836) ...	540	Stow v. Davenport (1833) ...	51, 79
— v. Firman (1836) ...	540	Stowell v. Billings (Ind.) ...	149
Stanley v. Bond (1844) ...	654	Strachan v. Blackbeard & Son (S. Af.) ...	303
— v. Stanley (1878) ...	273, 649	Strange v. Fooks (1863) ...	336
Stansfeld v. Hellawell (1852) ...	376, 377	Stratford (Doe d.) v. Shail (1844) ...	590
Stanstead Corpn. v. Beach (Can.) ...	159	— v. Twynam (1822) ...	512
Stanton v. Lambert, <i>Re</i> Lambert's Estate (1888) ...	127	Strathmore v. Vane, <i>Re</i> Bowes (1907) ...	75
Stanton v. Styles (1850) ...	214, 215	Street v. Roberts (1658) ...	559, 560, 561
— v. Suliard (1599) ...	613	Stretton v. Great Western & Brentford Ry. Co. (1870) ...	176, 177
Staple of England (Mayor, etc. of Merchants of) v. Bank of England (Governor & Co.) (1887) ...	401, 402	Stribley v. Hawkie (1744) ...	585
Star Kidney Pad Co. v. Greenwood (Can.) ...	383	Stringer's Estate, <i>Re</i> , Shaw v. Jones-Ford (1877) ...	330
Starkey v. Bank of England (1903) ...	137	Strode (Doe d.) v. Seaton (1835) ...	283
Starr Co. of Canada, Ltd. v. Merrill (Can.) ...	631, 660	Stronge v. Hawkes (1853) ...	374
Staunton v. McLean (Can.) ...	461	Stroud v. Gerrard (Lady) (1707) ...	404
Steadman v. Duhamel (1845) ...	281	— v. Stroud (1844) ...	346
Stebbins, Spinning & Walker v. Williams & Sears (Can.) ...	521, 624	Stroud's Will, <i>Re</i> , Bell v. Stroud (Aus.) ...	122
Steckle v. Byers (Can.) ...	659	Stroughill v. Buck (1850) ...	252, 253, 268
Steed v. Layner (1725) ...	557	Strowbridg & Archer's Case (1613) ...	438
Steele v. Mart (1825) ...	251, 252	Strowd v. Keckwith (1655) ...	440
— v. Pioneer Trading Corpn. (Can.) ...	675	Strutt v. Bovingdon (1803) ...	185, 187
Steer, <i>Re</i> (1858) ...	62	Stuart, <i>Re</i> (Can.) ...	587
		— v. Cockerell (1869) ...	661
		— v. Grough (Can.) ...	669
		— v. McKim (Can.) ...	626
		— v. Mott (Can.) ...	199
		— v. Whitaker (1825) ...	537
		Stubbs v. Lainson (1836) ...	538
		Stull v. McLeod (Can.) ...	530
		Stumore v. Campbell & Co. (1892) ...	620, 621, 641
		Sturgeon v. Henderson (Can.) ...	482, 523, 611
		— v. Wingfield (1846) ...	282



	PAGE		PAGE
Sturges v. Warwick (Countess) (1913)	674, 675	Syms' Case (1608)	188
Sturla v. Freccia (1879)	449, 450	Syud Tuffazal Hossein Khan v. Raghunath Prasad (Ind.)	628
Sturrock v. Thoms' Executors (Scot.)	345		
Style v. Martin (1669)... ..	185, 229		
Suarez, Re, Suarez v. Suarez (1918)	595, 598		
Subba Chariar v. Muthuveeran Pillai (Ind.)	163	T.	
Subbaji Rau v. Srinivasa Rau & Pulliah (Ind.)... ..	577	Taber, Re, Arnold v. Kayess (1882)	77
Subramania Ayyar v. Rajeswara Doral (Raja) (Ind.)	...	Tadman v. Henman (1893)	282
Subraya Chetti v. Rathnavelu Chetti (Ind.)	211	Taggart (Doe d.) v. Butcher (1815)	500
Succession Duty Act, Re, Re Lee Cheong (Can.)	101	Tailer v. Baker (1677)...	528
Succession Duty Act & Walker, Re (Can.)	100	Tait v. Stronach (Can.)	616
Sudeley (Lord) v. A.-G. (1897)	122	Tancred v. Allgood (1859)	501, 502
Sugrue v. Hovenden (Ir.)	510	— v. Christy (1843)	186
Suliard v. Stamp (1599)	613	Tapp v. Jones (1875)	624, 625, 640
Sullivan v. Giltrap (Ir.)	627	Tarn, Re, Ex p. Tarn (1893)	493, 494
— v. Sullivan (Ir.)	223, 224	Taruck Chunder Bhuttacharjee v. Divendro Nath Sanyal (Ind.)	459
Summerson, Re, Downie v. Summerson (1899)	343	Tate v. Toronto Corp'n. (Can.)	622, 644
Sumner v. Schofield (1880)	271	Tatham v. Parker (1855)	603
Sunbolt v. Alford (1838)	492	Tattersall's Settlement, Re, Public Trustee v. Tattersall (1918)	39
Sunderland Local Marine Board v. Frank-land (1872)	619	Taw v. Bury (1559)	243
Surender Nath Pal Chowdhry v. Brojo Nath Pal Chowdhry (Ind.)	168	Taxes Comr. for Victoria v. Currie (Aus.)	118
Surfleet's Estate, Re, Rawlings v. Smith (1911)	158, 173	Taylor, Ex p., Re Potts (1893)	671
Surrey Sheriff, Re, Mortimore v. Cragg (1878)	609	—, Ex p., R. v. Lilley (1910)	314
Surridge v. Cooper (1858)	637, 638	—, Re, Taylor v. Rawson (1913)	585
Sussex Sheriff, Ex p., Re Rogers (1911)	606	— v. Baker (1677)	528
Sutcliffe v. Bennett (Can.)	320	— v. Batten (1694)	514
— v. Gledhill, Re Greenwood (1901)	640	— v. Bekon (1677)	528, 582
Sutherland, Re (Aus.)	115	— v. Cole (1789)	491, 571
—, Re (N.Z.)	610, 611	— v. — (1791)	491, 571
Sutherland (Duke), Re, Chaplin v. Leveson-Gower (1922)	21, 36	— v. Cummings (Can.)	669
Sutherland v. Whidden (Can.)	475, 515	— v. Hortop (Can.)	198, 199
— v. Wilson (Can.)	268	— v. Knapman (N.Z.)	252
Sutton v. Barnet Local Board (1877)	593	— v. McCalmont (1855)	251
— v. Burgess (1835)	580	— v. Needham (1810)	269, 270, 276
— v. English & Colonial Produce Co. (1902)	651	— v. Philips (1749)	188, 273, 281, 289
— v. Stone (1745)	602	— v. — (1750)	273, 281, 289
Sutton, Carden & Co. v. Goodrich (1899)	640	— v. Poncia (1901)	43, 44
Swabey v. Swabey (1848)	56, 57	— v. Rawson, Re Taylor (1913)	585
Swain v. Morland (1819)	541	— v. Roe (1893)	416, 417
Swaine v. Great Northern Ry. Co. (1863)	371	— v. Scott (Can.)	167
— v. — (1864)	371	— v. Tucker (Can.)	636
Swaizie v. Swaizie (Can.)	377	— v. Turnbull (1859)	650
Swan v. North British Australasian Co. (1863)	291, 399, 401	Taylor's Estate, Re (1853)	29, 126
Swanson v. Getsman (Can.)	276	Teasdale v. Teasdale (1726)	372
Swaythling (Lord), Re, Samuel v. Swaythling (1912)	21	Tempest v. Kilner (1845)	362, 363
Sweeting v. Pearce (1861)	360, 361	— v. — (1846)	362, 363
— v. Sweeting (1853)	52, 60	Temple v. Baltinglass (Viscountess) (1677)	166
Swift Canadian Co. v. Easterbrook & Son (Can.)	403	— v. Western Assurance Co. (Can.)	323
Swinehammer v. Sawler (Can.)	632	Templeman v. Case (1711)	552
Swiney v. Enniskillen, Bundoran & Sligo Ry. Co. (Ir.)	630, 631	Templeton, Re (Can.)	100
Swiss Bank Corp'n. v. Boehmische Industrial Bank (1923)	637, 646	Tennent's Estate, Re (Ir.)	330
Swyny v. Harland (1894)	453, 454	Terrell v. Fisher, Re Essex Sheriff (1862)	475
Sydney & Louisburg Coal & Railway Co. v. Sword (Can.)	242, 269	Tew v. Briggs, Re Charlesworth's Trusts (1912)	28
Sykes, Re (1899)	20, 21	Thacker v. Williams (Ir.)	592
— v. Dyson (1870)	596, 597	Theobald v. Cotterell (1853)	474
— v. Soper (Can.)	498	Thirveton v. Collyer (1665)	189
— v. Sykes (1870)	506	Thomas v. Brown (1876)	387, 388
Symons v. Rees (1876)	167, 168	— v. Buxton (1869)	585
Sympson v. Juxon (1625)	469	— v. Cotton (Can.)	609
— v. Prothero (1857)	643, 644	— v. Cross (1865)	661
		— v. Davis (1752)	185
		— v. Exeter Flying Post Co. (1887)	150
		— v. Foster, Re Foster (1897)	34
		— v. Great Western Ry. Co. (Can.)	615
		— v. Griffith (1860)	157, 158
		— v. Hudson, Re Creed (1905)	31
		— v. Jones (1848)	573, 574
		— v. McNaughton (Can.)	218
		— v. Mirehouse (1887)	522, 534
		— v. Montgomery (1827)	68, 70
		— v. Newnam (1842)	455
		— v. Owen (1614)	590

## TABLE OF CASES.

lxxxvii

	PAGE		PAGE
Thomas v. Pearse (1818) ...	538, 542	Tomlin v. Hatfield (1839) ...	339
— v. Rowlands (1886) ...	551	Tomline, <i>Ex p.</i> , <i>Re</i> Walton-cum-Trimley Manor (1873) ...	138
— (Doe d.) v. Walker (1843) ...	248, 255	Tomlinson v. Shynn (1820) ...	519, 520
— v. Withers (1776) ...	154	Tompkinson v. Russell (1821) ...	495
Thomee v. Westcott & Westcott (Can.)	637, 643	Tompson v. Browne (1835) ...	50
Thompson, <i>Ex p.</i> (Can.) ...	606	Toogood v. Stamps Comr. (N.Z.) ...	25
— v. Bergland (Can.) ...	475, 567	Toogood's Trusts, <i>Re</i> (1887) ...	659
— v. Birch (1876) ...	99, 100	Toomey, <i>Ex p.</i> (Aus.) ...	227
— v. Castellain (1862) ...	312	Tootal's Trusts, <i>Re</i> (1883) ...	64
— v. Dempster (1735) ...	540	Tooth v. Kittredge (Can.) ...	354
— v. Farden (1840) ...	396	— v. Laws (Aus.) ...	360
— v. Gill (1903) ...	670	Topham (Lady) v. Portland (Duke) (1863) ...	447
— v. Johnson (Can.) ...	299	Toplis v. Vonder Heyde (1840) ...	351
— (Doe d.) v. McKenzie (Can.) ...	512	Topping v. Joseph (Can.) ...	474, 475
— (Doe d.) v. Mirehouse (1833) ...	588	Torguson v. Wayne Supply Co., Ltd. (Can.)	115
— v. Thompson (1923) ...	158	Toronto City & Toronto Ry. Co., <i>Re</i> (Can.)	447
— v. Wafer (Ir.) ...	429	Toronto Ry. Co. v. Toronto Corpn. (1904)	231, 232, n.
— v. Wallace (Can.) ...	642	Torre v. Browne (1855) ...	157
Thompson & Sons v. Clarke (1901) ...	146	Torres v. Torres (1917) ...	429
Thompson Rural Municipality v. Brethour (Can.) ...	519	Torrington (Viscountess), <i>Re</i> (1913) ...	20
Thompson's Trustees, Murray & M'Master v. Muir (Scot.) ...	378	Totten v. Halligan (Can.) ...	577
Thomson v. Advocate-General (1845) ...	60, 63	Touche v. Metropolitan Railway Warehouse Co. (1871) ...	449
— v. Clerk (1596) ...	511	Toursier (A.) & Co. & Berkeley, <i>Ex p.</i> , <i>Re</i> Pilet (1915) ...	248
— v. Leonard (Can.) ...	580	Tower Finance & Furnishing Co. v. Brown (1890) ...	495
— v. Moore (Can.) ...	166, 167	Townend, <i>Re</i> , Knowles v. Jessop (1914) ...	77
— (Doe d.) v. Roe (1835) ...	590	— v. Jones (1889) ...	650
Thomson's Will, <i>Re</i> (N.Z.) ...	26, 44	— v. Yorkshire Sheriff (1890) ...	613
Thordarson v. Jones (Can.) ...	616	Townsend, <i>Re</i> (1901) ...	10
Thorley, <i>Re</i> , Thorley v. Massam (1891) ...	52, 53, 54	—, <i>Re</i> , <i>Ex p.</i> Hall (1880) ...	511
Thorne v. Gibbs, <i>Re</i> Gibbs (1898) ...	47	Townshend v. Casual Ejector (Ir.) ...	469, 590, 591
Thornes v. White (1835) ...	321	Traders Bank v. McKay (Can.) ...	631
Thornton v. Hugo (S. Af.) ...	370	Transfer of Land Statute, <i>Re</i> , <i>Ex p.</i> Paterson (Aus.) ...	438
— v. M'Kewan (1862) ...	178, 179	Traunweiser v. Johnson (Can.) ...	483
— v. Ramsden (1864) ...	369	— v. —, <i>Re</i> Mucklow & Johnson's Contract (Can.) ...	564
Thoroughgood's Case (1598) ...	426, 427	Travers v. Kelly, <i>Re</i> King (1904) ...	44, 47, 48
Thorpe v. Argles (1844) ...	580	— v. Millet (N.Z.) ...	163
— v. Hook (1832) ...	432, 434	Treasure, <i>Re</i> , Wild v. Stanham (1900) ...	30, 31
— v. Mattingley (1838) ...	448	Tredegar (Lord) v. Windus (1875) ...	180, 181
Thrikaikat Madathil Raman v. Thiruthiyil Krishnen Nair (Ind.) ...	201	Trenchard, <i>Re</i> , Trenchard v. Trenchard (1905) ...	6, 7, 32
Thuppan Nambudripad v. Ittichiri Amma (Ind.) ...	159	Trent Brothers v. Hodgson (1885) ...	542
Thurston v. Mills (1812) ...	541	Trenwith, <i>Re</i> (Can.) ...	494
Thyatira, The (1883) ...	236, 237	Treport's Case (1594) ...	283
Thynne v. Protheroe (1814) ...	317	Trevey, <i>Re</i> (Ir.) ...	486
— v. Sarl (1891) ...	586	Trevivian v. Lawrence (1704) ...	139, 185
— v. Stewart, <i>Re</i> Bath's (Marquis) Settlement (1914) ...	32	Trezevant v. Fraser (1840) ...	659
Tiffany (Doe d.) v. McCreen (Can.) ...	244	Tribeni Sahu v. Bhagwat Bux (Ind.) ...	445
Tillakchand Hindumal v. Jitamal Sudaram (Ind.) ...	503, 504	Trigg v. Trigg (1759) ...	596
Tillett v. Pearson (1873) ...	668	Triminger v. Keene (1882) ...	441
Tilling, Ltd. v. Blythe (1899) ...	671, 672	Trinder, <i>Re</i> , Sheppard v. Prance (1911) ...	76
Tilt v. Jarvis (Can.) ...	550	Trinidad Asphalte Co. v. Coryat (1896) ...	276
Timothy v. Day (Ir.) ...	635	Tripp's Estate, <i>Re</i> (Can.) ...	493
Tindale (Doe d.) v. Hemming (1826) ...	271	Trower & Smedley v. Cox (1822) ...	143
Tinkler, <i>Re</i> , Loyd v. Allen (1917) ...	36, 37	Trudeau v. Lafleur & McNally (Can.)	350, 351
— v. Hilder (1849) ...	328, 329	Trueman v. Bain (Can.) ...	316
Tinnappa Chetti v. Murugappa Chetti (Ind.)	372, 373	— v. Woodworth (Can.) ...	569
Tipping v. Johnson (1801) ...	434	Trust & Loan Co. v. Cook (Can.) ...	526
Tirumala Rau (Sahib) v. Pingala Sunkara Rau (Ind.) ...	306	— v. Cuthbert (Can.) ...	577
Tobin v. Cleary (Ir.) ...	586	Trust & Loan Co. of Upper Canada v. Ruttan (Can.) ...	283, 284
Tobique Gypsum Co., <i>Re</i> (Can.) ...	445	Trustee, <i>Ex p.</i> , <i>Re</i> Chiandetti (1921) ...	520, 521
Todd, <i>Re</i> , Todd v. Todd (Can.) ...	106	—, <i>Ex p.</i> , <i>Re</i> Gunsbourg (1920) ...	225, 584
— v. Phoenix & United Fire Insurance Co. (Can.) ...	631	—, <i>Ex p.</i> , <i>Re</i> Pollard (1903) ...	591, 592
— v. Stewart (1846) ...	203	—, <i>Ex p.</i> , <i>Re</i> Prior (1922) ...	648
— v. Todd, <i>Re</i> Todd (Can.) ...	106	Tuck v. Southern Counties Deposit Bank (1889) ...	446, 447
— v. Wright (1847) ...	582	Tucker v. Maitland (1854) ...	393
Tokhan Singh v. Girwar Singh (Ind.) ...	424	Tucket v. Shaw, <i>Re</i> Shaw (1895) ...	40
Tomkins v. Tucker, <i>Re</i> Sealy (1901) ...	76		

	PAGE
Tuckett v. Eaton (Can.)	549
Tukaram Bin Atmaram v. Ramchandra Budharam (Ind.)	374
Tull v. Owen (1840)	245, 246
Tunbolf v. Alford (1838)	492
Tung Sang Wing Firm v. Chow Chun Kit (Hong Kong)	343
Tunncliffe v. Tedd (1848)	226, 227
Turley v. Benedict (Can.)	560, 561
— v. Daw (1906)	141
— v. Grafton Road Co. (Can.)	198
— v. Meyers (Can.)	605
Turnbull, Re, Skipper v. Wade (1905)	48, 79
— v. Hill (Scot.)	325
— v. Robertson (1878)	640
— v. Royal National Lifeboat Institution, Re Brown (1916)	32, 36
— v. Turnbull (Scot.)	42
Turner v. Bennett (Can.)	329
— v. Carson (Can.)	329
— v. Clifford (1870)	602
— v. Crozier (Can.)	609, 610
— v. Jones (1857)	645, 646
— v. Martin (1857)	51
— v. Nurse (1704)	156
— v. Patterson (Can.)	505, 532
— v. Pulman (1848)	460
— v. Tepper (1877)	201
— v. Turner (1852)	384
— v. Williams & Cotton (Can.)	580, 581
— v. Wilson (Can.)	374, 375
Tuytens v. Noble (Can.)	265
Twigg v. Thunder Hill Mining Co. (Can.)	340
Two Companies (0022 & 0023 of 1915), Re (1915)	428
Tyler, Re, Ex p. Higgins (1858)	218
— v. Leeds (Duke) (1817)	538, 545
Tyne Improvement Comrs. v. General Steam Navigation Co. (1867)	454
Tyrrell v. Painton (1895)	561, 668
Tyson v. Paske (1705)	572, 613

U.

Udeyadeta Dev v. Greegson (Ind.)	...	...	453
Udoy Kumari Ghatwalin v. Hari Ram Shaha (Ind.)	...	...	632
Umed v. Jas Ram (Ind.)	...	...	393
Umhlebi v. Umhlebi's Estate (S. Af.)	...	...	333
Underhill v. Devereux (1669)	...	...	571
— v. Wilson (1830)	...	...	545, 546
Union Bank (Liquidators) v. Beit (S. Af.)	...	...	293
Union Bank of Australia v. Harrison, Jones & Devlin, Ltd. (Aus.)	...	...	575
Union Bank of Canada v. Antoniou (Can.)	...	...	383
— v. Lumsden Milling Co. (Can.)	...	...	567
Union Bank of London v. Lenanton (1878)	...	...	489, 507
Union Bank of Manchester, Ltd. v. Grundy (1924)	...	...	607, 608, 612, 613
United Grocers Tea & Dairy Produce Employees' Union of Victoria v. Linaker (Aus.)	...	...	337, 338
U.S.A. (President) v. Drummond (1864)	...	...	62
United States Fidelity & Guarantee Co. v. R. (Can.)	...	...	109, 112, 113
United States Fidelity & Guaranty Co. v. Gouin (Can.)	...	...	676
University College, Oxford v. Foxcroft (1683)	...	...	605
Upton v. Vanner (1861)	...	...	354, 355
Upton & Wells Case (1589)	...	...	588, 589
Urruela, <i>In the Goods of</i> (1869)	...	...	126
Usher v. Walters (1843)	...	...	617

	PAGE
Uttam Chandra Krithy v. Khetra Nath Chattopadhyaya (Ind.) ... ..	390, 391
Utterson Lumber Co. v. Rennie (Can.) ...	322
Uxbridge Rural Sanitary Authority, <i>Re</i> , Jersey (Earl) v. Uxbridge Union Rural Sanitary Authority (1891) ... ..	565
Uxbridge Union v. Winchester Union (1904)	151

v.

Vacuum Oil Co., Ltd. v. Ellis (1914)	...	645
Vagliano Brothers v. Bank of England (1889)	...	400, 402
Vale v. Bliss (1858)	...	418
Valia Thamburatti v. Anujani Kunhunni (Ind.)	...	635
Van Blommestein v. Holliday (S. Af.)	...	401
Vance v. Ruttan (Can.)	...	522
Vancouver Machinery Depot v. Vancouver Timber & Trading Co. (Can.)	...	395
Vanderbergh v. Blake (1662)	...	140
Vandiest v. Fynmore (1834)	...	118
Van Grutten v. Foxwell (1897)	...	240
Van Horne Estate, <i>Re</i> (Can.)	...	98
—————, <i>Re</i> (No. 2) (Can.)	...	115
Varajlál Shivilál v. Dalsukh Varajlál (Ind.)	...	229
Vaselenak v. Vaselenak (Can.)	...	424
Vashon & Township of East Hawkesbury, <i>Re</i> (Can.)	...	339
Vaughton v. Bradshaw (1860)	...	227
Veal v. Warner (1669)	...	452, 456
Vencataraju v. Ramanamma (Ind.)	...	168, 169
Venkata Perumal (Raja Bahadur) v. Thata Ramasamy Chetty (Ind.)	...	149, 150
Venning v. Loyd (1859)	...	341
Ventris v. Brown (Can.)	...	464
Vernon, <i>Re</i> (1901)	...	19, 25
————— v. Croft (1888)	...	662
————— v. Watson (1891)	...	216
————— (Doe d.) v. White (Can.)	...	563
Vernon Fruit Co. v. Canadian Pacific Ry. Co. (Can.)	...	393, 394
Verschures Creameries v. Hull & Netherlands S.S. Co. (1921)	...	226
Vertue v. D'Oyly, <i>Re</i> D'Oyly (1917)	...	35, 36
Veuve Monnier et ses Fils, Ltd., <i>Re, Ex p.</i> Bloomenthal (1896)	...	291, 292
Vicars v. Colclough (1779)	...	603
Vick v. Edwards (1735)	...	282, 285
Vickers v. Bell (1863)	...	315, 316
————— v. ——— (1864)	...	315, 316
Victoria Permanent Benefit Building, Investment & Freehold Land Society, <i>Re, Empson's Case</i> (1870)	...	254, 278, 279
Victoria Supreme Court (Master in Equity of) v. Pearson (Aus.)	...	124, 125
Victoria Taxes Comr. v. Currie (Aus.)	...	118
Vidyárám v. Chandra Shekharram (Ind.)	...	635
Vigeon v. Northcote (Can.)	...	618, 619
Villars, <i>Ex p., Re</i> Rogers (1874)	...	511, 512, 514
Vinall v. De Pass (1892)	...	636, 640
Vine v. Mitchell (1834)	...	279
Vines v. Arnold (1849)	...	383
Vining, <i>Ex p., Re</i> Bowerman (1836)	...	356
Viraragava v. Ramudu (Ind.)	...	634
Viraraghava v. Subbakka (Ind.)	...	458
Virgoe v. R. (Aus.)	...	125
Vivian's Estate, <i>Re</i> (1831)	...	82
Vogel v. Thompson (1847)	...	428
Volansky v. Nat Bell Liquors, Ltd. (Can.)	...	637
Vonhollen v. Knowles (1844)	...	265, 266
Von Meyer v. Taylor (Aus.)	...	548, 549
Von Tungeln v. Dubois (1809)	...	156
Vooght v. Winch (1819)	...	235



## TABLE OF CASES.

lxxxix

	PAGE		PAGE
Vousden v. Hopper (Can.) ...	299	Want v. Moss (1894) ...	182, 183, 231
Vulcan Iron Works Co. v. Rapid City Farmers Elevator Co. (Can.) ...	358	Warbrick v. Varley (No. 1) (1861) ...	75, 77, 82
Vye v. McNeill (Can.) ...	480	Warburton v. Hill, <i>Ex p.</i> Perrin & Guildford (1854) ...	657, 658
Vyse v. Brown (1884) ...	620	———— v. Hill, Stent v. Wickens (1854) ...	656, 657, 658
Vyvyan v. Vyvyan (1861) ...	335, 356, 384	Ward v. Booth (1872) ...	603
Vyvyan's Estate, <i>Re</i> (1831) ...	82	———— v. Clark (Can.) ...	581, 582
W.		———— v. Cornwall (1871) ...	604, 605
W. v. J. (1368) ...	559	———— v. Day (1864) ...	356, 357, 358
Waddell v. Waddell (1892) ...	669	———— v. Grut (N.Z.) ...	552
Waddilove v. Taylor, <i>Ex p.</i> Waddilove (1848) ...	662	———— v. Macauley (1791) ...	501
Wade v. Simeon (1845) ...	203	———— v. National Bank of New Zealand (N.Z.) ...	147
———— v. Wade (1898) ...	25, 34, 38	———— v. Ryan (Ir.) ...	270
Wadsworth v. Bell (Can.) ...	611	———— v. Shakeshaft (1860) ...	648
———— v. Bentley (1853) ...	205	———— v. Vance (Can.) ...	621, 637, 642
Waghorne v. Langmead (1796) ...	427	Ward & Dominion Purebred Stock Co., <i>Re</i> , <i>Re</i> Creditors' Relief Act (Can.) ...	606, 607
Wahidunnessa v. Surgadass (Ind.) ...	361	Wardrope v. Canadian Pacific Ry. Co. (Can.) ...	641, 642
Waine v. Crocker (1862) ...	171	Ware, <i>Re</i> , <i>Ex p.</i> Drake (1877) ...	584
Wake v. Canadian Pacific Lumber Co., Ltd. (Can.) ...	204	———— v. Ware (Aus.) ...	659
Wakefield v. Lynn (Can.) ...	388	Warmoll v. Young (1826) ...	472, 533
Wakefield Corpn. v. Cooke (1902) ...	154	Warner v. Scott (N.Z.) ...	655
———— v. ——— (1903) ...	154	Warner's Settled Estates, <i>Re</i> , Warner to Steel (1881) ...	102, 114
———— v. ——— (1904) ...	154	Warter v. Freeman (1619) ...	456
Walbancke v. Masterman (1846) ...	614, 615	Warwick, The (1890) ...	238, 239
Walbank v. Quarterman (1846) ...	614, 615	Warwick v. Bruce (1815) ...	451
Waldron v. Jones (Ir.) ...	580	———— v. East (1889) ...	158
Walford v. Gray (1865) ...	310	Washburn v. Ferris (Can.) ...	311
Walker v. ——— (1731) ...	543	Waterer v. Freeman (1619) ...	456
———— v. Bell (1816) ...	603	Waterhouse v. McVeigh (Can.) ...	580
———— v. Davis (1858) ...	455	Watherston's Trustees v. Lord Advocate (Scot.) ...	47, 48
———— v. Fairfield (Can.) ...	610	Watkins, <i>Ex p.</i> (1862) ...	380
———— v. Hamersly (1684) ...	153	————, <i>Re</i> (Can.) ...	114
———— v. Hunter (1845) ...	509	————, <i>Re</i> , <i>Ex p.</i> Evans (1879) ...	572, 666, 667, 670, 672
———— v. Rooke (1881) ...	620, 637	———— v. Mahon (1836) ...	146
———— v. Willoughby (1816) ...	362	———— v. Ross (1893) ...	676
Wallace v. A.-G. (1865) ...	63, 97, 99	———— v. Watkins (1896) ...	594
———— v. Bossom (Can.) ...	384	Watson, <i>Ex p.</i> , <i>Re</i> Carter (1845) ...	663
———— v. Fraser (Can.) ...	326	————, <i>Ex p.</i> , <i>Re</i> Companies Acts (1888) ...	274, 296
———— v. Gray (Can.) ...	354	————, <i>Ex p.</i> , <i>Re</i> Sheffield Permanent Building Society (1888) ...	296
———— v. Orangeville Town (Can.) ...	340	———— v. Birch (1847) ...	419
Wallace Huestis Greystone Co. v. Foxwell (Can.) ...	383	———— v. Burchell (S. Af.) ...	335
Wallbank v. Masterman (1846) ...	614, 615	———— v. Inland Revenue Comrs. (1900) ...	17
Waller, <i>Re</i> , Margarison v. Waller (1916) ...	46, 48, 81, 82	———— v. Lloyd (Ind.) ...	633
———— v. Manchester Corpn. (1861) ...	396, 397	———— v. Maskell (1834) ...	461
———— v. Weedale (1604) ...	512, 534	———— v. Wace (1826) ...	156
———— v. Wildridge (Ir.) ...	661	Watson's Case (1628) ...	222, 234
Wallis v. Morris (1864) ...	569, 570	Watt, <i>Re</i> , <i>Ex p.</i> Joselyne (1878) ...	639, 640
———— v. Smith (1882) ...	642	———— v. National Bank of Scotland (Scot.) ...	325
Wallop's Trust, <i>Re</i> (1864) ...	98, 101	Watts, <i>Ex p.</i> (1871) ...	664
Walmsley v. Mundy, <i>Ex p.</i> Goodenough (1884) ...	674	———— v. Cowell (1850) ...	350
Walsh v. Myrick (Nfld.) ...	633, 634	———— v. Hobson (Can.) ...	424
———— v. Walper (Can.) ...	482, 483	———— v. Jefferyes (1851) ...	487, 655, 656
———— v. Wason (1874) ...	659	———— v. Porter (1854) ...	656
Walters, <i>Re</i> , Neison v. Walters (1889) ...	181	———— v. Watts (1871) ...	664
————, <i>Re</i> , ——— v. ——— (1890) ...	181	Weale v. Lower (1672) ...	271, 283
Walthamstow Sewage Question, A.-G. v. Walthamstow Urban District Council (1895) ...	593	Weall v. James (1893) ...	220, 422
Waltho v. Brooks & Aaron (1885) ...	364	Weatherby v. St. Georgio (1843) ...	63, 120
Walton v. Hill (Can.) ...	358	———— v. ——— (1846) ...	63, 120
———— v. Jarvis (Can.) ...	388, 484	Webb v. Austin (1844) ...	270, 284, 285
Walton (Francis) & Co. v. Topakyan, Kevorkian & Marler (1905) ...	220	———— v. McCracken (Aus.) ...	117
Walton-cum-Trimley, Manor, <i>Re</i> , <i>Ex p.</i> Tomline (1873) ...	138	———— v. Nect (1583) ...	186
Waman v. Hari (Ind.) ...	163	———— v. Plummer (1729) ...	141
Wangford & Sextons Case (1580) ...	524	———— v. Spicer (1849) ...	246, 247
		———— v. Stenton, <i>Re</i> Hatton (1883) ...	625
		———— v. Webb (Aus.) ...	72, 73
		Webber, <i>Re</i> , Gribble v. Webber (1896) ...	29, 47



## TABLE OF CASES.

	PAGE		PAGE
Webber v. Hutchins (1841) ...	430, 432, 433	White v. Witt (1877) ...	158
v. Ry. Co. (1881) ...	450	v. Wood (1843) ...	601
Webster, <i>In the Goods of</i> (1859) ...	129, 647	White, Son & Pill v. Stennings (1911) ...	617
v. Webster (1862) ...	629	White's Assignees, <i>Ex p.</i> , <i>Re</i> White (1862) ...	612
Wedgwood, <i>Re</i> , Allen v. Public Trustee (1921) ...	36, 77	Whitechurch (George), Ltd. v. Cavanagh (1902) ...	294, 295, 297, 304
Weegar v. Grand Trunk Ry. Co. (Can.) ...	609	Whitehal v. Squire (1690) ...	337
Wege v. Kemp (S. Af.) ...	293	Whitehead v. Bennett (1861) ...	334
Wegg Prosser v. Evans (1895) ...	221	v. Harrison (1730) ...	598, 605
Weir, <i>Re</i> (Ir.) ...	519, 520	v. Lynes (1865) ...	428
Weir & Pitt's Contract, <i>Re</i> (1911) ...	19	Whitehouse, <i>Ex p.</i> , <i>Re</i> General Horticultural Co. (1886) ...	629, 630, 638
Weldon v. Gounod (1885) ...	671	Whiteley, <i>Re</i> , Whiteley v. Learoyd (1887) ...	667, 668
v. Johnson (1884) ...	446	(1909) ...	78, 79
v. Lennon (Aus.) ...	124	Whitfield v. Prickett, <i>Ex p.</i> Brookes (1842) ...	658
Wellesley v. Mornington (1862) ...	660	Whiting v. Thompson (Aus.) ...	117
Wells v. Gibbs (1856) ...	660	v. Tuttle (Can.) ...	338
v. Kilpin (1874) ...	667	Whitla v. Spence (Can.) ...	457
v. Knott (Can.) ...	451	Whittaker v. Jackson (1864) ...	182
v. Pickman (1797) ...	634	Whittaker (1881) ...	619
v. Wells (1914) ...	605	Whittington (Doe d.) v. Hards (1851) ...	590, 591
Wenman (Lord) v. Osbaldiston (1719) ...	457	Whitworth v. Gaugain (1844) ...	563, 573
Wentworth v. Bullen (1829) ...	139	v. ——— (1846) ...	563, 573
v. Hamilton Radial Electric Ry. Co. & Hamilton (Can.) ...	149	Whurr v. Devenish (1904) ...	322
Wentzell v. Ross (Can.) ...	335	Wickham, <i>Re</i> (1917) ...	299, 300, 307
West v. Dillicar (N.Z.) ...	524	v. New Brunswick & Canada Ry. Co. (1865) ...	515, 516, 563, 572
v. Hedges (1751) ...	585	v. Wickham (1855) ...	314
v. Rogers (1888) ...	313	Wickison v. Mornington Tramways Co., Ltd. (N.Z.) ...	346
West & Green v. Elmore (1852) ...	567, 568	Wicks v. Shanks (1892) ...	654
Westbrook v. Blythe (1854) ...	650	Widgery v. Tepper (1877) ...	201, 648, 660
Westby v. Westby (1852) ...	322, 373	Wiebalck v. Told (1913) ...	604
Westen v. Fairbridge (1923) ...	386, 387	Wigan (Doe d.) v. Jones (1830) ...	562, 563
Western Assurance Co. v. Doull (Can.) ...	319	Wigand, <i>Re</i> , R. v. Wigand (1913) ...	597
v. Provincial Insurance Co. (Can.) ...	352	Wiggin & Elwell v. Browning (Can.) ...	326
Westgate v. Westgate (Can.) ...	665	Wightman v. Fields (Can.) ...	563
Westhead v. Riley (1883) ...	491	Wilbraham v. Snow (1670) ...	507
Westmoreland (Doe d.) v. Smith (1827) ...	15	Wilcocks v. Wilcocks (1762) ...	602
Westmoreland Green & Blue Slate Co. v. Feilden (1891) ...	114	Wilcox v. Brown (1857) ...	86, 87
Weston & Thomas' Contract, <i>Re</i> (1907) ...	316	v. Odden (1864) ...	
Wetherall, <i>Ex p.</i> , Middleton v. Pollock (1876) ...	512, 520	v. Pokinhorn (1728) ...	87
Wetmore v. Des Brisay (Can.) ...	505	Wild v. Southwood (1897) ...	655
Whale v. Booth (1784) ...	469	v. Stanham, <i>Re</i> Treasure (1900) ...	30, 31
Whalley v. Barnett (1833) ...	605	Wildes v. Russell (1866) ...	198
Wharam v. Broughton (1748) ...	453	Wiles v. Woodward (1850) ...	254, 258, 259, 280
Wheeler v. Gibbs, North Ontario Election Case (Can.) ...	622	Wilkes v. Flint (Can.) ...	204
v. McLean (Can.) ...	553	Wilkins, <i>Re</i> , Wilkins v. Rotherham (1884) ...	81
v. Montefiore (1841) ...	140	v. ———	
Whistler v. Lee (1614) ...	163	v. Howel (1830) ...	147
Whitaker v. Wisbey (1852) ...	112	v. Kirby (1854) ...	145
White, <i>Re</i> (Aus.) ...	162	Wilkinson's Case (1596) ...	469
<i>Re</i> , <i>Ex p.</i> Morley (1873) ...	612	Bank	
<i>Re</i> , <i>Ex p.</i> White's Assignees (1862) ...	53	Wilks v. Groom (1856) ...	80
<i>Re</i> , Pennell v. Franklin (1898) ...	58, 59	Willard v. Lodge (Can.) ...	456
v. Briggs (1846) ...	581	Wilbraham v. Snow (1670) ...	507
v. Burrow (Ir.) ...	301, 302	Willcocks v. Howell (Can.) ...	205
v. Greenish (1861) ...	426, 604	Willet v. Sparrow (1816) ...	531
v. Hayward (1752) ...	404	William Hutt, The (1860) ...	384
v. Kirkman (Can.) ...	465, 498	Williams, <i>Ex p.</i> , <i>Re</i> Davies (1872) ...	434, 435
v. Lake (1868) ...	615	<i>Re</i> , <i>Ex p.</i> Jones (1880) ...	475
v. Morris (1852) ...		<i>Re</i> , Williams v. Evans (1911) ...	347
v. Peters (Can.) ...		v. Bartholomew (1798) ...	
v. Sandon Waterworks & Light Co. ...	369	v. ———	
v. Stewart, <i>Re</i> Parker (1917) ...	37, 38	v. Craddock (1831) ...	519
v. Wiltshire (1619) ...	478		491

## TABLE OF CASES.

xci

	PAGE		PAGE
Williams v. Cutteris (1607) ...	439	Winans v. R. (1908) ...	5
— v. Dray (1860) ...	461	Winchelsea v. Garrety (1839) ...	660
— v. Evans, <i>Re</i> Williams (1911) ...	347	Winchelsea (Countess) v. Maidstone (Lady) (1691) ...	495
— v. Harper, <i>Re</i> Harper's Settlement (1919) ...	285	Winchester v. Hutchinson (Aus.) ...	515
— v. Hughes (1857) ...	76	Winckley (Doe d.) v. Pye (1795) ...	372
— v. Jersey (Earl) (1841) ...	370, 371	Windle v. Williams, <i>Re</i> Smith (1858) ...	641
— (Doe d.) v. Lloyd (1839) ...	277, 279	Winearls v. Hoey (Can.) ...	376
— (Doe d.) v. — (1840) ...	277, 279	Winfield v. Boothroyd (1886) ...	583, 584
— v. M. Rumely Co. (Can.) ...	480	Wingfield v. Erskine, <i>Re</i> Fludyer (1898) ...	115
— v. M'Donald (Can.) ...	516	Winkle, <i>Re</i> (1894) ...	423
— v. Morgan (1850) ...	170	Winn v. Ingilby (1822) ...	484
— v. Morris (Ir.) ...	561	Winnipeg (City), Garnishees, St. Boniface v. Kelly (Can.) ...	636
— v. Mudge (Nfld.) ...	578	Winnipeg (City) v. Winnipeg Electric Ry. Co. (Can.) ...	390
— v. Pinckney (1897) ...	137, 138, 255, 256	Wintemute v. Brotherhood of Railway Trainmen (Can.) ...	449
— v. Price (1824) ...	574	Winter v. Bartholomew (1856) ...	553, 554
— v. Pulley (1791) ...	328	— v. Campbell (1841) ...	487
— v. Rapelje (Can.) ...	495	— v. Elliott (1834) ...	582
— v. Reeves (Ir.) ...	644	Winters v. Kingston Permanent Building Society (Can.) ...	612
— v. Richardson (1877) ...	145	Winthrop v. Roberts (Can.) ...	326
— v. Smith (1863) ...	468	Wintle v. Chetwynd (Lord) (1839) ...	531, 535
— v. Stear (1867) ...	216	— v. Freeman (1841) ...	533, 534, 539
— v. Sun Life Assurance Co. & Spencer (David), Ltd. (Can.) ...	394	— v. Williams (1858) ...	641, 647
— v. Symonds (1846) ...	660	Wise v. Birkenshaw (1860) ...	641, 643
— v. Webb (1843) ...	582	Wishart v. Lord Advocate (Scot.) ...	124, 125
— (Doe d.) v. Williams (1834) ...	590, 591	Wisner v. Great Western Ry. Co. (Can.) ...	208
— v. Williams & Hutton (Can.) ...	380	Wiswell v. Wallace (Can.) ...	164
Williamson v. Advocate-General of Scotland (1843) ...	54, 82, n.	Withall v. Tuckwell (1859) ...	503
— v. Bank of Montreal (Can.) ...	489, 490	Witham v. Bland (1675) ...	602, 605
— v. Grigor (Can.) ...	448	— v. Lynch (1847) ...	650
— v. Naylor (1838) ...	51	Withers v. Henly (1615) ...	580
Willies v. Farley (1828) ...	543	— v. Parker (1860) ...	157, 475
Willis v. Cooper (1900) ...	670	Withy v. Woolley (1798) ...	175
Willis, Winder & Co. v. Combe (1884) ...	542	Wittington d. Wittington v. Hards (1851) ...	590
Willmot v. Rose (1854) ...	482	Wodehouse v. Scobell, <i>Re</i> Repington (1904) ...	74, 75
Willoughby v. Saskatchewan Valley & Manitoba Land Co. (Can.) ...	160	Wolfaardt v. Colonial Government (S. Af.) ...	165
Willows v. Ball (1806) ...	486	Wolfe v. Heydon (1621) ...	316, 317
Wills v. Luff (1888) ...	666	Wolverton v. A.-G. (1898) ...	86, 87, 89, 90, 91, 105
— v. Woodward (1850) ...	258, 259	Wood v. Adams (1780) ...	601
Wilmot v. Rose (1854) ...	482	— v. Confederation Life Assocn. (Can.) ...	320
Wilson, <i>Re</i> (1916) ...	332	— v. Dunn (1866) ...	646
—, <i>Re</i> , <i>Ex p.</i> Jones (1916) ...	332	— v. Freeman (1743) ...	612
—, <i>Re</i> , Wilson v. Clark (1916) ...	42, 43	— v. Joselin (Can.) ...	645
— v. Aldridge (1724) ...	528	— v. North British Ry. Co. (Scot.) ...	229
— v. Bennett (Scot.) ...	227	— v. Reesor (Can.) ...	359
— v. Chartier (1862) ...	589	— v. Rowcliffe (1846) ...	516, 517
— v. Church (No. 2) (1879) ...	448, 453	— v. — (1847) ...	516, 517
— v. Clark, <i>Re</i> Wilson (1916) ...	42, 43	— v. Smart (Can.) ...	139
— v. Dundas & Stevenson (1875) ...	620, 625, 641	— v. Taylor (1855) ...	158
— v. Henderson (Scot.) ...	246	— v. Wheeler (1882) ...	585
— v. Jamieson (Can.) ...	437	— v. Wood (1843) ...	480, 487
— v. Kingston (1816) ...	436, 463	— v. — (Can.) ...	577
— v. McCarthy (Can.) ...	659	Wood & Davis (Can.) ...	184
— v. Maryon-Wilson, <i>Re</i> Maryon-Wilson (1900) ...	47, 48	Woodall, <i>Re</i> , <i>Ex p.</i> Woodall (1884) ...	426
— v. Metcalfe (1839) ...	598, 599	Wooddy v. Coles (1595) ...	513, 519
— v. O'Leary (1874) ...	79	Wooden v. Bushen (Can.) ...	584, 585
— v. Postle (Can.) ...	621	Woodgate v. Knatchbull (1787) ...	607
— v. Smith (Can.) ...	463	Woodham, <i>Re</i> , <i>Ex p.</i> Conder (1887) ...	482, 607
— v. Street (Can.) ...	550	Woodham Smith v. Edwards (1908) ...	444, 648
— v. Traill (Aus.) ...	638, 639	Woodland v. Fuller (1840) ...	441
— v. Tumman (1843) ...	549, 550	Woodley v. Brown (1824) ...	324
— v. Woolfryes (1817) ...	244	— v. — (1825) ...	324
Wilson Brothers v. Donald (Can.) ...	489	— v. Coventry (1863) ...	323
— (Can.) ...	645	Woodroffe v. Doe d. Daniell (1846) ...	152, 153
Wilt v. Lai (Can.) ...	424	Woodruff v. A.-G. for Ontario (Can.) ...	99, 100
Wilton v. Chambers (1834) ...	510	— v. Clement (Can.) ...	204
— v. — (1835) ...	529	— v. Harris (Can.) ...	487
Winans v. A.-G. (1904) ...	65	Woods v. Beaumont, <i>Re</i> Beaumont (1910) ...	674
— v. — (1910) ...	5, 6, 17, 26, 27, 49, 65, 83, 116, 121	— v. Finnis (1852) ...	582
		Woodward v. Battersea Borough Council (1911) ...	276

	PAGE		PAGE
Woodworth, <i>Re</i> (Aus.) ...	127	Yale v. Tollerton (Can.) ...	576
Woolf v. Cowan (Ir.) ...	429	Yaroth v. Hopkins (1835) ...	455
Woolford's Estate Trustee v. Levy (1892) ...	616, 617	Yarroth v. Seys (1720) ...	596, 601, 602
Woollen v. Wright (1862) ...	550	Yates v. Hambly (1742) ...	574, 575, 579
Woolley v. Beecham, <i>Re</i> Beecham (1923) ...	37	— v. Kyffin-Taylor & Wark (1899) ...	197
— v. Morgan (1888) ...	465	— v. Terry (1902) ...	638
Woomesh Chandra Maitra v. Barada Dass Maitra (Ind.) ...	...	Yellappa v. Ramchandra (Ind.) ...	458
Wootton v. Sievier (1913) ...	448	Yelverton v. Longworth (1864) ...	323
Wordall v. Smith (1808) ...	536	Yeo v. Ahearn (Can.) ...	342
Wormall v. Young (1826) ...	533	— v. Betts (Can.) ...	576
Worman, <i>Ex p.</i> , <i>Re</i> Hallahan (1862) ...	583, 620	— v. Clemow, <i>Re</i> Clemow (1900) ...	6, 31, 32
— v. Worman (1889) ...	149, 150	Yescombe v. Landor (1859) ...	569
Wormwell v. Hailstone (1830) ...	421	Yorath v. Hopkins (1835) ...	455
Worrall Waterworks Co. v. Lloyd (1866) ...	565	York v. Twine (1605) ...	480
Worrall v. Worrall & Jones (1895) ...	594	York Corpn. v. Leetham (H.) & Sons, Ltd. (1924) ...	274, 275
Wotton v. Shirt (1600) ...	565	Yorke v. Brewer (1882) ...	450
Wrathwell v. Bates (Can.) ...	576	— v. Chapman (1839) ...	215
Wren v. Cittell (1606) ...	267	Yorkshire Guarantee & Securities Corpn. v. Cooper (Can.) ...	493
Wrench v. Wynne (1869) ...	659	Yorkshire Insurance Co. v. Craine (1922) ...	391
Wright v. Barnewall (1849) ...	72, 75	Yorkshire Sheriff, <i>Ex p.</i> , Eynde v. Gould (1882) ...	552
— v. Child (1866) ...	514, 515, 546	Youat v. Jones (1845) ...	467
— v. Hollingshead (Can.) ...	492	Young v. Daniell (Can.) ...	458, 459, 464
— v. Hull (Can.) ...	463	— v. Dencher (Can.) ...	476, 508, 510
— v. Lainson (1837) ...	538, 539	— v. Harper (N.Z.) ...	209
— v. London General Omnibus Co. (1877) ...	228	— v. Holloway (1895) ...	194
— v. Marghiloman (1913) ...	8, 9, 30, 34	— v. Lambert (1870) ...	503, 504
— v. Mitten (Can.) ...	333	— v. Mitchells (Scot.) ...	199
— v. Redgrave (1879) ...	444	— v. Raincock (1849) ...	287
— v. Sharman, <i>Re</i> Sharman (1901) ...	6, 33	— v. Short (Can.) ...	494
— v. Vanderplank (1856) ...	35	— v. Ward (Can.) ...	558
— v. Winnipeg City (Can.) ...	326	Young, Ross, Richardson & Co. v. Ramsay (Scot.) ...	373
— v. Woollen (1862) ...	550	Yrath v. Hopkins (1835) ...	455
Wright, Stephenson & Co., <i>Ex p.</i> , <i>Re</i> Dunedin Co-operative Meat Supply Co. (N.Z.) ...	346	Yuroth v. Hopkins (1835) ...	455
Wyld, <i>Re</i> , <i>Ex p.</i> Wyld (1860) ...	380	Yusuf Sahib v. Durgi (Ind.) ...	168
Wylie v. Birch (1843) ...	536		
— v. Pearson (1842) ...	532		
Wyllie v. Green (1857) ...	582		
Wyman v. Knight (1888) ...	585		
Wynch's Trusts, <i>Re</i> , <i>Ex p.</i> Wynch (1854) ...	259		
Wyndham v. Leconfield, <i>Re</i> Leconfield (1904) ...	21, 109		
— v. Mackenzie (Aus.) ...	6		
Wynniatt v. Lindon (1839) ...	163		
Wynter v. Orlebar, <i>Re</i> Orlebar (1908) ...	31		
Wytcherley v. Andrews (1871) ...	148		

## Z.

Zavitz v. Hoover (Can.) ...	422
Zetland (Earl) v. Lord Advocate (1878) ...	83, 89, 91, 92, 94, 96
Zubeda Bibi v. Sheo Charan (Ind.) ...	377
Zulueta v. Tyrie (1851) ...	349
Zwicker v. Feindel (Can.) ...	300
— v. Morash (Can.) ...	164

# ESTATE AND OTHER DEATH DUTIES.



	PAGE
PART I. IN GENERAL . . . . .	5
SECT. 1. INTERPRETATION AND APPLICATION OF TERMS . . . . .	5
SECT. 2. MANAGEMENT OF DUTIES . . . . .	5
SECT. 3. COMPOSITION OF CLAIMS . . . . .	6
SECT. 4. REMISSION OF DUTY AND INTEREST. . . . .	6
PART II. ESTATE DUTY . . . . .	6
SECT. 1. IN GENERAL . . . . .	6
SECT. 2. AS DISBURSEMENT OR TESTAMENTARY EXPENSE . . . . .	6
SECT. 3. WHAT PROPERTY CHARGEABLE . . . . .	7
SUB-SECT. 1. PROPERTY WHICH PASSES . . . . .	7
A. In General . . . . .	7
B. Settled Property. . . . .	7
SUB-SECT. 2. PROPERTY WHICH IS DEEMED TO PASS . . . . .	8
A. In General . . . . .	8
B. Property of which Deceased was competent to dispose at his Death . . . . .	8
C. Interest in Property limited to cease on Deceased's Death . . . . .	9
D. Gifts mortis causa and inter vivos. . . . .	10
(a) Mortis causa . . . . .	10
(b) Inter vivos . . . . .	10
E. Settlements with Reservations . . . . .	13
F. Settled Property in which the Interest failed before Possession. . . . .	14
G. Joint Investments . . . . .	15
H. Interest Purchased or Provided by Deceased . . . . .	15
I. Trust Property . . . . .	16
J. Property Reverting to Disponer . . . . .	16
SUB-SECT. 3. FOREIGN PROPERTY . . . . .	17
SECT. 4. EXCEPTIONS FROM CHARGE OF DUTY . . . . .	17
SUB-SECT. 1. WHERE MONEY CONSIDERATION GIVEN . . . . .	17
SUB-SECT. 2. WHERE DEATH DUTY ALREADY PAID . . . . .	20
SUB-SECT. 3. HEIRLOOMS . . . . .	21
SUB-SECT. 4. OTHER CASES . . . . .	22
SECT. 5. AGGREGATION OF PROPERTY . . . . .	22
SUB-SECT. 1. WHAT PROPERTY AGGREGATED . . . . .	22
SUB-SECT. 2. WHAT PROPERTY TREATED AS SEPARATE ESTATE . . . . .	23
SECT. 6. RATE OF DUTY . . . . .	24
SECT. 7. VALUE CHARGEABLE . . . . .	24
SUB-SECT. 1. GROSS VALUE . . . . .	24
SUB-SECT. 2. DEDUCTIONS . . . . .	25
SECT. 8. COLLECTION OF DUTY . . . . .	26
SUB-SECT. 1. WHEN DUTY PAYABLE . . . . .	26
SUB-SECT. 2. BY WHOM PAYABLE . . . . .	27
A. In Respect of Property of which Deceased was competent to dispose at Death . . . . .	27
B. In Respect of Other Property . . . . .	27
C. Limitation of Personal Liability . . . . .	28



	PAGE
SECT. 9. OUT OF WHAT PROPERTY PAYABLE . . . . .	29
SUB-SECT. 1. PROPERTY PASSING TO EXECUTOR . . . . .	29
A. In General . . . . .	29
B. Payment out of Residue . . . . .	29
C. Personal Property appointed in Exercise of General Power . . . . .	30
D. Fund charged with Payment of Testator's Testamentary Expenses . . . . .	31
SUB-SECT. 2. REAL ESTATE . . . . .	32
SUB-SECT. 3. SETTLED PROPERTY . . . . .	33
SUB-SECT. 4. GIFTS MORTIS CAUSA AND INTER VIVOS . . . . .	34
SUB-SECT. 5. OTHER PROPERTY . . . . .	35
SUB-SECT. 6. DUTY IMPOSED SUBSEQUENT TO DEATH OF TESTATOR . . . . .	35
SUB-SECT. 7. EXPRESS DIRECTION BY TESTATOR . . . . .	37
SECT. 10. APPORTIONMENT . . . . .	38
SUB-SECT. 1. IN GENERAL . . . . .	38
SUB-SECT. 2. PROPERTY PASSING UNDER APPOINTMENT . . . . .	40
SUB-SECT. 3. DISPOSITION EXCLUDING APPORTIONMENT . . . . .	41
SECT. 11. REFUND OF DUTY PAID BY PERSON NOT LIABLE . . . . .	42
SECT. 12. RAISING THE DUTY . . . . .	43
SECT. 13. INTEREST . . . . .	43
SECT. 14. LIMITATION OF THE CHARGE OF DUTY . . . . .	43
SECT. 15. REMISSION OF DUTY AND INTEREST . . . . .	43
SECT. 16. COMMUTATION OF DUTY AND COMPOSITION OF CLAIM . . . . .	43
SECT. 17. PROCEDURE . . . . .	44
SUB-SECT. 1. CONTEMPT OF COURT—ATTACHMENT . . . . .	44
SUB-SECT. 2. APPEAL . . . . .	44
PART III. SETTLEMENT ESTATE DUTY . . . . .	44
SECT. 1. IN GENERAL . . . . .	44
SECT. 2. WHAT SETTLED PROPERTY CHARGEABLE . . . . .	44
SECT. 3. EXCEPTIONS FROM CHARGE OF DUTY . . . . .	47
SECT. 4. COLLECTION OF THE DUTY . . . . .	47
SECT. 5. OUT OF WHAT PROPERTY PAYABLE . . . . .	47
SUB-SECT. 1. IN GENERAL . . . . .	47
SUB-SECT. 2. WHERE SETTLED PROPERTY EXONERATED . . . . .	48
PART IV. LEGACY DUTY . . . . .	49
SECT. 1. IN GENERAL . . . . .	49
SECT. 2. LEGACIES AND SUCCESSION UPON INTESTACY . . . . .	49
SUB-SECT. 1. WHAT IS A TESTAMENTARY INSTRUMENT . . . . .	49
SUB-SECT. 2. THE LEGACY . . . . .	50
SUB-SECT. 3. SUCCESSIONS UPON INTESTACY . . . . .	51
SUB-SECT. 4. PERSONAL ESTATE . . . . .	54
SUB-SECT. 5. TRANSMITTED INTERESTS . . . . .	58
SUB-SECT. 6. WHO IS THE LEGATEE OR SUCCESSOR . . . . .	58
SUB-SECT. 7. INTERESTS UNDER POWER OF APPOINTMENT . . . . .	60
SUB-SECT. 8. DOMICIL AND SITUS . . . . .	60
SECT. 3. EXCEPTIONS FROM CHARGE OF DUTY . . . . .	65
SECT. 4. RATES OF DUTY . . . . .	67
SECT. 5. VALUE CHARGEABLE . . . . .	68
SECT. 6. COLLECTION OF DUTY . . . . .	70
SUB-SECT. 1. WHEN DUTY PAYABLE . . . . .	70
SUB-SECT. 2. BY WHOM DUTY PAYABLE . . . . .	72
A. The Accountable Person . . . . .	72
(a) In General . . . . .	72
(b) In Administration Actions . . . . .	74
(c) Receipts . . . . .	75
B. Limitation of Personal Liability . . . . .	75

	PAGE
SECT. 7. OUT OF WHAT PROPERTY DUTY PAYABLE . . . . .	75
SUB-SECT. 1. IN GENERAL . . . . .	75
SUB-SECT. 2. DIRECTIONS BY TESTATOR . . . . .	76
A. General Directions to pay Duty . . . . .	76
B. Legacies free of Duty . . . . .	77
C. Annuities free of Duty . . . . .	79
D. Substituted and Additional Legacies . . . . .	81
E. Bequests of Residue . . . . .	81
F. New Duties . . . . .	82
SECT. 8. REMISSION OF DUTY AND INTEREST. . . . .	82
SECT. 9. COMMUTATION OF DUTY AND COMPOSITION OF CLAIMS . . . . .	82
SECT. 10. INTEREST, PENALTIES AND PROCEEDINGS . . . . .	82
SUB-SECT. 1. INTEREST . . . . .	82
SUB-SECT. 2. PENALTIES. . . . .	82
SUB-SECT. 3. PROCEEDINGS . . . . .	82
SECT. 11. REPAYMENT OF OVERPAID DUTY . . . . .	82
 PART V. SUCCESSION DUTY . . . . .	 83
SECT. 1. IN GENERAL . . . . .	83
SECT. 2. THE SUCCESSION . . . . .	83
SUB-SECT. 1. IN GENERAL . . . . .	83
SUB-SECT. 2. SUCCESSIONS UNDER DISPOSITIONS . . . . .	84
A. Dispositions . . . . .	84
B. Successions. . . . .	86
SUB-SECT. 3. SUCCESSIONS THROUGH DEVOLUTION BY LAW . . . . .	89
SUB-SECT. 4. THE SUCCESSOR . . . . .	89
SUB-SECT. 5. THE PREDECESSOR . . . . .	91
A. In General . . . . .	91
B. Under Dispositions . . . . .	93
(a) In General . . . . .	93
(b) Powers of Appointment . . . . .	93
(c) Resettlement of Entailed Property. . . . .	94
C. Under Devolution by Law . . . . .	95
SUB-SECT. 6. SPECIAL MODES OF CONFERRING SUCCESSIONS . . . . .	96
SUB-SECT. 7. DOMICIL AND SITUS . . . . .	97
A. Liability to Duty . . . . .	97
B. Real Property . . . . .	98
C. Personal Property . . . . .	99
D. Domicil of Successor . . . . .	101
SUB-SECT. 8. NATIONALITY OF SETTLOR OR SUCCESSOR . . . . .	102
SECT. 3. EXCEPTIONS FROM CHARGE OF DUTY . . . . .	102
SUB-SECT. 1. INTERESTS SURRENDERED, DESTROYED OR TRANSMITTED . . . . .	102
SUB-SECT. 2. WHEN SUCCESSOR ALSO PREDECESSOR . . . . .	102
SUB-SECT. 3. CONTRACT MADE FOR VALUABLE CONSIDERATION . . . . .	102
SUB-SECT. 4. WHERE OTHER DEATH DUTY CHARGEABLE AND EXEMPTED . . . . .	104
SUB-SECT. 5. SMALL SUCCESSIONS . . . . .	105
SUB-SECT. 6. PROPERTY NOT YIELDING INCOME . . . . .	105
SUB-SECT. 7. MONEY APPLIED TO PAYMENT OF DUTY . . . . .	105
SUB-SECT. 8. EARLY CESSER OF LIMITED INTEREST . . . . .	105
SECT. 4. RATES OF DUTY . . . . .	106
SECT. 5. VALUE CHARGEABLE . . . . .	107
SUB-SECT. 1. GROSS VALUE . . . . .	107
SUB-SECT. 2. DEDUCTIONS . . . . .	109
SECT. 6. COLLECTION OF THE DUTY . . . . .	111
SUB-SECT. 1. THE DUTY . . . . .	111
SUB-SECT. 2. WHEN PAYABLE . . . . .	111

	PAGE
SUB-SECT. 3. BY WHOM PAYABLE . . . . .	112
A. The Accountable Persons . . . . .	112
B. Limitation of Personal Liability . . . . .	113
SUB-SECT. 4. REMISSION OF DUTY AND INTEREST . . . . .	113
SUB-SECT. 5. COMMUTATION OF DUTY AND COMPOSITION OF CLAIMS . . . . .	113
SECT. 7. OUT OF WHAT PROPERTY PAYABLE . . . . .	113
SUB-SECT. 1. THE PROPERTY . . . . .	113
SUB-SECT. 2. POWER TO RAISE THE DUTY . . . . .	114
SUB-SECT. 3. LIMITATION OF THE CHARGE OF DUTY . . . . .	115
SUB-SECT. 4. BEQUEST FREE OF DUTY . . . . .	115
SECT. 8. INTEREST, PENALTIES AND PROCEEDINGS . . . . .	115
SUB-SECT. 1. INTEREST . . . . .	115
SUB-SECT. 2. PENALTIES . . . . .	115
SUB-SECT. 3. PROCEEDINGS . . . . .	115
SECT. 9. REPAYMENT OF OVERPAID DUTY . . . . .	115
PART VI. PROBATE DUTY . . . . .	116
SECT. 1. IN GENERAL . . . . .	116
SECT. 2. SUBJECT MATTER OF CHARGE . . . . .	116
SUB-SECT. 1. " ESTATE OR EFFECTS " . . . . .	116
A. Personal Estate . . . . .	116
B. Real Estate—Conversion . . . . .	118
SUB-SECT. 2. GRANTS IN CHAIN OF TITLE—CUMULATIVE DUTIES . . . . .	119
SUB-SECT. 3. DOMICIL AND SITUS . . . . .	119
SECT. 3. EXCEPTIONS FROM CHARGE OF DUTY . . . . .	122
SECT. 4. RATES OF DUTY . . . . .	123
SECT. 5. VALUE CHARGEABLE . . . . .	124
SUB-SECT. 1. GROSS VALUE . . . . .	124
SUB-SECT. 2. DEDUCTIONS . . . . .	125
SECT. 6. COLLECTION OF DUTY . . . . .	126
SUB-SECT. 1. WHEN DUTY PAYABLE . . . . .	126
SUB-SECT. 2. BY WHOM DUTY PAYABLE . . . . .	126
SUB-SECT. 3. OUT OF WHAT PROPERTY DUTY PAYABLE . . . . .	127
SECT. 7. INTEREST, PENALTIES AND PROCEEDINGS . . . . .	128
SUB-SECT. 1. INTEREST . . . . .	128
SUB-SECT. 2. PENALTIES . . . . .	128
SUB-SECT. 3. PROCEDURE . . . . .	128
SECT. 8. REPAYMENT OF OVERPAID DUTY . . . . .	128
PART VII. ACCOUNT DUTY . . . . .	129
PART VIII. FOREIGN DUTIES . . . . .	130

*Administrators* . . . . . See EXECUTORS.  
*Corporation Duty* . . . . . „ REVENUE.  
*Executors* . . . . . „ EXECUTORS.  
*Legacies* . . . . . „ WILLS.

*Personal Representatives* See EXECUTORS.  
*Probate Practice* . . . . . „ EXECUTORS.  
*Settlements* . . . . . „ SETTLEMENTS.

## Part I.—In General.

NOTE.—In this Part *Succession Duty Act*, 1853 (c. 51), *Customs and Inland Revenue Act*, 1881 (c. 12), *Customs and Inland Revenue Act*, 1889 (c. 7), *Inland Revenue Regulation Act*, 1890 (c. 21), *Finance Act*, 1894 (c. 30), *Finance Act*, 1896 (c. 28), *Finance Act*, 1900 (c. 7), *Finance Act*, 1907 (c. 13), *Finance (1909–1910) Act*, 1910 (c. 8) are referred to as *1853 Act*, *1881 Act*, *1889 Act*, *1890 Act*, *1894 Act*, *1896 Act*, *1900 Act*, *1907 Act*, *1909–1910 Act* respectively.

### SECT. 1.—INTERPRETATION AND APPLICATION OF TERMS.

See, generally, 1894 Act, Part I., ss. 1–24.

#### 1. Interpretation — Incidence of duties.] —

(1) Foreign bonds & certificates payable to bearer, passing by delivery, & marketable on the London Stock Exchange are, when physically situate in the United Kingdom at the death of the owner, liable to estate duty under 1894 Act, even though the deceased was a foreigner domiciled abroad.

(2) This provision [1894 Act, s. 2 (2)] adequately protects the representatives of a person dying domiciled abroad, for under the decisions already referred to the property of such persons when situated out of the United Kingdom would not be liable to legacy & succession duty (LORD GORELL).

(3) It may be noticed that it is equally clear that the effect of 1894 Act is to make all the property, wherever situate, of a person dying domiciled in this country, in respect of which legacy & succession duty is payable, liable to estate duty, although before the Act it would not have been liable to probate duty except so far as it was situate in this country (LORD GORELL).

(4) Legacy & succession duties fall upon the benefits received by survivors on their accession upon a death. Estate duty falls upon the property passing upon a death, apart from its destination. 1894 Act is in that respect analogous not to the Legacy & Succession Duty Acts, but to the old Probate Duty Acts, which it supersedes in so far as they cover common ground. No doubt the estate duty covers more than did the probate duty. Also it is possible, though no instance has been established in regard to personal property, that the probate duty may in some point extend beyond the ambit of the estate duty. But in the main the class of property once liable to the one duty is now liable to the other, & both proceed, not upon any assessment of benefit arising upon the death of this or that particular person, but upon the value of the property which passed upon the death of the deceased (LORD LOREBURN, C.).

(5) S. 6 (2) of that Act [1894 Act] expressly provides that exor. of deceased shall pay the estate duty in respect of all personal property, wheresoever situated, of which deceased was at the time of his death competent to dispose in delivering the Inland Revenue Affidavit (LORD ATKINSON).

(6) It appears to me to be clear that on the occasion of delivering this affidavit it was the duty of the Inland Revenue to see to it that estate duty was paid (LORD SHAW).

(7) The principle that domicile governs the liability to legacy & succession duties, has, as to personalty within the jurisdiction, no concern with the estate duty as it had no concern with the probate duties (LORD LOREBURN, C.).

(8) It is difficult, if not impossible, to suggest any case in which with regard to persons dying after the commencement of 1894 Act the new duty is not substituted for the old probate duties (LORD GORELL).—WINANS v. A.-G., [1910] A. C. 27; 79 L. J. K. B. 156; 101 L. T. 754; 26 T. L. R. 133; 54 Sol. Jo. 133, H. L.; *affg.* S. C. *sub nom.* WINANS v. R., [1908] 1 K. B. 1022, C. A.

Annotations:—As to (1) *Refd.* *Re Manchester, Duncannon v. Manchester*, [1912] 1 Ch. 540. As to (4) *Refd.* A.-G. v. Peck, [1912] 2 K. B. 192; *Re Avery, Pinsent v. Avery*, [1913] 1 Ch. 208; A.-G. v. Burns, [1922] 1 K. B. 491. Generally, *Mentd.* A.-G. v. Till (1909), 5 Tax Cas. 440.

2. — Legacy Duty Acts—In favour of subject.]—HOBSON v. NEALE, No. 369, *post*.

3. — Popular meaning of words—Not technicalities—1894 Act.]—LORD ADVOCATE v. MORAY (COUNTESS), No. 266, *post*.

4. — Substance of transactions—Not forms of conveyancing—1894 Act & Succession Duty Acts.]—LETHBRIDGE v. A.-G., No. 99, *post*.

5. “Death duties” — Includes succession duty.]—A testatrix directed “the death duties payable out of my estate” to be paid out of a specific fund:—*Held*: (1) this was an “express provision” within 1896 Act, s. 19 (1), so that the settlement estate duty on chattels settled by the will was payable out of the specific fund.

(2) A direction to pay “the death duties payable out of my estate” out of a specific fund, would, *primâ facie*, include all death duties, i.e., settlement estate duty as well as estate duty (SWINFEN EADY, J.).—*Re CAYLEY, AWDREY v. CAYLEY*, [1904] 2 Ch. 781; 74 L. J. Ch. 31; 91 L. T. 743; 53 W. R. 260.

Annotations:—As to (2) *Refd.* *Re Turnbull, Skipper v. Wade* (1905), 49 Sol. Jo. 417; *Re Kennedy, Corbould v. Kennedy*, [1916] 2 Ch. 379; *Re Hampton, Hampton v. Mawer* (1918), 62 Sol. Jo. 585.

6. — Although legacy duty expressly named.]—Where testator stated in his will “the following legacies I give free of legacy duty, which is to be borne by my residuary estate,” & then proceeded to leave numerous pecuniary & specific legacies to various persons other than his sister, & then devised & bequeathed his property at W. to his sister, & his residue to his trustees on trust to sell & pay, *inter alia*, his death duties, & the residue to certain residuary legatees:—*Held*: the words “death duties” must here be taken to include succession duty, & the earlier provision as to payment of legacy duty was redundant.—*Re HAMPTON, HAMPTON v. MAWER* (1918), 62 Sol. Jo. 585.

—.]—See Law of Property Act, 1922 (c. 16), s. 188 (20).

Estate duty.]—See Part II.

Settlement estate duty.]—See Part III.

Legacy duty.]—See Part IV.

Succession duty.]—See Part V.

Account duty.]—See Part VII.

### SECT. 2.—MANAGEMENT OF DUTIES.

See 1853 Act, s. 9; 1881 Act, s. 26 (1); 1889 Act, s. 9 (1); Inland Revenue Regulation Act, 1890 (c. 21), s. 1 (2); Finance Act, 1921 (c. 32), s. 63.



## SECT. 3.—COMPOSITION OF CLAIMS.

See 1894 Act, s. 13 (1) & (2); Finance Act, 1917 (c. 31), s. 34; Finance Act, 1918 (c. 15), s. 42; Death Duties (Payment in Exchequer Bonds) Regulations, 1916; Death Duties (Payment in Securities) Regulations, 1917; Death Duties, etc. (Payment in Securities) Regulations, No. 2, 1918; Death Duties, etc. (Payment in Securities) Regulations, 1919; Death Duties (Payment in Securities) Regulations, 1921.

## SECT. 4.—REMISSION OF DUTY AND INTEREST.

See 1894 Act, ss. 8 (11), 15 (2); 1896 Act, s. 18 (3); 1907 Act, s. 13; 1909–1910 Act, 1910, s. 63; Finance Act, 1921 (c. 32), s. 34; Naval Discipline Act, 1866 (c. 109); Naval Discipline Act, 1884 (c. 39), s. 7 (2); Army Act, 1881 (c. 58); Army (Annual) Act, 1885 (c. 8), s. 8 (2); 1900 Act, s. 14 (1); Finance Act, 1919 (c. 32), s. 31; Finance Act, 1921 (c. 32), s. 43; Death Duties (Killed in War) Act, 1914 (c. 76); Finance Act, 1918 (c. 15), s. 44; Finance (No. 2) Act, 1915 (c. 89), s. 46; Finance Act, 1917 (c. 31), s. 29.

## Part II.—Estate Duty.

NOTE.—In this Part Finance Act, 1894 (c. 30), Finance Act, 1896 (c. 28), Finance Act, 1898 (c. 10), Finance Act, 1900 (c. 7), Revenue Act, 1903 (c. 46), Finance Act, 1907 (c. 13), Finance (1909–1910) Act, 1910 (c. 8), Finance Act, 1912 (c. 8), Finance Act, 1914 (c. 10), Finance Act, 1920 (c. 18) are referred to as 1894 Act, 1896 Act, 1898 Act, 1900 Act, 1903 Act, 1907 Act, 1909–1910 Act, 1912 Act, 1914 Act, 1920 Act respectively.

## SECT. 1.—IN GENERAL.

See 1894 Act; 1896 Act; 1900 Act; 1907 Act; 1909–1910 Act; 1912 Act; 1914 Act; 1920 Act; Revenue Act, 1903 (c. 46).

7. Incidence of duty—Falls on property.]—WINANS v. A.-G., No. 1, ante.

8. — On inheritance as a whole—1894 Act.]—Re PARKER-JERVIS, SALT v. LOCKER, No. 261, post.

9. Duty payable in succession—On subject-matter of succession—1889 Act, ss. 5, 6.]—Under a marriage settlement, personal property, valued at the death of the settlor at £20,075 was settled (*inter alia*) upon the wife for life, & upon her children absolutely on their attaining 21 years of age or on their marriage. Upon the death of the settlor the wife succeeded to the life interest in the property. The value of her interest, taken on the basis of an annuity, was admittedly estimated at less than £10,000, & there being nine children entitled in remainder their several interests in the *corpus* of £20,075 clearly in no case exceeded £10,000. The trustees having duly presented one account for the several succession duties, all chargeable at the same rate of one per cent., the Comptroller of Legacy & Succession Duties claimed further “estate duty,” leviable under above sects., upon the value of any succession exceeding £10,000. The trustees declined to pay, on the ground that none of the beneficiaries individually succeeded to personal property exceeding £10,000 in value:—*Held*: estate duty was payable on the ground that the term “succession” in above sects. applied to the subject-matter of the succession, & not to the individual interests of the several successors, & consequently the *corpus* of the estate being valued in excess of £10,000, estate duty must be paid as upon a succession the value of which exceeded that amount.—A.-G. v. ABERDARE (LORD), [1892] 2 Q. B. 684; 61 L. J. Q. B. 615; 67 L. T. 588; 56 J. P. 806; 8 T. L. R. 653, D. C.

10. “Equitable charge”—Real Estate Charges

Act, 1877 (c. 34).]—The charge, created by Finance 1894 Act, s. 2 (1), whereby estate duty is charged upon property, is an “equitable charge” within 1877 Act. Where, therefore, land descended on an intestacy in 1904 to B., who himself died intestate in 1907 without having paid the estate duty, which became payable on the death of his predecessor:—*Held*: above Act applied, & B.’s heir-at-law was not entitled to have the land exonerated from payment of the duty by the personal estate.—*Re BOWERMAN, PORTER v.* 1908] 2 Ch. 340; 77 L. J. Ch. 594; 99 L. T. 7.

## SECT. 2.—AS DISBURSEMENT OR TESTAMENTARY EXPENSE.

11. Whether a disbursement—Within Solicitor’s Act, 1843 (c. 73), s. 37.]—A payment for probate duty made by a solr. on behalf of his client is a “disbursement” within above Act, & is properly included in his bill of costs.—*Re LAMB* (1889), 23 Q. B. D. 5; 58 L. J. Q. B. 455; 37 W. R. 506, D. C.

Annotation:—*Overd. Re Kingdon & Wilson*, [1902] 1 Ch. 242.

12. — — —.]—(1) A payment for estate duty made by a solr. on behalf of his client ought not to be included in his bill of costs as a “disbursement” within the above sect.

*Re Lamb*, No. 11, ante, *overd.*

(2) Estate duty is not like probate duty merely a stamp duty, but is a duty for which the exor. is personally accountable.—*Re KINGDON & WILSON*, [1902] 2 Ch. 242; 71 L. J. Ch. 604; 86 L. T. 639; 50 W. R. 533; 18 T. L. R. 588; 46 Sol. Jo. 502, C. A.

Annotations:—*Mentd. Re Buckwell & Berkeley*, [1902] 2 Ch. 596; *Re Grant, Bulcraig*, [1906] 1 Ch. 124.

13. A testamentary expense—In respect of personal property—Competence to dispose of at death.]—*Re CLEMOW, YEO v. CLEMOW*, No. 191, post.

14. — In respect of realty.]—*Re SHARMAN, WRIGHT v. SHARMAN*, No. 203, post.

15. — — Legacy charged as realty.]—*Re SPENCER COOPER, POE v. SPENCER COOPER*, No. 204, post.

16. — Property not passing to executors—Under general power of appointment.]—*Re DIXON, PENFOLD v. DIXON*, No. 211, post.

17. — Personal annuity.]—By his will testator gave to his wife so long as she should remain his

## PART II. SECT. 2.

a. A testamentary expense.]—The stamp duty payable under Stamp Duties Act, 1898, & the *corpus* com-

mission payable under Perpetual Trustee Co. (Ltd.) Act, are testamentary expenses.—*WYNDHAM v. MACKENZIE* (1918), 25 C. L. R. 172.—AUS.

b. —.]—Estate duty is included in the term “testamentary expenses.”—*Re HOLMES, BERTHAM v. HOLMES* (1913), 32 N. Z. L. R. 577.—N.Z.

widow an annuity of £500, & he declared that this annuity should be a first charge on all his freehold properties at G. He gave various legacies, & then devised & bequeathed all his real & personal estate not thereby otherwise disposed of upon trust for sale & conversion, & out of the proceeds to pay his funeral & testamentary expenses & debts & legacies, & to stand possessed of the residuary trust moneys upon certain trusts. The G. property passed to the trustees under the residuary devise:—*Held*: upon the true construction of the will, the annuity was not a rentcharge, but was a personal annuity secured by a charge on the G. property, & the estate duty on it must be paid by the exors. as testamentary expenses.—*Re TRENCHARD, TRENCHARD v. TRENCHARD*, [1905] 1 Ch. 82; 74 L. J. Ch. 135; 92 L. T. 265; 53 W. R. 235.

*Annotation*:—*Consd. Re Spencer Cooper, Poe v. Spencer Cooper*, [1908] 1 Ch. 130.

18. — Payable by executors.]—*Re PULLEN, PARKER v. PULLEN*, No. 208, *post*.

19. — Not on *donatio mortis causa*.]—(1) The subject-matter of a *donatio mortis causa* is "property which does not pass to the exor. as such" within the 1894 Act, s. 9 (1). If, therefore, the exor. pays the estate duty upon it, he will be entitled to recover from the donee the amount of the duty so paid, which, under above sub-sect. will be a first charge on the subject-matter of the donation. Estate duty on the subject-matter of a *donatio mortis causa* is not a testamentary expense, & therefore, is not payable by the exor. under a direction in a will to pay "testamentary expenses" out of the testator's residuary estate.

(2) *Qu.*: is the subject-matter of a *donatio mortis causa* property "of which the deceased was competent to dispose at his death" within 1894 Act, s. 6 (2).—*Re HUDSON, SPENCER v. TURNER*, [1911] 1 Ch. 206; 80 L. J. Ch. 129; 103 L. T. 718. *Annotation*:—*As to* (1) *Refd. O'Grady v. Wilmot*, [1916] 2 A. C. 231.

20. — Bequest of legacies—Immediate & deferred.]—Testatrix, who made her will in 1896 & died in 1919, bequeathed several legacies, some of which were immediately payable & others were only payable upon the death of the tenant for life. She directed her exors. to pay "testamentary expenses, including death duties":—*Held*: none of the legatees were entitled to have the duties payable under 1909–1910 Act, s. 58 (2), on their respective interests discharged out of the residuary personal estate.—*Re MASSEY, RAM v. MASSEY* (1920), 90 L. J. Ch. 40; 122 L. T. 676; 64 Sol. Jo. 308.

— Effect of direction to pay testamentary expenses.]—*See* Nos. 177, 182, 186, *post*, & Sect. 9, sub-sect. 1, D., *post*.

### SECT. 3.—WHAT PROPERTY CHARGEABLE.

#### SUB-SECT. 1.—PROPERTY WHICH PASSES.

##### A. In General.

*See* 1894 Act, ss. 1, 2, 6 (5), & 22 (1).

#### 21. Property passing on death—& changing

hands.]—*COWLEY (EARL) v. INLAND REVENUE COMRS.*, No. 27, *post*.

22. — — —.]—*INLAND REVENUE COMRS. v. PRIESTLEY*, No. 30, *post*.

23. Not individual interests.]—*A.-G. v. ABERDARE (LORD)*, No. 9, *ante*.

#### B. Settled Property.

*See* 1894 Act, ss. 1, 5 (5), 22 (1) (3) & 24; Settled Land Act, 1882 (c. 38), s. 2.

24. What amounts to settlement—Construed with Settled Land Act, 1882 (c. 38), s. 2.]—*A.-G. v. OWEN, A.-G. v. COULSON*, No. 290, *post*.

25. — — —.]—*Re CAMPBELL*, No. 292, *post*.

26. Settlement brought to an end prior to death—Surrender of interest by life tenant—To remainderman.]—(1) The tenant for life of settled property with a power of appointment appointed the property to her son subject to her own life interest; by a subsequent deed she surrendered her life interest to the trustees of the settlement "to the end & intent that such life interest may merge in the interest in remainder of " her son; & died more than twelve months after:—*Held*: the property did not pass on the death of the tenant for life to the remainderman within Finance 1894 Act, s. 1, or s. 2 (1) b, & estate duty was not payable by the remainderman under that Act.

(2) When *cestuis que trust* became absolutely entitled to the trust funds in possession with power of disposition without the consent of any other parties, the settlement is at an end (*LORD DAVEY*).

(3) When the mother had passed her life estate by a conveyance *inter vivos* to her son, would anybody in the world untainted by technical views have said that that estate passed from mother to son upon death. Death had nothing to do with it. The moment that conveyance was made the son . . . might have sold the property the next day. Then in what sense has it passed on the death? (*LORD HALSBURY, C.*).—*A.-G. v. BEECH*, [1899] A. C. 53; 68 L. J. Q. B. 130; 79 L. T. 565; 63 J. P. 116; 47 W. R. 257; 15 T. L. R. 85; 43 Sol. Jo. 94, H. L.; *affg.*, [1898] 2 Q. B. 147, C. A.

*Annotations*:—*As to* (1) *Consd. Cowley v. I. R. Comrs.*, [1899] A. C. 198. *Apld. A.-G. v. De Préville*, [1900] 1 Q. B. 223. *Consd. A.-G. v. Lane Fox*, [1924] 2 K. B. 498. *Refd. I. R. Comrs. v. Priestley*, [1901] A. C. 208; *A.-G. v. Montagu*, [1903] 1 K. B. 483; *A.-G. v. Milne*, [1914] A. C. 765. *Generally, Mentd. A.-G. v. Grey*, [1898] 2 Q. B. 534; *Evans v. Evans*, [1904] P. 274; *A.-G. v. Richmond (No. 2)* (1908), 78 L. J. K. B. 1.

27. — Mortgage of former settled estates—Subsequent settlement of equity of redemption.]—Father & son, tenant for life & tenant in tail respectively, executed a disentailing deed by which they granted the estates to a trustee to hold freed from the estate tail to such uses as they should jointly appoint. In exercise of that power father & son mortgaged the estates in fee simple to a co. as security for a loan, part of which was advanced for the benefit of the father & part for the benefit of the son. With part of the loan prior incumbrances on the father's life estate were paid off, & the co. took an assignment of the debts & all the assignors' rights & powers of recovery as further security for the loan. Father & son then executed a deed of resettlement by which the estates were

#### PART II. SECT. 3, SUB-SECT. 1.—A.

a. Property "passing on death"—Life interest left to widow—Amounting to more than £500 per annum.]—A life interest left to the widow of a testator, which amounts to more than £500 per annum, is chargeable with duty the same as the rest of the estate, & is not an "absolute" gift to the widow within Deceased Persons' Estates Duties Act, 1885, s. 18.—

*Re BRANDON'S WILL* (1886), 5 N. Z. L. R. C. A. 158.—N.Z.

d. — Annuity payable out of income—Right to resort to corpus in event of deficiency—Not a gift of share of corpus.]—An annuity bequeathed to a wife primarily payable out of income, with a right in the event of deficiency of income to resort to the corpus, is not an absolute gift of a share of the corpus within Deceased

Persons' Estates Duties Act, 1881 Amendment Act, 1885, s. 18.—*Re INGLIS' WILL* (1890), 8 N. Z. L. R. 28.—N.Z.

#### PART II. SECT. 3, SUB-SECT. 1.—B.

a. Proceeds of policies of insurance—Fund required to meet annual premiums.]—By an *inter vivos* trust disposition & assignation a trustee conveyed certain property, including

*Sect. 3.—What property chargeable: Sub-sect. 1, B.; sub-sect. 2, A., B. & C.]*

charged with an annuity to the son payable during the father's life, & subject thereto were declared to be held in trust for the father for life & after his death for the son for life with remainders over. Upon the father's death in 1895 the Crown claimed from the son under 1894 Act, estate duty upon the gross value of the estates without allowing any deduction in respect either of the mtge. to the co. or of the annuity which ceased with the father's life:—*Held*: (1) the case fell under 1894 Act, s. 1; (2) the settled property which passed to the son on the father's death was only the equity of redemption; (3) estate duty was therefore payable only on the equity of redemption; (4) no deduction was allowable in respect of the annuity.

(5) The principle on which 1894 Act was founded is that whenever property changes hands on death the State is entitled to step in & take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between deceased & the person or persons succeeding. Sect. 1 gives effect to that principle. Subject to certain exceptions or savings it imposes a duty called estate duty upon the principal value of all property settled or not settled which passes on death. Sect. 2 is merely subsidiary & supplemental. It was intended apparently to sweep in a few cases which were thought perhaps to be within the spirit though not within the letter of the proposed enactment or else were supposed likely to lead to evasion if not made equally subject to estate duty. Sect. 2 therefore declares that the expression "property passing on the death of deceased" shall be "deemed to include" property classified under four different heads. The two sections are mutually exclusive (LORD MACNAGHTEN).—COWLEY (EARL) v. INLAND REVENUE COMRS., [1899] A. C. 198; 68 L. J. Q. B. 435; 80 L. T. 361; 63 J. P. 436; 47 W. R. 525; 15 T. L. R. 270; 43 Sol. Jo. 348, H. L.; *varying* S. C. *sub nom.* *Re COWLEY'S (EARL) ESTATE*, [1898] 1 Q. B. 355, C. A.

*Annotations*:—*As to* (1) *Refd.* A.-G. v. Beech, [1898] 2 Q. B. 147; A.-G. v. De Préville, [1900] 1 Q. B. 223; *Re* Vernon, [1901] 1 K. B. 297. *As to* (3) *Distd.* A.-G. v. Montagu, [1904] A. C. 316. *Refd.* A.-G. v. Hawkins, [1901] 1 K. B. 285. *As to* (4) *Refd.* A.-G. v. Glossop, [1906] 1 K. B. 284. *As to* (5) *Consd.* A.-G. v. Dobree, [1900] 1 Q. B. 442; *Re* Abergavenny, Nevill v. I. R. Comrs., [1923] 2 K. B. 18. *Refd.* I. R. Comrs. v. Priestley, [1901] A. C. 208; A.-G. v. Boden, [1912] 1 K. B. 539; A.-G. v. Milne, [1914] A. C. 765; A.-G. v. Coole, [1921] 3 K. B. 607; A.-G. v. Astor, [1923] 2 K. B. 157. *Generally*, *Mentd.* A.-G. v. Richmond & Gordon, [1909] A. C. 466.

#### SUB-SECT. 2.—PROPERTY WHICH IS DEEMED TO PASS.

##### A. In General.

2 (1); 1909–1910, 1910 Act;  
1) & (4); 1900 Act, ss. 11 (1),  
16; 1881 Act, s. 38 (1) & (2);

1889 Act, s. 11 (1).

#### 28. Property "deemed to pass" — Distin-

four insurance policies upon his life, to trustees for behoof of his daughters in liferent & their issue in fee. The trustees were directed to pay the premiums necessary to keep the policies in force, but were also empowered, at their discretion, to sue, assign, or surrender the policies. They paid the premiums out of the trust funds until the trustee's death, when the proceeds of the policies were paid over to them:—*Held*: the proceeds of the policies, & such portion of the

trust estate as had been required to yield an annual income sufficient to meet the premiums, were liable to estate duty, as being property which passed on the truster's death.—INLAND REVENUE COMRS. v. SCOTT'S TRUSTEES, [1918] S. C. 720.—SCOT.

f. Money payable after death of settlor—Under covenant in marriage settlement.—Duty is payable under Deceased Persons' Estates Duties Act, 1881, on money payable after his death, out of the estate of a settlor,

gushed from property passing on death.]—COWLEY (EARL) v. INLAND REVENUE COMRS., No. 27, ante.

#### B. Property of which Deceased was competent to dispose at his Death.

See 1894 Act, ss. 2 (1), & 22 (1) & (2).

29. Property vesting by devise—Devisee predeceasing testator, leaving issue—Wills Act, 1837, c. 26, s. 33.]—*Re* SCOTT, No. 127, post.

30. Interest in expectancy—Marriage settlement—Wife predeceasing husband.]—(1) By a marriage settlement personal property was settled in trust for the husband for life, after his death for the wife for life, & after the death of the survivor for such persons as the wife by deed or will should appoint. The wife died, having exercised the power of appointment by will. Upon her death estate duty was paid under 1894 Act in respect of her expectancy, upon the principal value of the settled property, the value of her husband's life interest being deducted. Upon the husband's death the Crown claimed estate duty again upon the principal value of the settled property. The settlement trustees paid the claim, but afterwards petitioned for the return of the amount, less the value of the husband's life interest, alleging that on his death estate duty became payable (if at all) only on the value of his life interest:—*Held*: estate duty having been paid upon the settled property since the date of the settlement, namely, upon the wife's death, s. 5 (2) of 1894 Act exempted the settled property from estate duty until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of the property, & the husband not being such a person, the trustees were entitled to a return of the amount for which they petitioned, & if they had claimed the return of the whole sum they had paid upon the husband's death they would have been entitled to it.

(2) The wife died in the lifetime of her husband. On her death . . . there was no "passing" of property within the meaning of s. 1 taken by itself. No property changed hands. . . . But under s. 2 (a), taken in conjunction with s. 1, estate duty became liable in respect of the settled property as being property of which, at the time of her death, Mrs. S. was competent to dispose (LORD MACNAGHTEN).—INLAND REVENUE COMRS. v. PRIESTLEY, [1901] A. C. 208; 70 L. J. P. C. 41; 84 L. T. 700; 49 W. R. 657; 17 T. L. R. 507, H. L.

*Annotations*:—*As to* (1) *Consd.* *Re* Avery, Pinsent v. Avery, [1913] 1 Ch. 208. *Refd.* A.-G. v. Londesborough, [1905] 1 K. B. 98.

#### 31. Reversionary interest in settled fund.]—

(1) Under a settlement made in 1902 certain funds were vested in trustees upon trust for testator for life & on his death for his widow for life, & subject thereto, for testator absolutely. By his will dated in 1907 testator disposed of his interest in the settled funds. Upon his death in 1908, leaving his widow surviving, the question arose whether the estate duty upon testator's rever-

dying after the coming into force of the Act, under a covenant & charge contained in a marriage settlement executed by him before the coming into force of the Act.—*Re* CRAWFORD (1892), 10 N. Z. L. R. 193.—N.Z.

PART. II. SECT. 3, SUB-SECT. 2.—B. g. Gifts from husband to wife—Unrevoked at death of donor.]—A husband who had *stante matrimonio* gifted a sum of money to his wife, died some years afterwards, without



sionary interest in the settled funds was payable out of his residuary personal estate as testamentary expenses, or out of the settled funds:—*Held*: as between the beneficiaries under the will the duty was payable out of the residuary personal estate.

(2) It is perfectly clear that the reversionary interest in the settled fund formed part of testator's estate which he was competent to dispose of at his death (COZENS-HARDY, M.R.).—*Re AVERY, PINSENT v. AVERY*, [1913] 1 Ch. 208; 82 L. J. Ch. 434; 108 L. T. 1; *sub nom. Re AVERY, PINSENT v. AVERY, WRIGHT v. MARGHILOMAN*, 57 Sol. Jo. 112, C. A.

**32. Property settled by statute—Tenant in tail.**—Under private Acts of Parliament R. became entitled to certain real estate at G.:—*Held*: R. was tenant in tail & was competent to dispose of the G. estates at the date of his death within 1894 Act, s. 2, & on his death estate duty became payable on the principal value of those estates.—*A.-G. v. RICHMOND (DUKE)* (No. 2), [1907] 2 K. B. 910; 76 L. J. K. B. 1049; 97 L. T. 791; 23 T. L. R. 742; 51 Sol. Jo. 701.

**33. Property situate out of United Kingdom—Deceased having limited power of appointment.**—Testator who was domiciled in England had property situated in the United Kingdom & also in America. In 1916 he settled his American property upon certain trusts for his issue. The settlement provided that the settlor might with the consent of the trustees revoke it & appoint the property for the benefit of himself or any of his children. By a supplemental deed he revoked the settlement in part & appointed & declared that after his death the trustees should (*inter alia*) out of the trust fund raise & pay to the exors. of his English will the amounts paid by the exors. for any English death duties payable on his death & directed by the will to be paid by the exors. In 1917, he made an English will, expressly providing that it was not thereby intended to dispose of any of his American property, & he directed that all English death duties payable on or by reason of his death should be paid by his exors. out of moneys made available & applicable in that behalf by the American settlement & the supplemental deed. Upon the death of testator, in 1919, the A.-G. filed an information claiming a declaration that such part of the American trust fund as was required for the payment of the English death duties formed part of the residuary estate of testator & was liable to estate duty & legacy duty:—*Held*: the property in question passed on the death of testator under Finance Act, 1894 (c. 30), s. 1, but being situate out of the United Kingdom, by sect. 2, sub-sect. 2, it was only liable to estate duty "if under the law in force before the passing of the Act legacy duty was payable in respect thereof or would be payable but for the relationship of the person to whom it passes."

Under Revenue Act, 1845 (c. 76), s. 4, "every gift by any will or testamentary instrument of any person, which by virtue of any such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or movable estate or effects of such person, or out of any personal or movable estate or effects which such person hath had or shall have had power to dispose of" shall be chargeable with legacy duty. In this case none of the conditions mentioned in that sub-sect. were fulfilled & legacy duty was

therefore not payable; & consequently estate duty also was not payable.—*A.-G. v. ASTOR*, [1923] 2 K. B. 157; 92 L. J. K. B. 515; 129 L. T. 116; 39 T. L. R. 256, C. A.

—*See* Sect. 3, sub-sect. 3, *post*.

**Gifts mortis causa.**—*See* Sect. 3, sub-sect. 2, D. (a), *post*.

**C. Interest in Property Limited to cease on Deceased's Death.**

*See* 1894 Act, s. 2 (1), b, 7 (7); 1900 Act, s. 11 (1); 1909-1910 Act, s. 59 (1); 1914 Act, s. 14.

**34. Interest only as holder of office—Trustee.**—*A.-G. v. EYRES*, No. 297, *post*.

**35. Interest in goodwill of partnership.**—A father & his two sons carried on the business of lace manufacturers under a deed of partnership which included covenants to the following effect: Neither of the sons was, without the consent of the father, to be directly or indirectly engaged in any trade or business except on account & for the benefit of the partnership; both the sons were bound to give so much time & attention to the business as the proper conduct of its affairs required; the father was not bound to give more time or attention to the business than he should think fit; if the father should die his share was to accrue to the sons in equal shares, subject only to their paying out to his representatives the value of his share & interest at his death as ascertained by an account to be made as on the day of his death with all proper valuations, but without any valuation of or allowance for goodwill, which goodwill was to accrue to the sons in equal shares. The father died. The value of his share & interest at his death was ascertained by an account taken as directed by the deed of partnership without any valuation of or allowance for goodwill. The share & interest so ascertained amounted to a large sum, & estate duty was paid on that sum. The Crown claimed estate duty on the value of the father's share in the goodwill on the ground that it was (a) property which passed on the death of the father within 1894 Act, s. 1 (2) (b), or (b) property in which the deceased had an interest ceasing on his death in which a benefit accrued or arose to the sons by the cesser of that interest within s. 2 (1) (b) of that Act, or (c) property passing under a settlement by deed whereby an interest for life was reserved to the father, & therefore property which would be required on the death of the father to be included in an account under 1881 Act, s. 38, as amended by 1889 Act, s. 11, as further amended by & within the provision of 1894 Act, s. 1 (2) (c), or (d) an interest provided by the father in which a beneficial interest accrued or arose by survivorship on his death within s. 2 (1) (d) of the Act. The Ct. deciding on the evidence that the goodwill of the business was of small value:—*Held*: (1) having regard to the obligations of the sons under the partnership deed, the share & interest of the father in the goodwill of the business passed on the death of the father to the sons by reason only of a *bona fide* purchase for full consideration in money's worth paid to the father for his own use & benefit, within 1894 Act, s. 3 (1); (2) this was a question for the Ct., & not for the Comrs., under s. 7 of 1894 Act, to determine; (3) the share & interest of the father in the goodwill of the business was not (a) property which passed on the death of the father within s. 1 of 1894 Act,

having taken any steps to revoke the donation:—*Held*: the sum was property of which the deceased husband was at the date of his death competent to dispose, & estate duty was payable. —*LORD ADVOCATE v. GUNNING'S*

TRUSTEES, [1907] S. C. 800; 44 Sc. L. R. 514; 14 S. L. T. 946.—SCOT.



**Sect. 3.—What property chargeable: Sub-sect. 2, C.**

nor (b) an interest for life reserved to the father within 1881 Act, s. 38, as amended by 1889 Act, s. 11, & as further amended by & within 1894 Act, s. 2 (1) (c), of that Act, nor (c) an interest provided by the deceased within s. 2 (1) (d) of that Act; (4) it was a benefit accruing or arising to the sons by the cesser of an interest which the father had in property & which ceased on his death, within s. 2 (1) (b) of that Act.—*A.-G. v. BODEN*, [1912] 1 K. B. 539; 81 L. J. K. B. 704; 105 L. T. 247.

*Annotations:—As to (1) Consd. Baker v. I. R. Comrs.*, [1923] 1 K. B. 323. *Refd. A.-G. v. Sandwich*, [1922] 2 K. B. 500.

**36. Interest as annuitant—Charged on testator's residuary estate.]—**A testator who died before the commencement of 1894 Act, by his will bequeathed his real & personal estate to trustees for sale & investment, & for payment out of the annual income thereof of an annuity to his wife, & subject to the annuity, to his eight children, equally, & after the death of his wife to divide the trust fund among the children in equal shares; but if the fund exceeded a certain specified sum, then to divide eight-ninths of such excess among the children, & to pay the remaining ninth to certain other persons. The wife died after above Act had come into operation:—*Held*: estate duty was only payable on the one-ninth share of the excess of the trust fund over the specified sum & on the benefit which accrued to the children by the cesser of the annuity, since that was the only property passing on the death of his wife.—*Re TOWNSEND*, [1901] 2 K. B. 331; 70 L. J. K. B. 764; 84 L. T. 714; 65 J. P. 344; 49 W. R. 600, D. C.

**37. ———.]—**By his will testator bequeathed an annuity of £1,000 *per annum* to be paid out of his residuary estate, & primarily out of the income thereof, during the life of the annuitant or such less period as in the will mentioned:—*Held*: annuitant had an interest in testator's residuary estate within 1894 Act, ss. 1, 2 (1), 7 (7), & upon annuitant's death, estate duty became payable in respect of the benefit which accrued to the residuary estate upon the death of annuitant by cesser of the annuity.—*A.-G. v. WATSON*, [1917] 2 K. B. 427; 86 L. J. K. B. 1034; 117 L. T. 187.

*Annotation:—Folld. A.-G. v. Coole*, [1921] 3 K. B. 607.

**38. ———.]—***A.-G. v. COOLE*, No. 137, *post*.

**39. ——— Charged on testator's real estate.]—**By his will F., who died in 1896, charged his real estate with an annuity of £1,000 for his daughter M., for her life, & subject thereto, devised his real estate to his son, deft., in fee. On his father's death in 1906 deft. paid estate duty on the full value of the real estate devised to him less only a deduction therefrom of the value calculated according to the succession duty tables of an annuity of £1,000 for the life of M., who was then aged 64. By deed, dated Feb. 11, 1922, M. released & extinguished her annuity, & on Nov. 26, 1922, she died. Thereupon the Crown claimed from deft., by virtue of 1900 Act, s. 11 (1), estate duty on the property to the extent to which a benefit accrued by reason of the cesser of the

annuity:—*Held*: estate duty was not payable on the cesser of the annuity, inasmuch as M. had not an interest in the property ceasing on her death, & deft. was not "a person entitled to an estate or interest in remainder or reversion in such property" within the sub-sect.—*A.-G. v. LANE FOX*, [1924] 2 K. B. 498; 93 L. J. K. B. 1059; 40 T. L. R. 816; 69 Sol. Jo. 90.

**40. ——— During lifetime of deceased—Vested interest expectant on deceased's death—Property does not pass.]—***Re TOWNSEND*, No. 36, *ante*.

**41. Release of interest prior to death—Duty not chargeable.]—***A.-G. v. BEECH*, No. 26, *ante*.

**42. ——— Death occurring within twelve months of release.]—**Where the tenant for life of settled property has released the life interest in favour of the remainderman & dies within twelve months of such release, estate duty is not payable by the remainderman on the principal value of the property under 1894 Act, s. 2 (1) c, & 7 (7).—*A.-G. v. DE PRÉVILLE*, [1900] 1 Q. B. 223; 69 L. J. Q. B. 283; 81 L. T. 690; 48 W. R. 193; 16 T. L. R. 125, C. A.

*Annotations:—Consd. A.-G. v. Lane Fox*, [1924] 2 K. B. 498. *Refd. A.-G. v. Montagu* (1903), 72 L. J. K. B. 258.

*See, now*, 1900 Act, s. 11 (1).

**D. Gifts mortis causa and inter vivos.****(a) Mortis causa.**

*See* 1881 Act, s. 38 (2); 1889 Act, s. 11 (1); 1894 Act, s. 2 (1) (c); 1909–1910 Act, s. 59 (1), (2), & (3).

**43. Whether liable to estate duty.]—***A.-G. v. RICHMOND & GORDON (DUKE)*, No. 144, *post*.

**44. Whether property of which deceased competent to dispose.]—***Re HUDSON, SPENCER v. TURNER*, No. 19, *ante*.

*See, generally*, GIFTS.

**(b) Inter vivos.**

*See* 1881 Act, s. 38 (2); 1889 Act, s. 11 (1); 1894 Act, s. 2 (1) c; 1909–1910 Act, s. 59 (1), (2), & (3).

**45. Gift made within twelve months of death.]—**A gift was made within the twelve months preceding the death of the donor. The gift was without any reservation or power of revocation; was a gift out & out, & was not a *donatio mortis causa*:—*Held*: the gift was liable to account stamp duty under Customs & Inland Revenue Acts, 1881 (c. 12), s. 38, & 1889 (c. 7), s. 11.—*A.-G. v. BOOTH* (1894), 63 L. J. Q. B. 356; 10 T. L. R. 334; 10 R. 175, D. C.

**46. ———.]—***MILES v. R.* (1897), 41st Report of Inland Revenue Comrs. [Cd. 9020], p. 167.

**47. ——— Gift contained in marriage settlement—In favour of children of former marriage.]—**(1) By 1881 Act, s. 38, account duty is made payable on certain property including by sub-sect. 2 (a) any property "taken under a voluntary disposition made by any person dying after June 1, 1881, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bond fide* made three months before the death of deceased," & including by sub-sect. 2 (c) any property "passing under any past or future voluntary settlement made by any person

**PART II. SECT. 3, SUB-SECT. 2.—**  
**D. (b).**

**h. Gift made within twelve months of death—Gift contained in marriage settlement.]—**Estate duty is payable upon the death of a settlor in respect of property included in an ante-

nuptial settlement executed by him within twelve months before his death, on the marriage of his son, for which settlement there was no consideration in money or money's worth, although no estate for his life or for any period determinable by reference to his death is reserved

to the settlor by the settlement.—*A.-G. v. SMYTH*, [1905] 2 I. R. 553.—**IR.**

**k. ———.]—**H.M. ADVOCATE *v. HEYWOOD-LONSDALE'S TRUSTEES* (1906), 43 Sc. L. R. 529.—**SCOT.**

**45 i. ———.]—**Any property which

dying on or after such day," by deed or other instrument not taking effect as a will, whereby an interest in such property for life is reserved to settlor. By 1889 Act, s. 11, the above-mentioned period of three months is altered to twelve months, & the expression "voluntary settlement" is made to include any trust "in favour of a volunteer," whether the instrument effecting the settlement was made for value or not as between settlor & any other person.

(2) By the settlement made on the second marriage of a widow it was provided that out of 19,500 fully paid-up shares which she was entitled to have allotted to her, 1,000 should be allotted to each of her four adult sons by the former marriage, & the remaining 15,500 to trustees, as to 3,200 upon trust for her two infant sons & two married daughters by her former marriage, & as to the remaining 12,300 upon trust to pay a life annuity to her husband, & subject thereto, to pay the income to settlor for life, & hold the fund after her death, in trust for the children of the former marriage as she should appoint. The marriage was solemnised, & the shares duly allotted. Settlor died within twelve months after the settlement, having exercised by will her power of appointment in favour of the children of the former marriage:—*Held*: account duty was payable, for the children of the wife by her first husband were without the consideration of the marriage; with regard to the shares in which the settlor took no life interest, the disposition in favour of such children was therefore a "voluntary disposition" within sub-sect. 2 (a), though contained in a marriage settlement; with regard to the shares in which settlor took a life interest, the children of the first marriage took under a trust "in favour of a volunteer."—*A.-G. v. JACOBS-SMITH*, [1895] 2 Q. B. 341; 64 L. J. Q. B. 605; 72 L. T. 714; 59 J. P. 468; 43 W. R. 657; 11 T. L. R. 411; 39 Sol. Jo. 538; 14 R. 531, C. A.

*Annotations*:—As to (1) *Reid. I. R. Comrs. v. Gribble*, [1913] 1 K. B. 220. As to (2) *Folld. Miles v. R.* (1897) 41st Report of I. R. Comrs. [C. 9020], p. 167.

48. — In consideration of execution of settlement.]—In view of the approaching marriage of deft. it was agreed between his father & the bride's father that the latter would settle £20,000 on his daughter, on condition that deft.'s father would give to deft. £10,000. That sum was accordingly paid to deft. by his father, & a settlement of £20,000 was executed, & the marriage subsequently took place. Deft.'s father died within twelve months of the date of payment:—*Held*: estate duty was payable by deft. on the £10,000 under 1894 Act, s. 2 (1) c.—*A.-G. v. HOLDEN*, [1903] 1 K. B. 832; 72 L. J. K. B. 420; 88 L. T. 729; 67 J. P. 135; 51 W. R. 685; 19 T. L. R. 385; 47 Sol. Jo. 419.

49. — In pursuance of moral obligation.]—N., by his will dated Dec. 13, 1901, devised & bequeathed all his estate & effects of every

description to his brother, C., absolutely, & he appointed his brother, H. & G. exors. & trustees of his will. On Jan. 11, 1902, N. signed a document or letter, which has not been admitted to probate, which was headed "Instructions to my exors. C., M., & G.—Dear Brother C. (I dictated this to G.), I have failed to make provision for the distribution of my property amongst my relatives & friends before it became too late to do it with care. For this reason I have left all my estate to you in the fullest reliance that you will, as far as possible & to the uttermost, carry out any wish that I may express in writing now or later, or which may be conveyed to you verbally by G. or my cousin Henry. I have made a settlement on P. D. which should suffice for him. As regards our family, you will be the best judge how & when a suitable distribution should be made. I do not fetter your discretion in any way. You are an old man, & therefore do not delay the distribution." Then followed directions as to the disposal of certain property & amounts to be paid to certain persons. The document concluded: "Finally, these are the instructions referred to in my will. They are not in any way to fetter C., & may probably be added to if I am spared, or I may carry some out in my own lifetime." A copy of this document was sent to C., who, on Jan. 14, 1902, wrote to G. a letter in which he said: "All I wish to say now is that every wish expressed by my brother shall be carried out to the very fullest extent so far as I am concerned, & as far as all we three exors. are concerned, for his wishes are sacred, every word." The effect of this letter was communicated to N. N. died on Feb. 18, 1902, & his will was proved by all the exors., & estate duty & legacy duty was paid on his estate, including sums given or settled by testator within twelve months of his death. C. took possession as beneficial owner of the residuary personal estate & of the freehold & leasehold estate of N., & he made on May 13, 1902 (within twelve months next before his death) a settlement of £5,000 on each of his four nephews & niece. C. also gave & paid other sums to various persons in accordance with the instructions in the letter of Jan. 11, 1902. C. died on Dec. 13, 1902:—*Held*: no trust was created, & the settlement of £5,000 so made was a gift made by C. within twelve months of his death, & so estate duty & settlement estate duty were payable in respect thereof.—*A.-G. v. CHAMBERLAIN* (1904), 90 L. T. 581; 20 T. L. R. 359; 48 Sol. Jo. 332; 68 J. P. Jo. 136.

*Annotation*:—*Reid. A.-G. v. Milne*, [1913] 2 K. B. 606.

50. — In pursuance of enforceable voluntary obligation.]—In 1892 a person covenanted with trustees that within three months after her death her exors. should pay the sum of £5,000, free of all duties & deductions, to the trustees upon trust for a certain charity. Some eight years afterwards the donor, with the object of giving the sum in her lifetime, executed another deed by

has been disposed of by a deceased within a year prior to his death, whether transfer has actually been passed or not, forms part of the deceased's estate, under Act, 28 of 1909.—*FINANCE MINISTER v. MINNAAR'S EXECUTOR* (1916), T. P. D. 520.—S. AF.

1. Transfer to sons—Value exceeding consideration.—Not a gift of the difference in value.]—A father, 80 years of age, agreed to sell to his sons certain land, the consideration being an annuity to be paid by the sons to the father, the payment by the sons of a sum of money due to a bank by a co., the whole of the

shares in which belonged to the father & the sons, the father having the controlling interest, & the payment of a certain sum of money to a debtor of the father. The value of the land was much greater than the sum of the actuarial value of the annuity, & the other amounts forming the consideration:—*Held*: the facts did not establish a gift of the difference between the value of the land & the total amount of the consideration, & on the father's death, more than five years afterwards, the land was not chargeable with any duty.—*R. v. BALLARAT TRUSTEES, EXECUTORS & AGENCY CO., LTD.* (1919), 27 C. L. R.

257.—AUS.

m. — Gift of difference in value.]—C., in 1886, conveyed his lands to his three eldest sons in three several parcels, taking mtges. back from them by which they covenanted to pay him certain sums on Oct. 1, 1890, & certain sums on May 1, 1894, & also to pay certain annuities to himself & to his wife after him. Oct. 1, 1890, was the due date for the payment of a sum secured by a mtge. previously given by C. over the whole lands, & against which he had covenanted to indemnify his sons in the conveyances to them; & the amounts covenanted to be paid by the sons on that date were intended



*Sect. 3.—What property chargeable: Sub-sect. 2, D. (b) & E.]*

which she covenanted to pay the £5,000 at once, & by this deed she, her exors. & estate, were relieved from payment of the £5,000 under the former deed. The £5,000 was paid over, & the donor died within twelve months from the execution of the deed & the payment. Upon her death the Crown claimed estate duty upon this sum of £5,000:—*Held*: the payment of the £5,000 was “an immediate gift *inter vivos*,” within 1881 Act, s. 38 (2) *a*; it was none the less a gift because there was a release of the donor & her estate from the obligation under the prior deed, & as the donor died within twelve months from the making of the gift, estate duty was payable under 1894 Act, s. 2 (1) *c*.—*A.-G. v. COBHAM (VISCOUNT)* (1904), 90 L. T. 816; 20 T. L. R. 337; 48 Sol. Jo. 398; 68 J. P. Jo. 136.

*Twelve months extended to three years.]—See 1909–1910 Act, s. 59 (1).*

**51. Benefit to donor—Must be entirely excluded—Donee to have exclusive enjoyment on possession.]—**(1) By deed, in 1885, real & personal estate was given by the owner to applt. subject to an annual rentcharge issuing out of the realty, applt. covenanting to pay the rentcharge & all the funeral & testamentary expenses & all donor's debts at his death to the full exhaustion of all his property. In the event of applt.'s death in donor's lifetime or of any breach of covenant by applt. the donor had power to revoke the deed wholly or in part: any revocation to be without prejudice to any purchase or mtge. made before the revocation. Donor released the rent-charge & power of revocation by deed in Sept. 1894, & died in Oct. 1894:—*Held*: benefits having been reserved to donor, estate duty was payable upon all the property comprised in the deed of 1885 as property passing upon the death of the donor, within 1894 Act, ss. 1, 2 (1) *c*.

(2) In this case can anybody doubt that something has been reserved to settlor? The settlement itself has reserved £4,000 a year . . . it seems to me that it is burning daylight to say that it is not within the express language of the statute (LORD HALSBURY, C.).—*GREY (EARL) v. A.-G.*, [1900] A. C. 124; 69 L. J. Q. B. 308; 82 L. T. 62; 48 W. R. 383; 16 T. L. R. 202, H. L.; *affg.* S. C. *sub nom.* *A.-G. v. GREY (EARL)*, [1898] 2 Q. B. 534, C. A.

*Annotations:—As to (1) Expld. & Distd. A.-G. v. Johnson*, [1902] 1 K. B. 416. *Refd. A.-G. v. De Preville*, [1900] 1 Q. B. 223; *A.-G. v. Johnson*, [1903] 1 K. B. 617; *A.-G. v. Seccombe*, [1911] 2 K. B. 688.

**52. — Need not be reservation—Out of subject-matter of gift.]—A.-G. v. Worrall**, No. 54, *post*.

**53. — By “contract or otherwise”—1889 Act, s. 11 (1)—Interpretation of “otherwise.”]**—*A.-G. v. SECCOMBE*, No. 59, *post*.

**54. — What amounts to—Payment of annuity.]—**(1) 1881 Act, s. 38, imposes a duty upon the personal property therein described, & 1889 Act, s. 11 (1), includes within the description

of property in the earlier Act “property taken under any gift, whenever made, of which property *bonâ fide* possession & enjoyment shall not have been assumed by the donee immediately upon the gift, & thenceforward retained to the entire exclusion of donor or of any benefit to him by contract or otherwise.”

(2) The sum of £23,000 was due to A. upon a mtge. of land, & he had obtained a decree for foreclosure which had not become absolute. A deed was executed, by which mtgors. conveyed the equity of redemption to A.'s son in consideration of £500, & A. conveyed the legal estate to his son & released the mtge. debt, & his son covenanted to pay A. an annuity of £750. The annuity was paid for some years until the death of A.:—*Held*: this was a gift of personal property within 1889 Act, & upon the death of A., his son was liable to pay the duty imposed by 1881 Act.

(3) Under sect. 11, therefore, it is no longer necessary that the reservation or benefit to donor should be out of the property given. In the present case is it possible to say that no benefit has been reserved to donor? It is clear to me that there is reserved such a benefit as is contemplated by sect. 11 (LOPES, L.J.).—*A.-G. v. Worrall*, [1895] 1 Q. B. 99; 64 L. J. Q. B. 141; 71 L. T. 807; 59 J. P. 467; 43 W. R. 118; 11 T. L. R. 48; 39 Sol. Jo. 58; 14 R. 1, C. A.

*Annotations:—As to (1) & (2) Consd. A.-G. v. Holden*, [1903] 1 K. B. 832; *A.-G. v. Johnson*, [1903] 1 K. B. 617. *Refd. United Realisation Co. v. L. R. Comrs.* (1898), 79 L. T. 556; *A.-G. v. Sandwich*, [1922] 2 K. B. 500; *A.-G. v. Parr*, [1924] 1 K. B. 916. *As to (3) Refd. A.-G. v. Seccombe*, [1911] 2 K. B. 688; *A.-G. v. Sandwich*, [1922] 2 K. B. 500.

**55. — — — — —.]—**In 1889 £500 was paid to the directors of an unincorporated charitable society, in lieu of a legacy, & upon the terms of a resolution of the directors of the society that the trustees of the society should be authorised to pay to the person from whom the £500 was received, & to his wife if she survived him, an annuity of £25. The annuity was not charged upon or secured by the property of the society, & was paid by the directors as one of the ordinary outgoings of the society. The commercial value of the annuity in the year 1889 was £210. The payee of the £500 & his wife, who survived him, died after the date of 1894 Act. The Crown claimed that, on his death, estate duty became payable by the society on the £500 under 1894 Act, s. 2 (1) (c); & on her death succession duty became payable on the £500 under 1853 Act, s. 7:—*Held*: (1) the transaction was a gift & not a *bonâ fide* purchase of an annuity, & consequently estate duty was payable on the full sum of £500, without any reduction in respect of the value of the annuity; (2) the disposition of the £500 not being a *bonâ fide* sale, succession duty was payable under 1853 Act, s. 7.—*A.-G. v. JOHNSON*, [1903] 1 K. B. 617; 72 L. J. K. B. 323; 88 L. T. 445; 67 J. P. 113; 51 W. R. 487; 19 T. L. R. 324; 47 Sol. Jo. 367, C. A.

*Annotations:—As to (1) Consd. A.-G. v. Holden*, [1903] 1 K. B. 832. *Refd. A.-G. v. Seccombe*, [1911] 2 K. B. 688; *A.-G. v. Sandwich*, [1922] 2 K. B. 500.

to be applied in paying off this mtge., & were received by C. & so applied by him in due course. On May 30, 1892, C. executed four deeds of covenant by which he covenanted to pay certain sums to or in trust for his fourth son & his three daughters on May 1, 1894. The amounts which C. so covenanted to pay were together equal to the amounts which he was to receive from his three eldest sons on the same date, & the deeds of covenant provided that, in the event

of the latter amounts not being paid when due, C. might assign them in satisfaction of his own covenants. These deeds of covenant also secured the payment of certain annuities by the fourth son & three daughters to C. & his wife after him:—*Held*: the deeds of conveyance & deeds of covenant were deeds of gift within the meaning of Deceased Persons' Estates Duties Act 1881 Amendment Act, 1885, to the extent to which in each case the value of the land con-

voyed or the amount covenanted to be paid exceeded the amount or the value of the consideration given.—*Re CHAMBERS* (1894), 13 N. Z. L. R. 111. —N.Z.

*n. Verbal gift.]—*The testator some years before his death executed a power of attorney in favour of resp., his daughter, & by a verbal gift, in order to escape taxation, authorised her to appropriate the purchase-moneys received thereunder

56. ——— Gift of insurance policy—**Policy kept up by donee.**—LORD ADVOCATE *v.* FLEMING, No. 632, *post*.

57. ——— Payment of rent-charge—**Power to revoke gift.**—GREY (EARL) *v.* A.-G., No. 51, *ante*.

58. ——— Interest accruing on gift paid to donor—**For sole benefit of donee.**—A.-G. *v.* WAGHORN (1909), *Times*, Feb. 6.

59. ——— Donor allowed to reside on property granted.]—(1) By 1889 Act, s. 11 (1), the description of property required to be included in an account & made subject to duty under 1881 Act, s. 38 (2) (a), & therefore to estate duty under 1894 Act, s. 2 (1) (c), “shall include property taken under any gift, whenever made, of which property *bonâ fide* possession & enjoyment shall not have been assumed by donee immediately upon the gift & thenceforward retained to the entire exclusion of donor, or of any benefit to him by contract or otherwise.”

The owner of a farm & dwelling-house thereon by a deed of gift in 1897 in consideration of natural love & affection conveyed & assigned the farm, with the dwelling-house & other buildings & the live & dead stock & the other chattels thereon, to deft., his great-nephew, who resided with him, & who had in the preceding year taken over the management of the farm. Donor had no property other than that included in the deed, except an annuity of £15 chargeable upon certain land belonging to deft. After the execution of the deed donor continued to reside in the house until his death in 1906, & was maintained by deft., who retained the annuity, which was sufficient to meet the cost of his maintenance, but there was no agreement or understanding between donor & deft. that the former should be permitted to remain in the house or be maintained by deft. Upon the death of donor the Crown claimed estate duty upon the value of the property comprised in the deed upon the ground that *bonâ fide* possession & enjoyment of the property were not assumed by donor & thenceforward retained “to the entire exclusion of donor, or of any benefit to him by contract or otherwise”:—*Held*: though donor was permitted by donee to & did in fact reside in the house from the date of the deed until his death, there was an entire exclusion of donor from the possession & enjoyment of the property or of any benefit to him by contract or otherwise, within the sect., & therefore estate duty was not payable.

(2) The words “or otherwise” in the sentence “or of any benefit to him by contract or otherwise” must be read as meaning some arrangement *eiusdem generis* with contract, that is to say, an enforceable arrangement.—A.-G. *v.* SECCOMBE, [1911] 2 K. B. 688; 80 L. J. K. B. 913; 105 L. T. 18.

*Annotation*:—As to (2) *Refd.* A.-G. *v.* Sandwich, [1922] 2 K. B. 500.

60. Surrender of life interest to remainderman.]—A.-G. *v.* BEECH, No. 26, *ante*.

of lands sold by him & of mortgage moneys due to him, to relend the latter to the mortgagors in her own name, & generally to invest his moneys in her own name:—*Held*: the gift to resp. being verbal could not be stamped; the deeds executed in carrying out the transaction of gift were not deeds of gift within the meaning of the New Zealand Stamp Acts, & did not operate as a disposition of property under New Zealand Deceased Persons’ Estates Duties Act, 1881, s. 35.—STAMPS MINISTER *v.* TOWNEND, [1909] A. C. 633.—N.Z.

## PART II. SECT. 3, SUB-SECT. 2.—E.

*o.* Voluntary settlement—**Reserving life interest to settlor—Trusts & dispositions to take effect after settlor’s death.**—By a voluntary settlement S. conveyed property to trustees upon trust to sell, & to stand possessed of the proceeds upon trust to invest, with power, with the consent of S. during his lifetime, & after his decease, at their discretion, to vary the investments, & upon trust to pay the income to S. during his life, & after his decease in trust for all the children of S. by

## *E. Settlements with Reservations.*

*See* 1881 Act, s. 38 (2) (c); 1889 Act, s. 11 (1); 1894 Act, s. 2 (1) (c); 1909–1910 Act, s. 59 (1).

61. Voluntary settlement—**Reserving life interest to settlor—Appointment of shares in partnership.**—By deed dated July 12, 1883, settlor, in pursuance of a power given by articles of partnership, appointed & transferred to his sons his shares in the partnership business, as from Oct. 1, 1883, or as from settlor’s death, which should first happen, provided that such appointments were conditional upon the execution by the sons before Oct. 1, 1883, of a deed covenanting to pay to settlor, from Oct. 1, 1883, during his life, interest at 4 per cent. per annum on the value of the shares appointed as aforesaid, & to pay, out of the profits, certain annuities to other persons. The sons executed this last mentioned deed on July 12, 1883. Settlor died on July 19, 1883:—*Held*: the transfer of the shares was a voluntary settlement within 1881 Act, s. 38 (2), & by it an interest for life in the property transferred was reserved to settlor, & therefore duty was payable under that sect. on the amount of the shares so transferred.—CROSSMAN *v.* R. (1886), 18 Q. B. D. 256; 56 L. J. Q. B. 241; 55 L. T. 848; 35 W. R. 303, D. C.

*Annotations*:—*Consd.* A.-G. *v.* Worrall (1894), 38 Sol. Jo. 351; A.-G. *v.* Grey, [1898] 2 Q. B. 534. *Refd.* A.-G. *v.* Ellis, [1895] 2 Q. B. 466; A.-G. *v.* Johnson, [1903] 1 K. B. 617. *Mentd.* Ruffy-Arnell, etc., Co. *v.* R., [1922] 1 K. B. 599.

62. ———.]—A.-G. *v.* GOSLING, No. 954, *post*.

63. ——— Payable only at discretion of trustees.]—By a voluntary settlement settlor assigned to trustees a sum of money, with interest, upon certain trusts, & subject to certain powers, provisoes, agreements & declarations, & it was declared that the trustees should apply the income for the benefit of settlor & his wife & children, or, at their discretion, for the benefit of one or more of such persons to the exclusion of the others, & after settlor’s death the money was to be held subject to trusts in favour of his widow & children:—*Held*: notwithstanding the power conferred upon the trustees of depriving settlor of the benefit of the settled property at their discretion, an interest in such property for life was reserved to settlor, within 1881 Act, s. 38 (2) (c), & therefore on his death duty was payable.—A.-G. *v.* HEYWOOD (1887), 19 Q. B. D. 326; 56 L. J. Q. B. 572; 57 L. T. 271; 35 W. R. 772, D. C.

64. ——— Appointment of property—**“Passing under” prior marriage settlement.**]—(1) By a marriage settlement H. transferred personal property to trustees upon trusts, the ultimate trust being for such persons as she might appoint. The earlier trusts having failed, she by deed appointed the property to a niece:—*Held*: the property so appointed was property “passing under” the marriage settlement; the settlement & deed of appointment constituted a voluntary settlement whereby a life interest was reserved to the vendor within 1881 Act, s. 38, as amended by

his then late wife, with the usual provisions for the maintenance & advancement in life of the infant children of S., if any, at the time of his death:—*Held*: this was a settlement containing trusts & dispositions to take effect after the death of the settlor S., within the meaning of Deceased Persons’ Estates Duties Act, 1881, s. 22.—*Re* SIMPSON’S SETTLEMENT (1892), 10 N. Z. L. R. 743.—N.Z.

*p.* ——— Annuity reserved to settlor.]—W. transferred to three of his sons, who formed a co-partnership, the stock-



*Sect. 3.—What property chargeable: Sub-sect. 2, E., F., G. & H.]*

1889 Act, s. 11, & duty was payable in respect of such property.

(2) The expression ["passing under" in 1881 Act, s. 38 (2) (c)] is not a phrase of art in the same strict sense in which "devise," "grant," "estate in fee," "remainder" & a host of others having exact & uniform technical significations would be properly so termed. It is a phrase of a comprehensive nature, & we think it may fairly be used in respect not only of dispositions which are effected by the words of the instrument creating them but of those which are effected by the subsequent execution of a power created by the instrument in question (*per* CUR.).—A.-G. v. CHAPMAN, [1891] 2 Q. B. 526; 60 L. J. Q. B. 602; 65 L. T. 119; 40 W. R. 79; 7 T. L. R. 640, D. C.

*Annotations:—As to (1) Foll. A.-G. v. Gosling, [1892] 1 Q. B. 545. Consd. A.-G. v. Dodington, [1897] 1 Q. B. 722. As to (2) Apprvd. A.-G. v. Wendt (1895), 65 L. J. Q. B. 51. Refd. A.-G. v. Gosling, [1892] 1 Q. B. 545; A.-G. v. Dodington, [1897] 1 Q. B. 722.*

**65. — Marriage settlement—In favour of children of former marriage.]—A.-G. v. JACOBS-SMITH, No. 47, *ante*.**

**66. — Annuity payable under partnership deed—To widow of partner.]—A.-G. v. WENDT (1895), 65 L. J. Q. B. 54; 73 L. T. 255; 43 W. R. 701; 39 Sol. Jo. 708; 15 R. 528, D. C.**

**67. — What included in term "voluntary" —1889 Act, s. 11 (1) — Retrospective effect of section.]—1881 Act, by s. 38 (c) imposes stamp duty upon personal property "passing under any past or future voluntary settlement" if a life interest is reserved to settlor. 1889 Act, s. 11, enacts that the above sect. "is hereby amended as follows: the description of property marked (c) shall be construed as if the expression 'voluntary settlement' included any instrument was made for valuable consideration or not as between settlor & any other person." Upon demurrer to an information for stamp duty alleged to be due, under 1881 Act, s. 38, in respect of personal property to which certain persons became entitled in 1885, under a settlement:—*Held*: the provisions of 1889 Act, s. 11, were retrospective, & the construction provided by that sect. must be applied to the description of the property sought to be taxed, & this although the property passed to the beneficiaries, & the proceedings to recover the duty were taken, before the second Act came into force.—A.-G. v. THEOBALD (1890), 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527, D. C.**

*Annotations:—Refd. Young v. Adams, [1898] A. C. 469; Re Lovell & Collard's Contract, [1907] 1 Ch. 249.*

*F. Settled Property in which the Interest failed before Possession.*

*See* 1894 Act, s. 5 (3); 1896 Act, s. 14.

**68. Subsequent limitations continuing to subsist—Limitation giving absolute interest—Marriage settlement.]—(1) By 1894 Act, ss. 1 & 2, estate duty is imposed upon property, real or personal, settled or not settled, "which passes on the death" of every person dying after the commencement**

of the Act. By s. 5 (3), where the interest of any person under a settlement fails before it becomes an estate in possession, "& subsequent limitations under the settlement continue to subsist," the property shall not be deemed to pass on his death. By a marriage settlement personal property belonging to the wife was settled upon trusts to pay the income to her during the joint lives of her husband & herself, & after the death of such one of them as should first die, to pay the income to the survivor during his or her life, & if the wife should survive her husband, & there should be no children of the marriage, then in trust for her absolutely. There were no children of the marriage. The wife survived her husband, who died after the commencement of the Act:—*Held*: on his death "subsequent limitations under the settlement continued to subsist" within s. 5 (3), so that estate duty was not payable.

(2) I think "subsist" properly describes any estate created by the settlement which has not come to an end. I do not think that such an estate is the less a limitation because there is no estate limited beyond it—in other words, I think that limitations under the settlement continue until the death of a person who was, at the time of his death during the continuance of the settlement, competent to dispose of such property (VAUGHAN WILLIAMS, J.).—A.-G. v. WOOD, [1897] 2 Q. B. 102; 66 L. J. Q. B. 522; 76 L. T. 654; 45 W. R. 663; 13 T. L. R. 435; 41 Sol. Jo. 544, D. C.

*Annotation:—As to (1) & (2) Consd. A.-G. v. Glossop, [1907] 1 K. B. 163.*

**69. — From what time limitations commence—Death of person whose interest fails.]—(1) An "interest is created" within the words "& no other interest is created by the said disposition" in 1896 Act, s. 15 (1), by a limitation in a marriage settlement in favour of unborn children of the marriage, although there never is a child of the marriage. (2) By a marriage settlement property, described as the husband's fortune & the wife's fortune respectively, was settled by the husband & wife upon trust (*inter alia*) to pay during the joint lives of husband & wife an annuity of £400 to the wife for her separate use without power of anticipation & to pay the residue of the income, & after the death of the wife, the whole income, to the husband for life, & after his death to pay the whole income to the wife for life, & upon trust after the death of the survivor for such children of the marriage as the husband & wife, or the survivor, should appoint, & in default of appointment, upon trust for the children of the marriage who should attain the age of 21, or being daughters should marry under that age & failing such issue, upon trust as to the husband's fortune for him, his exors., administrators & assigns, & as to the wife's fortune for her exors., administrators & assigns. There was no issue of the marriage, & the wife survived the husband:—*Held*: upon the death of the husband estate duty became payable upon the wife's fortune, except as to so much of it as formed part of the *corpus***

in-trade & goodwill of his business. No cash was paid down by his sons, but they undertook as individuals & as a firm to grant a bond of annuity in their father's favour, & after his death, of their mother, equivalent to 5 per cent. of the value of the stock-in-trade:—*Held*: the transfer of the business was a voluntary settlement & the annuity was an interest in the business reserved by implication to the settlor, & duty was payable.—LORD ADVOCATE v. WILSON (1894),

21 R. (Cl. of Sess.) 997; 31 Sc. L. R. 819.—SCOT.

**PART II. SECT. 3, SUB-SECT. 2.—F.**

**68 i. Subsequent limitations continuing to subsist—Limitation giving absolute interest.]—Under a settlement H. took a vested legal estate as tenant in common in fee, with a limitation over on his dying under twenty-one, subject to a proviso that during his minority trustees were to enter into receipt of the rents, providing thereout**

for his maintenance, etc., & to accumulate the surplus upon trust, if he should attain his age, for him, but if he should die under age, for the persons who should ultimately become indefeasibly entitled as tenants in common in fee of all the lands in the settlement, including H.'s share:—*Held*: estate duty was not payable as on a property passing on H.'s death: H.'s interest had not become a beneficial interest in possession in the lands at his death.—A.-G. v. POWER, [1906] 2 I. R. 272, 280.—IR.

which produced the annuity of £400; but that as to that latter amount no estate duty was payable by reason of 1894 Act, s. 5 (3).

(3) With regard to the question whether in this case "subsequent limitations continued to subsist" within the meaning of the sub-sect., I agree that the point of time at which one must look for the purpose of answering that question is the time of the death of the person whose interest fails, & not any subsequent date" (FARWELL, L.J.).

(4) I think 1896 Act, s. 14, clearly cannot avail debts., because here the property was not settled by the lady on herself for life, but for the joint lives of herself & the husband (COZENS-HARDY, L.J.).—A.-G. v. GLOSSOP, [1907] 1 K. B. 163; 76 L. J. K. B. 199; 95 L. T. 823; 23 T. L. R. 103; 51 Sol. Jo. 97, C. A.

*Annotation:—As to (1) Refd. A.-G. v. Sandwich, [1922] 2 K. B. 500.*

**70. Settlor entitled to life interest & reversion—Life interest enlarged into absolute interest—Interest chargeable if operating in joint settlement.]—A.-G. v. GLOSSOP, No. 69, *ante*.**

**71. Interest in settled legacy—Death of tenant for life—Before legacy paid or appropriated.]—**The tenant for life of a settled legacy died before the expiration of a year from testator's death & before the legacy was paid or appropriated, so that he never became entitled to receive any income in respect thereof:—*Held*: estate duty did not become payable in respect of the legacy on his death.—*Re HARRISON, JOHNSTONE v. BLACKBURN & EAST LANCASHIRE ROYAL INFIRMARY*, [1918] 2 Ch. 374; 88 L. J. Ch. 133; 120 L. T. 187.

#### G. Joint Investments.

See 1894 Act, s. 2 (1) (c); 1881 Act, s. 38 (2) (b); 1889 Act, s. 11 (1).

**72. Voluntary joint purchase—Survivor to take the whole—Meaning of "voluntary"—1881 Act, s. 38 (2), b.]—**(1) A. & B. bought stock, paying for it in equal shares, & agreed that the survivor should take the whole. B. died:—*Held*: the purchase of the stock was a voluntary transfer of the stock by each to himself & his co-purchaser, & account stamp duty was payable under 1881 Act, s. 38 (1), on so much of the stock as was purchased with B.'s money.

(2) If "voluntarily" means "without consideration," it is difficult to give effect to the words in the last-mentioned sect., "in concert or by arrangement with"—words which would appear to point to the existence of some contractual obligation (*per CUR.*).—A.-G. v. ELLIS, [1895] 2 Q. B. 466; 64 L. J. Q. B. 813; 73 L. T. 190, 350; 59 J. P. 774; 44 W. R. 13; 11 T. L. R. 566; 39 Sol. Jo. 709; 15 R. 584, D. C.

#### H. Interest Purchased or Provided by Deceased.

See 1894 Act, s. 2 (1) (d); 1889 Act, s. 19.

**73. Life insurance policy.]—A.-G. v. MURRAY, No. 79, *post*.**

**74. ——— Effected by deceased at own expense—**

#### PART II. SECT. 3, SUB-SECT. 2.—H.

**73 i. Life insurance policy.]—**By an *inter vivos* trust disposition & assignation a truster conveyed certain property, including four policies of insurance upon his life, to trustees for behoof of his daughters in life-rent & their issue in fee. The trustees were directed to pay the premiums necessary to keep the policies in force, but were also empowered at their discretion to sell, assign, or surrender the policies. They paid the premiums out of the trust funds until the truster's

death, when the proceeds of the policies were paid over to them:—*Held*: the proceeds of the policies & such portion of the trust estate as had been required to yield an annual income sufficient to meet the premiums, were liable to estate duty, as being property which passed on the death of the truster within the meaning of Finance Act, 1894, s. 2 (1) (d).—*INLAND REVENUE COMRS. v. SCOT'S TRUSTEES*, [1918] S. C. 720.—SCOT.

**q. ——— On life of husband—Assigned to trustees—Premiums paid**

**Assignment to trustees—Of marriage settlement.]—A.-G. v. DOBREE, No. 97, *post*.**

**75. ——— ——— ———.]—**By a settlement made shortly before his marriage in 1887, settlor assigned to trustees a policy of assurance on his life, which he had shortly before effected, in trust for himself until the marriage, & thereafter to hold the moneys to become payable under the policy in trust to pay the income thereof to his wife during her life & after the decease of settlor & his wife in trust for the children of the marriage as therein mentioned, & if there should be no child of the marriage who should acquire an interest in the moneys in trust for settlor absolutely. By a settlement made shortly before his second marriage in 1897, settlor assigned to the trustees of that settlement another policy of assurance on his life, which he had shortly before effected, subject to an annual premium until 1916, in trust for himself until the marriage, & afterwards that the trustees should stand possessed of the moneys which should be received by them in respect of the policy during the joint lives of settlor & his wife, & during the life of settlor, if he should survive her, upon certain trusts, & that the trustees should hold the trust funds during the life of settlor's wife if she should survive upon trust to pay the income to her for life, & after the death of settlor & his wife upon trust for the children of the intended marriage, & the children of settlor by his former marriage as therein mentioned, & if none of the said children should acquire an interest then the trustees should stand possessed of the trust funds & the income thereof in trust for settlor absolutely. Settlor died in 1921, having duly paid the premiums on the policies, & was survived by his wife, three daughters of his first marriage, & a son of his second marriage:—*Held*: (1) the moneys payable under the policies were an interest purchased or provided by deceased & accruing or arising on the death of deceased within 1894 Act, s. 2 (1) (d), & should therefore be deemed to be property passing on the death of deceased under that sub-sect.; (2) these moneys were property in which deceased had had an interest, & consequently, under sect. 4 for determining the rate of estate duty to be paid on property passing on the death of deceased, these moneys should be aggregated with the other property so passing.—A.-G. v. PEARSON, [1924] 2 K. B. 375.

**76. ——— ——— ——— Under family arrangement.]—**A tenant for life of freehold estates, being in pecuniary difficulties, entered into an arrangement with his son, the tenant in tail in remainder, by which the entail was barred, & the fee was then mortgaged to secure advances to the father. The father was also possessed of policies on his own life to an amount substantially equivalent to the amount of the mtge. debt, which policies were, pursuant to the arrangement, assigned to trustees, who were to receive all policy moneys (if any) that might become payable during the life of the father & apply them in reduction of the mtge.

**money.]—**R. married in 1843 & assigned four policies of insurance to trustees. His wife assigned a sum of £3,500. Under the provisions of the settlement the policies were kept up & the annual premiums paid, exclusively out of the income of the moneys of the wife until the death of R. in 1898:—*Held*: the moneys payable under the policies were liable to estate duty under Finance Act, 1894, s. 2 (d).—A.-G. v. ROBINSON, [1901] 1 I. R. 67.—IR.

— Under



*Sect. 3.—What property chargeable: Sub-sect. 2, H., all property which passes on the death of a person I. & J.; sub-sect. 3. Sect. 4: Sub-sect. 1.]*

debt, & subject thereto were to hold all policy moneys & accumulations in trust for the son. The father's life interest was assigned to the trustees, who were out of the income to pay the mtg. interest & the premiums on the policies & other specified outgoings, & to divide the surplus income up to a certain amount between father & son & create a sinking fund out of the ultimate surplus. On the father's death the trustees received the policy moneys & paid them over to the son:—*Held*: the sums payable under the policies were an "interest purchased or provided by deceased" within 1894 Act, s. 2 (1) (d); the arrangement did not amount to an assignment of the policies to the son, but was an arrangement by virtue of which an interest in the policies passed to the son on the father's death; the transaction was in the nature of a family arrangement & not a purchase by the son, & therefore the exemption from estate duty contained in s. 3 did not apply.—*A.-G. v. HAWKINS*, [1901] 1 K. B. 285; 70 L. J. Q. B. 195; 83 L. T. 531; 64 J. P. 791; 49 W. R. 320; 17 T. L. R. 85; 45 Sol. Jo. 80, D. C.

*Annotations*:—*Distd. Lethbridge v. A.-G.*, [1907] A. C. 19. *Refd. A.-G. v. Montagu*, [1902] 1 K. B. 429; *A.-G. v. Sandwich*, [1922] 2 K. B. 500.

**77. — Purchase of policy by third person.]—***LETHBRIDGE v. A.-G.*, No. 99, *post*.

—*See, further*, No. 126, *post*.

**78. — With English company—Deceased dying domiciled abroad.]—**(1) The words "establish the right to receive," 1889 Act, s. 19, are applicable to legal proceedings in which the title to the money payable upon the policy is established.

Policies of life assurance were effected with an English insurance co. by a foreigner who died domiciled in Switzerland. By the policies respectively three directors of the co. whose hands were thereunto subscribed agreed that they would within three months after the decease of the assured should have been duly certified to the directors of the co. at their principal office pay out of the stock & funds of the co. to the exors. & administrators or assigns of the assured the sums of £300 & £700. Pltf., who was the testamentary exor. by Swiss law of the assured, brought an action, without taking out probate in the United Kingdom, against the insurance co. to recover the amount due on the policies, & proved that by Swiss law he had the right to recover debts due to the estate of deceased, including the sums due under the policies:—*Held*: (2) pltf. was within the words "exors. or administrators" in the policies; (3) he had established the right to receive the money payable in respect of the policies within the sect.; & he was therefore entitled to judgment for the amount less any English estate duties which might be payable thereon.

(4) *Qu.*: whether pltf. was an assign of deceased within the policies.—*HAAS v. ATLAS ASSURANCE CO., LTD.*, [1913] 2 K. B. 209; 82 L. J. K. B. 506; 108 L. T. 373; 29 T. L. R. 307; 57 Sol. Jo. 446; 6 B. W. C. C. N. 87.

**79. — Effected at expense of third person.]—**(1) By 1894 Act, s. 1, estate duty is granted upon

a marriage settlement, made in 1853, a wife become entitled for her life to the income of the settled property for her separate use. In 1861 she verbally agreed with her husband to pay the income to him yearly to be applied by him in paying the premiums on insurance policies on his life. The husband was always in the position of having received more

from his wife than he had paid in premiums. By an indenture made in 1887, the husband assigned the policies to trustees, upon trusts for his wife for life & after her death for children of the marriage, etc., as he should appoint. The agreement of 1861 remained unaltered & the manner in which the aforesaid payments were made to the husband, & the premiums on the policies

deemed to include (s. 2 (1), d) "any annuity or other interest purchased or provided by deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

(2) A father effected a policy of insurance in his own name on the life of his son, then aged eleven, to commence at the age of 21, upon which ten yearly premiums only were to be paid; the father, who had no insurable interest in his son's life, paid all the premiums. After the son had attained the age of 21, the father, with the approbation of the son, & the son's intended wife, assigned to the trustees of the son's marriage settlement the policy of insurance & all moneys assured or to become payable under it upon trust after the son's death to invest the insurance moneys & pay the income to the wife for life. After the death of the son (who survived his father) the insurance moneys were paid by the insurance co. to the trustees, who invested them in accordance with the trusts of the settlement:—

*Held*: assuming that as between the father the insurance co. the policy was illegal & void under 14 Geo. 3, c. 48, for want of insurable interest, & the insurance moneys were not legally recoverable, yet, the money having been in fact paid by the insurance co., the liability to estate duty was not affected by the illegality of the contract of insurance; (3) the expression "interest" in 1891 Act, s. 2 (1) (d), covers money paid under a policy of insurance on the life of deceased; (4) the sum paid under the insurance policy on the son's death was not an interest purchased or provided by the son in concert or by arrangement with his father within above sect., & on the death of his son estate duty was not payable in respect of that sum.

(5) A policy is plainly property within the scope of s. 2 [of 1894 Act] & we can see no ground for excluding it from sub-sect. 1 (d) (*per Cur.*).—*A.-G. v. MURRAY*, [1904] 1 K. B. 165; 73 L. J. K. B. 66; 89 L. T. 710; 68 J. P. 89; 52 W. R. 258; 20 T. L. R. 137, C. A.

*Annotations*:—*As to* (3) *Refd. A.-G. v. Lethbridge*, [1905] 2 K. B. 323 (*see* [1907] A. C. 19). *As to* (5) *Expld. A.-G. v. Pearson*, [1924] 2 K. B. 375.

**80. — Policy void for want of insurable interest—Liability to duty not thereby affected—Money in fact paid by insurance company.]—***A.-G. v. MURRAY*, No. 79, *ante*.

### I. Trust Property.

*See* 1894 Act, s. 2 (3); 1909–1910 Act, s. 59 (1). **Property held by trustee.]—***See* No. 297, *post*.

**81. Trust ended.]—***A.-G. v. PENRHYN*, No. 83, *post*.

### J. Property Reverting to Disposer.

*See* 1896 Act, s. 15.

**82. Benefit retained by disposer—Life interest created—Retention of annual payment.]—***A.-G. v. PENRHYN*, No. 83, *post*.

—*See, also*, Sect. 3, sub-sect. 2, D. (b), *ante*.

paid by him continued as it had been prior to the execution of the said deed of 1887. The wife survived the husband:—*Held*: the policies had not been to any extent purchased or provided by the husband within the meaning of Finance Act, 1894, s. 2 (1) (d).—*RICHARDSON v. INLAND REVENUE COMRS.*, [1909] 2 I. R. 597.—*IR.*

**83. No other interest created—Contingent interest to unborn children—Failure of contingent interest.]—**By her marriage settlement C. assigned certain funds to trustees, reserving to herself an annuity of £100 a year upon trust for her husband for life with the usual trusts in favour of the issue of the marriage with an ultimate trust for C. There was no issue of the marriage. On the death of the husband C. claimed that estate duty was not payable under 1896 Act, s. 15:—*Held*: estate duty was payable.—A.-G. v. PENRHYN (1900), 83 L. T. 103; 64 J. P. 552; 16 T. L. R. 464; 44 Sol. Jo. 574, D. C.

*Annotations*:—*Re*fd. A.-G. v. Glossop, [1906] 1 K. B. 284; A.-G. v. Sandwich, [1922] 2 K. B. 500.

**84. ———.]—**A.-G. v. GLOSSOP, No. 69, *ante*.

**85. Interest created—Devolution in succession.]—**WATSON v. INLAND REVENUE COMRS. (1900), 16 Sheriff Court Reports, 235.

**86. ——— Capital sum set aside by executor—To meet annuity bequeathed by will.]—**A.-G. v. HANNER (1904), 48th Report of Inland Revenue Comrs. [ed. 2633] p. 121.

**87. Possession of interest—To exclusion of disponent—Annuity charged on real property.]—**A.-G. v. SANDWICH (EARL), No. 106, *post*.

**88. Marriage settlement executed prior to August, 1894—Interest of survivor in capital & income—No exemption from duty—1894 Act, s. 21 (5).]**—Where under a disposition which has taken effect before the commencement of above Act, a husband or wife is entitled to the income of property settled by the other, & on his or her death the survivor becomes entitled to the capital as well as the income of such settled property, estate duty is payable in respect of the property passing on the death, & the case does not come within the exception in above sub-sect. The sub-sect. only applies to a case where the survivor becomes entitled to the income as distinguished from the capital of the settled property.—A.-G. v. STRANGE, [1898] 2 Q. B. 39; 67 L. J. Q. B. 629; 78 L. T. 516; 46 W. R. 663; 14 T. L. R. 419; 42 Sol. Jo. 507, C. A.

*Annotation*:—*Apld.* A.-G. v. Glossop, [1906] 1 K. B. 284.

appoint, or, in default of appointment, in equal shares. M. was domiciled in England when he died, & legacy duty was paid by his exors. on £1,600,000, of which £600,000 was appropriated to B. & her children. B. died in 1900, & by her will appointed the money to her children; it consisted exclusively of stocks & bonds of American cos. 1894 Act, s. 2, describes property on which estate duty is payable, & sub-sect. 2 provides that: "Property passing on the death of deceased when situate out of the United Kingdom shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes." The Crown claimed estate duty on the funds passing, on the ground that the legacy duty would have been payable but for the relationship of the parties; the parties having been in the same relationship, for the purposes of Legacy Duty Act, 1796 (c. 52), to M., & the legacy duty having therefore been paid on the death of M.:—*Held*: the reason why the legacy duty was not payable was not because of the relationship of the parties, but because it had been paid, once & for all, at the death of M. Estate duty was, therefore, not payable.—A.-G. v. BURNS, [1923] 2 K. B. 77; 92 L. J. K. B. 521; 129 L. T. 57; 39 T. L. R. 257; 67 Sol. Jo. 364, C. A.

*See, now*, Finance Act, 1923 (c. 14), s. 37.

**95. Property situate in England—Deceased domiciled abroad—Foreign bonds to bearer.]—**A colonial bond to bearer, even though containing a charge on property in such colony, if negotiable by the law of such colony, is also negotiable in the country where such bond is physically situated. Therefore, as the bailee of such bond must get a good discharge before he can deliver it up, where such bonds are actually in England at the death of deceased, estate duty is payable in respect of such bonds.—A.-G. v. GLENDINING (1904), 92 L. T. 87.

*Annotation*:—*Apld.* Winans v. A.-G. (1909), 101 L. T. 754.

**96. ———.]—**WINANS v. A.-G., No. 1, *ante*.

#### SUB-SECT. 3.—FOREIGN PROPERTY.

*See* 1894 Act, s. 2 (2).

**89. Property situate abroad—Deceased domiciled abroad.]—**WINANS v. A.-G., No. 1, *ante*.

**90. ———.]—***Re* LOIR'S POLICIES, No. 126, *post*.

**91. ——— Deceased domiciled in England.]—***Re* MANCHESTER (DOWAGER DUCHESS), DUNCANNON (VISCOUNT) v. MANCHESTER (DUKE), No. 150, *post*.

**92. ———.]—***Re* SCOTT, No. 127, *post*.

**93. ——— Property bequeathed to foreign executors.]—***Re* SCULL, SCOTT v. MORRIS, No. 151, *post*.

**94. ——— Relationship of beneficiary.]—**M., who died in 1890, by his will left large sums to trustees to be invested for his daughter, B., for life, & after her death to her children as she should

#### SECT. 4.—EXCEPTIONS FROM CHARGE OF DUTY.

##### SUB-SECT. 1.—WHERE MONEY CONSIDERATION GIVEN.

*See* 1894 Act, s. 3.

**97. General rule.]—**(1) By 1894 Act, s. 1, estate duty is granted upon all property which "passes on the death" of a person dying after the commencement of the Act. By s. 2, sub-sect. 1 (d), "property passing on the death" shall be deemed to include any annuity or other interest purchased or provided by deceased to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death. Sect. 3 exempts from estate duty property passing on the death of deceased by reason only of a *bond fide* purchase from the person under whose disposition the property passes, where such purchase was made

#### PART II. SECT. 3, SUB-SECT. 2.—J.

**83 i. No other interest created—Contingent interest to unborn children.]—**In 1902 C. conveyed to trustees £15,000 upon trust to pay yearly £575 to his daughter D. for life & after her death in trust for such of her children as D. should appoint, etc., with power to grant an annuity to her husband for life. In the event of there being

none, or no surviving children, in trust for C. absolutely, subject to the annuity to the husband. The trustees were to hold the balance of the income, after payment of the annuity to D., or the annuity to the husband, upon trust for C. absolutely:—*Held*: neither the trust for C. of the surplus income after payment to D. of the annuity of £575 nor the ultimate contingent trust for

C. of the corpus of the fund, render the gift one within Customs & Inland Revenue Act, 1881, s. 38 (2) (a) amended by Customs & Inland Revenue Act, 1889, s. 11, & Finance Act, 1894, s. 2 (c), & estate duty was not payable by the exors. of C. in respect of such part of the £15,000 as was settled on D. her husband & issue.—*Re* COCHRANE, [1906] 2 I. R. 200.—IR.



*Sect. 4.—Exceptions from charge of duty: Sub-sect. 1.]*

for full consideration in money or money's worth paid to the vendor for his own use or benefit.

(2) A., shortly before his marriage, effected a policy of insurance on his own life for a sum payable on his own death to his intended wife, & assigned the policy to the trustees of a settlement made in consideration of the marriage. By that settlement the principal moneys to be received under the policy were to be held by the trustees in trust for the wife for life & upon other trusts, & A. covenanted to keep up the policy & pay the premiums thereon during his life. He duly performed his covenant, & died after the commencement of the Act, leaving his wife surviving:—*Held*: the sum payable under the policy on A.'s death was an "interest purchased or provided by deceased" within s. 2 (1) (d); the exemption from duty contained in s. 3 did not apply; &, therefore, on A.'s death estate duty was payable in respect of that sum.

(3) I think that it [s. 3] is aimed at the kind of case where a person has bought something & paid for it a price—"a consideration in money or money's worth"—but is not to get the benefit of his purchase until the death of his vendor. It is clear, then, that he gets no immediate benefit at all; he has bought & paid for something the delivery of which to him is postponed. In such a case the Legislature has recognised that it would be unjust to make him pay duty upon the death of the vendor when he has paid the full value of the interest to the vendor—it may be years & years ago (DARLING, J.).—A.-G. v. DOBREE, [1900] 1 Q. B. 442; 69 L. J. Q. B. 223; 81 L. T. 607; 64 J. P. 24; 48 W. R. 413; 16 T. L. R. 80; 44 Sol. Jo. 103, D. C.

*Annotations*:—As to (2) & (3) *Consd. A.-G. v. Hawkins*, [1901] 1 K. B. 285. *Folld. A.-G. v. Murray*, [1903] 2 K. B. 64.

98. What constitutes "purchase"—Family arrangement—Partnership between father & son.]—BROWN v. A.-G., No. 765, *post*.

99. ———.]—A tenant for life of real estate had raised money by charges on his life estate & insurance policies on his life. By a family arrangement in 1885 between him & his son, the tenant in tail, the estates were disentailed & re-settled; the fee was mortgaged by father & son for an amount to pay off the father's debts; the policies were assigned to the son; the rents & profits of the estates were held in trust to pay the interest on the mtge., the premiums on the policies, an annuity to the son, & the residue for the father for life, with remainder to the son in fee. On the father's death the policy moneys were paid to the son, & the Crown claimed estate duty thereon from the son under Finance Act, 1894 (c. 30), sect. 2, sub-sect. 1 (d):—*Held* (1) in the true view of the family arrangement, the son had made an absolute purchase of the policies for valuable consideration—nay, for much more than the full value; (2) this was not a case of an "interest provided by the deceased, either alone

or in concert with any other person" within above sub-sect.; (3) estate duty was not payable on the policy moneys.

(4) I utterly fail to see how a transaction which would be regarded as a purchase if it took place between strangers, & would therefore be outside the Act, is to be brought within the Act because the parties to it are members of the same family & the interests or honour of the family induced to or were promoted or protected by it (LORD ATKINSON).

(5) It has many times been decided that in dealing with questions arising on the Finance Act of 1894 & the Succession Duty Acts regard should be had to the substance of the transactions on which these questions turn rather than to the forms of conveyancing which the parties to them may have adopted to carry out their objects (LORD ATKINSON).—LETHBRIDGE v. A.-G., [1907] A. C. 19; 76 L. J. K. B. 84; 95 L. T. 842; 23 T. L. R. 123, H. L.; *reversg. S. C. sub. nom. A.-G. v. LETHBRIDGE*, [1905] 2 K. B. 323, C. A.

*Annotations*:—As to (1) *Appl. A.-G. v. Sandwich*, [1922] 2 K. B. 500. As to (5) *Refd. A.-G. v. Parr*, [1924] 1 K. B. 916.

100. ——— Re-settlement of estate.]—A.-G. v. HAWKINS, No. 76, *ante*.

101. ——— Not change of security.]—Deft. was the owner of freehold estates in the county of L., & he was also the tenant for life of freehold estates in the county of D. The L. estates were charged with the payment of an annual jointure rent-charge. The person entitled to this rentcharge, by agreement with deft. in 1883, released the L. estates, & deft. in consideration granted to her an annuity charged on his life interest in the D. estates, & secured by policies of assurance on his life. On the death of the annuitant the Crown claimed estate duty from deft. under 1894 Act, s. 2:—*Held*: the Crown was entitled to the duty, since the transaction in 1883 was not the grant of an annuity for full consideration in money or money's worth paid to the grantor for his own use or benefit within 1894 Act, s. 3, but merely a transfer of the security for the jointure rent-charge from the L. estates to the D. estates.—A.-G. v. SMITH-MARRIOTT, [1899] 2 Q. B. 595; 69 L. J. Q. B. 59; 81 L. T. 359; 64 J. P. 54; 48 W. R. 12; 15 T. L. R. 497; 43 Sol. Jo. 690, D. C.

*Annotation*:—*Distd. A.-G. v. Sandwich*, [1922] 2 K. B. 500.

102. ——— Gift in lieu of legacy—Subject to payment of annuity.]—A.-G. v. JOHNSON, No. 55, *ante*.

103. Full consideration in money or money's worth—Bond to secure successor's interest—On disentailment.]—A.-G. v. RICHMOND & GORDON (DUKE), No. 144, *post*.

104. ——— For interest in goodwill of partnership.]—A.-G. v. BODEN, No. 35, *ante*.

105. ——— Question for court—Not for Inland Revenue Commissioners.]—A.-G. v. BODEN, No. 35, *ante*.

106. ——— Grant of annuity.]—In 1910 the eighth Earl of S. was tenant for life under a settlement of certain estates. In the event of his death

**PART II. SECT. 4, SUB-SECT. 1.**

104 i. Full consideration in money or money's worth—For interest in goodwill of partnership.]—A., the owner of a business, took into partnership his two sons. They brought no money in, but were bound to devote their whole time to the business. They were each to receive one-fourth of the profits, & on A.'s death they were jointly entitled to the partnership assets. Premiums of insurance on

A.'s life, & all his household expenses, were to be paid yearly out of the partnership assets. A. assigned to his sons all his share & interest in the entire business, & was empowered to charge the business with a sum of £12,000 which was thereby declared actually charged on the business. Estate duty was paid on the amount of A.'s real & personal estate, including the sum of £12,000. The Crown in addition claimed estate duty on the entire amount, less the £12,000 on

which duty had been paid, of the partnership assets:—*Held*: a benefit had been reserved to the donor, & the transaction was not a transaction for value, & estate duty was payable.—*Re CLARK* (1906), 40 I. L. T. 117.—*IR*.

106 i. ——— Grant of annuity.]—Testator bequeathed heritage to L. & conveyed his movable estate to trustees to pay therefrom an annuity & to hold the residue for L. in fee.

his brother, Admiral M., was the next tenant for life & deft., the Admiral's son, was tenant in tail. The Earl, & in the event of his death, the Admiral, possessed powers of jointuring & granting portions. By a disentailing deed dated Dec. 8, 1910, the Earl & the Admiral released their interests & powers of jointuring & portioning under the settlement & the estates were assured to deft. in fee simple in possession. The Admiral consented to this arrangement on condition that deft. should grant to his mother, Lady M., an annuity of £2,000 payable on the death of the survivor of the Earl & the Admiral, & this was effected by a deed dated Dec. 12, 1910. On the death of the survivor Lady M. entered into & continued in possession of the annuity until her death, when a claim for estate duty, upon its reverter to deft. was made by the Crown. Deft. claimed exemption from payment of the duty under 1896 Act, s. 15 (1), or 1894 Act, s. 3 (1).

S. 15 (1), provided that "where by a disposition of any property an interest is conferred on any person other than the disponent for the life of such person or determinable on his death, & such person enters into possession of the interest, & thenceforward retains possession thereof to the entire exclusion of the disponent or of any benefit to him by contract or otherwise & the only benefit which the disponent retains in the said property is subject to such life or determinable interest, & no other interest is created by the disposition, then, on the death of such person after the commencement of this part of this Act, the property shall not be deemed for the purpose of the principal Act to pass by reason only of its reverter to the disponent in his lifetime."

By 1894 Act, s. 3 (1), "estate duty shall not be payable . . . in respect of the determination of any annuity for lives . . . where such annuity was granted for full consideration in money or money's worth paid to the . . . grantor for his own use or benefit":—*Held*: (1) the transaction in question did not come within 1896 Act, s. 15, so as to exempt deft. from payment of duty; the conditions for the application of that sect. were not fulfilled; (2) the annuity was granted for "full consideration in money or money's worth paid to the grantor for his own use or benefit" within 1894 Act, s. 3 (1), & consequently, duty was not payable by deft. on the cesser of the annuity.—A.-G. v. SANDWICH (EARL), [1922] 2 K. B. 500; 91 L. J. K. B. 757; 127 L. T. 517; 38 T. L. R. 703; 66 Sol. Jo. 612, O. A.

*Annotations*:—As to (1) *Reid*. A.-G. v. Parr, [1924] 1 K. B. 916. As to (2) *Reid*. Baker v. I. R. Comrs., [1923] 1 K. B. 323.

**107. — Consideration less than full value of property—Conveyance *bonâ fide*.]**—(1) When property has been conveyed for a consideration less than its full value, the fact that stamp duty has only been paid in respect of the consideration mentioned in the conveyance, & not, as required by 1909–1910 Act, s. 74, in respect of the value

of the property, will not affect a subsequent purchaser for value.

(2) Estate duty will not be payable under s. 59 of the Act in respect of property which has been the subject of a *bonâ fide* bargain & conveyance, even if the consideration be less than the full value of the property.

(3) The provisions as to estate duty are laid down by s. 59 of the Act. For the purpose of this sect., the question must be asked, was the conveyance . . . a voluntary disposition operating as an immediate gift *inter vivos*. I do not think it was . . . No estate duty will be payable (WAR-RINGTON, J.).—*Re WEIR & PITT'S CONTRACT* (1911), 55 Sol. Jo. 536.

**108. Sale or mortgage of expectant interest prior to 1894 Act—1894 Act, s. 21 (3)—Expectant interest depending on two lives—Repayment of duty paid on death of first life.]**—A.-G. v. WALKER, *Re REVERSIONARY INTEREST SOCIETY LTD.'S PETITION* (1896), *Times*, May 14.

**109. — Exemption in favour of purchaser or mortgagee—Not vendor or mortgagor.]**—A tenant in tail in remainder to freehold estates raised money during the lifetime of the tenant for life by granting annuities or rent-charges charged upon the property, by purchasing an annuity & charging his interest in expectancy with the capitalised value, & by a mtge. of his interest in expectancy:—*Held*: (1) the annuities granted by the reversioner were in the nature of mtges. & not of sales for a valuable consideration; (2) the exemption in 1894 Act, s. 21 (3), was an exemption in favour of a purchaser or mtgee., & not of a vendor or mtgor.; (3) the reversioner was not entitled under the sub-sect., on the death of the tenant for life to exemption from estate duty in respect of any of the incumbrances created by him.

(4) Both under the Act of 1894 & still more under that of 1900, cases may arise where, owing to all the property being aggregable for duty & the rate of duty being very high, the duty upon the mortgaged property which the mtgor. would have to pay would be more than the value of the equity of redemption. In cases like this the personal liability of the mtgor. rests upon sect. 8 (4), of 1894 Act, & the effect of that sub-sect. is that he is only liable to the extent to which any property passes & a beneficial interest in possession is acquired. It may be that nothing passes to him. It was not the intention of the statute that a man who really receives nothing is to have what would otherwise have been a beneficial estate turned into a debt to the Crown (PHILLIMORE, J.).—*Re VERNON*, [1901] 1 K. B. 297; 70 L. J. Q. B. 202; 83 L. T. 535; 64 J. P. 804; 49 W. R. 192; 17 T. L. R. 91; 45 Sol. Jo. 101, D. C.

**110. — Liability of mortgagor—Where duty greater than value of equity of redemption.]**—*Re VERNON*, No. 109, *ante*.

L. agreed with the annuitant & trustees to discharge the annuity in exchange for a bond of annuity of the same amount granted by L. over the lands bequeathed to him & the trustees made over the residue of the movable estate to L. free of the annuity. On the death of the annuitant, estate duty was claimed from L. in respect of the cesser of the annuity:—*Held*: L. was liable in estate duty.—*LORD ADVOCATE v. LYELL (LORD)*, [1918] S. C. 125.—SCOT.

**s. — Obligations in marriage contract.]**—Under Finance Act, 1894, s. 7, obligations in the marriage con-

tracts of a husband or a son are not debts incurred "for full consideration in money or money's worth," so as to entitle the amount of the obligation to be deducted from the obligor's estate for revenue purposes.—*INLAND REVENUE COMRS. v. ALEXANDER'S TRUSTEES* (1905), 7 F. (Ct. of Sess.) 367; 42 Sc. L. R. 307; 12 S. L. T. 682.—SCOT.

**t. Partial consideration in money or money's worth—Marriage settlement.]**—By a marriage settlement L., the husband, in consideration, partly of the transfer to him by D., the wife, of shares, & partly of the marriage,

granted lands in trust for himself for life & after his death for D. absolutely:—*Held*: the expression "partial consideration in money or money's worth," in Finance Act, 1894, s. 3 (2), was intended to relate to contracts in which the consideration was partly money or money's worth & partly marriage, & the sum in respect of which D. was liable to pay estate duty was to be ascertained by deducting £6,600, the value of the consideration in money or money's worth, from the value of the property passing to her under the settlement upon the death of L.—*Re LOMBARD*, [1904] 2 I. R. 621.—IR.



**Sect. 4.—Exceptions from charge of duty: Sub-sects.****SUB-SECT. 2.—WHERE DEATH DUTY ALREADY PAID.**

See 1894 Act, ss. 5 (2); 20 (1), (3) & (4); 21 (1), 22 (1) (f); 1896 Act, ss. 21, 24 (1); 1898 Act, s. 13; 1907 Act, s. 15; 1909–1910 Act, s. 55; 1914 Act, ss. 14, 15.

**111. Settled property—1894 Act, s. 21 (1)—General rule.]—**By above sub-sect. “estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act, in respect of which property” probate duty (among other specified duties) “has been paid or is payable, unless in either case deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property.” Under a marriage settlement personal property belonging to the wife became vested in trustees upon trust for the wife for life, & after her death, if her husband should survive her, upon trust for the husband for life, & after the death of the survivor of them, upon trust for such person or persons as the wife should by deed or will appoint. The wife died in the lifetime of her husband, before the commencement of 1894 Act, having by her will appointed the property in favour of certain beneficiaries, & probate duty was thereupon paid by her exors. in respect of the value of the property so appointed after deducting the value of the husband’s life interest. The husband died after the commencement of the Act:—(1) the settlement & will together constituted a “disposition” by which the property was settled within the meaning of above sect., & therefore, estate duty was not payable on the husband’s death in respect of the value upon which probate duty had been paid.

(2) *Semble*: estate duty was not payable on the amount of the value of the husband’s life interest, probate duty having been paid on the whole of the property.

(3) The paramount object of the sub-sect. appears to be that settled property should not pay the two duties, namely, first probate duty & then estate duty (A. L. SMITH, L.J.).—A.-G. v. DODINGTON, [1897] 2 Q. B. 373; 66 L. J. Q. B. 684; 77 L. T. 299; 61 J. P. 644; 45 W. R. 657; 13 T. L. R. 533, C. A.

*Annotations*:—As to (1) *Re* Torrington, [1913] 2 Ch. 623. As to (2) & (3) *Apprvd.* I. R. Comrs. v. Priestley, [1901] A. C. 208. *Consd.* A.-G. v. Londesborough, [1904] 1 K. B. 749; *Re* Torrington, [1913] 2 Ch. 623. *Re* A.-G. v. Londesborough, [1905] 1 K. B. 98. *Generally*, Avery, Pinsent v. Avery, [1913] 1 Ch. 208.

**112. ——— What constitutes a “disposition”—Settlement & will together.]—**A.-G. v. DODINGTON, No. 111, *ante*.

**113. ——— Effect of change from personalty to realty.]—**(1) Under the will of testator, who died in 1849, his residuary personal estate became vested in trustees upon trust to invest it in land, & to settle the land to the use of two persons in succession for life, with remainders over in tail male. Probate duty was paid on testator’s personal estate, & the residue of the same was

invested in land, which was settled in accordance with the directions of the will. On the death of the second tenant for life in 1900, the Crown claimed estate duty in respect of the land:—*Held*: the estate duty claimed was not payable, the case coming within the exemption created by the above-mentioned sub-sect.

(2) The principle seems to be that, if the equivalent of estate duty has once been paid in respect of settled property, the duty is not to be payable again in respect of the same subject-matter; & it appears to me that the fact that, since the payment of the probate duty, the property has changed its form from that of personalty into that of realty cannot affect the application of the principle (COLLINS, M.R.).—A.-G. v. LONDESBOROUGH (EARL), [1905] 1 K. B. 98; 74 L. J. K. B. 81; 92 L. T. 39; 53 W. R. 147; 21 T. L. R. 36, C. A.

**114. ——— Limited to what property—Liability to probate duty arose at settlement.]—**The property exempted from estate duty by above sub-sect. is limited to property settled at the date when the liability to probate duty arose, & must be property in the settlement of which the will or disposition of the person on whose estate the probate duty is paid or payable forms an integral part. It is not sufficient to bring a case within the sub-sect. to show that the property is settled by some other instrument at the date when the probate duty becomes payable, still less to show that it is subject to a covenant to settle. Before any right to exemption can be established, it is necessary to find a will or disposition by the person on whose property probate duty is paid or payable constituting part of the settlement.—*Re* TORRINGTON (VISCOUNTESS), [1913] 2 Ch. 623; 83 L. J. Ch. 8; 109 L. T. 541; 29 T. L. R. 742; 57 Sol. Jo. 730.

**115. ——— Disposition must be integral part of settlement.]—***Re* TORRINGTON (VISCOUNTESS), No. 114, *ante*.

**116. ——— 1894 Act, s. 5 (2)—Re-settlement of reversion in lifetime of tenant for life—Duty payable on death of re-settlor.]—**The owner of an absolute reversionary interest in settled personal property, who during the lifetime of the tenant for life makes a settlement of his reversionary interest, reserving a life interest to himself, is a person who was “during the continuance of the settlement competent to dispose of” the property within above sub-sect., & therefore, upon his death, estate duty is payable upon the value of his interest, notwithstanding that estate duty has previously been paid upon it at the death of the original tenant for life.—A.-G. v. HAY, [1899] 2 Q. B. 245; 68 L. J. Q. B. 557; 80 L. T. 712; 15 T. L. R. 290; 43 Sol. Jo. 380, D. C.

**117. ——— Duty paid on interest in expectancy—Deceased being settlor & competent to dispose.]—**INLAND REVENUE COMRS. v. PRIESTLEY, No. 30, *ante*.

See, now, 1914 Act, s. 14.

**118. Allowance for duties already paid—Succession duty—Paid on assessed value of life interest—Not on capital value of property.]—***Re* FOLEY (LADY) (1898), *Times*, May 18.

**119. ——— Depreciation of capital value—**

**PART II. SECT. 4, SUB-SECT. 2.**

**a. Settled property—1894 Act, s. 5 (2)—Not applicable to absolute gift.]—**LORD ADVOCATE v. HARVEY’S TRUSTEES (1901), 39 Sc. L. R. 71.—SCOT.

*Prevention of second*

*of duty.]—*LORD ADVOCATE v. MACKENZIE’S TRUSTEES (1905), 42 Sc. L. R. 584.—SCOT.

**c. Allowance for duties already paid.]—**On the marriage of A. & B. trust was settled in trust as to the 2/3 thereof for B., the husband, & after his death for A. for life

& after the death of the survivor, then in the event which happened, of their being no children of the marriage in trust as to the capital of the funds for such person or persons as A. should appoint. On A.’s death in B.’s lifetime estate duty was paid on the value of her reversionary interest

**Effect on allowance.]—***Re SYKES* (1899), cited *Soward's Estate Duty*, 4th ed., p. 23.

**120. — Settlement estate duty—Payable under 1914 Act, s. 14 (b)—Enures to benefit of all persons interested.]—**(1) The amount of settlement estate duty allowed off the estate duty payable under above sect., on the first occasion on which it becomes payable enures for the benefit of the several persons interested in the property in respect of which such estate duty is paid.

(2) Testator, who died in 1913, by his will settled his residuary estate upon trust for A. for life, & then for other persons subject to the payment out of the income of a life annuity commencing on A.'s death. A. died in Oct. 1914, after 1914 Act came into operation:—*Held*: the amount of settlement estate duty paid on testator's death, which, pursuant to above sect., was allowed off the estate duty payable on A.'s death, reduced the amount of estate duty for the benefit of the annuitant as well as the residuary legatees; (3) the interest receivable under above sect. on the amount of settlement estate duty for the period between Aug. 15, 1914, & A.'s death belonged to A.'s representatives; (4) on the death of an annuitant, to whom an immediate annuity payable out of the income of the residuary estate was given by a codicil to the will, the interest receivable under above sect. for the period between Aug. 15, 1914, & the death of annuitant, on the amount of settlement estate duty paid in respect of the "slice" of the estate representing such annuity, will, belong to annuitant's representatives.—*Re BOOTH, PLEACE v. BOOTH*, [1916] 1 Ch. 349; 85 L. J. Ch. 249; 114 L. T. 498.

**121. — — — — —.]—**By his will dated Jan. 28, 1913, testator bequeathed a sum of £150,000 to trustees upon trust for his son for life & subject thereto upon trusts for his issue as therein mentioned. He bequeathed his residue personal estate to his trustees upon trust for conversion but with power to postpone the same. By clause 43 of his will he declared "that all the legacies & annuities & all other gifts bequests & devises therein contained shall be free from all death duties, & I direct that such death duties shall be paid out of my residuary estate." By clause 47 he directed his trustee out of the moneys to arise from the conversion of his residuary personal estate to "pay any funeral & testamentary expenses debts the legacies & annuities bequeathed by this my will or any codicil hereto & the death duties whether payable in respect of my estate or any of the legacies or annuities bequeathed free of legacy duty." Testator died on June 27, 1913, & settlement estate duty was paid out of residue in respect of the £150,000 fund. Testator's son died on Apr. 28, 1921:—*Held*: (1) the estate duty payable under the above sect. on the death of the son in respect of the £150,000 fund was payable out of that fund & not out of residue; (2) the amount already paid for settlement estate duty would be allowed under the above sect. against the sum chargeable against the £150,000 fund for estate duty; & the further allowance of 3 per cent. *per annum* interest on the settlement estate duty would enure for the benefit of those who would have received it, had that duty been added to the £150,000 fund.—*Re SUTHERLAND (DUKE), CHAPLIN v. LEVESON-GOWER*,

[1922] 2 Ch. 782; 92 L. J. Ch. 113; 128 L. T. 246; 67 Sol. Jo. 11.

#### SUB-SECT. 3.—HEIRLOOMS.

**122. Heirloom of national interest—1896 Act, s. 20.]—**By his will, dated in 1900, testator, who died in 1901, directed the trustees to pay out of the residuary proceeds of his estate (a) so much of the estate duty & other death duties which under 1894 Act, or any amending statute, should become payable upon or by reason of his death in respect of all the estates & property of which he should immediately before his death be tenant for life under a certain will or resettlement as the capital moneys & investments subject thereto should be insufficient to pay; & (b) all such succession duty as should become payable upon his death in respect of the same estates and property:—*Held*: (1) as to the duty in respect of the sale of certain timber, the provision of the will was applicable to duty payable in respect of a succession on the death of testator, which duty was payable out of his residuary estate; (2) as to certain heirlooms of national interest, the duty did not become payable upon the death of testator, & would not until the happening of the event mentioned in 1896 Act, s. 20. (3) It is not true to say . . . that the duty only becomes chargeable in each year upon the event of a sale; but it is really a duty which I think . . . is chargeable immediately upon the death, at the succession (*VAUGHAN WILLIAMS, I.J.*).—*Re LECONFIELD, WYNDHAM v. LECONFIELD* (1904), 90 L. T. 399; 20 T. L. R. 347, C. A.

*Annotations:—As to (1) Distd. Re Scott, Scott v. Scott*, [1916] 2 Ch. 268. *As to (2) Foll'd. Re Swaythling, Samuel v. Swaythling* (1912), 29 T. L. R. 88.

**123. — — — — — 1909-1910 Act, s. 63.]—***Held*: no part of testator's general personal estate should be set aside or retained to provide for estate duty or other duty in respect of certain heirlooms settled by his will which had been certified to be of national scientific, historic, or artistic interest.—*Re SWAYTHLING (LORD), SAMUEL v. SWAYTHLING* (1912), 29 T. L. R. 88; 57 Sol. Jo. 173.

*Annotation:—Dtd. Re Scott, Scott v. Scott*, [1916] 2 Ch. 268.

**124. — — — — —.]—**Testator, domiciled in England, died in Jan. 1912, & by his will bequeathed free of legacy duty to S. absolutely a valuable collection of works of art & other chattels at his apartments in Paris. In July, 1912, the exors. applied to the Treasury under 1896 Act, s. 20, & 1909-1910 Act, s. 63, for a certificate of exemption from duties until sale for such of the French chattels as were objects of national scientific, historic, or artistic interest. On June 2, 1914, the exors. assented to the bequest of the French chattels & forthwith delivered them to S., & she immediately on the same date delivered them to a purchaser, to whom she had contracted to sell them in Dec. 1912. The Treasury certificate specified & declared 80 per cent. in value of the chattels to be within the exemption of the sects. On the question whether S. or the residuary personal estate of the testator was liable to pay the English estate & legacy duties in respect of the chattels comprised in the certificate of exemption, & the chattels not

in the capital of the trust funds. On B.'s death estate duty was claimed on the actual amount of the capital:—*Held*: the duty paid on A.'s death

was in respect of "settled property" within the meaning of Finance Act, 1894, s. 5 (2), & credit for it should be given as regards the duty, which

would otherwise have been payable on B.'s death.—*Re FINANCE ACT, 1894, & STUDDERT*, [1900] 2 I. R. 281.—*IR.*



**Sect. 4.—Exceptions from charge of duty: Sub-sects. 3 & 4. Sect. 5: Sub-sects. 1 & 2.]**

included in the certificates:—*Held*: (1) no distinction could be drawn between enjoyment in kind for a moment & for a period of years; S. had "enjoyed in kind" although only for a most transient period, & was therefore under 1896 Act, s. 20, the person liable to account for & to pay the estate duty in respect of the exempted chattels; (2) the direction that the chattels were to be free of legacy duty was not limited to duty payable upon the testator's death, but extended to duty payable by S. in the event of the chattels being sold by her; & consequently the legacy duty was payable out of the residue; (3) the estate & legacy duties in respect of the chattels not within the certificate of exemption were payable out of the residuary estate (the gift being free of legacy duty), for all the personal estate, wheresoever situate, of a testator domiciled in England passes to his "exor. as such" within 1894 Act, s. 11 (1), although as to personalty situate abroad he may have to take proceedings in a foreign tribunal to obtain possession of them.—*Re SCOTT, SCOTT v. SCOTT*, [1916] 2 Ch. 268; 85 L. J. Ch. 528; 114 L. T. 1114; 60 Sol. Jo. 478, C. A.

— **Exemption on sale to national or public institution.]—See Finance Act, 1921 (c. 32), s. 44.**

#### SUB-SECT. 4.—OTHER CASES.

**125. Advowsons—1894 Act, s. 15 (4)—1853 Act, s. 24.]—A.-G. v. PEEK, No. 299, post.**

**126. Insurance policy of foreign subject—Domiciled abroad.]—A French subject, resident in Egypt, mortgaged his policies to the insurance co., & subsequently assigned them to C. to secure a further loan. On his death the insurance co. after deducting what was due to them paid the balance of the policy moneys into ct., as there was a dispute as to who was entitled to them. C. obtained judgment in the French Consular Ct. in Egypt, that she was the only & lawful assignee of the policies:—*Held*: on a petition by her for payment out of the policy moneys that the petition need not be served on the other claimants; it was not necessary to take out representation here to the French subject, & no duty was payable.—*Re LOIR'S POLICIES* (1916), 60 Sol. Jo. 445.**

**Gifts in consideration of marriage.]—See 1909–1910 Act, s. 59 (2).**

**Sums forming part of normal expenditure of deceased.]—See 1909–1910 Act, s. 59 (2).**

**Gifts not exceeding £100 to any one donee.]—See 1909–1910 Act, s. 59 (2).**

**Indian pensions.]—See 1894 Act, s. 15 (3).**

**Property of soldiers & sailors dying on active service.]—See 1894 Act, s. 8 (1).**

**Payment of sums under £100—Without requiring representation.]—See 1894 Act, ss. 8 (1), 22 (1) (c); Friendly Societies Act, 1896 (c. 25), s. 59;**

#### PART II. SECT. 4, SUB-SECT. 4.

**d. Charitable purposes—In Australia & abroad.]—The exemption given by Estate Duty Assessment Act, 1914–1916, s. 8 (5), in favour of devises, etc., for charitable purposes is not limited to such charitable purposes as have operation in Australia, but extends also to charitable purposes to be carried out abroad.—*JACKSON v. FEDERAL COMR. OF TAXATION* (1920), 27 C. L. R. 503.—AUS.**

**e. Widow—Absolutely entitled under husband's will.]—Where a testator gives his widow a life interest in his**

residuary estate, together with an absolute power of appointment over the property, which she exercises in favour of herself, she does not become "absolutely entitled" under her husband's will, & cannot claim the exemption from duty conferred on widows so entitled under Deceased Persons' Estates Duties Acts, 1881 & 1885.—*JACKSON v. STAMPS COMR.* (1903), 72 L. J. P. C. 68.—N.Z.

#### PART II. SECT. 5, SUB-SECT. 1.

**f. Property appointed with consent of object of special power.]—By a**

**Industrial & Provident Societies (Amendment) Act, 1913 (c. 31), s. 6.**

#### SECT. 5.—AGGREGATION OF PROPERTY.

##### SUB-SECT. 1.—WHAT PROPERTY AGGREGATED.

*See 1894 Act, s. 4, s. 7 (6 & 7); 1900 Act, s. 12 (1).*

**127. Property accruing to deceased after death—Under will of ancestor surviving him—Aggregated with deceased's other property—Wills Act, 1837 (c. 26), s. 33.]—A father devised real property to his son, who died in the lifetime of the father, leaving a daughter, who was living at the death of the father. The son devised his residuary estate to trustees. This devise included the property devised by the father's will, & took effect by virtue of the above sect. On the death of the father estate duty was paid on all the property which passed on his death, including that devised to his son. The Comrs. of Inland Revenue claimed estate duty on the property devised by the son to the trustees. On appeal by the trustees, under 1894 Act, s. 10, to determine the duty payable:—*Held*: (1) the property was property of which the son was at the time of his death competent to dispose, & therefore was property passing on the death of the son, within 1894 Act, s. 2 (1) (a); (2) as Wills Act, 1837 (c. 26), gave the property to the devisees of the son as if the son had survived the father, it gave it subject to the same duties as if the son had survived the father.**

We are bound to hold that Wills Act, 1837 (c. 26), s. 33, gives to the Crown the same duties as if the son had survived the father, & gives the property to the devisees of the son, subject to the payment of the same duties as if the son had survived (CHANNELL, J.).

(3) The duty out of this property must be the same as if the son had survived. The rate on the property, therefore, will be arrived at by taking the rate applicable to this property when aggregated with the other property of J. S., junior [the son]. I do not know whether the Crown claims any additional duty, i.e. at a higher rate than paid on the £16,000, property of J. S., junior, by reason of the aggregation with it of this freehold property, but I do not think the Crown entitled to such a higher rate on the £16,000. Wills Act, 1837 (c. 26), gives the duty on the property passing by virtue of it, but it is difficult to see how it could give a higher duty on other property (CHANNELL, J.).—*Re SCOTT*, [1900] 1 Q. B. 372; 69 L. J. Q. B. 121; 81 L. T. 610; 48 W. R. 205; 16 T. L. R. 110; 44 Sol. Jo. 147; *sub nom. In the Goods of SCOTT*, 64 J. P. 25, D. C.; *affd. sub nom. Re SCOTT*, [1901] 1 K. B. 228, C. A. *Annotations*:—As to (2) *Distd. Re Greenwood, Greenwood v. Sutcliffe*, [1912] 1 Ch. 392. *Generally, Mentd. Re Pearson, Smith v. Pearson*, [1920] 1 Ch. 247.

**128. Property settled by statute—By will—& by settlement.]—At the time of his death A. was**

married & a husband conferred on his wife a power of appointment over trust funds to be exercised in favour of the children of the marriage. The wife exercised the power by conferring, with the consent of a son of the marriage, a life interest of part of the fund on that son, & the fee on his children. The original donor of the power died prior to the commencement of Finance Act, 1894, Part I., his wife in 1897, & the son in 1916:—*Held*: as the appointment by the wife would have been invalid but for the son's consent, the son must be regarded as the settlor

entitled to certain free property which passed under his will, certain property comprised in his marriage settlement under which he was tenant for life, & certain landed estates of which he was tenant in tail male in possession according to the limitations contained in an old Act of Parliament whereby those estates were rendered inalienable. For the purpose of determining the rate of estate duty payable on the death of A. the Inland Revenue Comrs. decided that the interest of the successor of A. in the inalienable estates ought to be aggregated with the two other classes of property above mentioned:—*Held*: upon the true construction of 1894 Act, ss. 4 & 5 (5), as regards the inalienable estates estate duty was to be levied only on the value of the interest of the successor, & such interest was not to be aggregated with the other property passing on the death of A., but was to be treated as an estate by itself.—*NEVILL v. INLAND REVENUE COMRS.*, [1924] A. C. 385; 93 L. J. K. B. 321; 130 L. T. 802; 40 T. L. R. 341; 68 Sol. Jo. 418, H. L.; *revsg.* S. C. *sub nom.* *Re ABERGAVENNY (MARQUESS)*, *NEVILL v. INLAND REVENUE COMRS.*, [1923] 2 K. B. 18, C. A.  
*Annotation*:—*Reid*. A.-G. v. Lane Fox, [1924] 2 K. B. 498.

**Interest in expectancy—Payment of estate duty deferred.**—*See* 1894 Act, s. 7 (6).

—**Sold or mortgaged—After August 1, 1894, & before April 9, 1900.**—*See* 1894 Act, s. 4; 1900 Act, s. 12 (1).

**129. Settled property passing on deceased's death—Insurance policies.**—A.-G. v. PEARSON, No. 75, *ante*.

—**Disposed of by person dying prior to August 2, 1894—Interest of deceased arising under resettlement.**—*See* No. 131, *post*.

#### SUB-SECT. 2.—WHAT PROPERTY TREATED AS SEPARATE ESTATE.

**130. Settled property passing on deceased's death—Disposed of by person dying prior to August 2, 1894—and duty payable by disponent.**—By a marriage settlement made in 1864 a sum of money to which the wife was entitled in reversion subject to the successive life interests of her mother & father was assigned to trustees in trust to pay the income to the husband & wife for their lives & after the death of the survivor to stand possessed of the trust fund for such children of the marriage as the husband & wife or the survivor should appoint. The wife died in 1876. Her mother & father died respectively in 1884 & 1888. The husband died in 1910, & on his death the Crown claimed that for the purpose of ascertaining the rate of the estate duty which then became

payable the trust fund ought to be aggregated with other property passing on the husband's death in respect of which estate duty then became payable:—*Held*: if the wife had died after the commencement of Part I. of 1894 Act, estate duty would then have been payable in respect of the trust fund, because, the deaths of the mother & the father having occurred before that date, the trust fund would have become an interest in possession before the wife's death, & therefore by reason of 1900 Act, the claim of the Crown failed.—A.-G. v. THYNNE, [1914] 1 K. B. 351; 83 L. J. K. B. 592; 110 L. T. 203; 30 T. L. R. 182.

**131. ——— Interest of deceased arising under resettlement.**—Under the will of a testator, who died in 1870, real estate was devised to the use of A. for life & after his death to the use of his sons successively in tail male. On Nov. 4, 1895, A. & his son B., then tenant in tail, concurred in executing a disentailing assurance conveying the property to a grantee to hold to such uses as A. & B. should jointly appoint. By a resettlement dated Dec. 19, 1895, the property was appointed & conveyed to such uses as A. & B. should jointly appoint & in default of appointment to the use of A. for life by way of restoration & confirmation of his life estate under testator's will, & subject thereto to the use of B. for life with remainder to the use of his sons successively in tail male. A. died in 1920 possessed in his own right of real & personal estate. The Crown claimed that on A.'s death his own estate & the settled property fell to be aggregated under 1894 Act, s. 4, so as to form one estate for the purposes of estate duty. Defts. contended that the settled property passed on the death of A. not under the resettlement but under the will of the testator who died before Aug. 1, 1894, & that by 1900 Act, s. 12 (2), & 1907 Act, s. 16, the settled property did not fall to be aggregated with A.'s own estate, but was liable to estate duty as an estate by itself:—*Held*: the two estates fell to be aggregated, as the settled property passed on A.'s death not under testator's will but under the resettlement.—A.-G. v. PARR, [1924] 1 K. B. 916; 93 L. J. K. B. 659; 131 L. T. 205; 40 T. L. R. 827, C. A.

—*See* 1900 Act, s. 12 (2); 1907 Act, s. 16.

**Property in which deceased never had an interest.**—*See* 1894 Act, s. 4; 1900 Act, s. 12 (1).

**Small estates.**—*See* 1894 Act, s. 161 (3).

**Pictures, etc., of national, etc., interest.**—*See* 1894 Act, ss. 5, 15 (2); 1896 Act, s. 20 (1); 1909–1910 Act, s. 63.

—*See, also*, Sect. 4, sub-sect. 3, *ante*.

**Interest in expectancy sold or mortgaged—After August, 1, 1894, & before April 9, 1900.**—*See* 1894 Act, s. 4; 1900 Act, s. 12 (1).

of the fund in question, & the fund appointed must be aggregated with the rest of his estate for the purposes of estate duty.—*COLQUHOUN'S TRUSTEES v. INLAND REVENUE (OR LORD ADVOCATE)*, [1918] S. C. 887.—*SCOT*.

#### PART II. SECT. 5, SUB-SECT. 2.

**g. Property in which deceased never had an interest—Estate appointed by will.**—Stamp Duties (Amendment) Act, 1904, of New South Wales does not provide for any aggregation of estates of persons deceased for the purpose of determining the rate of duty. Therefore where a testator dies leaving free estate, & also estate subject to a special testamentary power of appointment, such estate ought not to be aggregated for the purpose of the assessment of duty as

on the death.—*BRUNTON v. NEW SOUTH WALES STAMP COMRS.* (1913), 82 L. J. P. C. 139.—*AUS*.

**130 i. Settled property passing on deceased's death—Disposal by person dying prior to August 2, 1894.**—Freehold lands were subject to the following limitations which took effect, viz. to A. for life, remainder to B., the disponent, for life, remainder to C., & B. died in 1863, A. in 1864, & C. in 1911, possessed of personal estate:—*Held*: for the purpose of assessing the rate of duty payable in respect of C.'s estate, there was no aggregation.—*EDGEWORTH v. INLAND REVENUE COMRS.*, [1912] 2 I. R. 606.—*IR*.

**130 ii. ———.**—D. died in 1875, leaving a will whereby he settled

estates to the use of B. for life, remainder to the use of her children, remainder to such uses as B. should by will or codicil expressly referring to the power in the will appoint, & in default of appointment by B. to the use of H. for life, with remainders over. B. died without issue in 1920, leaving a will in which she expressly referred to & exercised the power of appointment given by the will of D.:—*Held*: for the purpose of determining the rate of estate duty payable on the property passing on the death of B. the claim to aggregate the property over which B. had a power of appointment with the other property passing on her death failed, & the estate was "settled estate" within the meaning of Finance Act, 1900.—*Re DUNBAR-BULLAR*, [1923] 2 I. R. 143.—*IR*.



## SECT. 6.—RATE OF DUTY.

*See, generally, 1909-1910 Act, s. 54, Sched. II.; 1914 Act, s. 12, Sched. I.; 1919 Act, ss. 29, 38, Sched. III.*

**132. Aggregated property—Property accruing to deceased after death—Under will of ancestor surviving—Liability to higher rate.]—***Re SCOTT, No. 127, ante.*

**Sale or mortgage of interest in expectancy—After August 1, 1894, & before April 19, 1907.]—***See 1894 Act, s. 17; 1907 Act, s. 12.*

**—After April 18th, 1907, & before April 30, 1909.]—***See 1907 Act, s. 12, Sched. I.; 1909-1910 Act, s. 64.*

**Gross value of property not over £300 or £500.]—***See 1881 Act, ss. 33 (1), 35; 1894 Act, s. 16 (1 & 2); 1909-1910 Act, s. 61 (2); 1903 Act, s. 14.*

**Subsequent rectification of rate.]—***See 1894 Act, ss. 8 (7), 11 (3); 1896 Act, s. 18 (1).*

## SECT. 7.—VALUE CHARGEABLE.

## SUB-SECT. 1.—GROSS VALUE.

*See 1894 Act, s. 5 (5), s. 7 (5-9), s. 8 (8); 1909-1910 Act, s. 60 (1) (2), s. 61 (1).*

**133. Property settled by statute—1894 Act, s. 5 (5)—Duty payable by successive tenants in tail—Sale under Settled Land Act, 1882 (c. 38), s. 58.]—**(1) The power of sale conferred by Settled Land Act, 1882 (c. 38), s. 58, upon a tenant in tail in possession of lands settled by Act of Parliament with a restriction upon alienation does not make such a tenant in tail a person capable of alienating the lands so settled within 1894 Act, s. 5 (5), which provides that where lands are so settled by Act of Parliament that no one of the persons successively in possession thereof is capable of alienating the same, the property passing on the death of any person in possession of the lands shall be the interest of his successor therein, & such interest shall be valued for the purpose of estate duty in like manner as for the purpose of succession duty.

(2) Estate duty payable under 1894 Act, s. 5 (5), is payable out of income & not out of capital.

By a private Act passed in the reign of Henry VIII. to give effect to a family arrangement with reference to B.'s estates, a portion of the estates was settled upon his two daughters A. & E., & the heirs of their bodies as co-parceners with cross-remainders between them, & it was provided that no tenant in tail should alienate the estates except for the purpose of jointuring a wife, an exception which the ct. construed as implying a power in the tenant in tail under the existing law to jointure by will. Owing to the failure of the heirs of the body of A. the entirety of these estates had now become vested in the heirs of the body of E. The Crown claimed that estate duty was payable on the death

of each tenant in tail in possession under 1894 Act, s. 5 (5); & that upon the grant of a jointure by will succession duty was payable by the widow, either under sect. 2 or under sect. 4 of 1853 Act, in respect of one moiety of her jointure, on the footing that her interest was a succession derived as to one moiety from A., & as to the other moiety from E. as predecessor, it being conceded that as to the moiety derived from E. the succession duty was covered by the payment of estate duty as provided by 1894 Act, s. 1:—*Held*: (3) 1894 Act, s. 5 (5), applied; (4) the predecessor of the jointress was either her own husband or E., the lineal ancestress of the husband, & no succession duty was payable.—*Re BOLTON ESTATES ACT, 1863, [1904] 2 Ch. 289; 73 L. J. Ch. 688; 91 L. T. 259.*

*Annotation:—As to (1) Reid. Re Abergavenny, Nevill v. I. R. Comrs., [1923] 2 K. B. 18.*

**134. ——— Interpretation of.]—***NEVILL v. INLAND REVENUE COMRS., No. 128, ante.*

**135. Interest in expectancy—Payment of duty deferred—Until interest falls into possession—Value of interest at deferred date.]—**Where under 1894 Act, s. 7 (6), the person accountable for the estate duty on an interest in expectancy has exercised the option given by that sub-sect., & deferred the payment of the duty in respect of that interest until that interest has fallen into possession, the amount on which the duty is payable is the value of the interest when it has fallen into possession, & not merely its value on the death of deceased.—*Re EYRE, [1907] 1 K. B. 331; 76 L. J. K. B. 227; 96 L. T. 236.*

**136. Market value—Value estimated for duty—Higher than price realised at sale—Property sold as one lot.]—**(1) On the death of the owner of an estate his successor sold it in one lot after it had been well advertised. The estate, which comprised farms, accommodation holdings, private houses, shops & business premises, & a considerable area of woodland, was in several detached blocks lying at a little distance from one another:—*Held*: the fact of the estate consisting of miscellaneous property not all lying together was evidence on which a referee, to whom the value of the estate for the purposes of estate duty was referred, might and that the price which it actually fetched was not the market price within 1894 Act, s. 7 (5), & 1909-1910 Act, s. 60 (2), but the true market price was the aggregate of the prices which the several parts would have fetched if the estate had been broken up & sold in suitable lots.

(2) Where a person aggrieved by the decision of Comrs. of Inland Revenue as to the value of property for the purposes of estate duty appeals to a referee under 1909-1910 Act, s. 60 (2), applt. is in the position of a pltf., & notwithstanding that he is partially successful in his appeal, the referee has jurisdiction to order him to pay the costs of the appeal.—*ELLESMERE (EARL) v. INLAND REVENUE COMRS., [1918] 2 K. B. 735; 88 L. J. K. B. 337; 119 L. T. 568; 34 T. L. R. 560.*

## PART II. SECT. 6.

**h. Gifts to strangers in blood—Additional duty.]—**The clause in the schedule levying 3 per cent. additional duty on gifts to strangers in blood under Deceased Persons Estates Duties Act 1881 Amendment Act, 1885, applies to the whole schedule to that Act.—*Re CHUTE (1886), 5 N. Z. L. R. C. A. 8.—N.Z.*

## PART II. SECT. 7, SUB-SECT. 1.

**k. Market value—Agricultural property—Special rule of valuation.]—**The mode of ascertaining the legally assessable "principal value" of yearly

tenancies in agricultural property, as prescribed by Finance Act, 1894, s. 7 (5), is to estimate the price which, in the opinion of the comrs., such yearly tenancies should fetch if sold in the open market at the time of deceased's death, & to treat the price so estimated as the assessable value, subject to the proviso that such value shall in no case exceed 25 times the "net annual value" of such tenancies.—*Re FEENY (1902), 36 I. L. T. 80.—IR.*

**1. ——— Value estimated for duty—Lower than price realised at sale.]—***INLAND REVENUE v. MARR'S TRUSTEES*

(1906), 44 Sc. L. R. 647.—*SCOT.*

**m. ——— Shares in private limited company.]—**The principal value of shares in a private limited co. ought to be estimated at the price which, in the opinion of the Comrs. of Inland Revenue, they would fetch if sold in the open market on the terms that the purchaser should be entitled to be registered & should be registered as the holder of the shares, & should take and hold them subject to the arts. of assocn., including the arts. relating to the alienation & transfer of the shares of the co.—*A.-G. v. JAMESON, [1905] 2 I. R. 218; 38 I. L. T. 117.—IR.*

**137. Benefit accruing by cesser of interest—Interest less than whole income on property—Calculation of principal value.]**—Testator left [the residue of] his estate to trustees on trust as to the income of four-fifths thereof to pay £500 a year to his wife for the maintenance of their son until he should be 21. Eighteen months after the death of testator the son died, about eighteen months before attaining 21. The widow duly applied the £500 a year to his maintenance from the death of testator to that of the son:—*Held*: the son had an interest ceasing on his death in the above four-fifths to the extent of £500 a year within 1894 Act, s. 2 (1) (b), & by the cesser of that interest a benefit accrued to the four-fifths part the principal value of which, calculated in accordance with sect. 7 (7) (b) of the Act, was the sum which at the rate of interest earned by the rest of the estate would produce £500 a year; (2) the £500 a year was an annuity & not a legacy.—*A.-G. v. COOLE*, [1921] 3 K. B. 607; 91 L. J. K. B. 250; 126 L. T. 24; 37 T. L. R. 955.

#### SUB-SECT. 2.—DEDUCTIONS.

*See* 1894 Act, s. 7 (1), (2), (3), (4), s. 22 (1) (k); 1909–1910 Act, s. 57; 1920 Act, s. 64, Sched. IV.

**138. Sum payable out of policy moneys.]**—*WADE v. WADE*, No. 213, *post*.

**137 i. Benefit accruing by cesser of interest—Interest less than whole income of property—Calculation of principal value.]**—The proprietor of an estate burdened it with an annuity of £800 in favour of his widow. The succeeding proprietor burdened the estate with a further annuity of £800 in favour of his widow, restricted during the life of the first annuitant to £400, the balance of £400 being secured to the second annuitant from movable estate left by him. The second proprietor was survived by both annuitants. On the death of the first annuitant:—*Held*: the duty payable was on the capital value of an annuity of £800.—*LORD ADVOCATE v. MACLACHLAN* (1899), 1 F. (Ct. of Sess.) 917; 36 Sc. L. R. 727; 7 S. L. T. 45.—*SCOT*.

**n. — Calculation of value.]**—*LORD ADVOCATE v. HENDERSON'S TRUSTEES* (1905), 42 Sc. L. R. 720.—*SCOT*.

**o. Life insurance policy.]**—The word "property" in Deceased Persons' Estates Duties Act, 1881, ss. 7 & 8, means the same thing as the word "estate," & duty is therefore payable on the full value of a policy of assurance on the life of a deceased person as at the time of his death, & not on the surrender value of such policy immediately before that event.—*Re POTTER* (1895), 13 N. Z. L. R. 642.—*N.Z.*

**p. Valuation of goodwill of business.]**—An old-established business of a storekeeper carried on successfully in a country town in a definite locality & premises has a "goodwill."

The value of such a goodwill for the purposes of Deceased Persons' Estates Duties Act, 1881, is assessed by taking a year's average profits & deducting interest at 6 per cent. upon the capital employed.—*TOOGOOD v. STAMPS COMR.* (1905), 25 N. Z. L. R. 471.—*N.Z.*

**q. —.]**—In assessing the value, for the purposes of Deceased Persons' Estates Duties Act, 1881, of a property to which a publican's licence is attached, the existence of the licence & the trade attached to the house in consequence are factors to be considered, the risk of the loss of the licence in pursuance of a local-option poll being also taken

into consideration. In the case of such property subject to a lease for a long term, assessment made at its present value to a purchaser, who would take into consideration the rent receivable under the lease & the probable bonus attainable at the end of the term for a new lease if the licence subsisted, & on the other hand, if the licence were lost, the rent obtainable under these conditions & any probable increase in the value of the land irrespective of the licence.—*Re JOSEPH'S ESTATE* (1906), 26 N. Z. L. R. 81.—*N.Z.*

**r. —.]**—In the schedule of debts to the inventory of testator's estate, the amount of the trade debts was deducted, but no equivalent was brought into the inventory. Estate duty was claimed on the amount of the debts as representing the value of the goodwill of the business:—*Held*: the value of the goodwill was not determined by the price at which the owner's will gave a person the option of purchasing it, but was the subject of proof.—*LORD ADVOCATE v. WOOD'S TRUSTEES* (1910), 53rd Report of Inland Revenue Comrs. 50; 1 S. L. T. 186.—*SCOT*.

**s. Value of residue of testator's estate—Direction to accumulate & invest in land to be entailed.]**—A testator, who died prior to the passing of Finance Act, 1894, & on whose estate inventory duty was paid, directed his trustees to hold & accumulate the residue of his estate till the death of O. M., when it was to be invested in land, which was to be entailed. O. M. died in 1902:—*Held*: estate duty as payable on the value of the residue of testator's estate.—*LORD ADVOCATE v. STEWART* (1906), 8 F. (Ct. of Sess.) 579; 43 Sc. L. R. 465; 13 S. L. T. 945.—*SCOT*.

**t. Liquidation—Valuation of assets.]**—Estate duty levied under Transvaal Estates Duty Act 28 of 1909 is assessable upon the value of the assets as appearing in the liquidation accounts & not upon the value of the estate at the time of the death of the deceased.—*FINANCE MINISTER v. FARRAR'S ESTATE*, [1923] App. D. 109.—*S. AF.*

**139. Mortgage debt charged on settled property—By tenant for life & remainderman—Equity of redemption passing on death.]**—*COWLEY (EARL) v. INLAND REVENUE COMRS.*, No. 27, *ante*.

**140. ——— Tenant for life indemnified against liability—No reduction allowable.]**—A tenant for life of realty joined with the remainderman in mortgaging the realty. The loan was made to the remainderman only, & he alone covenanted for the repayment. He also covenanted to indemnify the tenant for life against the mortgage debt & interest, & assigned another property to secure the indemnity:—*Held*: in estimating the principal value of the realty for estate duty payable by the remainderman on the death of the tenant for life, no deduction could be made on account of the mortgage debt.—*A.-G. v. MONTAGU (LORD)*, [1904] A. C. 316; 73 L. J. K. B. 707; 90 L. T. 726; 53 W. R. 115; 20 T. L. R. 523, H. L.

*Annotation*:—*Apld. A.-G. v. Lethbridge* (1904), 92 L. T. 88.

**141. ——— By remainderman—On interest in expectancy.]**—*Re VERNON*, No. 109, *ante*.

**142. Annuity charged on settled property—Payable to remainderman—During life of tenant for life.]**—*COWLEY (EARL) v. INLAND REVENUE COMRS.*, No. 27, *ante*.

**143. ——— By remainderman—On interest in expectancy.]**—*Re VERNON*, No. 109, *ante*.

**144. Incumbrances—Created bona fide for full**

#### PART II. SECT. 7, SUB-SECT. 2.

**142 i. Annuity charged on settled property—Payable to remainderman—During life of tenant for life.]**—Under settlements executed in 1877 & 1901, A. was tenant for life of certain lands. Prior to the execution of the first of these settlements, A., who was then owner in fee, charged the lands by voluntary deeds with annuities in favour of his brothers & sister, reducible in case of bankruptcy or attempted alienation, & with sums in gross as portions for the children of his brothers & sister payable on the expiration of the annuities. The settlements were expressly declared to be subject to the charges created by those deeds:—*Held*: the property which passed on the death of A., so as to be subject to estate duty, consisted of the hereditaments comprised in the settlements, diminished by the value of the annuities & sums in gross; & these annuities & sums, although created without money consideration, were not incumbrances in respect of which allowance was prohibited by Finance Act, 1894, s. 7 (1) (a).—*DE FREYNE (LORD) v. INLAND REVENUE COMRS.*, [1916] 2 I. R. 458.—*IR.*

**a. Incumbrances—Not created for full consideration in money or money's worth—Nor wholly for deceased's own use and benefit.]**—A father in his son's marriage contract bound himself to grant a bond over his estate in security of an obligation to settle £30,000 in trust for the son & on the son's death for the widow in life & their issue in fee. In the marriage contract the son discharged any claim of *legitim* that he might have against his father's estate:—*Held*: the bond being granted in consideration of, not only the discharge of *legitim*, but also the marriage, was not a debt incurred "for full consideration in money or money's worth wholly for the deceased's own use & benefit" within Finance Act, 1894, s. 7 (1), & did not fall to be deducted in ascertaining the value of his estate for the purpose of estate duty.—*H.M. ADVOCATE v. WARREN-DER'S TRUSTEES* (1906), 43 Sc. L. R. 278.—*SCOT*.

**b. ——— Created by a disposition made by deceased—Out of the interest**



*Sect. 7.—Value chargeable: Sub-sect. 2. Sect. 8: Sub-sects. 1 & 2, A. & B.]*

**consideration—Without secret or covinous reservation.]—**R., institute of entail in possession of estates in Scotland, without the consent of his son & grandson, the next two heirs of entail, disentailed the estates, acquired the fee simple under Scotch Entail Acts, & secured to the satisfaction of the ct. the ascertained values of the respective interests of his son & grandson by bonds in their favour charged on the fee simple. By later bonds he charged the fee simple with interest due on the first bonds. A desire to lessen the estate duties payable on his death was R.'s motive in these transactions, but they were all open, straightforward, & genuine, not fictitious or colourable. Upon R.'s death:—*Held*: the bonds were incumbrances created *bonâ fide* for full consideration in money or money's worth wholly for R.'s own use & benefit & took effect out of his interest within 1894 Act, s. 7 (1) (a), & deductions accordingly ought to be allowed in assessing the estate duties.—*A.-G. v. RICHMOND & GORDON (DUKE)*, [1909]

*of deceased.]—*A. executed a trust-disposition & settlement by which he directed his trustees to pay an annuity out of his estate to B., & also, should B. request them to do so, to burden the estate with provisions for B.'s wife & family. On the death of B. the fee of the estate was directed to be conveyed to C.

After A.'s death his trustees paid the annuity to B. during his life, & also, at B.'s request, burdened the estate with bonds of provision for his widow & children. On B.'s death the estate was conveyed to C., who sought to make deductions in respect of the provisions to B.'s widow & children. The Inland Revenue refused to allow the deductions, & C. paid duty on the whole estate:—*Held*: as these incumbrances were not "created by a disposition made by" B. in the sense of sect. 7 (1) (a), & did not take effect "out of the interest of" B. in the sense of sect. 22 (2) (b), they were deductible.—*COLQUHOUN'S TRUSTEES v. ABERCROMBY*, [1913] S. C. 874.—SCOT.

*c. Statutory deductions.]—*The amount of duty to be adjusted under Deceased Persons Estates Duties Act, 1915 (Tas.), ss. 30 & 32, is the duty payable under the Act after making the deductions allowed under sect. 55.—*EAST LONDON HOSPITAL FOR CHILDREN v. COBBETT* (1922), 30 C. L. R. 278.—AUS.

*d. Value of interest of stranger in blood.]—*The duty of £3 per cent. additional charged on a stranger in blood in respect of the final balance of an estate under Deceased Persons' Estates Duties Act 1881 Amendment Act, 1885, is payable only in respect of the value of the interest of such stranger in blood, & the value of the life interest in such balance of a person not a stranger in blood must be deducted in order to ascertain the amount on which the £3 per cent. additional is payable.—*Re ANDREWS* (1902), 21 N. Z. L. R. 567.—N.Z.

*e. Reversion—Deduction of value of tenants' interest.]—*Where tenants have an interest in real property at the date of the decease of the proprietor, duty in respect of that property can only be assessed on the value of the reversion after deducting the value of the tenants' interest from the whole value of the realty.—*Re THOMSON'S WILL* (1885), 4 N. Z. L. R. 198.—N.Z.

*f. Debts due by deceased.]—*The "final balance" mentioned in Deceased Persons' Estates Duties Act, 1881, s. 7, upon which the rate of duty

shall be computed, is the total amount of the estate after deducting debts due by the deceased.—*Re CHUTE* (1886), 5 N. Z. L. R. C. A. 8.—N.Z.

*g. — Recoverable within the colony.]—*A debt was owing to a testator at the time of his death which was secured by a mtge. of lands in the colony. The testator & the mtgor. were resident & domiciled in England, both when the mtge. was executed & at the testator's death. The mtge. was executed in the colony by the attorney of the mtgor., but provided that the moneys secured were to be paid in England:—*Held*: the debt was a debt recoverable within the colony, within Deceased Persons' Estates Duties Act, 1881, s. 8, upon which duty was payable under that Act.—*Re GREENWOOD* (1888), 6 N. Z. L. R. 737.—N.Z.

*h. — Not amount of duty payable.]—*The amount of duty payable under Deceased Persons' Estates Duties Act, 1881, is not to be deducted from the final balance mentioned in sect. 7 as a debt due by the deceased.—*Re LYELL'S WILL* (1890), 8 N. Z. L. R. 414.—N.Z.

*k. — Calls on shares made after deceased's death.]—*A shareholder of the Bank of New Zealand died on Oct. 20, 1894. On Nov. 29, 1894, a call upon the shareholders of the bank of one-third of the sum of £10 per share was made under the authority of the Bank of New Zealand Share Guarantee Act, 1894. Notice of this call was given to the exors. of the deceased on Dec. 6, 1894, in respect of the shares held by the estate:—*Held*: the amount due under the call was not a debt due by the deceased shareholders within Deceased Persons' Estates Duties Act, 1881, s. 5 (b). Neither, in the alternative, were the exors. entitled to have the amount of the burden which the shares imposed upon the estate at the time of the death of the deceased ascertained & assessed as a set-off against the corpus of the estate.—*Re DIGNAN* (1896), 14 N. Z. L. R. 629.—N.Z.

*l. — Under guarantee.]—*A testator left certain assets. He had guaranteed a debt due by a brother, & his exors. paid the guaranteed debt out of the assets. He bequeathed a certain share of his estate to this brother, who, however, had no means of his own out of which he could repay to the estate the amount paid under the guarantee:—*Held*: duty was payable on the amount of the assets actually in the estate after deducting the amount paid under the guarantee.

A. C. 466; 78 L. J. K. B. 998; 101 L. T. 241; 25 T. L. R. 775; 53 Sol. Jo. 713, H. L.  
*Annotation:—Mentd. Wakefield v. Whiteaway, Laidlaw*, [1922] 1 Ch. 200.

**145. Appointment of "net sum"—Clear of costs & expenses.]—***Re GRANT, NEVINSON v. UNITED KINGDOM TEMPERANCE & GENERAL PROVIDENT INSTITUTION*, No. 260, *post*.

**Double death duties as between Great Britain & Northern Ireland—Provision against.]—***See Government of Ireland Act, 1920 (c. 67), s. 28.*

## SECT. 8.—COLLECTION OF DUTY.

### SUB-SECT. 1.—WHEN DUTY PAYABLE.

*See* 1894 Act, s. 6 (2), (6), (7), (8), s. 7 (6), s. 8 (9), s. 15 (4); 1896 Act, s. 16, s. 18 (1), s. 20 (2), s. 40 Sched. Pt. III.; 1909–1910 Act, s. 61 (5), s. 63; 1912 Act, s. 9.

**146. On delivering Inland Revenue affidavit.]—***WINANS v. A.-G.*, No. 1, *ante*.

—*DOLBELL v. STAMPS COMR.* (1903), 23 N. Z. L. R. 1003.—N.Z.

*m. — For philanthropic purpose.]—*A philanthropist, with a view to encouraging academic, scientific, & religious schemes, granted bonds in favour of Edinburgh University Court. He paid interest on the bonds during his life. On his death:—*Held*: the sum in the bonds formed part of his estate & were subjects of estate duty.—*H.M. ADVOCATE v. GUNNING'S TRUSTEES* (1902), 39 Sc. L. R. 534.—SCOT.

*n. Onerous leaseholds.]—*Where a testator dies possessed of onerous leaseholds, in order to ascertain the final balance of his estate on which duty is payable, the burden which such leaseholds impose on the estate should be assessed, & the amount deducted from the corpus.—*Re INGLIS' WILL* (1890), 8 N. Z. L. R. 28.—N.Z.

*o. Value of annuity to trustee.]—*A gift by will to an exor. & trustee of an annuity, while he should continue to act as a trustee of the will, is not a testamentary expense, & the capitalised value thereof cannot be deducted from the value of the testator's estate for the purpose of determining the duty payable thereon under Deceased Persons' Estates Duties Act, 1881.—*Re MCLEAN* (1903), 22 N. Z. L. R. 905.—N.Z.

*Value of annuity on cesser thereof.]* n a question between the Crown & the proprietor of a heritable property as to the amount of estate duty exigible in respect of the cesser of a life annuity payable out of the rents of the property:—*Held*: as the cesser of the annuity gave rise to a "benefit" only to the extent to which the net beneficial income of the property was relieved of the burden of the annual payment, the annuity fell to be capitalised on the basis of the net income after deducting not only feu-duties & public burdens, but also the cost of necessary repairs & not on the basis of the gross income.—*LORD ADVOCATE v. FOTHERINGHAM*, [1924] S. C. 52.—SCOT.

### PART II. SECT. 8, SUB-SECT. 1.

*q. At testator's death—Not at death of tenant for life.]—*In 1888 P. settled land worth £950, on trustees upon trust, for his wife E. for life, & at her death upon trust for sale & division amongst his children. P. spent considerable sums on the land & died in 1910, leaving E. & the children surviving. In 1912, the land was sold for £5,500:—*Held*: duty

147. Works of historic or national interest—On sale of chattels.]—*Re SCOTT, SCOTT v. SCOTT*, No. 124, *ante*.

SUB-SECT. 2.—BY WHOM PAYABLE.

A. In Respect of Property of which Deceased was competent to dispose at Death.

See 1894 Act, s. 6 (2), (3), s. 8 (3), (14), s. 22 (1) (d) & (n); Commissioners for Oaths Act, 1889 (c. 10), s. 1 (3); R. S. C. Ord. 38, rr. 16, 17.

148. Executor—Wherever personal property situated.]—*WINANS v. A.-G.*, No. 1, *ante*.

149. — Property subject to appointment—No appointment made.]—Testatrix who, under her husband's will, had a life estate in & a general power of appointment over his residuary estate, by her will recited the power, & that she did not desire to exercise it, but desired that the trusts of her husband's will should upon her death take effect. She then gave all her real & personal estate, exclusive of any which should remain subject to the trusts of her husband's will, to her trustees in trust for conversion, & out of the proceeds thereof to pay her funeral & testamentary expenses, & subject thereto in trust for her daughter for life & after her death as she should appoint. On the death of testatrix her exors. paid the estate duty in respect of the value at her death of her husband's residuary estate:—*Held*: (1) testatrix's "testamentary expenses" did not include the estate duty in respect of the unappointed property of her husband; (2) her exors. were entitled to recover the amount of the duty so paid by them from the trustees of her husband's will.—*PORTE v. WILLIAMS*, [1911] 1 Ch. 188; 80 L. J. Ch. 127; 103 L. T. 798; 55 Sol. Jo. 45.

*Annotations*:—As to (1) *Apld. Re Hudson, Spencer v. Turner*, [1911] 1 Ch. 206. *Refd. O'Grady v. Wilmot*, [1916] 2 A. C. 231.

150. — Whether on foreign personalty—Bequeathed to foreign executors—Remaining under their control.]—(1) The English exors. of a testatrix domiciled in England are to the extent of the assets in their hands liable to pay English estate duty & settlement estate duty on foreign personalty, although this foreign personalty is expressly bequeathed to foreign exors. & remains under their sole control.

(2) The true effect of 1896 Act, s. 19, is that it merely regulates the incidence of the settlement estate duty as between the beneficiaries & provides a more convenient mode of collection on the account delivered by the exor.—*Re MANCHESTER (DOWAGER DUCHESS), DUNCANNON (VISCOUNT) v. MANCHESTER (DUKE)*, [1912] 1 Ch. 540; 81 L. J. Ch. 329; 106 L. T. 332; 28 T. L. R. 241, 260; 56 Sol. Jo. 429.

151. — — — — —.]—An English testator bequeathed personalty in America to an American exor. upon trust for sale, & to pay out of the proceeds testator's American debts " & any American death duties or testamentary expenses "; & testator devised realty in England to an English

exor. upon trust for sale, & to pay out of the proceeds a fair proportion of testator's English debts & of " his funeral & testamentary expenses & estate, legacy & other duties payable in England "; & testator gave his residue to his English exor. upon trust for sale, & to pay out of the proceeds his " debts funeral & testamentary expenses except such debts & testamentary expenses as are hereinbefore directed to be paid out of some other fund." The English exor. proved the will in England, save as to the American personalty, paying the English estate & legacy duties due in respect of the American personalty out of the English assets. Upon summons, asking that these duties should be repaid to him by the American exor.:—*Held*: the American personalty did not pass to the English exor. " as such " within 1894 Act, s. 9 (1), & the duties ought to be repaid under sect. 9 (4) of that Act, there being no direction to the contrary on the will.—*Re SCULL, SCOTT v. MORRIS* (1917), 87 L. J. Ch. 59; 118 L. T. 7, C. A.

152. — Duty of—Inland Revenue affidavit—Sworn to best of knowledge & belief.]—*In the Goods of BEECH* (1904), *Times*, Aug. 9.

153. — — — Valuation of property—Within reasonable time.]—*Re HORREX* (1910), *Times*, Mar. 9.

— Property not passing to him as such—On request of persons accountable.]—*See* No. 210, *post*.

154. Administrators—Grant of administration pendente lite—Duty payable prior to grant.]—*In the Goods of GRIMTHORPE* (1905), *Times*, Aug. 8.

Out of what property payable.]—*See* Sect. 9, sub-sect. 1, *post*.

B. In Respect of Other Property.

: 1894 Act, s. 6 (2) & (4), s. 8 (4), (5), (14) & (18), s. 9; 1896 Act, s. 20 (2); 1900 Act, s. 13 (2); 1909–1910 Act, s. 61 (5), s. 63; 1912 Act, s. 9.

155. General rule—Persons taking benefit of property.]—(1) In respect of property, of which the deceased was not competent to dispose, the scheme of 1894 Act is to tax, not the interest which ceased with the death, but the property out of which the interest was enjoyed, & to make every person who takes property otherwise than through the exor. liable to pay a proportionate part of the estate duty. Accordingly where property, real & personal, was left upon trust for conversion & to pay an annuity to testator's widow for life, & after her death upon trust to pay legacies amounting to £9,000 & to divide the residue among persons named:—*Held*: under 1894 Act, s. 8 (4), the estate duty, which became payable on the death of the widow, who died in 1900, should be borne ratably both by the pecuniary legatees & the residuary legatees; & the pecuniary legatees were not entitled to throw the entire duty upon the residue.

It is to be recollected that the property in respect of which the question of the incidence of estate duty arises in this case, is property of which deceased was not competent to dispose, & that in

was payable at the testator's death, not at the death of the tenant for life.—*Re PEARCE* (1913), 1 Tas. L. R. 32.—AUS.

r. — — — — —.]—A settlement directed the trustees, during the joint lives of settlor & his wife, to pay the income of the trust property to settlor's wife, & from & after the death of one of them to pay the income to the survivor during his or her life:—*Held*: the wife's interest as survivor was distinct from the interest given her

during the joint lives of the settlor & herself & was an interest under a trust taking effect after the settlor's death within Deceased Persons' Estates Duties Act, 1881, s. 22; & duty was payable at once, & not upon her death only.—*Re DEANS* (1903), 23 N. Z. L. R. 60.—N.Z.

PART II. SECT. 8, SUB-SECT. 2.—A.

s. Successors—In absence of specific directions in will—Liability of life tenant.]—As between successors, estate

duty is payable by them *pro rata* out of their separate successions, as provided by Death Duties Act, 1909, s. 31 (4), unless the will contains a direction that their legacies are to be duty-free, or a direction to the exors. to pay testamentary expenses, or some other specific direction as to its payments. A life tenant, however, is not liable to pay any part of the estate duty out of his or her interest.—*Re HOLMES, BEETHAM v. HOLMES* (1913), 32 N. Z. L. R. 577.—N.Z.



*Sect. 8.—Collection of duty: Sub-sect. 2, B. & C.*  
*Sect. 9: Sub-sect. 1, A. & B.]*

respect of such property the scheme of the Act is to tax, not the interest which ceased with the death, but the property out of which the interest was enjoyed. 1894 Act, s. 8, provides for the collection of estate duty, & sub-sect. 4 of that sect. provides for cases in which property passes on the death of deceased, & his exor. is not accountable for the estate duty in respect of that property. Now that is admittedly the present case. In such a case it is provided that "every person to whom any property so passes for any beneficial interest in possession, & also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee or other person in whom any interest in the property so passing, or the management thereof is at any time vested, & every person in whom the same is vested in possession, by alienation or other derivative title, shall be accountable for the estate duty on the property." In my judgment each of the pecuniary legatees, & also the residuary legatees, took upon the death of the annuitant a portion of the property for which her exor. was not accountable for a beneficial interest in possession, & as such became accountable for the duty, & therefore debtors to the Crown for the duty. It seems to me that the moment you find that under sect. 8, sub-sect. 4, every person to whom property, other than free property of testator, passes for a beneficial interest in possession, which includes these pecuniary legatees, is accountable for the duty, be it on the whole fund or his portion of the fund, & therefore *pro tanto* a debtor to the Crown, the ct. ought in the due course of administration to take the whole duty out of the fund, & to deduct that duty ratably, from the legacy of each legatee & from the residuary share alike. If this were not so, the ultimate incidence of the estate duty on the fund passing would depend upon the accident of which of the parties accountable was in fact called on to pay, or on the fact that no one was called on to pay, but that payment was left to be determined in due course of administration. It seems to me that the pecuniary legatees cannot relieve themselves of the burden of a ratable part of this duty unless they can show that, outside the Finance Act, there is something which entitles the pecuniary legatees to have, as against the residuary legatees, the amount of their legacies free of estate duty (VAUGHAN-WILLIAMS, L.J.).

(2) By sect. 9, sub-sect. 5, any person authorised or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty or raising the amount of the duty when already paid, have power to raise the amount by sale or mtge. of the property. This sub-section applies to all property passing, whether "free property" of testator or not (VAUGHAN WILLIAMS, L. J.).—BERRY v. GAUKROGER, [1903] 2 Ch. 116 ; 35 T. T. 591 ; 51 W. T. 440 ;

19

. 490, C. A.

Trustee v. Hoare, [1917] 2 Ch. 278. *Reid. De Quetteville v. De Quetteville* (1905), 92 L. T. 758 ; *Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130 ; *Re Grant, Nevins v. United Kingdom Temperance & General Provident Institution* (1915), 59 Sol. Jo. 316 ; *Re Smyth, Edwards v. Smyth*, [1917] 2 Ch. 331 ; *Re Tattersall's Settlement, Public Trustee v. Tattersall*, [1918] 2 Ch. 243.

156. ———.]—(1) 1909–1910 Act, s. 61 (5), as amended by 1912 Act, s. 9, relating to the estate duty on timber, is to be construed in the light of 1894 Act, s. 9, which throws the liability for estate duty in respect of property not passing to

the exor. as such ultimately on the persons taking the benefit of such property. As, under 1912 Act, the duty attaches on the net moneys received from the sale of timber, a tenant for life not impeachable for waste, who receives the proceeds of timber sold apart from the land, has to bear the duty thereon, & such duty is not, since the recent Acts, as prior thereto it was, a charge on the inheritance of the land including the timber.

(2) *Qu.*: whether the general expression used in both the sects. of 1909–1910 Act & 1912 Act, "the owners or trustees of such land," may not include a tenant for life who has power to sell the timber & keep the proceeds.—*Re SMYTH, EDWARDS v. SMYTH*, [1918] 1 Ch. 118 ; 87 L. J. Ch. 40 ; 117 L. T. 793. C. A.

157. ———.]—The estate duty charged by 1894 Act, s. 9 (1), on property that does not pass to the exor. as such, e.g. a trust fund passing, in default of appointment to the pecuniary & residuary legatees of another will, must be borne ratably by the beneficiaries of that property.—*Re HICKLIN, PUBLIC TRUSTEE v. HOARE*, [1914] 2 Ch. 278 ; 86 L. J. Ch. 740 ; 117 L. T. 403 ; 33 T. L. R. 478 ; 61 Sol. Jo. 630.

158. Executor—At request of persons accountable.]—*Re MEYRICK, MEYRICK v. HARGREAVES*, No. 210, *post*.

159. Person interfering with estate—Legal adviser.]—*A.-G. v. WACK* (1899), *Times*, June 14, D. C.

160. Legatee—Of converted realty.]—*BERRY v. GAUKROGER*, No. 155, *ante*.

161. ——— Of settled residue.]—A trust fund was settled in 1897 upon trust to pay the income thereof to the settlor for life & after his death to his wife for life & after the death of the survivor upon trust as to £10,000, part of the fund, for such persons as the wife should by will appoint, & the remainder of the fund was to fall into the settlor's residuary estate disposed of by his will. On the settlor's death in 1908 estate duty was paid on the fund. The wife died in 1911, having appointed the £10,000 by her will :—*Held*: the estate duty paid on the settlor's death must be borne ratably by the wife's appointees & the settlor's residuary legatees.—*Re CHARLESWORTH'S TRUSTS, TEW v. BRIGGS*, [1912] 1 Ch. 319 ; 81 L. J. Ch. 267 ; 105 L. T. 817 ; 56 Sol. Jo. 108.

162. Of chattels of national interest—After sale.]—*Re SCOTT, SCOTT v. SCOTT*, No. 124, *ante*.

163. ——— Trust fund—Passing in default of appointment.]—*Re HICKLIN, PUBLIC TRUSTEE v. HOARE*, No. 157, *ante*.

164. Appointees—Under exercised power of appointment.]—*Re CHARLESWORTH'S TRUSTS, TEW v. BRIGGS*, No. 161, *ante*.

165. English insurance company—Liable for policy moneys—To foreign executor—Of person dying domiciled abroad.]—*HAAS v. ATLAS ASSURANCE Co., LTD.*, No. 78, *ante*.

166. Tenant for life—Not impeachable for waste—Receiving proceeds of timber—Sold apart from land.]—*Re SMYTH, EDWARDS v. SMYTH*, No. 156, *ante*.

Out of what property.]—See Sect. 9, *post*.

Apportionment.]—See Sect. 10, *post*.

### C. Limitation of Personal Liability.

See 1894 Act, s. 8 (2 & 3), s. 11 (2–4) ; 1907 Act, s. 14 ; EXECUTORS.

Property passing to executor as such—Personal property appointed in exercise of general power.]—See Sect. 9, sub-sect. 1, C., *post*.

## SECT. 9.—OUT OF WHAT PROPERTY PAYABLE.

## SUB-SECT. 1.—PROPERTY PASSING TO EXECUTOR.

## A. In General.

167. Personalty exhausted—In payment of debts.]—*Re TAYLOR'S ESTATE*, No. 931, *post*.

## B. Payment out of Residue.

168. Specific & general legatees—Customs & Inland Revenue Act, 1889 (c. 7), s. 5.]—The incidence of the new duties imposed by Customs & Inland Revenue Act, 1881 (c. 12), s. 27, & Customs & Inland Revenue Act, 1889 (c. 7), s. 5, is governed by the same principle as that which regulated the incidence of the old probate duty, namely, that it should be borne by the general residuary personal estate.

Testatrix, who died in 1891, by her will, dated in 1870, after making certain pecuniary bequests & specific gifts of property, partly real & partly personal, & disposing of the residue of her real estate, gave the residue of her personal estate to M. absolutely:—*Held*: the stamp duty payable under Customs & Inland Revenue Act, 1881 (c. 12), s. 27, & the estate duty payable under Customs & Inland Revenue Act, 1889 (c. 7), s. 5, must be paid by M. alone, & not ratably by him & the specific legatees.—*Re BOURNE, MARTIN v. MARTIN*, [1893] 1 Ch. 188; 62 L. J. Ch. 69; 67 L. T. 586; 41 W. R. 70; 37 Sol. Jo. 10; 3 R. 52.

*Annotations*:—*Distd. Re Orford, Cartwright v. Dol. Balzo*, [1896] 1 Ch. 257. *Consd. Berry v. Gaukroger*, [1903] 2 Ch. 116. *Refd. Re Foster, Thomas v. Foster*, [1897] 1 Ch. 484.

169. Share of residue settled.]—(1) The estate duty on the whole residue, & (2) the settlement estate duty in respect of settled shares of residue, ought to be borne by the general residuary estate.—*Re WEBBER, GRIBBLE v. WEBBER*, [1896] 1 Ch. 914; 65 L. J. Ch. 544; 74 L. T. 244; 44 W. R. 489; 12 T. L. R. 298; 40 Sol. Jo. 388.

*Annotations*:—*As to (1) Foll'd. Re Palmer, Palmer v. Rose-Innes*, [1900] W. N. 9. *As to (2) Foll'd. Re Gibbs, Thorne v. Gibbs*, [1898] 1 Ch. 625. *N.F. Re Maryon-Wilson, Wilson v. Maryon-Wilson*, [1900] 1 Ch. 565. *Refd. Re Manchester, Duncannon v. Manchester*, [1912] 1 Ch. 540.

170. —.]—*Re PALMER, PALMER v. ROSE-INNES*, [1900] W. N. 9.

*Annotation*:—*Refd. Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280.

171. Leaseholds specifically bequeathed.]—As leaseholds specifically bequeathed are property which by law passes to the exor. as such, the estate duty upon them under the 1894 Act is payable out of testator's general personal estate, & is not primarily charged upon them under sect. 9 (1) of the Act.—*Re CULVERHOUSE, COOK v. CULVERHOUSE*, [1896] 2 Ch. 251; 65 L. J. Ch. 484; 74 L. T. 347; 45 W. R. 10; 40 Sol. Jo. 374.

*Annotation*:—*Refd. Re Treasure, Wild v. Stanham*, [1900] 2 Ch. 648.

172. Debt due on covenant—Entered into by testator during lifetime.]—*Re GRAY, GRAY v. GRAY*, No. 253, *post*.

173. —.]—D. in 1890 covenanted to pay £20,000 to the trustees of his marriage settle-

ment, to be held as to one moiety upon trust for himself for life, remainder to his wife for life, & as to the other moiety upon trust for his wife for life with remainder to himself for life, with remainder as to the whole fund to the children of the marriage, & died in 1911 without having paid the £20,000, which with an arrear of interest was still owing to the trustees. He left estate in England & Australia, apart from assets in Victoria, of more than £45,000. His exors. registered the marriage settlement in Victoria, thereby reducing the duties payable in the colony by the duties which would have been payable there on the £20,000 debt & rendering the covenant in the settlement enforceable against testator's Victorian assets. They also paid estate duty on testator's estate without deducting the £20,000 debt, but with a deduction in respect of the duties paid in Australia. The exors. claimed to deduct from the £20,000 as against the settlement trustees a ratable part of the estate duty paid in England on the £20,000, & the registration duty paid in Victoria:—*Held*: the £20,000 being an unpaid debt to the trustees at D.'s death, they were not liable for any part of the estate duty in respect of it, & although the exors. had acted properly in registering the settlement in Victoria, yet in so doing they were not agents for the trustees, who had no need to resort to the Victorian assets, & were not liable to pay part of their debtor's probate duty, & neither amount could be deducted from the £20,000, which must be paid in full.—*Re DOWLING, DOWLING v. FENWICK* (1913), 108 L. T. 671.

174. Bequest of annuities.]—Testator, who died in 1895, bequeathed "all my moneys invested in & upon any stocks or funds, whether in or out of the United Kingdom, & all my railway stocks, shares, debentures & bonds, & generally all & every my securities for money" to trustees upon trust during the life of his sister to pay out of the income three annuities of £1,000, £500 & £500 respectively, & the residue thereof to his brother W. during his life. After the death of testator's sister the trustees were to hold the trust fund, as to two sums of £21,000 & £18,000, upon certain trusts in favour of two of testator's brothers & their issue; & to stand possessed of the residue upon trust for W. for life, with remainders over. Testator bequeathed all the residue of his personal estate of whatever kind to W., subject to the payment of his funeral & testamentary expenses & debts & certain annuities. The residuary personalty was insufficient to pay testator's debts & funeral & testamentary expenses, so a part of the estate duty had to be paid out of the trust fund:—*Held*: the interest given to W. in each case was not a share of the fund, but an interest in the actual residue after payment respectively of the annuities & the two sums of £21,000 & £18,000; & the annuities & those two sums were not liable to diminution by reason of the estate duty having to be borne by the fund or on account of the settlement estate duty being payable in

## PART II. SECT. 9, SUB-SECT. 1.—A.

t. *Corpus of estate*.]—Estate duty is imposed on the general estate of a deceased person, & is, in the absence of a specific direction in the will to the contrary, payable by the exors. out of the *corpus* of the estate.—*Re HOLMES, BRETHAM v. HOLMES* (1913), 32 N. Z. L. R. 577.—N.Z.

## PART II. SECT. 9, SUB-SECT. 1.—B.

a. *Residue charged by testator's will*.]—A testator by his will, dated June 21, 1911, directed that probate

& other duty should be paid out of the residue:—*Held*: estate duty payable under Estate Duty Assessment Act, 1914, was payable out of the residue.—*ROBSON v. BOARD* (1915), 15 S. R. N. S. W. 343.—AUS.

b. — *Specific devise revoked by codicil*.]—Testator devised & bequeathed a freehold & leasehold property to a daughter for her sole & separate use, & declared that the residue of his estate should be charged with the deceased persons' estates duties, except such duty as might be payable in respect of the said property, which

he directed should be paid by the said daughter. He afterwards by codicil revoked the said devise & bequest, & devised & bequeathed the same property to trustees upon trust for his said daughter for life, & after her death for her daughters in equal shares:—*Held*: the deceased persons' estates duty on the property became payable out of the residue.—*Re HOLMES* (1903), 22 N. Z. L. R. 895.—N.Z.

c. *Testator domiciled in Australia—Duties leviable in England & Australia*.]—Testator was domiciled



**Sect. 9.—Out of what property payable: Sub-sect. 1, B., C. & D.]**

respect of the fund.—*DE QUETTEVILLE v. DE QUETTEVILLE* (1905), 93 L. T. 579, C. A.

*Annotation:—Reid. Re Margot's, Smith v. Margot's* (1906), 50 Sol. Jo. 290.

**175. Reversionary interest to settlor—Disposal by settlor's will.]—*Re AVERY, PINSENT v. AVERY*, No. 31, ante.**

**176. Devise of realty—Upon contingency—Operating as conversion.]—**Testator by his will dated in 1911 (clause 9) devised his W. estates to B. absolutely, & provided (clause 10) that if after the date of his will & prior to his death he should receive, either personally or by payment to any person or persons, or to any bank or co., or into ct. on his behalf, any capital moneys in respect of the sale of his W. estates or any part or parts thereof, or if at his death any moneys should be owing to him & subsequently paid in respect of any such sale or sales & which did not pass under the devise & bequest thereinbefore contained then he bequeathed to B. for his own use & benefit a legacy equal in amount in the aggregate of the net capital moneys so received by or owing to him. Testator bequeathed his residuary personal estate in trust for the person who would at his death have been entitled thereto under Statute of Distributions, 1671 (c. 11), if he had died intestate, & who in subsequent proceedings was ascertained to be R. Prior to the date of his will in some instances & to that of a codicil confirming his will in others testator had entered into certain contracts with the tenants of the W. estates for the sale to them of their respective holdings under the Irish Land Act, 1903 (c. 37), in the form provided by the Act, which were subject to the sanction of the Land Comrs. being given to them. At his death in 1912 this sanction had not been obtained:—*Held*: (1) there had been no conversion of the W. estates, but that they passed to B. as real estate under clause 9 of the will, & not as a legacy of the proceeds of sale of real estate under clause 10; (2) B. was entitled to the W. estates for an estate in fee simple defeasible on the sanction of the Land Commrs. being given; & such sanction when given would operate to convert the real estate into personal estate as from its date; (3) on testator's death the W. estates did not vest in the exors. "as such," & the estate duty was a charge on the land itself & was not payable out of testator's residuary personal estate; (4) there was nothing in the Irish Land Acts to alter that position, except that if & when the purchases were completed the charge would be shifted from the land to the purchase-money, or, in other words, the estate duty would be payable out of that which represented the land & not out of the residuary personal estate.—*Re MARLAY, RUTLAND (DUKE) v. BURY*, [1915] 2 Ch. 264; 84 L. J. Ch. 706; 113 L. T. 433; 31 T. L. R. 422; 59 Sol. Jo. 494, C. A.

**Property passing under appointment.]—See Sect. 10, sub-sect. 2, post.**

**C. Personal Property appointed in Exercise of General Power.**

**177. Whether payable out of residue.]—**Where a general power of appointment over a fund is exercised by will, the appointed fund does not

pass to the exor. as such; consequently the estate duty in respect thereof, in the absence of any direction in the will to the contrary, is payable out of the fund; but such estate duty falls within the description of testamentary expenses; consequently, where the will contains a direction to pay testamentary expenses out of the residue, the estate duty in respect of the fund is payable out of the residue.—*Re TREASURE, WILD v. STANHAM*, [1900] 2 Ch. 648; 69 L. J. Ch. 751; 83 L. T. 142; 48 W. R. 696; 16 T. L. R. 542; 44 Sol. Jo. 675.

*Annotations:—Folld. Re Maddock, Llewelyn v. Washington*, [1901] 2 Ch. 372; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659. **N.F.** *Re Moore, Moore v. Moore*, [1901] 1 Ch. 691; *Re Orlebar, Wynter v. Orlebar*, [1908] 1 Ch. 136. **Overd.** *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20. **Folld.** *O'Grady v. Wilmot*, [1916] 2 A. C. 231. **Reid.** *Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280; *Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250; *Re King, Travers v. Kelly*, [1904] 1 Ch. 363; *Re Dodson, Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 284; *Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130.

**178. —.]—**The estate duty on a fund appointed by a will made in execution of a testamentary power of appointment must be borne by the appointed fund, & not by the residue.—*Re MADDOCK, LLEWELYN v. WASHINGTON*, [1901] 2 Ch. 372; 70 L. J. Ch. 660; 85 L. T. 12; 50 W. R. 54; *revid.* on other grounds, [1902] 2 Ch. 220, C. A.

*Annotations:—Folld. Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659. **N.F.** *Re Orlebar, Wynter v. Orlebar*, [1908] 1 Ch. 136. **Overd.** *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20. **Folld.** *O'Grady v. Wilmot*, [1916] 2 A. C. 231. **Reid.** *Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250; *Re Dodson, Re Dodson, Gibson v. Dodson*, [1909] 1 Ch. 284. **Mentd.** *Re Gardner, Huey v. Cunningham*, [1920] 1 Ch. 501; *Re Gardner, Huey v. Cunningham*, [1923] 2 Ch. 230.

**179. —.]—**Where a general power of appointment over a fund is exercised by will, the appointed fund does not pass to the exor. "as such," & consequently the estate duty in respect thereof is payable out of the appointed fund in the absence of any direction in the will to the contrary.—*Re POWER, Re STONE, ACWORTH v. STONE*, [1901] 2 Ch. 659; 70 L. J. Ch. 778; 85 L. T. 400; 49 W. R. 678; 17 T. L. R. 709; *sub nom.* *Re POWER, POWER v. STONE, ACWORTH v. STONE*, 45 Sol. Jo. 707.

*Annotations:—Consd. Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248. **Folld.** *Re Dodson, Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 284. **N.F.** *Re Orlebar, Wynter v. Orlebar*, [1908] 1 Ch. 136. **Overd.** *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20. **Folld.** *O'Grady v. Wilmot*, [1916] 2 A. C. 231. **Reid.** *Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250.

**180. —.]—**Where a general power of appointment over a fund is exercised by will, the appointed fund passes to the exor. as such, & consequently, the estate duty in respect thereof is payable out of residue.—*Re MOORE, MOORE v. MOORE*, [1901] 1 Ch. 691; 70 L. J. Ch. 321; 49 W. R. 373; 45 Sol. Jo. 312.

*Annotations:—N.F. Re Maddock, Llewelyn v. Washington*, [1901] 2 Ch. 372; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659. **Folld.** *Re Orlebar, Wynter v. Orlebar*, [1908] 1 Ch. 136; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20. **Overd.** *O'Grady v. Wilmot*, [1916] 2 A. C. 231. **Reid.** *Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250; *Re Dodson, Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 284; *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286.

**181. —.]—*Re DIXON, PENFOLD v. DIXON*, No. 211, post.**

**182. —.]—**Testatrix, having directed the exors. & trustees of her will to pay her testamentary expenses, bequeathed certain specific personalty, over which she had a general power of appointment, to her trustees upon trust for certain specific legatees. She devised & bequeathed her

in S., & there were no specific devises or bequests of property situated outside S.:—*Held*: (1) the duties leviable in England & the Australian colonies had to be paid by the executors to

enable them to get in the assets situated in these jurisdictions, & must be borne by the residuary estate; (2) that federal estate duty is in substance a legacy or succession duty, &

was payable out of the residuary estate.—*Re BARR SMITH, MARTIN v. BARR SMITH*, [1917] S. A. L. R. 1.—AUS.

positions of the will, & therefore did not come within Death Duties Act, 1909, s. 31 (2); the direction to pay testamentary expenses did not extend to the estate duty payable in respect of the said funds; & such duty was payable out of the said funds, & not out of testator's estate.—*Re McMASTER, PERPETUAL TRUSTEES, ESTATE & AGENCY Co. OF NEW ZEALAND, LTD. v. McMASTER* (1915), 35 N. Z. L. R. 56.—N.Z.



*Sect. 9.—Out of what property payable: Sub-sect. 1, D.; sub-sects. 2 & 3.]*

of her personal property.—*Re CLEWOW, YEO v. CLEWOW*, [1900] 2 Ch. 182; 69 L. J. Ch. 522; 82 L. T. 550; 48 W. R. 541; 44 Sol. Jo. 428.

*Annotations:—As to (1) Folld. Re Treasure, Wild v. Stanham*, [1900] 2 Ch. 648. *Apld. Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280. *Folld. Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250. *Consd. Porte v. Williams*, [1911] 1 Ch. 188; *Re Massey, Ram v. Massey* (1920), 90 L. J. Ch. 40. *Reid. Re King, Travers v. Kelly*, [1904] 1 Ch. 363; *Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130; *O'Grady v. Willmot*, [1916] 2 A. C. 231.

**192. — Personal annuity—Secured by charge on realty.]—***Re TRENCHARD, TRENCHARD v. TRENCHARD*, No. 17, *ante*.

**193. — Duty increased after testator's death—Original & increased duty payable.]—**A testator who died in July, 1909, bequeathed his residuary personalty upon trust to pay thereout all his testamentary expenses incident to the trusts, including estate duty & settlement estate duty:—*Held*: the increased duties & the new duties imposed by 1909–1910 Act, [ss. 54, 58], were payable out of the residuary personalty.—*Re BRISCOE, ROYDS v. BRISCOE* (1910), 55 Sol. Jo. 93.

**194. — Bequest of legacies free of duty—Legacy of mixed personalty & realty.]—**Testator gave to his trustees a sum of £270,000 "subject to death duties" on trust for investment in real estate & to pay the income to his nephew during his life, & on his death on trusts for his children & remoter issue. The will contained the following direction: "I direct that all the legacies given by this my will shall, except where expressly stated to be subject to death duties, be paid free from duty, which, whether presently or presumptively or prospectively payable, shall be paid out of my general personal estate." Testator gave his residuary real & personal estate on trust for sale & conversion, & out of the proceeds he directed the payment in the first place of certain trust expenses & his debts, testamentary & funeral expenses, & in the next place of the pecuniary legacies given by the will:—*Held*: in respect of the legacy of £270,000 estate duty was payable, as regarded personalty, out of the residuary estate, & the legacy should pay legacy duty, settlement estate duty & estate duty so far as it represented proceeds of the sale of realty.—*Re MORRISON, MORRISON v. MORRISON* (1910), 102 L. T. 530; 26 T. L. R. 395.

**195. — Pecuniary legacies.]—**Testator devised his residuary real estate upon trust for sale, & to stand possessed of the "clear money" to arise from such sale upon the trusts thereafter declared of his residuary personal estate. He then gave a number of pecuniary legacies, some of which were settled as therein mentioned, & also directed payment of various annuities. He declared that he intended to give all the legacies & annuities thereby bequeathed, & directed that the same "shall be paid or appropriated free from legacy duty respectively." He bequeathed his residuary personal estate, including the "clear money" to arise from the sale of his real estate, with certain exceptions, upon trust for sale & conversion, & to pay his funeral & testamentary expenses, debts & legacies, & the annuities thereinbefore directed to be paid, & the duties on the legacies & annuities, as well as all settlement estate duty, & to stand possessed of all the residue as therein mentioned:—*Held*: all the pecuniary legacies, settled & unsettled, & the annuities were given free of estate

thereon," & testator directed that every bequest, as well specific as pecuniary, thereinbefore made should, "except where otherwise expressly stated, be free & clear of duties." There was also a direction to pay testamentary expenses out of the residuary estate:—*Held*: the legatee took the legacy of stock subject to legacy duty, but not subject to any part of the estate duty payable on testatrix's death.

(2) Where testatrix gave the income of another stock to A. for life, & after her death the stock to be sold, & the proceeds of sale, "subject to any duty affecting the same," to be divided between two named charities:—*Held*: as the legacy duty was payable at one & the same rate by the persons entitled in succession under Legacy Duty Act, 1796 (c. 52), s. 12, no legacy duty, or any part of the estate duty payable on the death of testatrix, was payable by the charities, but the estate duty payable under 1914 Act, s. 14, on the death of the life tenant must be borne equally by the charities.

(3) Where there was no direction about duty, but a corp'n. annuity was given to the trustees to pay to the annuitant & at her death to sell, & hand the proceeds of sale to a charity:—*Held*: the estate duty payable on the death of the annuitant must be paid out of testatrix's estate.—*Re BROWN, TURNBULL v. ROYAL NATIONAL LIFE-BOAT INSTITUTION* (1916), 60 Sol. Jo. 353.

**197. — Appointment of portion to daughter.]—**A. by his will dated in 1895, after appointing exors. & trustees, bequeathed a sum of £3,000 "free of estate duty," an annuity of £100 "free of legacy & estate duties," & a sum of £900 "free of legacy & estate duties." By clause 7, after reciting a power of appointing portions contained in his marriage settlement dated in 1861, he appointed the sum of £20,000 so raisable for portions to his three daughters in equal shares. By clause 8 he bequeathed certain moneys & securities to his trustees upon trust for sale & conversion, & proceeded as follows: "I direct my trustees or trustee out of my ready money & out of the moneys to arise from such sale, calling in & conversion as aforesaid to pay & provide for my funeral & testamentary expenses, including estate duty on everything passing under this my will, & debts, other than those mentioned in paragraph 6 hereof, & the annuity & pecuniary legacies thereinbefore bequeathed, & the legacy duty on such legacies as are bequeathed free of duty & to stand possessed of the residue of the said money," upon trust for investment as therein mentioned. Upon a summons being taken out by one of the daughters of testator for the purpose of ascertaining whether the duty payable upon her one-third of the portions fund was payable out of the property comprised in clause 8:—*Held*: the daughters took by virtue of the will & their shares passed under the will; & the estate duty payable upon the one-third belonging to pltf. was payable out of the property disposed of under clause 8 of the will.—*Re BATH'S (MARQUIS) SETTLEMENT, THYNNE v. STEWART* (1914), 111 L. T. 153; 58 Sol. Jo. 578.

— **Personal property appointed in exercise of general power.]—**See Nos. 177, 182, 186, *ante*.

**Estate duty as testamentary expense.]—**See No. 191, *ant*, & No. 208, *post*.

#### SUB-SECT. 2.—REAL ESTATE.

See 1894 Act, s. 5 (5), s. 9 (1–3), s. 14 (1); 1912 Act, s. 9; Finance Act, 1922 (c. 17), s. 44.

**198. Effect of Land Transfer Act, 1897 (c. 65).]**

**196. — Bequest of stock.]—**(1) A sum of stock was bequeathed "subject to any duty



—*Re PALMER, PALMER v. ROSE-INNES*, [1900] W. N. 9; 35 L. Jo. 48.

*Annotation*:—*Foll.* *Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280.

**199. Estate chargeable with duty.**—*Re JOLLEY, NEAL v. JOLLEY* (1901), 17 T. L. R. 244.

*Annotations*:—*Refd.* *Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280; *Re Trenchard, Trenchard v. Trenchard*, [1905] 1 Ch. 82.

**200.** —.—.]—By a marriage settlement of 1845, real estates were conveyed by a settlor to trustees, subject to the prior life interests of his parents therein, to the use of the settlor for life, & after his death, to the use of the trustees upon trust to sell & hold the proceeds for certain specified purposes for the benefit of the settlor's wife & children, with an ultimate trust for the settlor, his exors., administrators & assigns. The settlor died in 1905, without having had any issue, & all the purposes for which conversion had been directed had at this date failed. By his will the settlor had devised "his interest" in these estates to his "successor G. in fee":—*Held*: as the trust for sale arose only after the death of the settlor, there was at that time in the events which had happened no enforceable trust, & the question of conversion or reconversion did not arise; but these estates devolved as realty under testator's will, & the estate duty payable in respect of them was property payable by G.—*Re GRIMTHORPE (LORD), BECKETT v. GRIMTHORPE (LORD)*, [1908] 2 Ch. 675; 78 L. J. Ch. 20; 99 L. T. 679; 25 T. L. R. 15, C. A.

*Annotations*:—*Distd.* *O'Grady v. Wilmut*, [1916] 2 A. C. 231. *Mentd.* *Re Ffennell's Settlement, Re Ffennell's Estate, Wright v. Holton*, [1918] 1 Ch. 91; *Re Hopkinson, Dyson v. Hopkinson* (1921), 66 Sol. Jo. (W. R.) 18; *Re Hopkinson, Dyson v. Hopkinson*, [1922] 1 Ch. 65; *Re Sturt, De Bunsen v. Hardinge*, [1922] 1 Ch. 416.

**201.** —.—.]—*In ratable proportion.*—Estate duty payable on death of tenant for life to be borne ratably by the shares into which the estate became divisible & by the residuary devisee.—*Re POWER, POWER v. HOWELL* (1898), 47 W. R. 183; 43 Sol. Jo. 63.

**202.** —.—.]—*Re PALMER, PALMER v. ROSE-INNES*, [1900] W. N. 9; 35 L. Jo. 48.

*Annotation*:—*Refd.* *Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280.

**203.** —.—.]—Testator devised his real estate on certain trusts & after giving pecuniary legacies, bequeathed all the residue of his personal estate, "after payment thereof of all his just debts, funeral & testamentary expenses," on certain other trusts. Summons by the trustees to determine the question whether the estate duty payable on the death of testator in respect of his real estate was payable out of testator's personal or out of his real estate:—*Held*: as the estate duty on real estate was made a first charge on the property, & the exors. could obtain probate without paying it, that duty did not come within the expression "testamentary expenses"; the real property must bear its own duty, notwithstanding the direction concerning testamentary expenses.—*Re SHARMAN, WRIGHT v. SHARMAN*, [1901] 2 Ch. 280; 70 L. J. Ch. 671; 84 L. T. 859; 49 W. R. 555; 45 Sol. Jo. 576.

*Annotations*:—*Apld.* *Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130. *Refd.* *Re King, Travers v. Kelly*, [1904] 1 Ch. 363.

**204.** —.—.]—(1) A general direction to

pay legacies out of a mixed fund of residue charges them ratably on the portions attributable to realty & personalty.

(2) So far as the legacies are payable out of the portion attributable to realty they are real estate & must bear their own estate duty notwithstanding a direction to pay "testamentary expenses" out of the mixed fund.—*Re SPENCER COOPER, Poë v. SPENCER COOPER*, [1908] 1 Ch. 130; 77 L. J. Ch. 64; 98 L. T. 344.

*Annotation*:—*As to (2) Consd.* *Re Palmer, Leventhorpe v. Palmer* (1912), 106 L. T.

**205.** —.—.]—*Bequest of "sum sufficient to discharge all estate duty."*—Testator by a codicil to his will, executed after the passing of 1894 Act, bequeathed to his eldest son, to whom certain settled estates would pass on testator's death, "a sum of money sufficient to pay & discharge all the estate duty which may be payable by" him; & he directed such sum to be paid out of moneys in the hands of his bankers at his death, but if the sum at the bankers should not be sufficient, he declared that no other part of his estate should be liable to make good the deficiency:—*Held*: the legacy was a gift to the eldest son for his own benefit absolutely, & was not impressed with a trust to pay the estate duty out of it; & the legatee had not lost his right to recoup himself for the duty by a charge on the settled estates under sect. 9 (6) of the above Act.—*MEXBOROUGH (EARL) v. SAVILE* (1903), 88 L. T. 131; 19 T. L. R. 287, H. L.; *reversg. S. C. sub nom. Re MEXBOROUGH, SAVILE v. MEXBOROUGH* (1902), 86 L. T. 331, C. A.

**206.** —.—.]—*Land settled by statute—Duty payable only on interest of successor.*—*Re BOLTON ESTATES ACT, 1863, No. 133, ante.*

**207.** —.—.]—*Exoneration of personal estate.*—*Re BOWERMAN, PORTER v. BOWERMAN*, No. 10, *ante.*

**208.** —.—.]—*Deficiency of residuary personalty.*—Estate duty, which under 1894 Act, is payable in respect of personal property specifically bequeathed by testator, being a testamentary expense, is payable in the same order of administration as other testamentary expenses are payable, & accordingly where the residuary personal estate is insufficient to pay the estate duty on the specifically bequeathed personalty the heir-at-law is not entitled to have the duty paid out of such personalty in exoneration of the undisposed of realty.

My own opinion is . . . that the estate duty on personalty is part of the testamentary expenses, & that testamentary expenses ought to be paid out of the assets in the same order in which other deductions payable by the exors. ought to be borne (*WARRINGTON, J.*).—*Re PULLEN, PARKER v. PULLEN*, [1910] 1 Ch. 564; 79 L. J. Ch. 303; 102 L. T. 453; 54 Sol. Jo. 341.

*Estate subject to charge—Apportionment between owner & chargees.*—*See Sect. 10, sub-sect. 1, post.*

**209.** *Interest of devisee defeasible—On happening of contingency—Conversion.*—*Re MARLAY, RUTLAND (DUKE) v. BURY*, No. 176, *ante.*

#### SUB-SECT. 3.—SETTLED PROPERTY.

**210.** *Settled funds—Appropriated after death of settlor.*—(1) By a post-nuptial settlement

[1923] 1 I. R. 35.—*IR.*

#### PART II. SECT. 9, SUB-SECT. 3.

*d. Sum payable out of policy moneys.*—*P.* had taken out a policy of insurance whereby the insurers agreed to pay after *P.*'s death an

#### PART II. SECT. 9, SUB-SECT. 2.

**201 i.** *Estate chargeable with duty—In ratable proportion.*—On an application to determine whether estate duty was payable in respect of freehold registered land by the devisees &

owners of the testator's freehold lands, or by the residuary legatees:—*Held*: the freehold registered lands specifically devised were primarily liable to a ratable part of the estate duty in exoneration of the residuary estate.—*Re DREW, MARRY v. DREW*,

*Sect. 9.—Out of what property payable: Sub-sects. 3, 4, 5 & 6.]*

personal property was settled in the events that happened upon trust for the settlor for life, & after his death upon trust that the trustees should appropriate funds of a specified value to be held upon the trusts thereafter declared for the benefit of two of the settlor's daughters & their issue, & should stand possessed of the residue of the trust premises in trust for the settlor, his exors., administrators, & assigns:—*Held*: the appropriated funds were not voluntary incumbrances within 1894 Act, s. 7 (1), upon property passing to the exor. as such of the deceased, in which case the estate duty on the entire funds would have had to be borne exclusively by the settlor's residuary legatee, but the provisions contained in the settlement with regard to those funds amounted to substantive settlements thereof, & the estate duty was payable ratably out of the appropriated funds & the residue according to their respective values.

(2) The sub-sect. provides that in the case of property not under his control, which plainly means under his control as exor. of the deceased person, he may pay the estate duty. "if the persons accountable for the duty in respect thereof request him to make such payment." As trustee he was one of those persons, & he did pay the duty. I need hardly say that he paid the duty on the whole rightly; & as for the request, it was the request which he impliedly made to himself in the character of trustee to himself as exor. of the deceased (CHITTY, J.).—*Re MEYRICK, MEYRICK v. HARGREAVES*, [1897] 1 Ch. 99; 66 L. J. Ch. 33; 75 L. T. 621; 45 W. R. 120; 41 Sol. Jo. 97.

*Annotation*:—As to (1) *Refd. Berry v. Gaukroger*, [1903] 2 Ch. 116.

**211. — Reversionary interest to settlor—Disposal of interest by will.**—Where a general power of appointment over a reversionary interest in a fund expectant upon the determination of a life interest in testator & of a subsequent life interest in a person who survived him is exercised by will, the corpus of the fund is, under 1844 Act, s. 2 (1) (b), property which passes on testator's death, & estate duty is payable on the corpus under s. 8 (4), by the person to whom the property passes for a beneficial interest in possession, or by the trustees in whom the fund is vested. It is not payable by the exors. of the will, & is consequently not a testamentary expense. In these circumstances the question whether the fund passed to the "executors as such" within s. 9 (1) does not arise.—*Re DIXON, PENFOLD v. DIXON*, [1902] 1 Ch. 248; 71 L. J. Ch. 96; 85 L. T. 622; 50 W. R. 203; 18 T. L. R. 155; 46 Sol. Jo. 137.

*Annotations*:—*Folld. Re Orlebar, Wynter v. Orlebar*, [1908] 1 Ch. 136; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20. *Overd. Re Avery, Pinsent v. Avery*, [1913] 1 Ch. 208; *O'Grady v. Wilmot*, [1916] 2 A. C. 231. *Refd. Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250; *Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 284; *Re Scott, Scott v. Scott*, [1916] 2 Ch. 268.

**212. — — — — —**—*Re AVERY, PINSENT v. AVERY*, No. 31, *ante*.

**213. Sum payable out of policy moneys—1884 Act, s. 14 (1).**—The above sub-sect. has no reference to the incidence of the estate duty, but is intended for the protection of the exor. or other person who is called upon to pay the duty, by giving him a right to recoupment.

The holder of a policy of assurance on his own life for £5,000 by his marriage settlement assigned

the policy to trustees upon trust to raise at his death £4,000 to be held on certain trusts, & as to the remaining part of the policy moneys in trust to pay the same to his exors.:—*Held*: the above sub-sect. was not applicable, & the estate duty on the fund must be borne by the part remaining after payment of the £4,000.—*WADE v. WADE*, [1898] 2 Ch. 276; 67 L. J. Ch. 527; 78 L. T. 808; 47 W. R. 43; 42 Sol. Jo. 592.

*Annotations*:—*Distd. Kekewich v. Kekewich* (1909), 101 L. T. 887. *Refd. Re Fitzhardinge, Fitzhardinge v. Jenkinson* (1899), 80 L. T. 376.

#### SUB-SECT. 4.—GIFTS INTER VIVOS AND MORTIS CAUSA.

*See, now*, Finance (1909–10) Act, 1910 (c. 8), s. 59.

**214. Gift inter vivos—Duty payable by donee.**—Under Customs & Inland Revenue Acts, 1881 (c. 12) & 1889 (c. 7), account stamp duty in respect of property given by a deceased person, within twelve months before his death, to another, is payable by the donee personally & not out of the estate of deceased.—*Re FOSTER, THOMAS v. FOSTER*, [1897] 1 Ch. 484; 66 L. J. Ch. 220; 76 L. T. 228; 45 W. R. 333; 41 Sol. Jo. 242.

**215. — Gift within year of settlor's death.**—Testator, within one year of his death, spent £4,000 on the purchase of house, which he settled on one of his daughters, & contributed £4,320 towards the purchase of another house for another daughter; the ct. having decided that these gifts must be considered as an ademption *pro tanto* of the daughters' shares in the testator's residuary estate, which must be brought into account:—*Held*: the amount for which the daughters were accountable was the sums so advanced, less the amount they were liable to pay for estate duty by reason of the death of testator within one year of the gift.—*Re BEDDINGTON, MICHOLLS v. SAMUEL*, [1900] 1 Ch. 771; 69 L. J. Ch. 374; 82 L. T. 557; 48 W. R. 552; 16 T. L. R. 291.

*Annotation*:—*Folld. Re Crocker, Crocker v. Crocker*, [1916] 1 Ch. 25.

**216. — Gift within three years of settlor's death.**—Testator, who died in 1914, had in his lifetime settled certain stocks on two of his daughters & their children, & these stocks had depreciated in value at the time of his death. By his will he gave his residuary estate in trust for all his children equally, subject to a proviso that for the purposes of division there should be brought into hotchpot, in respect of each of the two daughters or her children, the value of the trust funds which he had settled upon them. It was conceded that 1844 Act, s. 2 (1) (c), s. 9 (1), the estate duty payable in respect of the portion of the settled funds which were settled within three years of the testator's death must be borne by those funds:—*Held*: the sum to be brought into account under the hotchpot clause in respect of all the settled funds was the value of all the settled funds at the date of settlement, & not at the date of the will less the estate duty payable in respect of the funds settled within three years of the testator's death.—*Re CROCKER, CROCKER v. CROCKER*, [1916] 1 Ch. 25; 85 L. J. Ch. 179; 114 L. T. 61.

**217. Donatio mortis causa—Payable by donee.**—*Re HUDSON, SPENCER v. TURNER*, No. 19, *ante*.

*See Sect. 3, sub-sect. 2, D., ante.*

annuity to his widow, or in case she predeceased him, to make other payments:—*Held*: the proceeds of the

policy were liable to duty under Deceased Persons' Estates Duties Act, 1904, & the policy was a settlement under

sect. 5 (2) of that Act.—*Re PIKE, Ex p. PIKE* (1912), 8 Tas. L. R. 46.—**AUS.**



## SUB-SECT. 5.—OTHER PROPERTY.

**218. Proceeds of sale of timber—Cut from settled estates.]—***Re SMYTH, EDWARDS v. SMYTH*, No. 156, *ante*.

**Where testator directs payment of testamentary expense.]—***See* Sub-sect. 1, D., *ante*.

## SUB-SECT. 6.—DUTY IMPOSED SUBSEQUENT TO DEATH OF TESTATOR.

*See* 1894 Act, s. 5 (2); 1914 Act, s. 14.

**219. Whether dependent on construction of will.]—**By a codicil to her will made in July, 1911, testatrix bequeathed to her trustees the sum of £6,000 "free of all duty," to be held upon trust for her niece, H., for life, & after her death for her children, with a gift over to certain charitable institutions in the event of no child of the niece attaining a vested interest. At the respective dates of the will & codicil & of the death of testatrix in Jan. 1913, this settled legacy was, by virtue of 1894 Act, relieved from the payment of estate duty on the death of the niece; but by 1914 Act, s. 14, which came into operation on July 31, 1914, this relief was abolished in the case of any person dying after Aug. 15, 1914. The niece was still living & a spinster, & estate duty would be payable on her death, as well as legacy duty. Upon a summons by the trustees of the settled legacy asking whether they ought to set aside, out of the assets of testatrix, any sums to meet the estate duty & the legacy duty, or whether both or either were payable out of the legacy:—*Held*: (1) on the question of construction of the gift "free of all duty," the legacy duty was payable out of the general estate; (2) the operation of the gift must be determined, with reference to the duties imposed in respect of the legacy, at the date of the death, & ought not to be extended to duties imposed by the Legislature subsequent to that date, & the estate duty was accordingly payable out of the legacy, & not out of the general estate.—*Re SNAPE, ELAM v. PHILLIPS*, [1915] 2 Ch. 179; 84 L. J. Ch. 803; 113 L. T. 439; 59 Sol. Jo. 582.

*Annotations*:—*As to* (2) *Consd.* *Re Palmer, Palmer v. Palmer*, [1916] 2 Ch. 391; *Re Stoddart, Bird v. Grainger*, [1916] 2 Ch. 444; *Re Hatch, Hatch v. Hatch* (1917), 86 L. J. Ch. 454; *Re Tinkler, Loyd v. Allen*, [1917] 1 Ch. 242. *Refd.* *Re Eve, Hall v. Eve*, [1917] 1 Ch. 562; *Re Wedgwood, Allen v. Public Trustee*, [1921] 1 Ch. 601; *Re Fenwick, Lloyds Bank v. Fenwick*, [1922] 2 Ch. 775.

**220. —.]—**Testator, by his will made in 1910, bequeathed to trustees the sum of £25,000 upon trust during the life of his wife to pay the income to the persons who would for the time being be entitled as tenant for life or tenant in tail to the rents of his settled hereditaments if his wife were then dead, & directed that after the death of his wife the said sum should fall into residue, & that all legacies thereinbefore given or which might be given by any codicil should be handed over or paid free of all duties & deductions in respect of duties, other than income tax, to the several legatees; & testator thereby devised his settled hereditaments to his trustees upon trusts in favour of his wife during her life, & after her death to the use of his nephew A. for life, with remainder, in the events which happened, to his nephew B. for life, with remainder to the use of B.'s children in strict settlement; & testator thereby gave his residuary real & personal estate to his trustees upon trust for sale & conversion & out of the moneys so to arise to pay his funeral & testa-

mentary expenses & legacies, & to make provision for the payment of all duties on any bequests thereinbefore made free from duties or deductions for duties, & to invest the residue upon trust out of the income thereof to pay an annual sum of £3,000 to the person who would be so entitled as tenant for life or in tail as aforesaid, & to hold the surplus income upon the trusts therein mentioned. Testator died in 1913. A. died a bachelor in 1915. Upon the question how as between the beneficiaries under the will the estate duty payable on the death of A. imposed since the testator's death by virtue of 1914 Act, s. 14, ought to be borne:—*Held*: (1) the duty on the settled legacy must be paid out of the investments representing the £25,000, & not out of the residue; (2) inasmuch as the annuity of £3,000 was chargeable upon the whole estate, the residue, the whole of which benefited by the cesser of the annuity, must bear the duty; (3) the annuitant being liable, however, to pay interest on a ratable proportion of the duty corresponding to the proportion which the nominal sum required to produce the annuity bore to the whole residue.

(4) A testator may use language which is sufficient to cover a duty not in force at his death, & in one at least of the clauses of his will the testator has in this case done so. His intention must be found from the language of the will (*LORD COZENS-HARDY, M.R.*).—*Re PALMER, PALMER v. PALMER*, [1916] 2 Ch. 391; 85 L. J. Ch. 577; 115 L. T. 57; 60 Sol. Jo. 565, C. A.

*Annotations*:—*As to* (1) *Apld.* *Re Wedgwood, Allen v. Public Trustee*, [1921] 1 Ch. 601. *As to* (4) *Apld.* *Re Stoddart, Bird v. Grainger*, [1916] 2 Ch. 444; *Re Hatch, Hatch v. Hatch* (1917), 86 L. J. Ch. 454; *Re Tinkler, Loyd v. Allen*, [1917] 1 Ch. 242. *Consd.* *Re Eve, Hall v. Eve*, [1917] 1 Ch. 562; *Re Parker, White v. Stewart* (1917), 86 L. J. Ch. 766. *Refd.* *Re Wedgwood, Allen v. Public Trustee*, [1921] 1 Ch. 601; *Re Sutherland, Chaplin v. Leveson-Gower*, [1922] 2 Ch. 782.

**221. —.]—***Re HATCH, HATCH v. HATCH*, No. 229, *post*.

**222. Payable out of bequeathed fund—Although given free of duty.]—***Re SNAPE, ELAM v. PHILLIPS*, No. 219, *ante*.

**223. — — — & residue charged with duty.]—***Re GUNN, HARVEY v. GUNN*, [1916] W. N. 283; 51 L. Jo. 387.

*Annotation*:—*Refd.* *Re Tinkler, Loyd v. Allen*, [1917] 1 Ch. 242.

**224. — — — —.]—***Re PALMER, PALMER v. PALMER*, No. 220, *ante*.

**225. — — — —.]—**Testatrix, after giving numerous pecuniary legacies "free of duty," gave to trustees "the sum of £7,000 free of duty" upon trust for A. for life, & after his death upon trust for his wife & children; & testatrix gave the residue of her estate, "after payment thereof of her just debts, funeral & testamentary expenses & the duties of the thereinbefore mentioned legacies," to B. absolutely. Between the date of the will & of the death of testatrix 1914 Act, s. 14, came into operation, which abolished the relief from estate duty given by 1894 Act, s. 5 (2), & the question arose whether the estate duty which under 1914 Act, s. 14, would be payable on the death of A. in respect of the legacy of £7,000 ought to be borne by the *corpus* of the legacy or by the residuary estate:—*Held*: (1) upon the true construction of the will the words "free of duty" were limited to the duties presently payable on the death of testatrix in respect of the legacy, & did not extend to any estate duty that might become payable on the death of A.; (2) on payment of the legacy to the trustees without deduction there was no obligation to retain any part of the residuary estate for any claim that might arise for such estate duty.—*Re D'OYLY, VERTUE*



*Out of what property payable: Sub-sects.*

*v. D'OYLY*, [1917] 1 Ch. 556; 86 L. J. Ch. 373; 116 L. T. 442; 61 Sol. Jo. 336.

*Annotations:—As to (1) Distd. Re Eve, Hall v. Eve*, [1917] 1 Ch. 562. *Consd. Re Parker, White v. Stewart* (1917), 86 L. J. Ch. 766; *Re Wedgwood, Allen v. Public Trustee*, [1921] 1 Ch. 601.

**226.** ———. ———.]—(1) The words “free of all death duties” have no general meaning as applied to all wills, but must be construed according to the meaning given to them by the particular will under consideration. The natural time to ascertain the meaning of these words is when the legacies which are given free of all duties are in the sense of having been transferred out & out from the testator's estate. If it be intended to prolong this date to that of payment or transference to the ultimate beneficiary words should be used clearly expressing that intention. Testatrix, by her will, dated June 26, 1913, bequeathed a number of pecuniary legacies, & amongst others a legacy of £5,000 to the N. Society, & directed “that all legacies & annuities given by this my will or any codicil hereto shall be paid free of all death duties.” She then devised & bequeathed all the residue of her real & personal estate to her trustees upon the usual trusts for sale & conversion, with a direction out of the proceeds “to pay & provide for my funeral & testamentary expenses & debts & the pecuniary legacies bequeathed by this my will or any codicil hereto & the duties on all legacies & annuities bequeathed free of all duties.” The beneficial trusts were to pay “free of all death duties” certain annuities with a direction to appropriate funds for answering them by the income thereof & then to pay to each of the nephews B. & J. “free of all death duties,” the sum of £6,000, & to her niece, M., “free of all death duties,” the sum of £1,000, & to hold the residuary estate in trust for C. absolutely. She then declared that the sum of £6,000 was not to be paid to her nephew J., but was to be held upon certain trusts for him & other persons in succession. By a second codicil to her will, dated Nov. 17, 1913, testatrix reduced the legacy of £5,000 to the N. Society to £2,500, & directed that her will should be read & have effect as if a legacy of £2,500 “free of all death duties had been thereby bequeathed in lieu of the said legacy of £5,000.” She then bequeathed “free of all death duties” to her trustees £2,500 upon trust to invest the same & to pay the income to her sister, F., for life & after her death as to both capital & income in trust for the N. Society. Testatrix died on Nov. 26, 1913. A summons was taken out by the surviving exor. for the determination of the question as to the incidence of the legacy & estate duties which would become payable on the deaths of the respective tenants for life of the settled legacies, including the legacy to the N. Society:—*Held*: (2) the legacy duty which would become payable on the N. Society's legacy of £2,500 on the death of the tenant for life would be payable out of the ultimate residue of the testatrix's estate; (3) the estate duty would be payable out of the *corpus* of the settled legacy.—*Re WEDGWOOD, ALLEN v. PUBLIC TRUSTEE*, [1921] 1 Ch. 601; 90 L. J. Ch. 322; 125 L. T. 146, C. A.

*Annotations:—As to (1) Apld. Re Beecham, Woolley v. Beecham* (1923), 130 L. T. 558. *Refd. Re Fenwick, Lloyds Bank v. Fenwick*, [1922] 2 Ch. 775. *As to (3) Apld. Re Sutherland, Chaplin v. Leveson-Gower*, [1922] 2 Ch. 782.

**227.** ———. ———.]—*Re SUTHERLAND (DUKE), CHAPLIN v. LEVESON-GOWER*, No. 121, *ante*.

**228.** ———. ———.]—Bequeathed “subject to duty affecting the same.”—*Re BROWN, TURNBULL v. ROYAL NATIONAL LIFEBOAT INSTITUTION*, No. 196, *ante*.

**229. Payable out of residue—As directed in will—Language of will sufficient to include future duties.**—(1) By the will of a testator, who died in 1907, certain legacies of specific securities were settled upon trust in each case for a tenant for life, with remainders over. The will contained a direction that “all legacy annuity succession or other duties payable in respect or all & every the benefits given by this my will (& save & except the legacy succession & other duties payable by my residuary legatees in respect of their shares in interests of & in my residuary & personal estate & which duties are to be borne & paid by such residuary legatees) shall be borne & paid by my residuary trust estate”:—*Held*: all estate & succession or legacy duties, which became payable on the deaths of the tenants for life of the specific settled legacies were, upon the construction of the will, properly payable out of the residuary estate, notwithstanding that they were imposed by legislation coming into operation subsequently to testator's death.

(2) The decision in *Re Snape, Elam v. Phillips*, No. 219, *ante*, if & so far as it was intended to lay down any general principle was wrong having regard to what was said in *Re Palmer, Palmer v. Palmer*, No. 220, *ante*. Since that decision of the Ct. of Appeal I am left free to decide the question according to the construction which I think ought to be put upon this particular will before me (SARGANT, J.).—*Re HATCH, HATCH v. HATCH* (1916), 86 L. J. Ch. 451; 115 L. T. 472; 60 Sol. Jo. 567.

*Annotations:—As to (1) Distd. Re Kennedy, Corbould v. Kennedy*, [1916] 2 Ch. 379. *Apld. Re Eve, Hall v. Eve*, [1917] 1 Ch. 562. *As to (2) Consd. Re Tinkler, Loyd v. Allen*, [1917] 1 Ch. 212. *Refd. Re Stoddart, Bird v. Grainger*, [1916] 2 Ch. 111.

**230.** ———. ———.]—Testator who died in 1872 bequeathed £10,000 upon trust to pay the interest to T. for life, & after her death upon trust for her children or other issue as she should appoint, & in default of appointment for her children who should attain 21 years equally, & in default of issue to pay the same to a hospital, & directed that “all duties” payable in respect thereof should be paid out of & be a charge upon his residuary estate. He directed his trustees to pay his funeral & testamentary expenses & debts & legacies out of his real & mixed personal estate, & gave the income of his residuary estate to S. for life; & after her death he gave his residuary pure personal estate to the hospital, & his residuary real & mixed personal estate to T. absolutely. By 1894 Act, estate duty was for the first time imposed upon the death of a person after the commencement of the Act. S. died in 1916, & a question arose whether the estate duty, which would be payable on the £10,000 legacy on the death of T., would be payable out of the legacy or out of the residuary estate; & if out of the latter, whether out of the whole estate ratably or out of the proceeds of the real & mixed personal estate only:—*Held*: it was a question of construction in each case whether or not a testator had used language sufficient to cover a duty not in force at his death; in this will the words “all duties” must either refer to legacy duty only or to every duty which might be imposed; they were too wide to be referred to legacy duty only; & the estate duty was a charge on the residuary estate, & must be paid ratably out of the two branches of the residuary estate.—*Re TINKLER, LOYD v. ALLEN*

[1917] 1 Ch. 242; 86 L. J. Ch. 177; 115 L. T. 710; 61 Sol. Jo. 170.

**231.** ———.—]—*Re PALMER, PALMER v. PALMER*, No. 220, *ante*.

**232.** ———.—]—Testator, who died in 1913, gave six sums varying from £7,000 to £1,000 to trustees upon trust as to each sum to pay the income to a relation for life, & then to his or her wife or husband for life, & subject thereto he gave the income & capital to the children & issue of the relation. The will also said: "I direct all the legacies, whether settled or otherwise, & the annuities hereinbefore bequeathed to be paid & enjoyed free of all death duties." The real & personal estate was given to the trustees upon trust for sale & conversion & out of the proceeds "to pay my funeral & testamentary expenses & debts & pay or provide for the legacies & annuities hereby or by any codicil bequeathed & the duties thereon" & to invest the residue in trust for certain charities. 1914 Act, s. 14, abolished the relief which had been given by 1894 Act, s. 5 (2), in respect of the estate duty which would otherwise have been payable on the deaths of the tenants for life of the settled legacies, & consequently created a further claim for estate duty on those legacies:—*Held*: the words of the will threw that prospective claim on the residue in relief of the settled legacies.—*Re STODDART, BIRD v. GRAINGER*, [1916] 2 Ch. 414; 86 L. J. Ch. 29; 115 L. T. 540; 60 Sol. Jo. 586.

*Annotations*:—**Distd.** *Re D'Oyly, Vertue v. D'Oyly* (1917), 61 Sol. Jo. 336. **Consd.** *Re Parker, White v. Stewart* (1917), 86 L. J. Ch. 766; *Re Wedgwood, Allen v. Public Trustee*, [1921] 1 Ch. 601. **Refd.** *Re Eve, Hall v. Eve*, [1917] 1 Ch. 562; *Re Tinkler, Loyd v. Allen*, [1917] 1 Ch. 242.

**233.** ———.—]—(1) Testator by his will settled four trusts legacies upon certain persons for life with divers remainders over. He also gave an annuity for life that was to take effect after one of the life interests in the settled funds. The will directed that "all the legacies annuities & bequests hereinbefore made by me shall be free of legacy & succession duty & all other death duties, & such duties shall be borne by & paid out of my general estate":—*Held*: on the construction of the will all the duties in respect of the pecuniary dispositions made by testator, whether presently payable or becoming payable by reason of subsequent events happening to the property bequeathed, must be borne by the general estate.

(2) *Semble*: in setting aside a fund out of the residue to provide for future duties, unascertainable as to amount & rate of duty, the exors. must provide for the maximum amount of duty now payable.—*Re PARKER, WHITE v. STEWART* (1917), 86 L. J. Ch. 766; 117 L. T. 422; 33 T. L. R. 501, C. A.

*Annotations*:—*As to* (1) **Distd.** *Re Wedgwood, Allen v. Public Trustee*, [1921] 1 Ch. 601; *Re Sutherland, Chaplin v. Leveson-Gower*, [1922] 2 Ch. 782; *Re Beecham, Woolley v. Beecham* (1923), 130 L. T. 558. *As to* (2) **Consd.** *Re Wedgwood, Allen v. Public Trustee*, [1921] 1 Ch. 601.

**234.** ———.—]—By her will, dated Aug. 31, 1910, testatrix, after giving certain specific & pecuniary legacies, gave (clause 8) £8,000 to her trustees upon trust for a life tenant & remainderman. By clause 9 she declared that "all the foregoing gifts bequests & legacies shall be free of duty." By clause 10 she gave her residuary estate to her trustees upon trust for sale & conversion, & directed them, after payment of the legacies " & the duty on all gifts bequests & legacies bequeathed free of duty," to hold the net proceeds upon trust for two residuary legatees. Testatrix died on Oct. 9, 1915, *i.e.*, more than a

year after settlement estate duty & the relief thereby conferred had been abolished by 1914 Act, s. 14. The life tenant of the settled legacy died on July 27, 1916, after the legacy had been set aside but before the estate was distributed:—*Held*: not only the settled legacy itself but the successive beneficial interests therein were "gifts bequests or legacies" within clause 9, & consequently the estate duty payable on the cesser of the life interest fell on residue.—*Re EVE, HALL v. EVE*, [1917] 1 Ch. 562; 86 L. J. Ch. 396; 116 L. T. 682; 33 T. L. R. 251.

*Annotation*:—**Refd.** *Re Wedgwood, Allen v. Public Trustee*, [1921] 1 Ch. 601.

#### SUB-SECT. 7.—EXPRESS DIRECTION BY TESTATOR.

**235. Direction to pay out of residue—Duty on realty conveyed inter vivos—Within twelve months of testator's death—Residue not liable.**—*Re BAXTER, BAXTER v. BAXTER* (1898), 42 Sol. Jo. 611.

*See, now*, 1909–1910 Act, s. 59.

**236.** ———.—**Duty on devised realty.**—Testator, who died in 1903, after making pecuniary bequests & devising certain freeholds upon trusts by way of settlement, devised & bequeathed the residue of his real & personal estate upon trust for sale & conversion, & directed his debts, funeral & testamentary expenses & duties to be paid out of the proceeds of such sale & conversion:—*Held*: the settlement estate duty as well as the estate duty payable in respect of the specifically devised realty must be paid out of the general residuary estate in exoneration of the specifically devised realty.—*Re PIMM, SHARPE v. HODGSON*, [1904] 2 Ch. 345; 73 L. J. Ch. 627; 91 L. T. 190; 52 W. R. 648; 48 Sol. Jo. 588.

*Annotations*:—**Folld.** *Re Cayley, Awdry v. Cayley*, [1904] 2 Ch. 781. **Consd.** *Re Briggs, Richardson v. Bantoft*, [1914] 2 Ch. 413. **Distd.** *Re Kennedy, Corbould v. Kennedy*, [1916] 2 Ch. 379.

**237.** ———.—**Extent of such direction.**—*Re BRIGGS, RICHARDSON v. BANTOFT*, No. 248, *post*.

**238.** ———.—]—Testator directed his trustees to stand possessed of his residuary estate upon trust (*inter alia*) to pay "all death duties of every kind on every part of my estate including my business assets, except as hereinbefore expressly provided, & so that this direction shall operate to exonerate any part of my estate which otherwise or might be charged with or liable for any death duties":—*Held*: this was a direction to pay out of residue all death duties payable at the death of testator, but not to pay future duties which would arise later on the deaths of annuitants or tenants for life of settled legacies under the will.—*Re BEECHAM, WOOLLEY v. BEECHAM* (1923), 130 L. T. 558; 68 Sol. Jo. 208, C. A.

**239.** ———.—]—By his will made in 1910 testator who died in 1913, after appointing exors. & bequeathing certain legacies, settled a terminable rentcharge of £120 *per annum* for the residue of a term of forty-eight & a half years on his son S. & his son's widow successively for life, with remainder to the son's children. After a further bequest & a devise of freeholds testator directed his exors., after payment of debts, etc., & the legacies thereinbefore given " & duties thereon," to transfer his residuary estate to the Public Trustee to be held upon trust for conversion & investment, the resultant investments being called "the residuary trust funds." Upon the death of testator's widow, to whom a trust annuity of £800, was given, these trust funds & all accumulated income were to be applied in paying numerous



*Sect. 9.—Out of what property payable: Sub-sect. 7.*  
*Sect. 10: Sub-sect. 1.]*

pecuniary legacies, & two settled legacies of £2,000 each. One of these was given upon trust to pay the income to a daughter of testator for life, & after her death for her husband & children. The other was given in trust to pay the income to S. for life, & after his death to his widow for life, & subject thereto upon trust for the children of S. Subject to the payment of the various legacies made payable after the death of the widow testator declared that the trustee should stand possessed of the residuary trust funds upon trust for his children in equal shares. Testator then directed that all legacies, devises, & bequests should be free of all duties, & that all estate, settlement, succession, legacy & other duties in respect of any of his property, real or personal, should be paid out of his residuary estate. Testator's widow died on Nov. 20, 1923:—*Held*: (1) the only estate duty payable out of residue in respect of the £120 rentcharge & the two settled legacies of £2,000, was that properly payable on & in consequence of testator's death; & any future estate duty must be paid out of the property the subject of these gifts respectively; (2) on the true construction of the will, the direction as to the payment of all legacies, etc., free of all duties could not be construed as giving to the postponed legatees any wider relief than was given to those who took legacies on testator's death; (3) any legacy duty which might thereafter become payable in respect of these gifts was payable out of testator's residuary estate.—*Re SARSON, PUBLIC TRUSTEE v. SARSON*, [1925] 1 Ch. 31; 69 Sol. Jo. 105.

**240. — Duty on annuities from residue—Construction of will.]—***Re KENNEDY, CORBOULD v. KENNEDY*, No. 577, *post*.

**241. Direction to pay out of mixed fund.]—***Re SPENCER COOPER, POE v. SPENCER COOPER*, No. 204, *ante*.

**242. Direction to pay probate duty—Estate duty not payable at time of will—Direction inoperative.]—**By her will, dated Aug. 20, 1888, when probate duty was in force, testatrix bequeathed certain Consols to her trustees upon trust for her brother for life & subject thereto upon trust to raise thereout "the amount of the probate duty which may be payable on the proving of this my will in respect of the said Govt. Consolidated Annuities," the said sum when raised to fall into residue. The balance of the Consols was given to certain specific legatees. Testatrix died on Aug. 19, 1896, after the commencement of 1894 Act, so that estate duty & not probate duty was payable. The brother died on Nov. 15, 1909, & the Consols became divisible:—*Held*: the direction to raise probate duty did not operate as a direction to raise the larger & widely different estate duty subsequently imposed by 1894 Act, & the direction was therefore inoperative.—*Re BOXER, MORRIS v. WOORE*, [1910] 2 Ch. 69; 79 L. J. Ch. 492; 103 L. T. 126.

**243. Devise of realty—"Free from incumbrances"—Duty thrown on residue.]—**Testator by his will made in 1908 devised a messuage & premises "free of any incumbrances." At the date of his death in 1912 the title deeds of the premises were on deposit at a bank as part of the security for an overdraft:—*Held*: the words "free from any incumbrances" were inserted in the will for the purpose of relieving the property from any charge whatsoever, & the payment of estate duty & succession duty was thrown upon the general

residue.—*Re NESFIELD, BARBER v. COOPER* (1914), 110 L. T. 970; 59 Sol. Jo. 44.

**Direction to pay testamentary expenses.]—***See* Sub-sect. 1, D., *ante*.

**Direction against apportionment.]—***See* Sect. 10, sub-sect. 3, *post*.

**Duty imposed subsequent to testator's death.]—***See* Sub-sect. 6, *ante*.

## SECT. 10.—APPORTIONMENT.

### SUB-SECT. 1.—IN GENERAL.

*See* 1894 Act, s. 14 (1).

**244. Finance Act, 1894 (c. 30), s. 14—Intent & scope of section—Value of residue.]—***WADE v. WADE*, No. 213, *ante*.

**245. Chargees to bear proportion—Charge upon insurance moneys.]—***WADE v. WADE*, No. 213, *ante*.

**246. — Charge upon realty—In favour of trustees of settlement.]—**The persons entitled to a sum of money charged by a testator upon his real estate during his life in favour of the trustees of his marriage settlement, being a charge which cannot, under 1894 Act, s. 7 (1), be deducted from such real estate before estimating its amount for the purposes of estate duty, must by sect. 14, sub-sect. 1, pay a proportionate amount of the duty which sect. 9, sub-sect. 1, makes a first charge upon the real estate in question.—*Re HACKET, HACKET v. GARDINER*, [1907] 1 Ch. 385; 76 L. J. Ch. 249; 96 L. T. 420.

**247. — — — — —.]—**A sum payable to the trustees of a marriage settlement on the death of the wife's father with interim interest during his life was secured by his covenant in the settlement & by an equitable charge on real estate. There was no money consideration for the covenant or charge, so that on the covenantor's death estate duty became payable thereon:—*Held*: 1894 Act, s. 14 (1), was applicable, & consequently the settlement trustees must pay the proper ratable part of the estate duty in respect of the property comprised in their security.—*Re HARTLAND, BANKS v. HARTLAND*, [1911] 1 Ch. 459; *sub nom. Re DIXON HARTLAND, BANKS v. HARTLAND*, 80 L. J. Ch. 305; 104 L. T. 490; 55 Sol. Jo. 312.

*Annotations:—***Appld.** *Re Briggs, Richardson v. Bantoft*, [1914] 2 Ch. 413. **Mentd.** *Brooks v. I. R. Comrs.*, [1913] 3 K. B. 398; *Re Turner, Klaffenberger v. Groombridge*, [1917] 1 Ch. 422; *Howe v. I. R. Comrs.*, [1918] 2 K. B. 584.

**248. — — — — —.]—**A fund payable at testator's death to the trustee of his daughter's marriage settlement dated Sept. 29, 1884, was secured by testator's covenant in the settlement & by a contemporaneous mtge. of real estate. By his will dated Apr. 29, 1908, testator devised & bequeathed his residuary real & personal estate to his trustees on trust for sale & conversion & directed them to pay "all death duties" out of the proceeds. The testator died on Aug. 21, 1913:—*Held*: (1) the expression "all death duties" referred to duties to which testator's estate became liable under the disposition of his will, & did not include duties arising under the settlement, & really payable by or recoverable from the settlement trustee; (2) the settlement estate duty & succession duty on the settled fund & the ratable part of the estate duty apportionable thereon under 1894 Act, s. 14 (1), must therefore be borne by that fund.—*Re BRIGGS, RICHARDSON v. BANTOFT*, [1914] 2 Ch. 413; 83 L. J. Ch. 874; 111 L. T. 939; 58 Sol. Jo. 722.

**249. — — — — —.]—**Charge liable to abatement.]—



(1) A rentcharge of £50,000 *per annum* charged on London settled estates was limited to the use of deft., the fourth Viscount Portman for life, with remainder to the use of his eldest son during his life, to commence from their respective successions to the title & to be paid without any deduction except for death duties, & a similar rentcharge was limited in remainder, in the event of any other issue of the fourth viscount succeeding to the title, to the use of the sons of such eldest son & other sons of the fourth viscount in tail male. Subject to such rentcharge the London settled estates were limited to the use of pltf. for life with remainders over. The third viscount, who was tenant for life of the estates in question, had died in 1923, while nine of the yearly instalments of estate duty payable in respect of the death of the second viscount, who had died in 1919 remained unpaid. It was not disputed that the rentcharge limited to the fourth viscount must bear some proportion of the estate duty assessable upon the death of the third viscount, & that in principle the same proportion would apply to the estate duty remaining unpaid in respect of the death of the second viscount. The London estates comprised a large number of freehold reversions, some of which would in future be constantly falling into possession on the determination of existing building leases, & the capital value of the estates was much greater than a sum represented by twenty-four or twenty-five years' purchase. Upon an application for determining how the perpetual yearly rentcharge should be valued for the purpose of bearing its due proportion of estate duty:—*Held*: while the £50,000 rentcharge was payable, the owner should be treated, for the purpose of apportioning estate duty, as the tenant for life of a capital sum charged on the estate equal to the capitalised value, as at the death of the third viscount, of a perpetual or adequately secured rentcharge of £50,000, which capital sum would be treated as chargeable estate duty at the rate charged upon the death of the third viscount, & the fourth viscount as the owner of the rentcharge would, so long as it was payable, have to pay interest in respect of such estate duty at the rate ascertained as in *Re Parker-Jervis, Salt v. Locker*, No. 261, *post*.

(2) The settlement also provided that if in any year the net rents, profits & income for that year after payment of all rent, rates, taxes & other family charges & the interest on all capital charges; but excluding the £50,000 rentcharge should be less than £100,000, then the £50,000 rentcharge payable for that year should abate & be reduced to a sum equal to one-half of such net rents, profits & income:—*Held*: the abated rentcharge remained liable to both estate duty interest & income tax, & in every year in which the abated rentcharge became payable, the capitalised value of a perpetual & adequately secured rentcharge of the abated amount must be ascertained as at the death of the third viscount, & such capitalised sum must be treated as charged with estate duty at the rate above-mentioned.—*Re PORTMAN (VISCOUNT), PORTMAN v. PORTMAN (VISCOUNT)*, [1924] 2 Ch. 6; 93 L. J. Ch. 362.

**250. — Annuities—Charged on residue.**—*Re PALMER, PALMER v. PALMER*, No. 220, *ante*.

**251. — Charged on settled personalty.**—By a separation deed a trust fund was settled by the wife upon trust out of the income to pay an annuity of £400 to the husband during the joint lives of himself & the wife, & subject thereto to pay the income to the wife for life. After her

death the income was to be applied in paying the husband's annuity of £400, an annuity of £300 to the wife's testamentary appointee, £400 *per annum* for the maintenance of the infant son of the marriage during his minority, & £400 *per annum* to him after his majority during his & the husband's joint lives. The husband's annuity in any year was to abate or increase proportionately as the total income received by the trustee from the fund in that year fell below £1,250 or rose above £1,300. Upon the wife's death in Nov. 1913, no estate duty became payable in respect of the husband's annuity, & the estate & settlement duty payable in respect of the benefit accruing to the other beneficiaries had been raised by a charge on the fund & paid, but the proposal of the trustee to sell part of the fund & pay off the charge raised the question of the ultimate incidence of the duty as between the parties interested in the income, which, owing to the war, had fallen far below £120 *per annum*:—*Held*: as between the husband & the other beneficiaries, the husband was entitled to throw the burden of the duty on the interests in respect of which the claim had arisen.—*Re TATTERSALL'S SETTLEMENT, PUBLIC TRUSTEE v. TATTERSALL*, [1918] 2 Ch. 243; 87 L. J. Ch. 521; 119 L. T. 70; 62 Sol. Jo. 605.

**252. Who is a chargee—Not beneficiary of trust—To discharge liabilities on beneficiaries' estate.**—

A person entitled to the benefit of a trust for the application of the rents & profits of an estate in the discharge of the incumbrances on his own estate was not a person "entitled to any sum charged" on such estate "whether as capital or as an annuity or otherwise" within 1894 Act, s. 14 (1).

A testator settled his A., B., & C. estates to different uses in strict settlement, & limited his D. estate to trustees for a term of 1,000 years, & subject to the term he settled the estate as to one moiety to the uses declared of the A. estate, & as to the other moiety to the uses declared of the B. estate. He declared that the term of 1,000 years was limited to the trustees upon trust to apply the rents & profits of the D. estate in the discharge of the mortgage debts & other gross sums charged upon the four estates or any of them:—*Held*: the estate duty payable in respect of the D. estate was a first charge on that estate & was raisable by mtge. or sale thereof, & the interest on any mtge. so raised was payable out of the rents & profits of that estate with no right of recoupment of either capital or income as against any other of the estates.—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, [1910] 2 Ch. 83; 79 L. J. Ch. 435; 102 L. T. 802; 26 T. L. R. 434; 54 Sol. Jo. 475.

**253. Debt due on covenant—In settlement.**—

A father upon the marriage of his son covenanted with the trustees of the son's settlement that his exors. or administrators should, within six months after his death, pay to the trustees the sum of £25,000 to be held by them upon the trusts of the settlement. The father by his will devised & bequeathed to his trustees, who were also his exors., the residue of his real & personal estate, in trust for sale & conversion & out of the proceeds to pay his funeral & testamentary expenses, debts & legacies & to hold the residue upon certain trusts. After the father's death his exors. paid the estate duty upon the value of his estate after deducting his funeral & testamentary expenses & his debts other than the debt of £25,000:—*Held*: the estate duty in respect of the £25,000 must as between the exors. & the trustees of the settlement be borne by the former.—*Re GRAY, GRAY v. GRAY*, [1896] 1 Ch. 620; 65 L. J. Ch. 462; 74

**Sect. 10.—Apportionment: Sub-sects. 1, 2 & 3.]**

L. T. 275; 60 J. P. 314; 44 W. R. 406; 12 T. L. R. 270.

*Annotations:—***Appld.** *Re Dowling, Dowling v. Fenwick* (1913), 108 L. T. 671. **Refd.** *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457.

**254. Pecuniary & residuary legatees.]—BERRY v. GAUKROGER, No. 155, ante.**

**SUB-SECT. 2.—PROPERTY PASSING UNDER APPOINTMENT.**

*See* 1894 Act, s. 14 (1).

**255. Appointees ratably with residue of fund.****PART II. SECT. 10, SUB-SECT. 1.****254 i. Pecuniary & residuary legatees.]**

—Testator by his will directed payment of testamentary expenses out of residue. He further declared that all legacies should be free of legacy & probate duty:—*Held*: federal estate duty upon the legacies was apportionable amongst all the beneficiaries except that each legatee was relieved from the obligation of bearing any share of the estate duty payable in respect of his legacy.—*O'NEILL v. COFFIN* (1920), 20 S. R. N. S. W. 264.—**AUS.**

**e. Statutory apportionment—How made.]—**Subject to any contrary direction in the will, an apportionment of duty, under Commonwealth Estate Duty Assessment Act, 1914, s. 35, amongst all the beneficiaries in an estate "in proportion to the value of their interests" was held to be properly made in the cases (a) of annuities charged on residue; (b) of successive gifts to life tenant & remainderman; & (c) of a gift to infants upon certain contingencies (with gift over) by deducting the whole amount of duty assessed from the corpus as to (a) of the sum required to provide the annuity, & as to (b) of the settled property, & as to (c) of the subject of the gift.—*Re DAVIDSON'S WILL, PERPETUAL EXECUTORS & TRUSTEES ASSOCN. OF AUSTRALIA v. DAVIDSON*, [1917] V. L. R. 748.—**AUS.**

**f. — Specific bequests or devises not exceeding £200.]—**PERPETUAL TRUSTEE CO., LTD. v. MACKENZIE (1917), 17 S. R. N. S. W. 660.—**AUS.**

**g. — What amounts to a different disposition—Exemption of realty in case of intestacy.]—**In the absence of any different disposition by a testator in his will, executors & administrators *cum testamento annexo* must deduct from any property devised or bequeathed a proportionate amount of the stamp duty. Realty in respect of which there is an intestacy is exempt from contribution to the stamp duty payable on the estate of the intestate. A general direction in a will to pay debts, funeral & testamentary expenses, is not a different disposition within 44 Viet. No. 3, (1).—*FRASER v. WHITE* (1893), 14 N. S. W. Eq. 216.—**AUS.**

**h. — —.]—**Testator made a specific devise & then devised his residuary realty & bequeathed his personalty upon trust, after payment of his debts, funeral & testamentary expenses, for all his children in equal shares:—*Held*: the direction for payment of testamentary expenses out of residue was not "a different disposition as to payment of duty" within Deceased Persons Estates Duties Act, 1904, No. 9, s. 16, so as to relieve the specific devisee from payment of duty. Each legacy or devise must pay its proportion of the duty.—*Re DENNE* (1906), 2 Tas. L. R. 37.—**AUS.**

— two testamentary instruments, called respectively a British will & an Australian will.

a testator domiciled in Scotland disposed of his British & Australian estates, directing that the British will should be construed according to the law of Scotland & the Australian will according to the law of N. S. W. His widow, on his death without issue, established in Scotland her legal rights to *jus relictae* & *terce*:—*Held*: the stamp duty was payable out of the general estate, there being a first trust which was "a different disposition" within Stamp Duties Act, 1898, s. 56 (3).—*In the Will of DOUGLAS* (1909), 9 S. R. N. S. W. 269.—**AUS.**

**i. — —.]—**Testatrix gave & devised all her real & personal estate after payment of "her just debts, funeral & other expenses" to her trustee, & having disposed of specific portions of her estate directed the trustee to hold the residue upon trust for certain beneficiaries:—*Held*: there was no "special provision" within Deceased Persons Estates Duties Act, 1915, & no "different disposition" within Estate Duty Assessment Act, 1914.—*Re MURRAY* (1918), 14 Tas. L. R. 5.—**AUS.**

**m. — —.]—**A testator after making certain specific bequests gave the residue of his estate upon trust for conversion, & directed that there should first be paid "all the expenses incident to the execution of the preceding trusts & my debts funeral & testamentary expenses":—*Held*: the Commonwealth estate duty was to be apportioned among the beneficiaries, the provision in the will not being a "different disposition" within the meaning of sect. 35.—*SHELLEY v. NEW SOUTH WALES INSTITUTION FOR DEAF & DUMB & BLIND*, [1919] A. C. 650.—**AUS.**

**n. — —.]—***Re GARDNER* (1919), 15 Tas. L. R. 78.—**AUS.**

**o. In absence of a "different disposition."]**—In cases where a testator by his will has not made a different disposition within Estate Duty Assessment Act, 1914, no hard & fast rule of universal application can be laid down as to the method of apportioning the burden of the duty amongst the various interests given by the will.—*PERPETUAL TRUSTEE CO., LTD. v. MITCHELL* (1920), 20 S. R. N. S. W. 647.—**AUS.**

**p. Gift inter vivos.]—**Property the subject matter of gifts *inter vivos* is under Estate Duty Assessment Act, 1914, s. 8 (4), to be deemed to be part of the estate for the purpose of apportionment.—*Re HARPER, HARPER v. HARPER*, [1922] V. L. R. 512.—**AUS.**

**q. Between owner of property & person entitled to a charge upon it.]—**B. mortgaged property to secure the payment of £10,000 to a son of a first marriage. On the son's marriage the mortgage was vested in the trustees of his settlement. On B.'s second marriage B. agreed to bring into settlement property sufficient to produce £500 a year & property was settled on trust, which, however, proved to be worth only £297 a year.

By an order of ct. on B.'s death

**No intention to burden residue.]—***Re CROFT, DEANE v. CROFT*, No. 953, *post*.

**256. —.]—**The donee of a power of appointment over a sum of New 3 per cent. Annuities made successive appointments by deed of specific amounts of the annuities, subject to her own life interest, & by will appointed the amount not appointed by deed:—*Held*: the account duty payable under Customs & Inland Revenue Act, 1881 (c. 12), & costs of administering the fund must be borne by the appointees ratably.—*Re SHAW, TUCKET v. SHAW*, [1895] 1 Ch. 343; 64 L. J. Ch. 283; 71 L. T. 873; 43 W. R. 315; 13 R. 185.

*Annotation:—***Consd.** *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457.

leave was given to the trustees of the second settlement to prove for a sum of £6,800 to make good the deficiency in the value of the property brought by B. into the settlement. The estate proved insolvent.

The exor. claimed to be recouped by the trustees of the settlements a proportionate part of the duty on the sums realised by them:—*Held*: the exor. was entitled to be so recouped.—*COPE v. BRESLIN*, [1903] 1 I. R. 418.—**IR.**

**r. — —.]—**A testator gave his wife a life interest of lands & the fee of the residue of his movable estate, & conferred upon her full power to "raise such sums as may be required to pay all debts & succession duties which may fall upon her after my decease as well as all my debts & funeral expenses":—*Held*: this power did not authorise her to charge the heritage with his debts & funeral expenses, or with the whole estate duty, but only to charge it with the rateable part of estate duty affecting to the heritage itself.—*FRASER v. CROFT* (1898), 25 R. (Ct. of Sess.) 496.—**SCOT.**

**s. — —.]—**ALEXANDER'S TRUSTEES v. ALEXANDER'S MARRIAGE-CONTRACT TRUSTEES (1910), 47 Sc. L. R. 537.—**SCOT.**

**t. — —.]—**Testator bequeathed his heritage consisting of a mill, etc., to two cousins, under burden of a bond & disposition in favour of certain other beneficiaries to be secured over the heritable subjects. He further directed his trustees to form a limited co. to convey the mill, etc., under burden of the bond, to the co. & to make over the shares in the co. to the two cousins in equal portions:—*Held*: the estate duty payable upon the heritage did not form a charge upon the residue of the testator's estate but fell to be borne in rateable proportions by the two cousins & by the beneficiaries under the bond as being the persons beneficially interested in the heritage.—*ANDERSON'S TRUSTEES v. MATTHEW*, [1916] S. C. 299.—**SCOT.**

**u. Estate in dower.]—**ROSS v. ROSS' TRUSTEES (1901), 9 S. L. T. 340.—**SCOT.**

**v. Periodical payments in the nature of income.]—**A landowner died on June 6, 1907. There was then current a lease of a farm for nineteen years from Martinmas 1900, under which the rent was payable in half-yearly portions at the terms of Whit-Sunday & Martinmas. By the lease the tenant's entry was at Martinmas, but according to custom under such leases, the entry to houses & lands was on Nov. 28. The rent was due & payable on May 15 & Nov. 11, in each year:—*Held*: the current rent was to be considered as accruing day by day from the legal term of May 15, when the last half-year's rent became due, & the amount as accrued at June 6 fell to the executor & was liable in estate duty.—*BALFOUR'S EXECUTORS v. INLAND REVENUE*, [1909] S. C. 619; 46 Sc. L. R. 363; 1 S. L. T. 160.—**SCOT.**



**257.** —.]—A donee of a power over settled property appointed £35,000 to one & the residue otherwise:—*Held*: the £35,000 was charged on the property within 1894 Act, s. 14 (1), & estate duty was to be borne *pari passu* by the specific & residuary appointees.—*Re ORFORD (COUNTESS), CARTWRIGHT v. BALZO (DUC DEL)*, [1896] 1 Ch. 257; 65 L. J. Ch. 253; 44 W. R. 383; *sub nom. Re ORFORD (EARL), NEVILLE v. CARTWRIGHT, CARTWRIGHT v. BALZO (DUC DEL)*, 73 L. T. 681.

*Annotations*:—*Consd.* *Berry v. Gankroger*, [1903] 2 Ch. 116. *Refd.* *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457; *De Quetteville v. De Quetteville* (1905), 92 L. T. 758. *Mentd.* *Re Hill's Settlt. Trusts, Hill v. Equitable Reversionary Interest Soc.* (1896), 75 L. T. 477.

**258.** —.]—*Re CHISHOLM, GODDARD v. BRODIE*, No. 275, *post*.

**259. Residue liable—Sums appointed to be “of clear amount or value” —Or “of the like amount or value.”**—By his will, made in 1883, the donee of a special power of appointment over a settled trust fund directed that certain portions of the fund “of the clear amount or value,” & subsequently, “of the like amount or value,” therein specified should be appropriated & retained upon the trusts therein declared in favour of certain objects of the power, & that the residue of the fund should be appropriated & retained upon trust for another object. The donee died in 1906:—*Held*: the words “of the clear amount or value” & “of the like amount or value” exempted from estate duty the portions of the fund in respect of which those words were used, & that such duty must be borne by the residue of the fund.—*Re COXWELL'S TRUSTS, KINLOCH-COOKE v. PUBLIC TRUSTEE*, [1910] 1 Ch. 63; 79 L. J. Ch. 62; 101 L. T. 627.

*Annotation*:—*Apld.* *Re Grant, Nevins v. United Kingdom Temperance & General Provident Institution* (1915), 85 L. J. Ch. 31.

**260.** — Appointment of “net sum” — “Clear of all costs & expenses of raising same.”—An appointment was made of “the net sum” of a specified amount “clear of all costs & expenses of raising the same”:—*Held*: the latter words did not cut down or restrict the meaning of the word “net” & the estate duty payable on the appointed sum must be borne by the appointed residue of the fund.—*Re GRANT, NEVINSON v. UNITED KINGDOM TEMPERANCE & GENERAL PROVIDENT INSTITUTION* (1915), 85 L. J. Ch. 31; 112 L. T. 1126; 31 T. L. R. 235; 59 Sol. Jo. 316.

**By express provision in disposition.**—*See* Sect. 9, sub-sect. 7, *ante*.

### SUB-SECT. 3.—DISPOSITION EXCLUDING APPORTIONMENT.

*See* 1894 Act, s. 14 (1).

**261. Payment of jointure —Without any deductions.**—Under a settlement made by a father & son on the marriage of the latter, an estate was limited to certain uses in strict settlement, including a limitation of a jointure of £1,000 a year to the wife, A., in case she survived both father & son, which event happened, such jointure to be paid to her “without any deduction whatsoever except in respect of income tax.” The father, by a subsequent settlement made on his second marriage, appointed, under a power in the former settlement, a jointure of £500 a year to his wife, B., if she survived him, which event happened, & charged the same upon the settled estate, but there were no words of exemption as in the case of the £1,000 jointure. Upon the father's death both jointures became payable:—*Held*: (1) as to A.'s jointure, she was not herself

liable to pay the estate duty upon it, or any interest on such duty, since the words “without any deduction, etc.,” constituted a contract of exemption & also amounted to an “express provision to the contrary” within 1894 Act, s. 14 (1); (2) as to B.'s jointure, she must be treated as tenant for life of a sum equivalent to the capitalised value of the jointure, to be ascertained at the same number of years' purchase as the estate as a whole was capitalised for the purpose of duty; & she must be charged with estate duty on that sum, but was entitled to throw the duty charged against her upon the corpus of the estate, on the terms of her paying interest to the tenant for life or in tail or in fee in possession at the rate actually paid to the Commrs. of Inland Revenue until payment of the duty, & thereafter at the rate at which the duty could be raised by mtge. of the estate.

(3) Under above Act the estate duty on the estate passing on a debt is chargeable on the estate as a whole, without regard to tenancies for life or other particular interests, the scheme of the Act being that the duty shall be levied on the inheritance & that the inheritance shall bear it.—*Re PARKER-JERVIS, SALT v. LOCKER*, [1898] 2 Ch. 613; 67 L. J. Ch. 682; 79 L. T. 403; 47 W. R. 147.

*Annotations*:—*As to* (1) *Refd.* *Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726; *Re Tinkler, Loyd v. Allen*, [1917] 1 Ch. 242; *Re Wedgwood, Allen v. Public Trustee*, [1921] 1 Ch. 601. *As to* (2) *Apld.* *Re St. Albans, Loder v. St. Albans*, [1900] 2 Ch. 873. *Distd.* *De Quetteville v. De Quetteville* (1905), 92 L. T. 758. *Apld.* *Re Palmer, Palmer v. Palmer*, [1916] 2 Ch. 391; *Re Portman, Portman v. Portman*, [1924] 2 Ch. 6. *Refd.* *Re Booth, Pleace v. Booth*, [1916] 1 Ch. 349. *As to* (3) *Consd.* *Re Portman, Portman v. Portman*, [1924] 2 Ch. 6.

**262.** — Except legacy & succession duty.]—A testator, who died in Oct. 1857, by his will, dated in Sept. 1856, empowered any tenant for life to charge on the estates thereby settled a jointure, not exceeding £3,000 a year, for his widow “free from all taxes & deductions except property tax & legacy or succession duty”:—*Held*: this was an “express provision to the contrary” within 1894 Act, s. 14 (1), testator's intention clearly being that the jointure should be paid to the widow of the tenant for life free from all taxes & deductions except those specified by him.—*Re FITZHARDINGE (LORD), FITZHARDINGE (LORD) v. JENKINSON* (1899), 80 L. T. 376; 15 T. L. R. 225; 43 Sol. Jo. 296, C. A.

**263.** — Free from all charges & outgoing.]—In exercise of a power under a settlement whereby C. was empowered to appoint by way of jointure to his wife an annual sum not exceeding £3,000 clear of all charges & outgoing whatsoever, C. executed a settlement appointing the said sum, not expressly clear of all charges & outgoing. On the death of C.:—*Held*: the jointure was clear of all charges & outgoing, & therefore free from estate duty.—*Re CADOGAN'S (EARL) SETTLEMENTS, RICHMOND v. LAMBTON* (1911), 56 Sol. Jo. 11.

**264. Payment of annuities—Free from all deductions except legacy duty & income tax—Annuities charged on realty.**—Testator by his will made in 1882 gave an annuity to H. for her life, & after her death, in the events which happened, he gave annuities to her three children, & charged all the annuities on his real estate, & directed that they should be paid “without any deduction except for legacy duty & income tax.” By a codicil, made after the passing of the Customs & Inland Revenue Act, 1888 (c. 8), he made certain dispositions, & in all other respects confirmed his said will. By sect. 21 of above Act, legacy duty was abolished, & the duties under 1853 Act, & certain additional duties were made



**Sect. 10.—Apportionment: Sub-sect. 3. Sects. 11, 12, 13, 14, 15 & 16.]**

chargeable in respect of legacies, whether given by way of annuity or in any other form, charged on the real estate of any person dying after July 1, 1888. Testator died in 1892. H. died in 1900; & thereupon estate duty & succession duty became payable in respect of the annuities given to her children, & the question arose who was liable to pay the same:—*Held*: (1) testator, when he republished his will, must be taken to have known that there was then no legacy duty; it was a case of *falsa demonstratio*; & testator intended the annuitants to pay that duty, whether it was legacy duty or succession duty, which at that date was chargeable in respect of the annuities; (2) the estate duty was payable out of testator's residuary personal estate.—*Re RAYER, RAYER v. RAYER*, [1903] 1 Ch. 685; 72 L. J. Ch. 230; 87 L. T. 712; 51 W. R. 538.

*Annotations*:—*Generally*, *Mentd. Re Joseph, Pain v. Joseph* (1908), 98 L. T. 392; *Re Whiting, Ormond v. De Launay* (1913), 108 L. T. 629; *Re Smith, Prada v. Vandroy*, [1916] 1 Ch. 523.

**265. Payment of portions—Declared to be of "cash value"—Not sufficient contrary direction.]**—Under two indentures of settlement dated 1849, the seven younger children of T. were entitled to funds in remainder, & by a voluntary settlement dated 1881 T. assigned securities to trustees for their additional benefit; covenanting that he or his estate would be liable to pay any further sum which might be required to make up the portion of each child to £6,000 sterling; these portions being described in a subsequent clause of the voluntary settlement as being of a "cash value" of £6,000. T. died in 1909, two of the children having received portions of £6,000 clear during his lifetime:—*Held*: in the absence of any direction to pay a "clear" portion of £6,000, the five remaining portions must bear their share of estate duty ratably.—*KEKEWICH v. KEKEWICH* (1909), 101 L. T. 887.

#### SECT. 11.—REFUND OF DUTY PAID BY PERSON NOT LIABLE.

See 1894 Act, s. 6 (8), s. 9 (4), (6), s. 20 (2).

**266. To "person having limited interest"—Tenant in tail—Entitled to charge on property—For amount of duty.]**—An heir of entail who had paid out of his own money estate duty due in respect of the entailed estate on the death of his predecessor died without having taken any steps to charge the sum so paid on the entailed estate. The Crown having claimed an account & estate duty on the sum so paid from his exors.:—*Held*: (1) the money became automatically a statutory charge on the estate, & was placed by the statute in the same position as if the heir of entail paying the duty actually held a bond over the estate for the amount; & accordingly the deceased heir of

entail at the time of his death had a vested transmissible interest in the amount of the estate duty he had paid, & was competent to dispose of it; (2) 1894 Act was not to be construed according to the technicalities of the law, but according to the ordinary popular signification of the words employed.—*LORD ADVOCATE v. MORAY (COUNTESS)*, [1905] A. C. 531; 74 L. J. P. C. 122; 93 L. T. 569; 21 T. L. R. 715, H. L.

*Annotation*:—*As to* (1) *Consd. Re Anson, Buller v. Anson*, [1915] 1 Ch. 52.

**267. ———.]**—A tenant in tail in possession who succeeds to land & has not barred the entail is "a person having a limited interest" in the property within 1894 Act, s. 9 (6), & when he pays the estate duty on the principal value of the property passing on death to him he is entitled to a first charge for the amount on the property.—*Re ANSON, BULLER v. ANSON*, [1915] 1 Ch. 52; 84 L. J. Ch. 347; 111 L. T. 1065; 30 T. L. R. 694.

**268. To person both heir-at-law & next of kin—Duty on realty paid out of personalty—Death of such person intestate—Claim by deceased's next of kin.]**—II. by her will appointed D. her exor. & trustee, but, in the events which happened, died in 1896 intestate as to her real & personal estate, leaving her brother, a lunatic, her sole next of kin & heir-at-law. D. was also committee of the lunatic. D. paid the estate duty in respect of both the real & personal estate out of the personal estate. The lunatic died intestate in 1903; his income was more than sufficient for his maintenance, the surplus rents of his real estate were accumulated during his life, & the accumulations were more than sufficient to have paid the amount of the estate duty attributable to the real estate. The lunatic's next of kin claimed to be entitled to a charge on his real estate for the amount of duty paid in respect thereof out of his personal estate:—*Held*: assuming the payment of the estate duty created a charge upon the real in favour of the personal estate, any charge which might have existed at the time of the payment of the duty on the realty out of the personalty in favour of the personalty was extinguished before the death of the lunatic; as there was no interest in the lunatic requiring the charges to be kept alive, & no person who could require the charge to be raised, it had merged.—*Re HOLE, DAVIES v. WITTS*, [1906] 1 Ch. 673; 75 L. J. Ch. 362; 94 L. T. 451; 50 Sol. Jo. 359, C. A.

*Annotation*:—*Apld. Re Wilson, Wilson v. Clark*, [1916] 1 Ch. 220.

**269. ———.]**—W. died intestate in 1902 whilst seised of lands of gavelkind tenure, & leaving a widow, C., who was entitled to the income of one-half of the lands during widowhood for her dower, & an infant daughter, K., who was his heiress. Letters of administration of W.'s estate & also of K.'s estate (when she died in her infancy in 1913) were granted to C., who on W.'s death paid the estate duty on his realty out of his

#### PART II. SECT. 11.

**a. ———.]** "person having limited interest—Life tenant—Entitled to have duty charged by way of mortgage."—*TURNBULL v. TURNBULL* (1910), 47 Sc. L. R. 668.—*SCOT*.

**d. Statutory allowance off duty—Remains part of trust fund.]**—Under a voluntary settlement executed by settlor in 1873, & a deed poll executed by settlor on Mar. 10, 1884, in exercise of a power reserved in the settlement, a fund became absolutely vested in a daughter of settlor, subject to life interests in the settlor & his wife.

The daughter settled this fund by her marriage settlement made on Mar. 11, 1884. The original settlor having died, duty was assessed upon the fund under Deceased Persons' Estates Duties Act, 1881, s. 25, & an allowance of one-half of the duty was made under sect. 37 of that Act:—*Held*: sect. 37 had not the effect of withdrawing the amount allowed off the duty from the trusts of the daughter's marriage settlement, & of making a statutory gift of it to the daughter personally; & that it must be retained by the trustees of the marriage settlement as part of the fund subject to that

settlement.—*BEETHAM v. BELL* (1904), 24 N. Z. L. R. 573.—*N.Z.*

**e. ———.]**—Testator set apart a fund, & directed that his trustees should, subject to certain life interests therein previously created, stand possessed thereof upon trust for his grandchildren:—*Held*: the sum allowed off the duty payable under Deceased Persons' Estates Duties Act, 1881, s. 37.

Testator gave the income of the residue of his estate to his wife during her life, & after her death he gave the capital to a daughter, if she should

personalty, & therefore as to two-thirds of the duty out of that to which K. was beneficially entitled & as to one-third out of C.'s share. On the death of K. defts. were the heirs of W. in respect of the gavelkind lands, which were sold: *Held*: (1) C. was not entitled to have the two-thirds of the estate duty paid to her out of the proceeds of the sale; (2) but she was entitled in respect of the one-third of the duty to a charge on K.'s real estate & to have it paid out of the proceeds of sale.—*Re WILSON, WILSON v. CLARK*, [1916] 1 Ch. 220; 85 L. J. Ch. 254; 114 L. T. 390.

**270. To next of kin only—By person entitled to realty—Duty on realty paid out of personalty.]—***Re WILSON, WILSON v. CLARK*, No. 269, *ante*.

**271. To executors—By trustees of fund subject to appointment—Power of appointment not exercised.]—***PORTE v. WILLIAMS*, No. 149, *ante*.

**272. — By foreign executors—Duty paid on foreign property—Out of English assets.]—***Re SCULL, SCOTT v. MORRIS*, No. 151, *ante*.

#### SECT. 12.—RAISING THE DUTY.

*See* 1894 Act, s. 9 (5), (7).

**273. Power to sell or mortgage.]—***BERRY v. GAUKROGER*, No. 155, *ante*.

**274. — What property—All property passing—Whether “free property” or not.]—***BERRY v. GAUKROGER*, No. 155, *ante*.

**275. Costs of raising duty—Funds in marriage settlement—Apportionable amongst appointees ratably.]—**By their marriage settlement testator & his wife, now deceased, were empowered, subject to their life interests, to exercise a joint power of appointment over the whole of the funds settled by them among the children of their marriage. In the exercise of this power they appointed three sums of £10,000 each to three of their daughters upon their respective marriages. They also appointed the residue of the settled funds, after satisfying the previous appointments, up to the sum of £10,000 to a fourth daughter upon her marriage, & testator covenanted with the trustees of her marriage settlement to make good any deficiency in her £10,000 out of his own estate. The settled funds now amounted to about £38,000. Upon summons to determine how in the distribution of the settled funds the duties & the costs ought to be borne:—*Held*: (1) the estate duties payable on the death of testator & his wife; (2) the costs of raising & paying the same; (3) the costs of raising & paying the three first appointed sums of £10,000; (4) the general costs of administering the fund ought to be borne by all the appointed funds ratably.—*Re CHISHOLM, GODDARD v. BRODIE*, [1902] 1 Ch. 457; 71 L. J. Ch. 289; 86 L. T. 183.

*Annotation*:—*As to* (3) *Refd. Re Grant, Nevins v. United Kingdom Temperance & General Provident Institution* (1915), 59 Sol. Jo. 316.

survive his wife. A considerable sum was, under Deceased Persons' Estates Duties Act, 1881, s. 37, allowed off the duty:—*Held*: the daughter was not during the lifetime of the widow entitled to any payment in respect of the allowance so made, & she was not entitled to any income in respect of such allowance for the period between the death of the testator & the death of his widow.—*BRETHAM v. LEVIN* (1904), 24 N. Z. L. R. 577.—N.Z.

#### PART II. SECT. 12.

**1. Power to charge the estate—For duty paid—Not for expenses.]—***LAWRIE*,

*PETITIONER* (1898), 35 Sc. L. R. 496.—*SCOT*.

**g. — — — & expenses.]—***MENZIES, PETITIONER* (1903), 10 S. L. T. 636.—*SCOT*.

**h. — — — Not for expenses of petition to court.]—**Trustees acting under a will, having paid the estate duty due on the death of the testator, presented a petition for authority, under Finance Act, 1894, s. 9 (5), to grant a bond & disposition in security over the property for the amount of the duty so paid & the expenses of settling the same & of the

#### SECT. 13.—INTEREST.

*See* 1894 Act, s. 6 (6 & 8), s. 9 (5), s. 16 (5); 1896 Act, s. 18 (1).

**276. Out of what property payable—Capital money—Of residuary estate.]—***Re FISH, LEA v. FISH* (1897), 103 L. T. Jo. 267.  
*Annotation*:—*Refd. Re Howe's S. E., Howe v. Kingscote*, [1903] 2 Ch. 69.

**277. How payable—Not by charge on settled estates—By tenant for life—Unless interest properly incurred by him.]—**The general rule that, in the absence of special circumstances, the tenant for life of a settled estate is bound to keep down the interest on charges on the inheritance, is not affected by 1894 Act & 1896 Act; so that, although under the power given to him by 1894 Act, s. 9 (5), he may charge the inheritance with instalments of estate duty payable by him under sect. 6 (8) of that Act, he cannot also charge it under sect. 9 (5) of that Act with the interest on the unpaid portion of the duty unless he can show that such interest has been “properly incurred by him.”—*Re HOWE'S (EARL) SETTLED ESTATES, HOWE (EARL) v. KINGSCOTE*, [1903] 2 Ch. 69; 72 L. J. Ch. 461; 88 L. T. 438; 51 W. R. 468; 19 T. L. R. 386; 47 Sol. Jo. 434, C. A.

*Annotation*:—*Consd. Re Egmont's S. E., Lefroy v. Egmont*, [1912] 1 Ch. 251.

#### SECT. 14.—LIMITATION OF THE CHARGE OF DUTY.

*See* 1894 Act, s. 8 (2), s. 11 (1-4); 1907 Act, s. 14.

**278. Charge remains—Until duty paid.]—***Re JOLLEY, NEAL v. JOLLEY* (1901), 17 T. L. R. 244.  
*Annotations*:—*Refd. Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280; *Re Trenchard, Trenchard v. Trenchard*, [1905] 1 Ch. 82.

**279. Nature of charge—Equitable charge—Within Real Estate Charges Act, 1877 (c. 34), s. 1.]—***Re BOWERMAN, PORTER v. BOWERMAN*, No. 10, *ante*.

#### SECT. 15.—REMISSION OF DUTY AND INTEREST.

*See* Part I., Sect. 4, *ante*.

#### SECT. 16.—COMMUTATION OF DUTY AND COMPOSITION OF CLAIM.

*See* 1894 Act, s. 12; 1900 Act, s. 11 (1); 1909-1910 Act, s. 5, s. 9 (1).

**280. Life interest in fund in court—Released to remainderman—Payment out of court—Deduction of estate duty payable on death of tenant for life.]—**When payment out of ct. is authorised of funds in which one of petitioners had a life interest now

petition:—*Held*: the trustees were entitled to authority to charge the property by way of bond & disposition in security for the duty paid, & also for the expenses incurred in settling the duty but not for the expenses of the petition.—*HARRIS' TRUSTEES v. HARRIS* (1904), 6 F. (Ct. of Sess.) 470; 41 Sc. L. R. 357; 11 S. L. T. 726.—*SCOT*.

#### PART II. SECT. 13.

**k. Order for repayment of excess duty—Includes decision to pay interest.]—***SPROT'S TRUSTEES v. LORD ADVOCATE* (1903), 10 S. L. T. 452.—*SCOT*.

*Sect. 16.—Commutation of duty and composition of claim. Sect. 17: Sub-sects. 1 & 2. Part III. Sects. 1 & 2.]*

released, the practice of the Ct. is to retain a sufficient sum of money to satisfy the amount of estate duty payable in the event of the death of the tenant for life within twelve months of the date of the release.—*TAYLOR v. PONCIA* (1901), 49 W. R. 596.

*See, also, Part I., Sect. 3, ante.*

#### SECT. 17.—PROCEDURE.

##### SUB-SECT. 1.—CONTEMPT OF COURT—ATTACHMENT.

*See* 1894 Act, s. 8 (6), (14); 1896 Act, s. 18 (1); Inland Revenue Act, 1868 (c. 124), s. 9; Inland Revenue Regulation Act, 1890 (c. 21), s. 21.

**281. Order for attachment—Non-delivery of account.]—***Re HORREX* (1910), *Times*, Mar. 9.

#### SUB-SECT. 2.—APPEAL.

*Sec* 1894 Act, s. 8 (1), (13), s. 10 (1-6), s. 20 (2); 1896 Act, s. 22; 1909-1910 Act, ss. 33, 34, 60 (3); R. S. C. (Finance Act), 1895; R. S. C. (Finance (1909-1910) Act), 1914.

**282. Appeal to High Court—From referee—Admissibility of oral evidence.]—**The revenue judge ought not, under R. S. C. (Finance (1909-10) Act), 1914, to give directions for the admission of oral evidence at the hearing of a petition of appeal to the High Ct. from the decision of a referee duly appointed under 1909-1910 Act, as to the value of land for the purposes of estate duty, except under special circumstances of the existence of which substantial evidence should be given before the order requiring oral evidence to be taken is given, & the order should be limited to the points upon which oral evidence is necessary.—*INLAND REVENUE COMRS. v. HOLLOWAY* (1917), 87 L. J. K. B. 406; 118 L. T. 289.

## Part III.—Settlement Estate Duty.

*NOTE.—In this Part Finance Act, 1894 (c. 30), Finance Act, 1896 (c. 28), Finance Act, 1898 (c. 10), Finance (1909-1910) Act, 1910 (c. 8), Finance Act, 1914 (c. 10) are referred to as 1894 Act, 1896 Act, 1898 Act, 1909-1910 Act, 1914 Act respectively.*

#### SECT. 1.—IN GENERAL.

*See* 1894 Act, s. 5 (1), (4), (5), s. 16 (3), s. 21 (4); 1896 Act, s. 19 (1), (2); 1898 Act, s. 14; 1909-1910 Act, s. 54, s. 56 (1); 1914 Act, s. 14.

**283. Abolition of the duty—Payment of duty deferred pending possession—Duty abolished prior to possession—1914 Act, s. 14.]—**1914 Act, s. 14, provides that "settlement estate duty shall not be levied in the case of persons dying after May 11, 1914." The trustees of the will of the tenth Earl of C., who died in 1912, elected, under 1894 Act, s. 7 (6), to defer payment of estate duty & settlement estate duty on certain interests in expectancy until they should fall into possession. These interests fell into possession in 1921 on the death of the widow of the ninth Earl of C. Thereupon the Crown claimed estate duty & settlement estate duty.

to pay settlement estate duty, relying on 1914 Act, s. 14:—*Held*: settlement estate duty was payable, inasmuch as it was being levied, not on the death of the widow of the ninth Earl in 1921, but on the death of the tenth Earl in 1912.—*A.-G. v. SMITH*, [1923] 2 K. B. 531; 92 L. J. C. B. 922; 130 L. T. 94; 39 T. L. R. 587.

**284. Nature of duty—A further estate duty.]**

*ix hv a will made in 1890*

residuary personal estate upon trust to pay (amongst other things) the estate duty on the whole of the real & personal estate devised & bequeathed by her will:—*Held*: "estate duty" included settlement estate duty.

The words "estate duty" are used both of settlement estate & also of the ordinary estate duty (*JOYCE, J.*).—*Re LEVERIDGE, SPAIN v. LEJOINDRE*, [1901] 2 Ch. 830; 71 L. J. Ch. 23; 85 L. T. 458; 50 W. R. 205; 46 Sol. Jo. 14.

*Annotations:—Consd. Re Pimm, Sharpe v. Hodgson*, [1904] 2 Ch. 345. *Refd. Re King, Travers v. Kelly*, [1904] 1 Ch. 363; *Re Briggs, Richardson v. Bantoft* (1914), 111 L. T. 939.

**285. Not a testamentary expense—Executor accountable.]—**Settlement estate duty on personalty is not a testamentary expense, although the exor. is accountable for it. It is therefore payable out of the settled property under 1896 Act, s. 19 (1), notwithstanding a direction in the will to pay testamentary expenses out of residue.—*Re KING, TRAVERS v. KELLY*, [1904] 1 Ch. 363; 73 L. J. Ch. 210; 90 L. T. 281; 52 W. R. 230; 20 T. L. R. 187; 48 Sol. Jo. 207.

*Annotation:—Distd. Re Pimm, Sharpe v. Hodgson*, [1904] 2 Ch. 315.

#### SECT. 2.—WHAT SETTLED PROPERTY CHARGEABLE.

*See, now*, 1914 Act, s. 14.

*See* 1894 Act, s. 5 (1); 1896 Act, s. 19 (1).

**286. Incidence of duty—Finance Act, 1896**

& directed her

#### PART II. SECT. 17, SUB-SECT. 1.

**1. Recovery of penalties.]—**Deceased Persons' Estates Duties Act, 1881, s. 28, does not prescribe a form or mode of procedure for the recovery of penalties under that Act within Penalties Recovery & Remission Act, 1888; such penalties must therefore be recovered in a summary way before justices under Justices of the Peace Act, 1882, & the Supreme Ct. cannot fix the amount & order payment of such penalties on petition by the Comr. of Stamps.—*Re SIMPSON'S SETTLEMENT* (1892), 10 N. Z. L. R. 743.—N.Z.

#### PART II. SECT. 17, SUB-SECT. 2.

**m. From decision of commissioner.]—**Deceased Persons' Estates Duties Act, 1881, s. 33, gives an appeal from a decision of the Comr. under sect. 38 even if in deciding he has exercised a judicial discretion.—*Re THOMSON'S WILL* (1885), 4 N. Z. L. R. 198.—N.Z.

#### PART III. SECT. 1.

**n. Raising the duty—Powers of heir of entail to charge property.]—***LAWRIE, PETITIONER* (1898), 35 Sc. L. R. 496.—SCOT.

**o. — Authority to trustees to charge property.]—**Trustees are entitled to authority under Finance Act, 1894, s. 9 (5), to charge the property for settlement estate duty paid & also for the expenses incurred in settling the duty, but not for the costs of the application.—*HARRIS' TRUSTEES v. HARRIS* (1904), 6 F. (Ct. of Sess.) 470.—SCOT.

#### PART III. SECT. 2.

**p. Property settled by will of deceased—Passing to person with limited power of appointment.]—***LORD*



**287. Property contingently settled—Although contingency may not arise.]**—Property which is contingently settled is not the less liable to settlement estate duty under 1894 Act, s. 5, because the contingency may never arise.

A testator left his residuary estate in trust for all his children who should attain the age of twenty-one years, or being daughters should marry under that age, in equal shares, & directed the trustees to retain the share of each daughter & pay the income thereof to such daughter for her life, & after her death to hold it in trust for her children. The testator died leaving two sons & one daughter surviving him, all being under the age of twenty-one years & unmarried:—*Held*: as there was a chance of the sons dying under the age of twenty-one, & of their shares becoming subject to the trusts of the daughter's settlement, settlement estate duty was payable on the whole of the testator's residuary estate.—*A.-G. v. FAIRLEY*, [1897] 1 Q. B. 698; 66 L. J. Q. B. 454; 76 L. T. 526; 45 W. R. 589; 13 T. L. R. 320; 41 Sol. Jo. 439, D. C.

*Annotations*:—*Folld. A.-G. v. Clarkson*, [1900] 1 Q. B. 156. *Mentd. A.-G. for Victoria v. Melbourne Corpn.*, [1907] A. C. 469.

**288. ———.]**—Settled estate duty is, under 1894 Act, s. 5 (1) (a), payable in respect of property only contingently settled, though, under 1898 Act, s. 14, the duty will, if the contingency does not & cannot arise, be repaid.—*A.-G. v. CLARKSON*, [1900] 1 Q. B. 156; 69 L. J. Q. B. 81; 81 L. T. 617; 48 W. R. 216; 16 T. L. R. 51; 44 Sol. Jo. 74, C. A.

*Annotations*:—*Reid. Re Lewis*, *Lewis v. Smith* (1900), 48 W. R. 426; *Re St. Albans*, *Loder v. St. Albans* (1900), 49 W. R. 74. *Mentd. A.-G. for Victoria v. Melbourne Corpn.*, [1907] A. C. 469; *Cape Brandy Syndicate v. I. R. Comrs.*, [1921] 2 K. B. 403.

**289. Interest in expectancy.]**—*A.-G. v. SMITH*, No. 283, *ante*.

**290. Annuity fund.]**—(1) Testatrix by her will bequeathed an annuity to A., & directed that a portion of her estate should be set apart to provide for the payment of the annuity, & subject thereto she bequeathed the portion of her estate to B.:—*Held*: the property so set apart to provide for the payment of the annuity was property "standing limited to or in trust for persons by way of succession" within Settled Land Act, 1882 (c. 38), s. 2 (1), & settlement estate duty was consequently payable in respect of it.

(2) Testator bequeathed his residuary estate to trustees on trust to pay the income to his wife for life, & after her death to pay an annuity to each of his four daughters for life, & after the death of each of his daughters to raise certain named sums in trust for the children of such daughter who should attain the age of 21 years, or being females, should marry under that age:—*Held*: the direction to raise the portions amounted to a limitation in favour of testator's grandchildren to take effect upon the death of his daughters; there was therefore a succession in respect of such portions, & settlement estate duty was payable upon them.

(3) In order to see what is "settled" property within s. 5 (1), we must turn to the definition clause of the Act [Finance Act, 1894], s. 22. By sub-sect. 1 (i) of that sect. the expression "settlement" means any instrument whether relating to real property or personal property which is a "settlement" within Settled Land Act, 1882 (c. 38), s. 2, or, if it related to real property would be a settlement within that section. Turning to that sect. we find that any will under or by virtue of which any land or any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession, creates, or is, for the purposes of this Act, a settlement (*KENNEDY, J.*).—*A.-G. v. OWEN*, *A.-G. v. COULSON*, [1899] 2 Q. B. 253; 68 L. J. Q. B. 779; 81 L. T. 121; 63 J. P. 611; 15 T. L. R. 381, D. C.

*Annotations*:—*As to* (1) *Appl. Re St. Albans*, *Loder v. St. Albans*, [1900] 2 Ch. 873. *Apprvd. Re Campbell*, [1902] 1 K. B. 113. *Consd. Re Waller*, *Margarison v. Waller*, [1916] 1 Ch. 153. *As to* (3) *Reid. Re Trafford's S. E.*, [1915] 1 Ch. 9.

**291. ———.]**—The testator by his will gave certain legacies & annuities, some of which were contingent upon the legatees & annuitants attaining the age of twenty-one. He directed that every legacy & annuity should be primarily payable out of his personalty, & charged his real estate in aid, but not in exoneration, of his personalty with the same, if the personalty should be insufficient. He devised his real estate to the use of his eldest son for life with remainders over. He declared that if his residuary personalty should be insufficient for payment of his funeral & testamentary expenses, debts, legacies, & annuities, the trustees might raise the deficiency by mtge. of the real estate, but so that the annuities should be paid out of rents & profits, & not by raising a capital sum to provide for the same; & he charged the residuary personalty with the payment of the legacies & annuities, & directed that the ultimate residue of the personalty should be invested & should follow the limitations of the real estate. After the testator's death the exors. had paid settlement estate duty in respect of the contingent legacies & annuities. There was a probability that the personal estate would be insufficient to pay the funeral & testamentary expenses, legacies, & annuities. The question having arisen as to how the settlement estate duty ought to be borne as between the residuary estate & the legatees & annuitants:—*Held*: (1) the contingent legacies must be treated as settled, & the duty must be borne by the legatees; (2) as regarded the annuities, the decision in *A.-G. v. Owen*, No. 290, *ante*, applied to the personalty, & consequently the annuitants must bear their proper proportion of the settlement estate duty in accordance with the rule laid down in *In re Parker-Jervis*, No. 261, *ante*.—*Re ST. ALBANS (DUKE)*, *Loder v. ST. ALBANS (DUKE)*, [1900] 2 Ch. 873; 69 L. J. Ch. 863; 49 W. R. 74; 44 Sol. Jo. 690.

*Annotation*:—*As to* (1) *Reid. Re King*, *Travers v. Kelly*, [1904] 1 Ch. 363.

**292. ———.]**—(1) Testator by his will devised & bequeathed all his real & personal estate to

*ADVOCATE v. STEWART'S TRUSTEES* (1899), 36 Sc. L. R. 297.—*SCOT*.

*q. Voluntary disposition operating as gift inter vivos*—*Improvements to settled property.*—Testator was equitable tenant for life in possession of land in S. by virtue of two indentures of settlement executed by his two daughters subject to a fixed annual payment to them during his or their joint lives with remainder on certain trusts for them & their children. Testator, with the trustees' knowledge,

pulled down & rebuilt the buildings on the said land at a cost of £25,000, whereby the profits from the said buildings were largely increased & the value of the land was increased by at least the said sum. Within three years of the completion of the buildings the testator died aged 81:—*Held*: duty was payable in respect of the said sum of £25,000, upon the ground that it was a voluntary disposition operating as a gift *inter vivos*, within Stamp Duties Act, 1898, s. 49 (2) (a, b).

—*CHADWICK v. STAMPS COMR.* (1919), 19 S. R. N. S. W. 39.—*AUS.*

*r. Passing to person not competent to dispose of it.*—In 1902 C. conveyed to trustees £15,000, invested on mortgage, upon trust to pay yearly £575 to his daughter D. for life & after her death as to the sum of £15,000 in trust for such of her children as D. should appoint, etc., with power to grant an annuity to her husband for life. In the event of there being no, or no surviving children, in trust for

*Sect. 2.—What settled property chargeable. Sects. 3, 4 & 5: Sub-sect. 1.]*

trustees on trust for conversion into money, & out of the moneys so produced to pay his funeral & testamentary expenses, & debts, & certain pecuniary legacies given by the will, & to set aside a sufficient amount of the residuary estate upon trust to pay annuities for life to certain persons, & subject to that provision, to divide the residuary

testator's directions, set aside out of the residuary estate a certain amount, which they invested so as to produce an income sufficient to pay the annuities:—*Held*: the fund so set aside was property settled by testator's will within Finance Act, 1894 (c. 38), s. 5 (1), & therefore settlement estate duty was payable upon it.

(2) The Legislature having introduced into Finance Act, 1894, the definition given by Settled Land Act, 1882, regard must be had to the divisions in that Act in construing Finance Act (STIRLING, L.J.).—*Re CAMPBELL*, [1902] 1 K. B. 113; 71 L. J. K. B. 160; 85 L. T. 708; 18 T. L. R. 86, C. A.

*Annotations*:—*As to* (1) *Consd. Re Waller, Margarison v. Waller*, [1916] 1 Ch. 153. *Refd. Berry v. Gaukroger*, [1903] 2 Ch. 116. *As to* (2) *Refd. Re Trafford's S. E.*, [1915] 1 Ch. 9.

**293.** —.]—Testator, who died prior to 1909-10 Act, by his will, made in 1908, bequeathed certain articles & sums of money "free of duty" & then bequeathed to his wife his jewellery & certain household goods & effects, & also bequeathed to her two pecuniary legacies & a life annuity, in each case without any mention of duty. He also bequeathed pecuniary legacies & life annuities to other persons, all "free of duty," & gave the residue of his real & personal estate to trustees on trust to sell & convert & out of the proceeds to pay his funeral & testamentary expenses & pecuniary legacies (other than annuities) & the duty on such specific & pecuniary legacies & annuities as were bequeathed free of duty, & upon trust to invest the residuary moneys & out of the income of his residuary estate to pay the annuities thereinbefore bequeathed until the payment thereof should be provided for as thereafter directed, & subject thereto settled his residuary estate on certain persons for their respective lives, & after their respective deaths on their respective children; & he thereby authorised & directed his trustees to appropriate out of his residuary estate such part thereof as should at the time of such appropriation be sufficient to answer by means of the "net income" thereof the annuities thereinbefore bequeathed, & directed that upon such appropriation being made the rest of his residuary estate should be discharged from the annuities, & directed that the trustees should by means of the income of the annuity fund, or, if that were insufficient, then by means of the capital, pay the annuities thereinbefore bequeathed & apply the surplus, if any, of the income as if it were income arising from the rest of his residuary estate, & as the annuities fell in directed a proportionate part of the annuity fund to fall into his residuary estate. The trus-

C. absolutely subject to the annuity to the husband. The trustees were to hold the balance of the income, after payment of the annuity to D., or the annuity to the husband upon trust for C. absolutely. C. died in 1904:—*Held*: settlement estate duty was not payable by the exors. of C. in respect of such part of the £15,000 as was

settled on D. her husband & issue.—*Re COCHRANE*, [1906] 2 I. R. 200.—*IR.*

s. —.]—*LORD ADVOCATE v. WOOD'S TRUSTEES* (1910), 53rd Report of Inland Revenue Comrs. 50; 1 S. L. T. 186.—*SCOT.*

t. *Gift by way of settlement—Made within one year of donor's death.]*

tees had appropriated an annuity fund accordingly:—*Held*: (1) the settlement estate duty payable in respect of the annuity fund was payable out of the residuary estate & not out of the annuity fund; (2) the widow must bear in respect of as well her annuity as her specific & pecuniary legacies the legacy duty imposed by 1909-10 Act, s. 58.—*Re WALLER, MARGARISON v. WALLER*, [1916] 1 Ch. 153; 85 L. J. Ch. 188; 114 L. T. 42.

of

**Although not "person not competent to dispose of the property."—***Re PALMER, PALMER v. ROSE-INNES*, [1900] W. N. 9; 35 L. Jo. 48.

*Annotation*:—*Mentd. Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280.

**295. Property deemed to pass—Gifts inter vivos—1894 Act, s. 2 (1).—***A.-G. v. CHAMBERLAIN*, No. 49, ante.

**296.** — — — —.]—By 1894 Act, s. 1, estate duty is leviable upon the principal value of all property, settled or not settled, which passes on the death of the deceased. By sect. 2, sub-sect. 1, as amended by 1909-1910 Act, s. 59, "Property passing on the death of the deceased shall be deemed to include" property taken under a disposition purporting to act as an immediate gift *inter vivos*, provided the disposition be made within three years of the death of the disponent. By 1894 Act, s. 5 (1), "Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property" a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied:—*Held*: the notional passing of property on death introduced by sect. 2, did not apply to sect. 5, & the words of the latter sect. were to be construed in their ordinary & natural sense.

Where therefore the owner of certain property, in consideration of natural love & affection, settled it by deed on his son for life with remainders over & died within three years of the execution of the deed, & the property was liable to estate duty on the death of the settlor:—*Held*: the property did not pass under that disposition on the death of the deceased within 1894 Act, s. 5 (1), & settlement estate duty was not payable in respect thereof.—*A.-G. v. MILNE*, [1914] A. C. 765; 83 L. J. K. B. 1083; 111 L. T. 343; 30 T. L. R. 476; 58 Sol. Jo. 577, H. L.

**297. — Interest of deceased ceasing on death—Interest only as holder of office—Trustee.]—**By an indenture property was settled upon three named trustees upon trust that they & the survivors & survivor, & the exors. & administrators of such survivor, or other the trustees or trustee for the time being of the settlement (thereinafter called "the trustees or trustee"), should, so far as material, pay "an annual sum of £200 each to the trustees or trustee while acting in the trusts by way of remuneration for their services, & in addition to any payments for professional services," & subject thereto upon trust to pay the income of the property according to the direction of the settlor during her life, with remainders over.

—*INLAND REVENUE v. HEYWOOD-LONSDALE'S TRUSTEES* (1906), 43 Sc. L. R. 589.—*SCOT.*

a. *Money vested in trustees—To purchase lands to be entailed.]—*A testator, who died prior to the passing of the Finance Act, 1894, directed his trustees to hold & accumulate the



The settlor during her life had power to appoint a new trustee or new trustees for the purposes of the trust. One of the original trustees died, having received the annual sum of £200 up to the date of his death, & the settlor appointed a new trustee in his place. The Crown claimed succession duty upon the annual sum of £200 to which the new trustee became entitled upon his appointment, & also estate duty & settlement estate duty upon the principal value of the capital fund yielding the annual sum of £200:—*Held*: (1) the new trustee did not become entitled to the annual sum of £200 by reason of the settlement upon the death of the former trustee within the meaning of Succession Duty Act, 1853 (c. 51), s. 2, but by reason of the settlement coupled with the vacancy & his appointment as trustee, & succession duty was not payable; (2) the interest which the deceased trustee had in the property was an interest only as holder of an office, namely, the office of trustee, within the exception of Finance Act, 1894 (c. 30), s. 2 (1) (b), & estate duty & settlement estate duty were not payable.—*A.-G. v. EYRES*, [1909] 1 K. B. 723; 78 L. J. K. B. 384; 100 L. T. 396; 25 T. L. R. 298.

**298. Foreign assets—Settled by person domiciled in England.]—***Re MANCHESTER (DOWAGER DUCHESS), DUNCANNON (VISCOUNT) v. MANCHESTER (DUKE)*, No. 150, *ante*.

**299. Advowson—Proceeds of sale.]—**1894 Act, s. 15 (4), provides that estate duty shall not be payable in respect of any advowson which would have been free from succession duty under 1853 Act, s. 24.

H., who died in 1898, by his will settled property, including certain advowsons, upon his son C. for life, with remainder to his grandson W. for life, with remainders over. C. died in 1901 without having sold the advowsons. In 1909 W., in exercise of his powers as tenant for life under Settled Land Acts, sold the advowsons, & the proceeds of sale were paid to the trustees of H.'s will. The advowsons were not included in any estate duty account rendered in connection with the death of either H. or of C. Upon a claim by the Crown that, upon the sale of the advowsons, estate duty & settlement estate duty became payable as on the death of H., or alternatively as on the death of C. upon the amount of the proceeds of sale, or alternatively, upon the principal value of the advowsons as at the death of H., or alternatively of C.:—*Held*: neither estate duty nor settlement estate duty was payable upon the principal value of the advowsons nor upon the proceeds of sale thereof.—*A.-G. v. PEEK*, [1913] 2 K. B. 487; 82 L. J. K. B. 767; 108 L. T. 744, C. A.

### SECT. 3.—EXCEPTIONS FROM CHARGE OF DUTY.

*See* 1894 Act, s. 5 (1), (4), (5), s. 16 (3).

#### 300. Property contingently settled—Contingency

residue of his estate till the death of O. M., when it was to be invested in land, which was to be entailed. O. M. died in 1902:—*Held*: settlement estate duty was payable on the value of the residue of testator's estate.—*LORD ADVOCATE v. STEWART* (1906), 8 F. (Ct. of Sess.) 579; 43 Sc. L. R. 465; 13 S. L. T. 945.—*SCOT*.

#### PART III. SECT. 5, SUB-SECT. 1.

**b. Settled funds—Under marriage settlement.]—**When a father becomes a party to a marriage settlement of a

child, & covenants to pay at his death a certain sum to the marriage contract trustees, the settlement estate duty on that sum falls to be borne by the marriage contract trustees, & not by the father's executors.—*DUNDAS' TRUSTEES v. DUNDAS' TRUSTEES*, [1912] S. C. 375.—*SCOT*.

**c. Residue—Settlement with competency to dispose of settled property in a particular event—Whether a contingent settlement.]—**Trustees were directed to hold the residue of a trust estate for the truster's unmarried

not arising—*Repayment*.]—*A.-G. v. CLARKSON*, No. 288, *ante*.

**301. Money vested in trustees—To purchase lands to be entailed.]—**Money vested in trustees for the purpose of purchasing at their discretion lands in Scotland or in England to be strictly entailed is not "entailed estate" within the meaning of 1894 Act, & is not liable to "settlement estate duty."—*LORD ADVOCATE v. STEWART*, [1902] A. C. 344; 71 L. J. P. C. 66; 86 L. T. 603; 50 W. R. 673; 18 T. L. R. 618, H. L.  
*Annotation*:—*Consd. A.-G. v. Seccombe*, [1911] 2 K. B. 688.

### SECT. 4.—COLLECTION OF THE DUTY.

*See* 1896 Act, s. 19 (2).

**302. What persons accountable—Executor.]—***Re KING, TRAVERS v. KELLY*, No. 285, *ante*.

**303. ——— In respect of foreign assets.]—***Re MANCHESTER (DOWAGER DUCHESS), DUNCANNON (VISCOUNT) v. MANCHESTER (DUKE)*, No. 150, *ante*.

**304. Sufficiency of accounts.]—***A.-G. v. MONTEFIORE* (1909), 52nd Report of Inland Revenue Comrs. [Cd. 4868], p. 85.

### SECT. 5.—OUT OF WHAT PROPERTY PAYABLE.

#### SUB-SECT. 1.—IN GENERAL.

*See, now*, 1914 Act, s. 14.

*See* 1894 Act, s. 5 (1); 1896 Act, s. 19 (1); 1909–1910 Act, s. 56 (1).

**305. General residuary estate.]—***Re WEBBER, GRIBBLE v. WEBBER*, No. 169, *ante*.

**306. ——— Not retrospective—1896 Act, s. 19.]—**1896 Act, s. 19, is not retrospective; consequently the settlement estate duty leviable in respect of a legacy settled by the will of a person dying after the commencement of 1894 Act, but before the commencement of 1896 Act, is still payable out of residue.—*Re GIBBS, THORNE v. GIBBS*, [1898] 1 Ch. 625; 67 L. J. Ch. 282; 78 L. T. 289; 46 W. R. 477; 14 T. L. R. 317; 42 Sol. Jo. 379.

**307. Settled funds.]—**A father on the marriage of his daughter covenanted with the trustees of her marriage settlement that his exors. should within six months after his death pay to them the sum of £25,000 "without any deduction," to be held by them upon the trusts of the settlement. By his will the father devised lands to trustees for the term of 2,000 years, upon trust to raise thereout & to pay to the trustees of the settlement the £25,000, with interest from his death. On the death of the testator the Crown claimed, under 1894 Act, s. 5, the payment of settlement estate duty in respect of the £25,000:—*Held*: (1) independently of the words "without any deduction" in the covenant, the settlement estate duty must have been paid out of the £25,000 & not out of the testator's residuary estate; (2) but by reason of those words, the settlement estate duty must be paid out of the residuary estate, or that if the

daughter in life, & her children in fee, it being provided that if she had no children the fee should go as she might direct, & failing such direction, to certain third parties.

On the death of the truster the trustees paid settlement estate duty on the residue as a settled estate under Finance Act, 1894. The daughter died unmarried.

In an action by the trustees for repayment of the amount paid as settlement estate duty, on the ground that the estate was only settled con-



*Sect. 5.—Out of what property payable: Sub-sects. 1 & 2. Part IV. Sects. 1 & 2: Sub-sect. 1.]*

£25,000 was raised by the trustees of the term they must raise also the settlement estate duty in respect of the £25,000.—*Re MARYON-WILSON, WILSON v. MARYON-WILSON*, [1900] 1 Ch. 565; 69 L. J. Ch. 310; 82 L. T. 171; 48 W. R. 338; 16 T. L. R. 256; 44 Sol. Jo. 312, C. A.

*Annotations:—As to (1) Folld. Re St. Albans, Loder v. St. Albans*, [1900] 2 Ch. 873. *Refd. Re Lewis, Lewis v. Smith*, [1900] 1 Ch. 176; *Re King, Travers v. Kelly*, [1904] 1 Ch. 363; *Re Manchester, Duncannon v. Manchester*, [1912] 1 Ch. 540; *Re Booth, Pleace v. Booth* (1916), 85 L. J. Ch. 249. *As to (2) Refd. Re Pimm, Sharpe v. Hodgson* (1904), 52 W. R. 648; *Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726.

**308. — Contingent legacies.]—*Re ST. ALBANS (DUKE), LODER v. ST. ALBANS (DUKE)*, No. 291, *ante*.**

**309. — Annuities—In ratable proportion.]—*Re ST. ALBANS (DUKE), LODER v. ST. ALBANS (DUKE)*, No. 291, *ante*.**

**310. — Direction to pay testamentary expenses out of residue.]—*Re KING, TRAVERS v. KELLY*, No. 285, *ante*.**

#### SUB-SECT. 2.—WHERE SETTLED PROPERTY EXONERATED.

*See 1896 Act, s. 19 (1).*

**311. Residue—Covenant by testator to pay sum—“Without any deduction.”]—*Re MARYON-WILSON, WILSON v. MARYON-WILSON*, No. 307, *ite*.**

**312. — Bequest of residue for that purpose.]—*Re LEVERIDGE, SPAIN v. LEJOINDRE*, No. 284, *ante*.**

**313. — —.]—*Re PIMM, SHARPE v. HODGSON*, No. 236, *ante*.**

**314. — —.]—*DE QUETTEVILLE v. DE QUETTEVILLE*, No. 174, *ante*.**

**315. — —.]—*Re WALLER, MARGARISON v. WALLER*, No. 293, *ante*.**

**316. — Fund to produce “clear yearly sum.”]—A testator directed his trustees to set apart & invest so much of his estate as would produce a clear yearly sum of £400, & pay the income thereof to his wife during her widowhood:—*Held*: the settlement estate duty must be paid out of residue.—*Re DYET, MORGAN v. DYET* (1902), 87 L. T. 744.**

*Annotation:—Consd. Re Waller, Margarison v. Waller*, [1916] 1 Ch. 153.

tingently on the daughter leaving issue, & that this contingency had not arisen:—*Held*: they were not entitled to repayment.—*WATHERSTON'S TRUSTEES v. LORD ADVOCATE* (1901), 3 F. (Ct. of Sess.) 429; 38 Sc. L. R. 324; 8 S. L. T. 479—**SCOT.**

d. ——.]—By his trust disposition

& settlement executed in 1911, testator directed his trustees to pay £12,000 to his brother in liferent for his alimentary use, & to the brother's children in fee. He further provided that “the whole of the foregoing legacies are given free of duty”:—*Held*: the legacy of £12,000 fell to be paid over to the heirs undiminished, &

**317. — Legacy bequeathed “free from duty.”]—(1) Testatrix, who made her will in 1893 & died in 1903, bequeathed numerous pecuniary legacies & directed that all the legacies should be paid “free from duty.” Her estate was insufficient to pay all the legacies & duties in full:—*Held*: the legacy duty payable on each legacy must be treated as an additional legacy & be added to the legacy for the purposes of abatement.**

**(2) Testatrix by her will settled one of the legacies on certain trusts:—*Held*: 1894 & 1896 Acts applied, & the direction to pay “free from duty” included the settlement estate duty, which must, like the legacy duty, be treated as an additional legacy & be added to the legacy for the purposes of abatement.—*Re TURNBULL, SKIPPER v. WADE*, [1905] 1 Ch. 726; 74 L. J. Ch. 438; 53 W. R. 440; 49 Sol. Jo. 417.**

*Annotation:—As to (2) Folld. Re Snape, Elam v. Phillips*, [1915] 1 Ch. 179.

**318. Specifically appointed fund—Chargeable with “all duties payable by law”—Effect of payable by law.]—Testatrix who died in 1899, after giving a specific legacy on trust by way of settlement, directed that her debts, funeral & testamentary expenses, “including all duties payable by law” out of her estate, & including the duties on certain annuities given by her will, & on all legacies bequeathed by her duty free, should be paid out of funds which she designated. She then directed certain legacies to be paid out of these funds free of duty:—*Held*: the special direction in the will for payment of duties payable by law out of the testatrix's estate referred to duties which by law were payable out of the general residuary estate of the testatrix, & not to duties which by law were made payable out of specific property, & therefore the direction did not amount to such an express provision as was required by 1896 Act, s. 19, in order to make the settlement estate duty payable otherwise than out of the settled legacy. Accordingly, the settlement estate duty payable in respect of the settled legacy must be paid thereout.—*Re LEWIS, LEWIS v. SMITH*, [1900] 2 Ch. 176; 69 L. J. Ch. 406; 82 L. T. 291; 48 W. R. 426; 44 Sol. Jo. 347.**

*Annotations:—Distd. Re Cayley, Awdry v. Cayley*, [1901] 2 Ch. 781. *Consd. Re Massey, Ram v. Massey* (1920), 90 L. J. Ch. 40. *Refd. Re King, Travers v. Kelly*, [1904] 1 Ch. 363; *Re Pimm, Sharpe v. Hodgson* (1904), 52 W. R. 648; *Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726.

**319. — Chargeable with “death duties payable out of my estate.”]—*Re CAYLEY, AWDRY v. CAYLEY*, No. 5, *ante*.**

accordingly the estate duty which would become payable in terms of Finance Act, 1914 (c. 10), s. 14, upon the death of the liferenter would be a charge against the residue of testator's estate, & not against the legacy.—*DUNN'S TRUSTEES v. DUNN*, [1921] S. C. 613.—**SCOT.**

## Part IV.—Legacy Duty.

NOTE.—In this Part *Legacy Duty Act, 1796* (c. 52), *Legacy Duty Act, 1799* (c. 73), *Legacy Duty Act, 1805* (c. 28), *Probate and Legacy Duties Act, 1808* (c. 149), *Stamp Act, 1815* (c. 184), *Revenue Act, 1845* (c. 76), *Succession Duty Act, 1853* (c. 51), *Crown Suits etc. Act, 1865* (c. 104), *Inland Revenue Act, 1868* (c. 124), *Customs and Inland Revenue Act, 1880* (c. 14), *Customs and Inland Revenue Act, 1881* (c. 12), *Customs and Inland Revenue Act, 1889* (c. 7), *Finance Act, 1894* (c. 30), *Finance Act, 1896* (c. 28), *Finance Act, 1898* (c. 10), *Finance Act, 1900* (c. 7), *Finance Act, 1907* (c. 13), *Finance (1909–1910) Act, 1910* (c. 8), *Finance Act, 1914* (c. 10) are referred to as *1796 Act, 1799 Act, 1805 Act, 1808 Act, 1815 Act, 1845 Act, 1853 Act, 1865 Act, 1868 Act, 1880 Act, 1881 Act, 1889 Act, 1894 Act, 1896 Act, 1898 Act, 1900 Act, 1907 1909–1910 Act, 1914 Act respectively.*

## SECT. 1.—IN GENERAL.

*See, now, 1845 Act, s. 4.*

**320. Incidence of duty—Falls on beneficiary.]—**WINANS v. A.-G., No. 1, *ante*.

**321. Date of death of testator or intestate immaterial—Unless interest reduced into possession—Before October 10, 1808.]—**£3,000 was given by will to trustees upon trust to invest & to pay the interest to A. for life & after her death to transfer the principal to B. Under a decree, this legacy was paid by the trustees into ct., & invested in stock, in the name of the Accountant-General, previous to the imposition of the duty on legacies by 20 Geo. 3, c. 28, B. being then an infant & therefore incapable of discharging the trustees:—*Held*: this was a sufficient appropriation of the legacy within the words of 48 Geo. 3, c. 149, "paid, retained, satisfied, or discharged," before Oct. 10, 1808, & therefore, upon a question arising at the time of the principal becoming payable, no legacy duty was chargeable in respect of it.

If exors., being also trustees, shift the property from their hands as exors. into their hands as trustees, & if there is evidence that they have done so, & that they have paid the interest upon the fund so shifted from hand to hand for twenty years together, that is undoubtedly an appropriation (LORD ELDON, C.).—HILL v. ATKINSON (1816), 2 Mer. 45; 35 E. R. 857; *sub nom.* HILL v. ATKINSON, ATKINSON v. HILL, 3 Price, 399, L. C. *Annotations*:—*Distd.* A.-G. v. Wood (1828), 2 Y. & J. 290. *Folld.* Coombe v. Trist (1835), 1 My. & Cr. 69. *Apld.* A.-G. v. Loscombe (1860), 5 H. & N. 564. *Refd.* Wright v. Barnwell (1849), 13 Jur. 1041; A.-G. v. Giles (1860), 5 H. & N. 255.

**322. ——— Before August 31, 1815.]—**One S. by his will devised all his real estates, except his mtges. in fee, unto W. & J., their heirs & assigns, to & upon the uses & trusts therein mentioned, viz. to the use of M. & his assigns for life, with remainder in tail to his issue, with divers remainders over; & the said S., testator, by his will gave & devised all the residue of his personal estate, after payment of debts & legacies, as also all such real estates as he was seised of as mtgee. in fee, unto W. & M., their heirs, exors., administrators, & assigns, upon trust, to convert the whole of the said residue into money, & to lay out & invest the same, as soon as conveniently might be, in the purchase of real estate, to be conveyed to the said W. & J., the trustees of his real estates, their heirs & assigns, to & upon the same uses & trusts as were thereinbefore declared of & concerning his real estates; & testator thereby declared, that until

such purchases were made, his said exors. should place out or continue all the said residue at interest, in the names of his said exors., on mtge. of real estate; or if the same should not offer, that the residue should be placed out at interest in the public funds, & the interest & dividends were directed to be paid to the persons to whom the rents & profits of the real estate therewith to be purchased would belong by virtue of his will. Testator appointed the said W. & M. his exors., & died in 1791, when they took upon themselves the execution of the will. The residue amounted to £14,000, & was invested in mtge., in the names of the exors., before the year 1796, & before 1796 Act, after which W. died & M. who enjoyed the interest during his life, became the surviving exor. M. died without issue in 1825, & appointed H. & R. his exors. The money was never applied in the purchase of real estate; & H. & R., the exors. under the will of M., on Jan. 26, 1832, paid the residue of the personal estate of S., the original testator, to J., he being the person entitled to it under S.'s will:—*Held*: this was a legacy given by the will of a person dying before Apr. 5, 1805, & paid, satisfied, or discharged after Aug. 31, 1815, within 1815 Act, & was liable to the payment of legacy duty under that Act.

There is no exception, therefore, to be found in favour of any actual interest for whatever length of time it might have been vested provided it was not actually reduced into possession & the exor. fully exonerated before Aug. 31, 1815 (LORD ABINGER, C.B.).

It is clear that if a legacy passing to several persons in succession, according to the directions of a will, can be properly said to be paid & satisfied to each of them in turn, the words of the schedule & of 1796 Act, which provides for such cases, may apply to the last of these payments, if made after Aug. 31, 1815, although one or more of the first payments may have taken place before that date (LORD ABINGER, C.B.).—A.-G. v. HANCOCK (1837), 2 M. & W. 563; Murp. & H. 159; 6 L. J. Ex. 168; 150 E. R. 882.

**323. Duty not a professional disbursement—By solicitor.]—**The town agents of a country solr., in passing the accounts of an administrator, paid four sums amounting to £11 8s. 6d. at the Stamp Office for legacy duty & stamps. These were included by the country solr. in his bill of fees & disbursements, but upon taxation they were struck out, by which the bill was reduced more than one-sixth. Upon a petition asking for liberty to except to the taxing master's certificate:—*Held*: (1) the payment for legacy duty & stamps could only be made as agent, & it was not a professional disbursement; (2) it ought to be inserted in the cash account, & not in the bill of fees & disbursements; (3) the taxing master was right, & the petition would be dismissed without costs.—*Re* HAIGH (1849), 12 Beav. 307; 19 L. J. Ch. 79; 15 L. T. O. S. 129; 14 Jur. 340; 50 E. R. 1079. *Annotations*:—*As to* (1) & (2) *Consd.* *Re* Lamb (1889), 23 Q. B. D. 5. *Refd.* *Re* Kingdon & Wilson, [1902] 1 Ch. 242.

## SECT. 2.—LEGACIES AND SUCCESSION UPON INTESTACY.

## SUB-SECT. 1.—WHAT IS A TESTAMENTARY INSTRUMENT.

*See, generally, WILLS.*

**324. Voluntary deed reserving power of revoca-**

*Sect. 2.—Legacies and succession upon intestacy:  
Sub-sects. 1 & 2.]*

**tion—Deed not delivered—Confirmed by will.]—**

If a man give, by deed, his leasehold & personal property to trustees for the use of himself for life & of several persons therein named at his death, with a power of revocation reserved—never having parted with the deed or with any part of the property during his life—& confirming, in most respects such disposition of it by will at his death, those two instruments will be considered as to be taken & construed together as testamentary instruments & the property passing under them will pass as legacies, & be subject to duty.—*A.-G. v. JONES & BARTLETT* (1817), 3 Price, 368; 146 E. R. 291.

*Annotations:—***Dbtd.** *Sheldon v. Sheldon* (1844), 1 Rob. Eccl. 81. **Mentd.** *Tompson v. Browne* (1835), 3 My. & K. 32; *Doe d. Cross v. Cross* (1846), 15 L. J. Q. B. 217; *Jeffries v. Alexander* (1860), 8 H. L. Cas. 594; *Patch v. Shore* (1862), 2 Drew. & Sim. 589; *In the Goods of Robinson* (1867), L. R. 1 P. & D. 384.

**325. ———.]—An instrument, vesting property in trustees for the benefit of the grantor for his life, & after his decease for the benefit of other persons, with a power of revocation, is not testamentary, & consequently, not liable to the payment of legacy duty.—***TOMPSON v. BROWNE* (1835), 3 My. & K. 32; 5 L. J. Ch. 64; 40 E. R. 13.

*Annotations:—***Consd.** *Sheldon v. Sheldon* (1844), 1 Rob. Eccl. 81. **Refd.** *Jeffries v. Alexander* (1860), 8 H. L. Cas. 594.

**326. Irrevocable mutual settlement—Subject to paying debts of party dying.]—An instrument may pass property from the dead to the living, & yet not be testamentary, or subject to legacy duty. Upon a recital of mutual love & affection, five maiden sisters, by a written instrument, conveyed & assigned “from them & their heirs severally to & in favour of each other, & to the heirs & assignees of the last survivor,” all property then belonging to them, & all property to which they should be entitled at their death, transferring the whole “from them severally, & from the predecessor & predecessors, to & in favour of themselves jointly, & the survivors & survivor of them,” with power of administration, & with an obligation to pay all debts of the sisters predeceasing:—*Held*: this instrument was not testamentary & duty under stamp laws was not demandable.—*BROWN v. H.M. ADVOCATE-GENERAL* (1852), 1 Macq. 79, H. L.**

**327. Covenant to pay sum to charitable trust—Subject to debts & legacies—Deed not delivered.]—A. being possessed of some pure personalty, but of considerable property in mtges., executed some years before his death an indenture, by which, declaring a wish to found certain charities, he covenanted to pay, or that if he did not pay during his lifetime, his exors. should, within twelve months after his death, subject to his debts & legacies, pay to certain persons therein named the sum of £60,000, to be invested in their names on the trusts thereby declared; the trusts were charitable trusts. This deed was never enrolled in Chancery. On the same day he made a will giving certain legacies, & appointing exors., most of whom were the persons named in the deed. These papers were never communicated by him to anybody. Just before his death he caused the papers to be produced from his drawers, & handed them to the persons attending his death-bed. They were tied up with a memorandum which**

declared that they had been prepared in that form, under advice, to save the legacy duties, & in order that if probate duty was paid in the first instance it might be got back again in consequence of the covenant creating a debt to be paid out of the assets:—*Held*: the indenture was a deed & not a testamentary paper.

The fact that the deed was never delivered to any one; that its real nature was never stated; that it could be, if not formally revoked, at least effectually rendered unavailable, by the mere gift of the whole sum in legacies, or by the general gift of residue; all these things show that it is a gift to take effect only after the death of testator, & being a gift of real assets so to take effect, but not being so executed as the statute requires, it is void (*per CUR.*).—*JEFFRIES v. ALEXANDER* (1860), 8 H. L. Cas. 594; 31 L. J. Ch. 9; 2 L. T. 748; 24 J. P. 643; 7 Jur. N. S. 221; 11 E. R. 562, H. L.

*Annotations:—***Refd.** *Re Robson, Emley v. Davidson* (1881), 19 Ch. D. 156. **Mentd.** *Marsh v. A.-G.* (1860), 3 L. T. 615; *Patch v. Shore* (1862), 2 Drew. & Sim. 589; *Richards v. Davies* (1862), 13 C. B. N. S. 69; *Brook v. Badley* (1867), L. R. 4 Eq. 106; *Coleman v. Llanelly Ry. & Dock Co.* (1867), 17 L. T. 86; *Fox v. Lownds* (1875), L. R. 10 Eq. 453; *Cotton v. Imperial & Foreign Agency & Investment Corp.*, [1892] 3 Ch. 454.

**SUB-SECT. 2.—THE LEGACY.**

**328. Forgiveness of a debt.]—The forgiveness of a bond debt by will is a legacy, & as such, is liable to the payment of legacy duty; but where a specific sum is bequeathed or a specific debt forgiven, which is known & ascertained at the time of testator's death, legacy duty is not payable upon the interest accruing in respect of such debt or sum of money, between the time of such death & the period when the exors. close their accounts. The obligee of a bond, after the death of the principal therein, but during the life of the surety, who was his brother, made his will, containing the following directions relative to the bond: “I hereby forgive the bond debt, both principal & interest, due to me, & entered into by J. & my brother H., with & for him, for the said J.'s paying me the principal sum of £4,000 & interest, at £4 per cent., etc., & do order the said bond, at my decease, to be delivered up & cancelled.” The interest upon the bond was paid up to the death of testator, whom his brother survived:—*Held*: this was a legacy whereon legacy duty was payable by H., testator's brother, but upon the principal sum only, & not in respect of interest accruing subsequent to testator's death.—*A.-G. v. HOLBROOK* (1823), 3 Y. & J. 114; 12 Price, 407; 148 E. R. 1115.**

**329. ——— When irrecoverable by law.]—By agreement made in 1794, £8,000 stock was transferred by O. to H., upon the terms that H. should repay the money produced by the sale of it or replace the stock at the option of O., & in the meantime pay interest at the rate of 5 per cent.; the loan was secured by bond, mtge., & a deed of covenant. O. & H. being dead, E. being the legatee & heiress, but not the personal representative of O., & J. being the devisee of H., J. applied to E. to assist him to raise money, which E. agreed to do on having a security for the replacement of the stock. E. accordingly assigned the bond mtge., & deed of covenant of 1794, to H. & P., by way of mtge., to secure an advance to J.,**

**PART IV. SECT. 2, SUB-SECT. 1.**

**325 L. Voluntary deed reserving power of revocation.]—A testamentary instru-**

ment is a writing, in whatever form, which remains dormant during the life of the grantor, is revocable by him, & only comes into operation at his

death.—*ADVOCATE-GENERAL v. RAMSAY'S TRUSTEES* (1823), 4 L. J. Ex. 211.—**SCOT.**



& in consideration thereof, J., in 1842, by indenture, conveyed to E. the premises comprised in the original mtge., together with other lands, by way of mtge., with a proviso & covenant to secure the transfer to E. of £8,000 stock. E. died, & by her will forgave the mtge. debt of 1842 to J.:—*Held*: the mtge. & covenant of 1842 were not so connected with the illegal agreement of 1794, as to be usurious & void, &, therefore, legacy duty was payable on the bequest.—*A.-G. v. HOLLINGWORTH* (1857), 2 H. & N. 416; 27 L. J. Ex. 102; 29 L. T. O. S. 184; 5 W. R. 684; 157 E. R. 172. *Annotation*:—*Mentd.* Hyams v. Stuart King, [1908] 2 K. B. 696.

**330. Direction to pay testator's debts—When statute barred.]**—Testator by his will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his will. The schedule contained both the names of the creditors, & the debts due to them respectively:—*Held*: (1) the parties so named in the schedule were not to be considered as legatees, but strictly as creditors, &, consequently, the representatives of such as died in testator's lifetime were entitled to the benefit of the will; (2) the direction so given for payment of these debts prevented the operation of Stat. Limitations; (3) the fund being insufficient to pay the debts in full, & many of the creditors having failed to answer the master's advertisements, their shares were to be applied in further satisfaction of the demands of the creditors who had come in, & were not to be distributed amongst testator's next of kin.

(4) Where a testator revives debts which have been barred by Stat. Limitations, he may appropriate a specific fund for their payment, &, if the fund is not sufficient, the creditors must take ratably.—*WILLIAMSON v. NAYLOR* (1838), 3 Y. & C. Ex. 208; 160 E. R. 676.

*Annotations*:—*As to* (1) *Consd.* Philips v. Philips (1844), 3 Hare, 281; Stevens v. King, [1904] 2 Ch. 30. *Refd.* Can v. O'Connor (1851), 18 L. T. O. S. 11; Turner v. Martin (1857), 7 De G. M. & G. 429; Ashley v. Ashley (1877), 4 Ch. D. 757. *As to* (2) *Refd.* Courtenay v. Williams (1844), 3 Hare, 539; Philips v. Philips (1844), 3 Hare, 281. *As to* (3) *Refd.* Wild v. Banning (1866), L. R. 2 Eq. 577; Wilson v. Church (1911), 106 L. T. 31. *As to* (1) *Consd.* Philips v. Philips (1844), 3 Hare, 281.

**331. — When legally extinguished—By bankruptcy.]**—A. & B. having been bkpts. in 1882, B., the survivor, in 1851, by his will directed his exors. & trustees to pay his just debts, including the unpaid in full debts proved under the bkpcy., & he directed his exors. to pay to the official manager of the bkpcy., or to some authorised person to be appointed by the Ct. of Ch., in trust for all the creditors under the commission so much money as would make the dividend on the estate equal to 20s. in the pound on all the debts so proved:—*Held*: the direction to pay must be regarded as a bounty, not only in favour of those creditors who survived B., but of representative of those who predeceased him, & the official assignee of the joint estate was entitled to receive the amount found due to all the creditors, less the amount of legal duty.—*TURNER v. MARTIN* (1857), 7 De G. M. & G. 429; 26 L. J. Ch. 216; 28 L. T. O. S. 349; 3 Jur. N. S. 397; 5 W. R. 277; 44 E. R. 168, L. C.

#### PART IV. SECT. 2, SUB-SECT. 2.

**334 i. Annuity or rentcharge—Out of real estate.]**—The proprietrix of a landed estate executed a bond of annuity in favour of her factor, binding her heirs & successors in the estate to pay him an annuity for his life after her decease, declaring her desire that he should continue to perform the duties of factor without factor fee, but that the annuity should be paid to him

even if he should cease to act, whether from inability or from his services not being required:—*Held*: the annuity was a legacy chargeable with legacy duty.—*LORD ADVOCATE v. REID'S EXECUTORS* (1880), 7 R. (Ct. of Sess.) 483; 17 Sc. L. R. 303.—*SCOT.*

*e. Donatio mortis causa.]*—An uncle who had made a will in favour of his nephew, with the view of saving inventory & legacy-duties, proceeded

**332. Direction to pay debts of another.]**—(1) Where testatrix bequeathed property in trust "to pay off the debts of her first husband, as it was her will that same should be discharged," & the moneys remaining unexpended, to her nephew:—*Held*: the creditors ought to pay the legacy duty upon their several debts.

(2) The matter having been overlooked in an order made by the Ct. of Ch. for the payment of the debts:—*Held*: the exors. who paid the debts in full, & then paid the legacy duty, might recover the amount from the creditors respectively, in an action for money paid to their use.—*FOSTER v. LEY* (1835), 2 Bing. N. C. 269; 1 Hodg. 326; 2 Scott, 438; 5 L. J. C. P. 17; 132 E. R. 106.

*Annotations*:—*As to* (1) *Expld.* Gude v. Mumford (1837), 2 Y. & C. Ex. 445. *Consd.* Can v. O'Connor (1851), 18 L. T. O. S. 11. *Appld.* Turner v. Martin (1856), 3 Jur. N. S. 397. *Refd.* Williamson v. Naylor (1838), 3 Y. & C. Ex. 208. *Generally, Mentd.* Wright v. Barnewall (1849), 13 Jur. 1041; O'Connor v. Haslam (1855), 5 H. L. Cas. 170.

**333. Direction to pay interest on debt not bearing interest—Legacy as to interest.]**—*COOKE v. TURNER* (1850), cited Hanson's Death Duties, 6th ed., p. 472; *previous proceedings, sub nom.* *COOKE v. CHOLMONDELEY* (1849), 2 Mac. & G. 18, L. C.

**334. Annuity or rentcharge—Out of real estate.]**—*A.-G. v. JACKSON*, No. 480, *post.*

**335. — — —.]**—Lands were devised to the use, among others, that M. should take, from & out of the same premises, an annuity or yearly rentcharge of £500 a year, to be paid clear of all taxes & deductions, remainder to S. for life, subject to the annuity:—*Held*: the annuity was to be paid clear of legacy duty, & was a charge upon the land; &, consequently, S., who had entered into possession under the devise to him, & been compelled to pay the legacy duty on the annuity, pursuant to 1805 Act, s. 5, could not recover it again from the annuitant.—*STOW v. DAVENPORT* (1833), 5 B. & Ad. 359; 2 Nev. & M. K. B. 805; 110 E. R. 823.

*Annotations*:—*Refd.* Wright v. Barnewall (1849), 13 Jur. 1041; *Re* De Hoghton, *De Hoghton v. De Hoghton*, [1895] 2 Ch. 517.

**336. Personalty appointed under power—General power.]**—A sum of money, appointed by will under a power, though not the personal estate of the donee of the power, is liable to legacy duty. Thus, where by a marriage settlement £20,000 was vested in trustees, to pay the dividends to the wife's father for life, & after his death to the husband, with remainder to the wife for her life, with a power of appointment amongst children, & in default of issue, as she should by will appoint, in case she died in her husband's lifetime, or in case she should survive him, by deed or will; & in default of her appointment, amongst her next of kin; & the wife, after appointing this sum by will, died in her husband's lifetime:—*Held*: legacy duty was payable thereon.—*Re CHOLMONDELEY* (1832), 1 Cr. & M. 149; 3 Tyr. 10; 2 L. J. Ex. 65; 149 E. R. 352.

*Annotations*:—*Consd.* A.-G. v. Hertford (1845), 14 M. & W. 284. *Refd.* A.-G. v. Staff (1833), 4 Tyr. 14; Platt v. Routh (1840), 6 M. & W. 756.

**337. — — —.]**—J. by will directed his real estates to be sold & converted into personalty; &

(three months before his death) gradually to transfer to his nephew's name all the money he had invested on deposit-receipts, amounting to £4,000, handing the receipts to his nephew who applied the interest in paying the rent of a farm held by the uncle & nephew jointly & for other joint purposes. Subsequently the uncle transferred stocks & debentures to the nephew. No revenue accrued

*Sect. 2.—Legacies and succession upon intestacy:  
Sub-sect. 2.]*

after giving certain legacies, he thereby vested the residue in trustees, for the use of his daughter P. for life, with power to her to appoint same by will, but expressly excluding from the benefit of that appointment certain persons named or indicated in his will; & directed, that in default of appointment, or so far as such appointment should be incomplete, the residue should be held by the trustees in trust for the next of kin of D. This power was exercised by P. by her will, partly in favour of the next of kin of D., & partly in favour of other persons:—*Held*: (1) she must be considered to have had, notwithstanding the special exclusions in her father's will, an absolute power of appointment, within 1796 Act, & consequently, legacy duty was payable by her appointees, upon the bequests made by her, as being, under sect. 7 of that Act, bequests made by her out of personal estate which she had the power of disposing of; (2) this property, though subject to her power of disposal, was not so strictly her own property, as to render it, under sect. 18, liable to probate duty under her will, as property which she had died possessed of or entitled to.—*DRAKE v. A.-G.* (1843), 10 Cl. & Fin. 257; 1 L. T. O. S. 382; 8 E. R. 739, H. L.; *affg. S. C. sub nom. PLATT v. ROUTH* (1840), 3 Beav. 257.

*Annotations*:—*As to* (1) *Consd. Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; *O'Grady v. Wilnot*, [1916] 2 A. C. 231. *Refd. Re Hoskin's Trusts* (1877), 5 Ch. D. 229; *Re Byron's Settlement*, *Williams v. Mitchell*, [1891] 3 Ch. 474; *Re Orlebar, Wynter v. Orlebar*, [1908] 1 Ch. 136. *As to* (2) *Refd. Cusance v. Bradshaw* (1845), 4 Hare, 315; *Ewart v. Ewart* (1853), 1 Eq. Rep. 536; *Re Philbrick's Settlement* (1865), 5 New Rep. 502; *Stamp Duties Comr. v. Stephen*, [1904] A. C. 137. *Generally, Mentd. O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *Matson v. Swift* (1845), 14 L. J. Ch. 354; *Perry's Exors. v. R.* (1868), L. R. 4 Exch. 27; *Re Fearnside, Baines v. Chadwick* (1902), 72 L. J. Ch. 200.

**338. — Limited power.**—Testator by will, directed a settlement of his estates to be executed containing a power for the tenant for life by deed or will to charge the estates with an annuity for the benefit of his wife. The donee by his will, in execution of that power, charged the estates with the payment of the annual sum of £2,000 to his wife during her life in lieu, bar, & satisfaction of her dower, which she accepted:—*Held*: this annuity was "a gift" subject to legacy duty under 1805 Act, s. 4. & not a purchase for a valuable consideration.—*HENNIKER (LORD) v. A.-G.* (1852), 8 Exch. 257; 22 L. J. Ex. 41; 20 L. T. O. S. 130; 16 Jur. 1143; 155 E. R. 1343, Ex. Ch.; *affg. S. C. sub nom. A.-G. v. HENNIKER (LORD)*, 7 Exch. 331.

*Annotation*:—*Folld. Sweeting v. Sweeting* (1853), 22 L. J. Ch. 441.

**339. — — —**—Testator gave to his son certain real estates, with power to appoint to any woman they might respectively marry a jointure in bar of dower:—*Held*: an appointment under this power was a gift within 1805 Act, & liable to legacy duty.

It may be a question whether, if there were a gift of a legacy out of personalty, on a condition the performance of which would cause something to be returned to the personal estate of testator, whether there the duty would be payable on the whole legacy, or whether there would be a deduction in respect of the difference (*KINDERSLEY,*

*V.-C.*)—*SWEETING v. SWEETING* (1853), 1 Drew. 331; 22 L. J. Ch. 441; 20 L. T. O. S. 288; 17 Jur. 123; 1 W. R. 121; 61 E. R. 331.

*Annotations*:—*Refd. Cullen v. A.-G. for Ireland* (1866), 12 Jur. N. S. 531; *Re Thorley, Thorley v. Massam* (1891), 60 L. J. Ch. 537.

**340. — — —**—*A.-G. v. ASTOR*, No. 33, *ante*.

**341. Gift under condition.**—*Re KIRK, KIRK v. KIRK* (1882), 21 Ch. D. 431; 47 L. T. 36; 31 W. R. 94, C. A.

**342. — Annuity in bar of dower.**—*HENNIKER (LORD) v. A.-G.*, No. 338, *ante*.

**343. — — —**—*SWEETING v. SWEETING*, No. 339, *ante*.

**344. — Condition involving repayment to testator's estate—Duty chargeable on balance.**—*SWEETING v. SWEETING*, No. 339, *ante*.

**345. — — —**—A manufacturer, by his will, gave his factory & business to trustees upon trust to carry on the business in conjunction with his son, & declared that, while the trustees should be carrying on the business, each of them should receive the annual sum of £250 out of the profits thereof, & that, while his son should be managing the business in conjunction with the trustees, he should be entitled to the said annual sum of £250 more:—*Held*: the sums received by the trustees & by the son, in pursuance of these directions, were legacies, & liable to legacy duty under 1845 Act, s. 4.

It is a gift on condition, which is just as much a taxable legacy as a legacy to an exor. for his trouble in winding up the estate (*LINDLEY, L.J.*).

If he could give the subsequent profits of his business, it follows as a matter of course, he could give an annuity out of the subsequent profits of his business. Therefore, the subsequent profits of his business out of which this annuity was to come, were beyond all question his personal estate which he could deal with. They were, in truth, the fruit of the business which belonged to him (*KAY, L.J.*).

The argument was also put thus: Supposing, it was said, testator had made a gift of £5,000 to his son, not upon condition of his giving valuable services, but upon condition of his releasing a debt of £2,000 which testator owed him. Then it was said, surely the son would not have to pay the duty on the whole £5,000. I do not know how the office would deal with that. But it seems to me probable that he would not. Why? For this simple reason: In that case the residuary estate would be increased by the £2,000, which otherwise would have to be paid out of it. The residue would pay increased duty—namely, the duty payable on that sum of £2,000, so that if the legatee were made to pay the duty on the whole fund, the estate would have to pay the duty twice over (*KAY, L.J.*).—*Re THORLEY, THORLEY v. MASSAM, Re THORLEY, THORLEY v. MASSAM*, [1891] 2 Ch. 613; 60 L. J. Ch. 537; 64 L. T. 515; 39 W. R. 565; 7 T. L. R. 479, C. A.

*Annotations*:—*Refd. A.-G. v. Wendt* (1895), 65 L. J. Q. B. 54; *Re White, Pennell v. Franklin*, [1898] 1 Ch. 297; *Re Salmon, Salmon v. Bernstein* (1912), 107 L. T. 108; *Baxendale v. Murphy*, [1924] 2 K. B. 494. *Mentd. Re White, Pennell v. Franklin* (1898), 78 L. T. 770.

**346. — Provision of home for children.**—*A.-G. v. SHARPE* (1891), 7 T. L. R. 558, C. A.

**347. — Carrying on testator's business.**—*Re THORLEY, THORLEY v. MASSAM, Re THORLEY, THORLEY v. MASSAM*, No. 345, *ante*.

from the stocks during the few months the uncle survived, but interest on the debentures was received by the nephew's agent & placed to his credit:—*Held*: in transferring the sums on

deposit-receipt to the nephew the uncle had been moved by an *animus donandi*, but as there was no change in the application of the income, the inference was that the *animus* was

*donandi mortis causa* & not absolute, & legacy-duty was due.—*LORD ADVOCATE v. GALLOWAY* (1884), 11 R. (Ct. of Sess.) 541; 21 Sc. L. R. 390.—*SCOT.*



**348. Legacy to executor—In return for work as executor.]—***Re THORLEY, THORLEY v. MASSAM, Re THORLEY, THORLEY v. MASSAM, No. 345, ante.*

**349. — Solicitor executor—Profit costs.]—**A solr. who is the sole exor. & trustee of a will is not entitled to his profit costs of acting as solr. to the estate if it turns out to be insolvent, even though the will contains the usual clause empowering him to charge for work done; for the clause being in effect a legacy of profit costs to the solr. he cannot claim it as against creditors.

It is a legacy, & chargeable as such with legacy duty (KEKEWICH, J.).—*Re WHITE, PENNELL v. FRANKLIN*, [1898] 1 Ch. 297; 67 L. J. Ch. 139; 77 L. T. 793; 46 W. R. 247; 42 Sol. Jo. 200; *affd.*, [1898] 2 Ch. 217, C. A.

*Annotations:—Consd. Re Salmen, Salmen v. Bernstein* (1912), 107 L. T. 108. *Refd. Re Brown, Wace v. Smith* (1918), 62 Sol. Jo. 487.

**350. Gift of property of legatee—Election by legatee to surrender.]—**Under 1796 & 1805 Acts no legacy duty is payable on the value of personal estate given up by one legatee to another under the doctrine of election; but where testator devises his own real estate to A., & bequeaths A.'s personal estate to B., the legacy duty is payable on the value of the personal estate so charged on testator's real estate.—*LAURIE v. CLUTTON* (1852), 15 Beav. 131; 21 L. J. Ch. 226; 19 L. T. O. S. 343; 16 Jur. 825; 51 E. R. 486.

*Annotation:—Refd. A.-G. v. Wyndham* (1862), 8 Jur. N. S. 1182.

Election generally, *see* EQUERRY, Vol. XX., pp. 403 *et seq.*

**351. Legacy to satisfy covenant in marriage settlement—Of specific sum.]—**Where a father covenanted in his son's marriage settlement, by will or otherwise, in his lifetime, to settle £3,000, to be charged upon all real & personal property of which he should at or immediately before his death be seised or possessed, so as, immediately after the decease of the survivor of himself & wife, to become well & effectually vested in the trustees of the settlement, upon trust for the son's widow & the issue of the marriage:—*Held*: it created a specialty debt, to be proved accordingly in the administration of the father's estate.—*EYRE v. MONRO* (1857), 3 K. & J. 305; 26 L. J. Ch. 757; 30 L. T. O. S. 61; 3 Jur. N. S. 584; 5 W. R. 870; 69 E. R. 1124.

*Annotations:—Refd. Graham v. Wickham* (1863), 32 L. J. Ch. 639. *Mentd. Patch v. Shore* (1862), 11 W. R. 142; *Keays v. Gilmore* (1874), 22 W. R. 465.

**352. —.]—**A covenant in a marriage settlement to bequeath a legacy of not less than £2,500, constitutes a specialty debt for £2,500, & is not merely payable out of such assets as are applicable for the payment of legacies.—*GRAHAM v. WICKHAM* (1863), 1 De G. J. & Sm. 474; 2 New Rep. 410; 32 L. J. Ch. 639; 8 L. T. 679; 9 Jur. N. S. 702; 11 W. R. 1009; 46 E. R. 188, L. J.J.

**353. — Of share of residue.]—**(1) A trustee who accepts office at the request of a *cestui que trust* is entitled to be indemnified by that *cestui que trust* personally against all loss which may accrue in the proper execution of the trust.

(2) Notice of a remote contingent liability on the part of a testator is not sufficient to prevent his exor. from distributing his residuary estate; & if the exor. distributes with such notice, & the liability afterwards ripens into a debt, he will be entitled to call on the residuary legatees to refund. The exors. of a testator had during his lifetime, & at his request, become trustees of a deed, whereby certain shares in an unlimited co. were settled on a tenant for life, with remainders over. While

the co. was a going concern, & believed to be perfectly solvent, they distributed the residuary estate; afterwards the co. was ordered to be wound up. Large calls were made in respect of the shares, & the remaindermen all disclaimed:—*Held*: the trustees & exors. were entitled to be indemnified out of testator's estate, & to call on the residuary legatees to refund.

(3) A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee. The above-mentioned testator had, by the settlement made on the marriage of one of his daughters, covenanted to bequeath or otherwise provide that a certain share of his residuary estate should go to her; & it was by the same settlement agreed that such share should be paid to the trustees & held by them on the trusts of the settlement. Testator accordingly bequeathed the proper share to his daughter, & it was paid by the exors. to the trustees of the settlement:—*Held*: the trustees were liable to refund equally with the other residuary legatees.

The covenant by J. was simply that he would bequeath by will, or otherwise provide, that this share of residue should come to Mrs. B. He did bequeath it by will, & he therefore fulfilled his covenant. The effect of the bequest by will was to make the lady a residuary legatee, & nothing else (JESSEL, M.R.).

(4) An exor. who compels a legatee to refund can recover only the capital sum which he has paid to the legatee, without any intermediate income.—*JERVIS v. WOLFERSTAN* (1874), L. R. 18 Eq. 18; 43 L. J. Ch. 809; 30 L. T. 452.

*Annotations:—As to (1) Refd. Fraser v. Murdoch* (1881), 6 App. Cas. 855; *Hobbs v. Wayet* (1887), 36 Ch. D. 256; *Hosegood v. Pedler* (1896), 66 L. J. Q. B. 18; *Re Nixon, Gray v. Bell* (1904), 73 L. J. Ch. 446; *Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194. *As to (2), (3), & (4) Consd. Re Knott, Bax v. Palmer* (1887), 56 L. J. Ch. 318. *Refd. Whittaker v. Kershaw* (1890), 45 Ch. D. 320. *Generally, Mentd. A.-G. v. Smith* (1892), 66 L. T. 857.

**354. Profits of business.]—***Re THORLEY, THORLEY v. MASSAM, Re THORLEY, THORLEY v. MASSAM, No. 345, ante.*

**355. Annuity—Charged on property of annuitant.]—**A testator devised certain estates to the use of trustees for the term of 500 years, & subject thereto, to the use of other trustees, to preserve contingent remainders, with remainder to the first & other sons of C., then an infant, with divers remainders over, & he directed that the trustees of the term should, after paying certain annuities, apply so much of the rents & profits of the estates as they should think fit, not exceeding in any one year a certain amount, in aid of another fund, to the maintenance & education of C., until she should attain 21 or marry, & that they should accumulate the surplus rents & profits for the benefit of C. when she should attain 21 or marry, & if she should die under 21 & unmarried, then for the benefit of the parties entitled under the subsequent limitations of the estates, & that upon her attaining 21 or marrying, they should, during her lifetime, pay the surplus rents, after payment of the annuities, to her for her separate use:—*Held*: the sums annually applied out of the rents & profits, under the trusts of the term, to the maintenance & education of C. until her marriage were not liable to legacy duty.—*SHIRLEY v. FERRERS (EARL)* (1842), 1 Ph. 167; 12 L. J. Ch. 111; 6 Jur. 1047; 41 E. R. 595, L. C.

*Annotation:—Distd. Re De Hoghton, De Hoghton v. De Hoghton*, [1896] 1 Ch. 855.

**356. — Out of future profits of business.]—**



*Sect. 2.—Legacies and succession upon intestacy:*  
*Sub-sects. 2, 3 & 4.]*

THORLEY, THORLEY v. MASSAM, *Re* THORLEY,  
 THORLEY v. MASSAM, No. 345, *ante*.

**357. — Charged on estate of another person.]**  
 —A testator who died in 1876 devised real estate to trustees for a term of 500 years, & subject thereto, on limitations under which A. became tenant for life. The trusts of the term were to raise & pay out of the rents & profits of the estate an annuity to the person who should, subject to the term, be entitled to the rents & profits; & testator declared that, subject thereto, the trustees should, during 21 years from testator's death, accumulate the rents & profits & invest them in land to be settled to the same uses; & after the determination of the 21 years should pay the rents & profits to the person for the time being entitled to the hereditaments comprised in the term:—*Held*: as A. during the period of 21 years had in effect a mere charge upon the estate of another person, legacy duty & not succession duty was payable on the annuity.—*Re* DE HOUGHTON, DE HOUGHTON v. DE HOUGHTON, [1896] 1 Ch. 855; 65 L. J. Ch. 528; 74 L. T. 297; 44 W. R. 550; 12 T. L. R. 304; 40 Sol. Jo. 402, C. A.

*Annotation*:—**Mentd.** *Re* Llewellyn, Llewellyn v. Llewellyn, [1911] 1 Ch. 451.

**Donatio mortis causa.]—See, now, 1845 Act, s.**

#### SUB-SECT. 3.—SUCCESSIONS UPON INTESTACY.

*See* 1815 Act, s. 2, Sched., Part III.

#### SUB-SECT. 4.—PERSONAL ESTATE.

Conversion generally, *see* EQUITY, Vol. XX., pp. 335 *et seq.*

**358. Proceeds of sale of real estate—Express direction to sell—Property taken in specie.]—**(1) A bequest of real property to trustees to be sold, & the profits to be deemed part of the residue of testator's estate, or go in aid, if necessary, of the rest of his property, in discharge of his pecuniary legacies, given either by his will, or any codicil thereto, is liable to the legacy duty imposed by 1808 Act, although the residuary legatee took the property *in statu quo*, & the trustees did not convert it into money by sale, according to the directions of the will, there being no claim to render such sale necessary.

(2) The subject of such a bequest would be considered, in equity, as personal property, & would go, in case of the legatee's death, to personal representatives.—*A.-G. v. HOLFORD* (1815), 1 Price, 426; 145 E. R. 1451.

*Annotations*:—*As to* (1) **Distd.** *Re* Evans (1835), 2 Cr. M. & R. 206. **Refd.** *Advocate-General v. Ramsay's Trustees* (1880), 11 L. J. Ex. 211; *A.-G. v. Handcock* (1837), Murp. & H. 159; *A.-G. v. Mangles* (1839), 5 M. & W. 120.

**359. — — — — —.]—**A testator devised, by two testamentary papers, his real & personal estates to trustees. In the first paper he declared the trusts, & among others he created a power of sale in the following terms: "To sell & dispose of the lands, mills, teinds, woods, fishings, messuages, tenements, & hereditaments, & others hereby generally & particularly disposed to them, etc., on such conditions & at such prices as they shall think fit." To render these sales effectual, he granted full power to convey, etc. The paper then went on thus: "Declaring always, etc., that my said trustees shall by their acceptance hereof be bound & obliged, after the sale of the said lands, teinds, & others before disposed, which I recommend to them to be done as soon as con-

venient after this trust opens upon them, to satisfy & pay all my lawful & just debts," etc. By a second testamentary paper reciting the first, he said that by the recited paper he had disposed of his heritable & movable estates to trustees on the trusts therein mentioned, & "Amongst others, my trustees are required to turn my means & effects, thereby conveyed in trust, into money"; & he gave directions accordingly. He further directed, that in case he should die leaving an heir of his body, his trustees should employ the trust funds for the use of such heir; & that as soon as such heir should attain majority or be married, the trustees should "denude themselves of the whole trust & funds" in favour of such heir, but to return to the trustees in case of failure of heirs of his body, without disposing of the same:—*Held*: (1) the testamentary papers must be construed as amounting not merely to a power of sale for the purposes of the trust, but to a direction to sell in case testator should die without leaving any heir of his body living at the time of his death; (2) therefore, though in fact the real estate was not sold, the positive direction to sell rendered it liable to the legacy duty.—*WILLIAMSON v. ADVOCATE-GENERAL OF SCOTLAND* (1843), 10 Cl. & Fin. 1; 8 E. R. 641, H. L.

*Annotations*:—*As to* (2) **Folld.** *A.-G. v. Lomas* (1873), 29 L. T. 749. **Refd.** *A.-G. v. Wyndham* (1862), 8 Jur. N. S. 1182.

**360. — — — — —.]—**(1) J., by his will, gave his lands, etc., unto trustees, in trust for the benefit of his children on their attaining the age of 21 years, & authorised his trustees to sell such of his lands, etc., in the will mentioned as they might see fit & to invest the monies in any way which might appear unto them best & to pay such sums as they might think right for the proper maintenance & education of the children. In an administration suit the estates were directed to be sold:—*Held*: legacy duty was payable on the proceeds, & succession duty was payable on the dower to which the widow was entitled out of a certain portion of the estate.

(2) Where a testator directs a sale of real estate or it takes place under a power, legacy duty is payable; but where property is sold under the direction of the ct., legacy duty is not payable.—*HARDING v. HARDING* (1861), 2 Giff. 597; 7 Jur. N. S. 906; 66 E. R. 250.

*Annotation*:—*As to* (1) **Refd.** *A.-G. v. Noyes* (1881), 8 Q. B. D. 125.

**361. — — — — — Failure of purposes of will.]—**When a will contains an absolute trust for the conversion of land, & by reason of the failure of the limitations of the proceeds contained in the will, testator's heir takes the undisposed-of interest, he takes it as money, & on his death probate duty is payable upon it, although the land still remains unsold. C. by his will directed his real estate to be converted, & the proceeds with his personalty to be held in trust for the payment of debts & legacies, & as to the residue, on certain trusts which failed. Testator's heiress, M., became, by reason of the failure of the last-mentioned trusts, entitled to the proceeds of the real estate. She died under 21, & at the time of her death the real estate was unsold:—*Held*: the interest which M. took as heiress of C. was taken by her as money, & probate duty was payable by her administrator in respect of it.—*A.-G. v. LOMAS* (1873), L. R. 9 Exch. 29; 43 L. J. Ex. 32; 29 L. T. 749; 22 W. R. 188.

*Annotations*:—**Consd.** *Re* Richerson, Scales v. Heyhoe, [1892] 1 Ch. 379; *A.-G. v. Dodd*, [1894] 2 Q. B. 150. **Refd.** *A.-G. v. Hubbuck* (1883), 10 Q. B. D. 488; *A.-G. v. Allesbury* (1887), 12 App. Cas. 672. **Mentd.** *Re* Hopkinson, Dyson v. Hopkinson, [1922] 1 Ch. 65.

**362.** ———.]—Where freehold property is, by the doctrine of equitable conversion, to be considered as personalty, it is liable to probate & legacy duty.—*In the Goods of GUNN* (1884), 9 P. D. 242; 53 L. J. P. 107; 49 J. P. 72; 33 W. R. 169.

*Annotations* :—**Consd.** A.-G. v. Dodd, [1894] 2 Q. B. 150. **Refd.** A.-G. v. Ailesbury (1887), 12 App. Cas. 672; *Re Berchtold*, *Berchtold v. Capron*, [1923] 1 Ch. 192.

**363.** ——— **Direction not imperative.**—A testator devised real estates to trustees for the benefit of several parties for life, & after their deaths to be distributed amongst their children, etc., & the will contained a power by which testator directed that it should be lawful for the trustees to sell the same, or part, etc., “as shall appear most expedient to any trustee or trustees for the time being, towards the management of my property & affairs.” Some portion was sold shortly after testator’s death, because, being suitable for building, it was advantageous to the estate to sell it; & the remainder, after being subject to the trusts for ten years, was sold under an order of a Ct. of equity in a cause :—**Held** : the money arising from neither sale was liable to legacy duty.—*Re EVANS* [1891] 1 Ch. 206; 5 Tyr. 660; 4 L. J. Ex. 89.

*Annotations* :—**Consd.** A.-G. v. Simcox (1848), 1 Exch. 749. **Expld.** A.-G. v. Metcalfe (1851), 6 Exch. 26. **Refd.** *Williamson v. A.-G.* (1843), 10 Cl. & Fin. 1; *A.-G. v. Wyndham* (1862), 11 W. R. 185. **Mentd.** *Fletcher v. Fletcher* (1844), 4 Hare, 67.

**364.** ——— **Duty payable on part sold.**—A testator, by his will, after giving certain legacies, gave, devised, & bequeathed unto his exors., their heirs, exors., & administrators, all the rest & residue of his estate, real & personal, upon trust, at such times as they might think fit, to sell, convey, or otherwise convert into money the same, or any part thereof; & testator directed that all the residue of his estate should be invested as it should be realised, & should be divided amongst all his children, in such shares & proportions that his son then born should take four shares, any other son or sons which he might have should take three shares each, & his daughters should take two shares each; but if his son then born should die before attaining 21, & without leaving issue, testator directed that his next son should take four shares, or, if he should have no other son, then that his eldest daughter should take three shares; & he directed that in the event of any of his children dying under 21 & without leaving issue, his or her legacy or share should be considered as having lapsed; & that in case any of his daughters should marry under 21, his trustees should settle her fortune upon such trusts, etc., as were specified in the will of his, testator’s father, with respect to certain bequests of personal property to the sisters of the said testator therein contained; & testator directed that his trustees should have full power, in making such sales as in the said will were directed, to resort to either public or private

sale, & to buy in & re-sell, & to defer any sale so long as they might think fit, & of causing any part or parts of his, the said testator’s real or personal estate to be valued instead of being sold, & of allotting such parts to any or either of his the said testator’s children at the amount of the valuation, as a part of his or her proportion of his residuary estate, but to be considered as personal estate, & subject to the trusts in the said will declared respecting such proportions of residuary estate. Testator, at the time of his death, had one son & four daughters. The trustees, after testator’s death, sold a large part of the real & personal estate, amounting to £180,000, & caused the remaining part of the residue, which consisted of real estate, to be valued, & the same was valued at £90,000, which was the son’s share of the residue, & the sums of £45,000 each, amounting to £180,000 were the shares of the daughters. The trustees allotted the estate which had been so valued at £90,000 to testator’s son, at the amount of the valuation, & retained the sum of £180,000, the proceeds of the part which had been sold, for the benefit of the four daughters :—**Held** : legacy duty was payable upon the amount of the part which was actually sold, but not upon the part which the trustees had allotted to testator’s son, under the discretionary power contained in the will.—*A.-G. v. MANGLES* (1839), 5 M. & W. 120; 2 Horn & H. 74; 3 Jur. 981; 151 E. R. 52.

*Annotations* :—**Appld.** A.-G. v. Simcox (1848), 1 Exch. 749. **Refd.** *Baxter v. Brown* (1845), 7 Man. & G. 198; *A.-G. v. Wyndham* (1862), 11 W. R. 185; *A.-G. v. Ailesbury* (1885), 14 Q. B. D. 895.

**365.** ———.]—Where real estate was devised to trustees, in trust to convey the same unto & among certain persons mentioned in the will, in equal proportions, in severalty; & for the purpose of such division & partition, the trustees were empowered from time to time to sell all or any part of the devised estates, & were to stand possessed of the money to arise from such sales, in trust for the same persons, share & share alike; & the trustees, accordingly, for the purposes of the trust, sold the whole of the devised estates—**Held** : this was “real estate directed to be sold,” within 1815 Act, Sched., Part III., & legacy duty was payable upon the proceeds of such sale.—*A.-G. v. SIMCOX* (1848), 1 Exch. 749; 18 L. J. Ex. 61; 10 L. T. O. S. 420; 154 E. R. 319.

*Annotations* :—**Refd.** A.-G. v. Metcalfe (1851), 6 Exch. 26; *A.-G. v. Wyndham* (1862), 8 Jur. N. S. 1182.

**366.** ——— **Beneficiary electing to take as money.**—Testator devised to trustees his real estate in W., upon trust, out of the rents to pay M. an annuity of £50, & upon further trust, to pay to his grandson the rents for his life, & after his decease, upon trust for his children & in default of such issue, testator gave all his estates to his nephews, their heirs & assigns, for ever, subject to the said annuity, provided that it should be lawful for the trustees, if thought beneficial to do so, to sell his real estate in W., & testator directed

#### PART IV. SECT. 2, SUB-SECT. 4.

**363 i. Proceeds of sale of real estate—Direction not imperative.**—Testator conveyed his whole estate, heritable & movable, to trustees; the free residue, after payment of debts & legacies, to be divided between his children in equal shares. The trustees had power either to sell or retain the property as they should consider advantageous, & if they resolved to dispose of it, power to invest the proceeds. The trustees sold the property at different times, & as funds were realised they paid in money to the children. The remainder of the fund was held by the trustees for

behoo of testator’s surviving daughters & party lent on heritable securities :—**Held** : the trustees having an ample & absolute discretion conferred upon them by testator, the character of his succession was made dependent on their resolution, & they having in exercise of their powers, converted the estate, it became liable to legacy duty.—*ADVOCATE-GENERAL v. HAMILTON* (1856), 18 Duul. (Ct. of Sess.) 636.—**SCOT.**

**i. ——— But conversion into money the fair meaning of the deed.**—To warrant the imposition of legacy duty, an express direction by the testator to trustees to sell is not

indispensable, but a power to sell becomes as imperative as an express direction, when converting into money is the fair meaning of the deed.—*ADVOCATE-GENERAL v. BLACKBURN’S TRUSTEES* (1847), 10 Duul. (Ct. of Sess.) 166.—**SCOT.**

**g. ——— Option given to legatee—To buy the real estate—Or take it as part of his share.**—A trustee directed that the residue of his estate should be divided among his four sons. Part of the residue consisted of heritable property, which it was declared the eldest son should be entitled to take at a specific price or value, to be paid by him to the trustees, or imputed



*Sect. 2.—Legacies and succession upon intestacy:*  
*Sub-sect. 4.]*

that the purchase-moneys should be invested by the trustees in the purchase or on mtge. of other lands in the counties of S. or D., which lands should be settled to the same uses; & until the money arising from such sale should be so invested, the trustees should place in it the public funds, or on govt. or real securities in England. Testator died, leaving his grandson then an infant, & his nephews him surviving. The trustees filed a bill in Chancery to establish the trusts of the will & take the usual accounts, & a decree was made accordingly. The master by his report, found that there were no debts due from testator. Subsequently, the trustees presented a petition in the cause, stating that they were desirous that the estate in W. should be sold, & the proceeds laid out in the purchase of other lands as directed by the will & praying that it might be referred to the master to inquire whether it would be for the benefit of the infant grandson that the estate should be sold. An order having been made, the master by his report found that it would be beneficial to sell the estate; & in pursuance of an order of the ct. it was sold, & the proceeds laid out in the purchase of Bank annuities. The grandson afterwards died without issue, & the interest of the nephews expectant on his decease vested in M. By a decree in the cause, legacies & costs were ordered to be paid, & the residue of the Bank annuities transferred to M.:—*Held*: the fund was not subject to legacy duty, since the person entitled to it did not take it as personalty under the will, but in consequence of his election to receive a gift of real estate in the shape of money.—*MULES v. JENNINGS* (1853), 8 Exch. 830; 1 C. L. R. 660; 155 E. R. 1589; *sub nom.* *HEALE v. KNIGHT, MULES v. JENNINGS*, 22 L. J. Ex. 358.

**367.** ———.]—Prior to the alteration of the law legacy duty was not chargeable upon real estate except where its conversion into personalty took place under some imperative trust or direction to that effect. Hence, where the conversion was a thing done at discretion, for the convenience or benefit of the parties, the claim of the Crown did not arise. In such cases the words "to pay" did not necessarily denote conversion. They might be taken for "to transfer."

As to the power of varying the securities, I must observe, that where such a power is not imperative on the trustees, but is to be exercised for the convenience & benefit of the parties, conversion, in the sense meant by the statute, does not take place (*LORD ST. LEONARDS*).—*ADVOCATE-GENERAL v. SMITH* (1854), 1 Macq. 760, H. L.

*Annotation*:—*Refd. A.-G. v. Wyndham* (1862), 7 L. T. 386.

**368.** ———.]—*Direction to sell & invest in other real estate.*—*MULES v. JENNINGS*, No. 366, *ante*.

**369.** ———.]—*Sale by order of court.*—(1) The Legacy Duty Acts are to be construed strictly, & in favour of the subject.

(2) A will empowered the trustees, with the consent of A., to sell the real estate, & invest a sufficient sum to answer two annuities. The rents being deficient to pay the annuities, the ct. ordered a sale out of the produce & £20,000 Consols were purchased to provide for the annuities.

towards payment of his share of the residue: failing the eldest son choosing to take the lands, it was directed that each of the younger sons should have the same option; & in the event of none of them choosing to take the property, that it should be sold & the price divided along with the rest

of the residue. The eldest son elected to take the property: the value put upon it by the testator was accounted for as part of the residue divided among the sons & deducted from the eldest son's share & the property was conveyed to him:—*Held*: the trustee having conveyed the estate in pursuance of the

Legacy duty being claimed on the corpus of the Consols:—*Held*: the validity of this claim depended on whether the sale had taken place under the general jurisdiction of this ct., or under the power in the will, & the ct. having held the former, determined that no legacy duty was payable.—*HOBSON v. NEALE* (1853), 17 Beav. 178; 1 Eq. Rep. 165; 51 E. R. 1001; *previous proceedings*, 8 Exch. 368.

*Annotations*:—*Refd. Harding v. Harding* (1861), 2 Giff. 597. *Mentd. Armytage v. Wilkinson* (1878), 3 App. Cas. 355.

**370.** ———.]—*HARDING v. HARDING*, No. 360, *ante*.

**371. Purchase-money of real estate—Bought under option given by testator.**—Testator, who died in 1811, by his will gave all his freehold & copyhold lands to his three nieces, as tenants in common in fee simple, subject to certain provisos in case of marriage with the further proviso that his nephew should have the option of becoming the purchaser of the whole in fee simple at the rate or price of £10,000 £3 per cent. Consols; & that upon his said nephew investing the sum of £10,000 Consols in the name of himself & other trustees to be appointed by his said nieces, that then & from thenceforth, the use in the said will before limited to the said nieces in the said lands should absolutely cease & determine, & the said lands should forthwith be & enure to the only absolute use of his nephew, & that then & from thenceforth his said nieces should, on request of his said nephew, convey the said lands to the use of his said nephew; & testator further declared that the said nephew & such other persons should thenceforth stand possessed of the said £10,000 £3 per cent. Consols in trust for his said three nieces, & that after the marriage of all of them, or the death of the survivor of them, the said trustees should transfer the said principal £10,000 to his said nieces & their respective exors., administrators, & assigns, in three equal shares. The nephew in the year 1812, having exercised the option given him by testator's will, entered into the possession of the estates, & forthwith thereupon transferred the sum of £10,000 Consols into the names of himself & two others as trustees for testator's said nieces. The said nephew survived both his co-trustees, & died, leaving deft., his only son & heir-at-law & exor. under his will, him surviving who proved his father's will, & thereby became sole trustee of the said £10,000 Consols upon the trusts declared by testator's will:—*Held*: a duty at the rate of £2 10s. per cent. upon the said sum of £10,000 Consols became payable upon the transfer thereof into the names of the trustees as directed by the said will, & deft. was liable for that duty.—*A.-G. v. WYNDHAM* (1862), 1 H. & C. 563; 1 New Rep. 100; 32 L. J. Ex. 1; 7 L. T. 386; 8 Jur. N. S. 1182; 11 W. R. 185; 158 E. R. 1008.

**372. Mortgage debt—Secured on property devolving on legatee.**—A. made a mtge. in fee to secure a sum lent to him by the trustees of his marriage settlement. On his death, his daughter became entitled to the equity of redemption of the mortgaged estate as his heir, & under his marriage settlement, to the mtge. money. The trustees then conveyed the estate to her, subject, expressly,

directions of the trustee, legacy duty was not payable on its value.—*LORD ADVOCATE v. MEIKLAM* (1860), 22 Dunl. (Ct. of Sess.) 1427.—*SCOT*.

*h. Estate pur autre vie—Descending to heir—Not chargeable with duty.*—M. F. having an annuity for his own



to the equity of redemption, & did not release her father's covenant for repayment of the money. Afterwards she granted an annuity to M., & as a security for it, conveyed the estate & assigned the money to a trustee for him. By her will she devised the estate, but did not dispose of her personal estate:—*Held*: the money was subject to probate & legacy duty.—*SWABEY v. SWABEY* (1848), 15 Sim. 502; 11 L. T. O. S. 410; 12 Jur. 688; 60 E. R. 714.

*Annotation*:—*Refd. Re French-Brewster's Settlements*, Walters v. French-Brewster, [1904] 1 Ch. 713.

*See, now*, Customs & Inland Revenue Act, 1888 (c. 8), s. 21 (2).

**373. Tolls of lighthouse.**—The profits arising from the tolls received under a grant of a lighthouse, are in the nature of realty, & not liable to either probate or legacy duty.—*A.-G. v. JONES* (1849), 1 Mac. & G. 574; 1 H. & Tw. 493; 19 L. J. Ch. 266; 14 L. T. O. S. 287; 14 Jur. 379; 41 E. R. 1388, L. C.

*Annotations*:—*Mentd. Myers v. Perigal* (1852), 2 De G. M. & G. 599; *Re Christmas, Martin v. Lacon* (1886), 33 Ch. D. 332; *Re David, Buckley v. Royal National Life Boat Institution* (1889), 41 Ch. D. 168.

**374. Capital sum to be raised out of settled real estate—To which legatee entitled on testator's death.**—Lord E. & his son, by a deed of 1800, conveyed to trustees certain real estates, to the use, subject to a term to secure a rentcharge of £2,000 to the son during their joint lives, of Lord E. for life, with remainder to the son for life, with remainder to the first & other sons of the latter in tail, with remainders over; with a joint power to revoke such uses & declare others. By a deed of 1814 they executed the power. This deed recited, that Lord E. was not possessed of personal estate sufficient, in the event of his death, to discharge all the debts he might probably owe, & such legacies as he might bequeath, without a sale of his family & other pictures, plate & other articles of a similar nature; & that, therefore, the son had agreed, for the accommodation of Lord E., to join him in charging the said lands with a sum of £50,000, to be raised after the death of Lord E., & applied in augmentation of his personal estate; & that Lord E. had agreed in charging the estates with £20,000, to be raised, after his death, for the use of his son; & that it was agreed that the pictures, etc., should be assigned to trustees. The deed then contained a revocation of the former uses; & it was thereby directed, that the said estates should be & remain to the use of the trustees, in trust (*inter alia*) within six months after the death of Lord E., to raise by sale such sum not exceeding £50,000 as should be necessary to make good the deficiency of the personal estate of Lord E., in payment of his debts & legacies, & in aid of the same. The estates were then settled as before to the use of Lord E. for life, with remainder to his son & his issue, with remainder in undivided third parts to Lord E.'s three daughters, Lady S., Lady C., & another daughter for their lives respectively, with remainder to their sons in tail; & Lord E. assigned all his pictures, furniture, etc., to trustees, to go, for the most part, as heirlooms. Lord E. by his will, gave, amongst other legacies, to his exors. two sums of £10,000 each, in trust for his daughter Lady S., the wife of Lord S., the same to be subject to her appointment. The son died without

issue in the lifetime of his father, whose personal estate, after his death, was not sufficient for the payment of his debts & legacies, without a part of the said sum of £50,000, out of which it was necessary to provide for payment of the legacies to Lady S. Common recoveries were suffered, & the estates tail in the lands thereby barred, & partition was made, one share being limited to such uses as Lady S. & her husband, & their eldest son, or the survivors of them, should jointly appoint; & it was agreed that, instead of raising the legacies, they should be charged upon the estates in proper proportions. The sums apportioned to the lands taken by the other daughters & their sons were at once paid to the trustees, leaving a large amount to be charged, & which was charged on Lady S. own share of the estates so limited as aforesaid, the same being secured by means of a term created for the purpose, & vested in trustees. Lady S., by virtue of the power in her father's will, appointed by deed the sums received by the trustees on account of her legacies to her husband, & directed that the residue should be paid to such person as she should thereafter appoint, & in default of appointment, then to her husband; & she died without having made any further appointment. Lord S. & his son, by deed, conveyed the estates subject to the said term, to the use of themselves & the survivor in fee. On the death of Lord S., his son became seised of the said estates, & as residuary legatee of his father, entitled to the residue of the legacies charged thereon; & he called upon the trustees to surrender the estate in lieu of selling it to realise the amount charged upon it. This was done, & thereby the demand of the trustees became extinguished; & that extinguishment took place before 1845 Act:—*Held*: (1) legacy duty was payable upon all the legacies, under 1815 Act; (2) the £50,000 stipulated for by testator as a fund for the payment of his debts & legacies, was personal estate; (3) the fact, that the legacy, & the land upon which the legacies were charged, had devolved upon the same person, whereby it became unnecessary for the trustees to realise the money by the sale of the land, was equivalent to a satisfaction of the legacies within Sched., Part III., of the latter Act.—*A.-G. v. METCALFE* (1851), 6 Exch. 26; 20 L. J. Ex. 329; 16 L. T. O. S. 417; 155 E. R. 439.

*Annotation*:—*As to* (1) & (3) *Distd. A.-G. v. Astor*, [1922] 2 K. B. 651.

**375. Partnership share in real estate.**—Legacy duty is payable upon the share of a deceased partner, a domiciled Englishman, in the proceeds of freehold property in Bombay used for the purposes of the partnership, & forming a partnership asset.—*FORBES v. STEVEN, MACKENZIE v. FORBES* (1870), L. R. 10 Eq. 178; 39 L. J. Ch. 485; 22 L. T. 703; 18 W. R. 686.

*Annotations*:—*Consd. Re Stokes, Stokes v. Ducroz* (1890), 62 L. T. 176; *Re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192. *Refd. A.-G. v. Allesbury* (1887), 12 App. Cas. 672. *Mentd. A.-G. v. Lomas* (1873), L. R. 9 Exch. 29; *In the Goods of Ewing* (1881), 6 P. D. 19; *A.-G. v. Hubbuck* (1884), 13 Q. B. D. 275.

**376. — Property abroad.**—J., testator in this action, who died in Sept. 1890, domiciled in England, for many years previous to his death carried on the business of sheep-breeding in partnership with his brother R. in New Zealand. Part of the partnership property

life, assigned it to D. J. & his heirs; D. J. having died intestate in the lifetime of M. F.:—*Held*: the annuity descending to his heir-at-law, & not being distributable amongst his next of kin, the administrator *de bonis non* of D. J. was not chargeable with duty

in respect thereof.—*R. v. NORREYS* (1852), 18 L. T. O. S. 352.—*IR.*

**k. Profits arising from business.**—Testator by his will provided for his business being carried on & eventually being acquired by certain of his

employees. After paying depreciation & interest on testator's capital, 90 per cent. of the profits was to be retained in certain shares on behalf of the employees & used as a fund to pay out testator's capital, & the remaining 10 per cent. was to be paid to them in

*Sect. 2.—Legacies and succession upon intestacy: 4, 5 & 6.]*

consisted of a freehold estate of 29,000 acres in New Zealand known as the Milbourne estate. By articles of partnership dated Feb. 14, 1879, made between testator & R., it was agreed that the Milbourne estate should be forthwith sold in the manner which the parties should mutually agree upon, & the articles contained provisions for sale in case of no agreement & for carrying on the partnership. R. died in Jan. 1880. Testator was entitled to four-sevenths of the partnership property. No sale of the estate was made in his lifetime or in that of testator. By his will testator gave his four-sevenths shares in the said Milbourne estate to trustees upon trust to sell, with powers of management till sale, & subject to the payment of an annuity, & of the income of one-seventh to the widow of R. during her life, to divide the proceeds & the produce till sale among thirteen charities. An administration action was commenced in 1881. The New Zealand property had never been sold, but the income had from time to time been paid into ct. Under an order made in Apr. 1888, the funds then in ct. had been divided, & legacy duty had been paid upon the moneys arising from the New Zealand estate. The duty had been paid under an arrangement that it should be repaid if it was ultimately decided not to be payable. The Governors of the London Hospital, who had been appointed to represent the other charities, presented a petition asking for distribution of the fund which had accumulated in ct. since Apr. 1888, without payment of legacy duty, on the ground that being proceeds of real estate in New Zealand, it was not subject to English legacy duty:—*Held*: testator's interest in the property whether regarded as a share in land agreed to be sold by the articles of partnership or as a share in partnership property, was personal & movable property, & therefore, subject to legacy duty according to the law of testator's domicile.—*Re STOKES, STOKES v. DUCROZ* (1890), 62 L. T. 176; 38 W. R. 535; 6 T. L. R. 154.

*Annotation*:—*Consd. Re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192.

*See, generally, PARTNERSHIP.*

**377. Estate pur autre vie—1796 Act, s. 20.]—**

A testator gave a rentcharge, to issue out of lands in England, to A. for life, & directed that after her death it should be continued, & equally divided between B., C., & D. during their lives & the life of the longest liver. B. died domiciled abroad, leaving an English will, by which she disposed of her personal estate. On the death of A., who was survived by C. & D., the Crown claimed from B.'s exors. legacy duty in respect of B.'s third share of the rentcharge:—*Held*: such duty was payable, for the interest in the rentcharge which passed to B.'s exors. was, by Wills Act, 1837 (c. 26), "an estate pur autre vie, applicable by law in the same manner as personal estate," & therefore, fell within 1796 Act, s. 20, & it was not exempt from duty by reason of B.'s foreign domicile, inasmuch as, although it was by law applicable in the

same manner as personal estate, it was not by any of the statutes made personal estate, but was realty not following the person.—*CHATFIELD v. BERCHTOLDT* (1872), 7 Ch. App. 192; 41 L. J. Ch. 255; 26 L. T. 267; 20 W. R. 401, L. J.J.

*Annotation*:—*Reid. Re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192.

**378. Real property notionally converted to personalty.]—In the Goods of GUNN, No. 362, ante.**

**SUB-SECT. 5.—TRANSMITTED INTERESTS.**

**379. Interest passing after death—Power of appointment—Failure to appoint.]—A.-G. v. MALKIN, No. 895, post.**

**380. Interest passing before death—Effect of 1853 Act, s. 14.]—**By sect. 14 of the above Act it is enacted that where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor, then, one duty only shall be paid in respect of one interest & shall be due from the successor who shall first become entitled thereto in possession. A. by his will gave to trustees £10,000 upon trust for B., then the wife of C., & after her death upon trust for all her children who should attain 21 years. B. had seven children who attained that age, two of whom, D. & E., died in the lifetime of their parents, intestate, whereby their father, C., became their next of kin, & entitled beneficially to the one-seventh share of the legacy of £10,000 expectant upon the death of their mother, B. Their father, C., never took out letters of administration, but himself died in the lifetime of his wife B., & by his will surviving children became entitled to his residuary personal estate upon which the sum of £448 10s. 4d. was paid, being at the rate of 1 per cent., & was paid in respect of the beneficial acquisition of his surviving children of his residuary personal estate, & which included the reversionary value of the two-seventh parts of the legacy of £10,000 to which he was entitled as next of kin of his children D. & E., & in respect of which two-seventh parts no legacy or succession duty had been paid by C. Upon the subsequent death of B., F., who was one of the exors. under the will of C., obtained letters of administration of the estate & effects of D. & E., so as to enable him to receive & give a good discharge for their two-seventh shares:—*Held*: sect. 14 of the above Act did not apply to such a case, & legacy duty was payable in respect of the beneficial acquisition by C. of the two-seventh shares of D. & E., as well as a similar duty in respect of the transmission of the same shares by the will of C.—*A.-G. v. CLEAVE* (1873), 31 L. T. 86.

**SUB-SECT. 6.—WHO IS THE LEGATEE OR SUCCESSOR.**

**381. Gift in confidence—Where no trust imposed.]—**J. bequeathed to his wife, sundry specific chattels, "to be finally appropriated as she pleased," together with the sum of £4,000 in money. This sum, however, he recommended

the same shares. When the testator's capital was paid out, the business was to belong to the employees, but no interest was to vest in them till then.

After the business had been carried on for some years & a large sum paid to the employees under the 10 per cent. provision, the Inland Revenue claimed from the trustees legacy duty thereon:—*Held*: legacy duty was due, the sum being a gift under the will of

the testator & not remuneration.—*INLAND REVENUE v. DICKS' TRUSTEES* (1907), 44 Sc. L. R. 567.—*SCOT.*

**PART IV. SECT. 2, SUB-SECT. 5.**

**1. Interest passing after death.]—**It is not necessary, in order that legacy duty should be payable in respect of the personal estate of any person, that such person should have acquired in his lifetime, a present right to receive

the fund charged.—*A.-G. v. MAXWELL* (1860), 10 L. C. L. R. 262.—*IR.*

*m. —.]—EWING'S TRUSTEES v. MATHIESON* (1906), 44 Sc. L. R. 12.—*SCOT.*

**PART IV. SECT. 2, SUB-SECT. 6.**

**n. Gift to persons to be chosen by trustees—Trustees not successors.]—***LORD ADVOCATE v. NISBET'S TRUSTEES* (1878), 15 Sc. L. R. 508.—*SCOT.*



her to divide, & then named the parties & their respective sums. The lower ct. held that testator's wife had not a bare discretionary power, but that these precatory words created a trust, & that the gifts to the several individuals named in the will were subject to the legacy duty. On appeal:—*Held*: where a testator recommended the particular mode of disposing of a benefit which but for such recommendation would have been an absolute gift, that word, unless controlled by the context would render it a precatory trust; but as that construction commonly defeated testator's intention, the doctrine would not be extended beyond the limits assigned to it by decided cases, & no legacy duty was payable on the sum of £4,000 given by testator to his wife.—*WHITE v. BRIGGS* (1846), 15 L. J. Ch. 182; 6 L. T. O. S. 477, L. C.

**382.** ———.]—A devise to exors. in full confidence, but without imposing any trust or obligation enforceable either at law or in equity or otherwise, that they will apply a sum of money in a particular manner, does not create a trust upon which legacy duty will be payable.—*Re MARTINEAU* (1884), 48 J. P. 295, D. C.

**383. Gift of indefinite sum in trust—Beneficiary legatee to extent of benefit received.**]—A testator made his will in the following terms: "I give & bequeath all my property, of whatsoever description, to my wife, for the maintenance of herself, & our children," naming seven in number, "& I constitute my said wife to be sole extrix. of this my will," etc.:—*Held*: a trust was thereby constituted for the benefit of the children, & the extrix. was bound to deliver an account to the legacy duty office.—*Re HARRIS* (1852), 7 Exch. 344; 21 L. J. Ex. 92; 18 L. T. O. S. 278; 155 E. R. 980.

**384.** ———.]—A testator devised real estate to trustees upon trust in a certain event, which happened, to apply the whole or so much of the net income as the trustees in their absolute & uncontrolled discretion might deem right for the maintenance of A. The trustees in the exercise of their discretion applied a portion of the income to A.'s maintenance & intended to continue so applying it from time to time:—*Held*: each such application, as & when the income was so applied, became & would become a legacy to A. in respect of which succession duty was & would be payable.—*A.-G. v. WADE*, [1910] 1 K. B. 703; 79 L. J. K. B. 569; 102 L. T. 494.

*Compare* No. 346, *ante*.

**385. Gift to personal representatives—Of named person—Beneficiary as cestui que trust.**]—Where a bequest is made by A. to the exors. of B., such exors. hold it in trust, & to be administered as part of B.'s assets. The persons who take it beneficially take as *cestuis que trust* & not as *personæ designatæ*, & it may belong either to the creditors, or the pecuniary or residuary legatee or next of kin of B., according to the circumstances.—*LONG v. WATKINSON* (1852), 17 Beav. 471; 51 E. R. 1116; *sub nom.* *LONG v. WATKINSON*, *LONG v. LONG*, 21 L. J. Ch. 844; 19 L. T. O. S. 309; 16 Jur. 235.

*Annotations*:—*Consd.* *Webb v. Sadler* (1873), 8 Ch. App. 419; *Re Clay, Clay v. Clay* (1885), 54 L. J. Ch. 648. *Refd.* *King v. Cleaveland* (No. 2) (1858), 26 Beav. 166; *Re Thompson, Machell v. Newman* (1886), 55 L. T. 85; *Re Bosanquet, Unwin v. Petre* (1915), 85 L. J. Ch. 14. *Mentd.* *Dixon v. Dixon* (1857), 24 Beav. 129; *Holloway v. Radcliffe* (1857), 23 Beav. 163; *Re Seymour's Trusts* (1859), John, 472; *Re Wilder's Trusts* (1859), 27 Beav. 418; *Juler v. Julier* (1860), 30 L. J. Ch. 142; *Leak v. Macdowall* (No. 2) (1863), 33 Beav. 238.

**386.** ——— **Failing legatee—Predecease of legatee.**]—A. bequeathed one-third of the residue

of her estate to B., & failing him, to his exors. & representatives. B. pre-deceased A., leaving a will under which he appointed exors. The Crown having claimed, in addition to the inventory duty, called in England probate duty, & legacy duty paid by the exors. of A.'s will a second inventory duty & legacy duty from B.'s exors. on one-third of A.'s residue, on the ground that it had been disposed of by B.'s will:—*Held*: the Crown was not entitled to the duties claimed, the property not being the personal estate & effects of B. within the statutes.—*LORD ADVOCATE v. BOGIE*, [1894] A. C. 83; 63 L. J. P. C. 85; 70 L. T. 533; 6 R. 98, II. L.

*Annotations*:—*Folld.* *A.-G. v. Loyd*, [1895] 1 Q. B. 496. *Distd.* *Re Scott*, [1901] 1 K. B. 228. *Refd.* *Re Bosanquet, Unwin v. Petre* (1915), 85 L. J. Ch. 14.

**387.** ———.]—Testator bequeathed his personal estate to his brother, & in case of his death in testator's lifetime directed that it should go & be paid to his brother's exors. or administrators as part of his personal estate as if his brother had survived him & died immediately after him. Testator's brother predeceased testator, leaving a will under which he appointed exors.

The Crown having claimed, in addition to the probate & estate duties paid by testator's exors., a second probate duty & estate duty from the exors. of his brother's will:—*Held*: the brother's exors. were not chargeable with the duties claimed.—*A.-G. v. LOYD*, [1895] 1 Q. B. 496; 64 L. J. Q. B. 365; 11 T. L. R. 79; 15 R. 277, D. C.

*Annotation*:—*Refd.* *Re Scott*, [1900] 1 Q. B. 372.

**388. Disclaimer of legacy—After adoption by executor of legatee—Duty payable.**]—D. by his will bequeathed to W. certain personal estate of the value of £7,487, upon trust for D.'s daughter, the wife of B. during her life, & provided she died without issue, he bequeathed the same to B., his heirs & assigns. B. by his will bequeathed the said & all his other personal estate to S. & deft., upon trust to pay debts & legacies, & as to the residue in trust for such purposes as his wife should by her will appoint, & in default of such appointment, in trust for her exors. & administrators. B. appointed S. & deft. exors. of his will, & died, leaving his wife him surviving. After the death of B., his wife appointed deft. with two other persons trustees of the will of D. in the place of W. & all the personal estate of D. was assigned by D. to them. The wife of B. appointed deft., with the two last-mentioned persons, exors. of her will, & bequeathed to them the whole of her personal property on certain trusts. She died without ever having had issue, & more than two years after her death, S. & deft., on being applied to for payment of legacy duty, on the above sum of £7,487, by a certain writing, signed by them, reciting the bequest by D. to B. professed to disclaim & renounce such bequest:—*Held*: it was not competent for deft. to disclaim the bequest after B. had accepted & bequeathed it, & deft. was liable as exor. of B. to pay a legacy duty of £10 per cent.—*A.-G. v. MUNBY* (1858), 3 H. & N. 826; 157 E. R. 701.

**389.** ——— **Given under power of appointment—Duty payable.**]—J. by his will devised real & personal property to trustees, upon trust to convert into money, & to pay the income thereof to his daughter H. for her life, & in case she should die without having married, the said property, & the income thereof, were to remain & be upon such trusts as she should by her will appoint; & in default of any such appointment, in trust for devisor's brother, R. & his sister B. H. survived her father J. & died without having married, &



*Sect. 2.—Legacies and succession upon intestacy:  
Sub-sects. 6, 7 & 8.]*

by her will gave, subject to the payment of her debts, funeral & testamentary expenses, & certain legacies & annuities, all the residue of her property unto & equally between her uncle R. & her aunt B. & appointed her uncle R., one E. & one T., who renounced probate, her exors. In an information against R. & E. claiming legacy duty at the rate of £5 per cent. in respect of so much of the residuary estate of J. as was appointed & disposed of by the will of H. in favour of her uncle, deft. R. & her aunt B.:—*Held*: H. by making the fund in question liable to her debts, legacies, etc., dealt with it as her own, & exercised her power of appointment, & R. & B. could not reject the appointment & elect to take under the gift from their brother J., & they were, therefore, liable to a legacy duty at the rate of £5 per cent., being the rate according to their relationship to H.—*A.-G. v. BRACKENBURY* (1863), 1 H. & C. 782; 1 New Rep. 334; 32 L. J. Ex. 108; 8 L. T. 22; 9 Jur. N. S. 257; 11 W. R. 380; 158 E. R. 1099.

*Annotation*:—*Mentd.* Milman v. Lane (1901), 85 L. T. 180.

**SUB-SECT. 7.—INTERESTS UNDER POWER OF APPOINTMENT.**

**390. General power of appointment—Legatee takes under will exercising power.]—***Re CHOLMONDELEY*, No. 336, *ante*.

**391. ———.]—***DRAKE v. A.-G.*, No. 337, *ante*.

**392. Limited power of appointment—Legatee takes under will creating power—Power exercised by will.]—**A testator devised real estate to W. for life, with remainder to his first & other sons in tail, with remainder to T. for life, remainder to his first & other sons in tail, remainder to G. for life, with remainders over; & gave a power to the several persons who, by virtue of the limitations in the will, should be in actual possession of the estates, by deed or will to appoint to any woman or women they should marry, by way of jointure, rentcharges not exceeding £750 *per annum* for life, to be issuing out of & chargeable upon the devised estates, clear of all taxes & deductions whatsoever. W. died without issue, & T. entered into possession of the estates, & by his will charged them with £750 *per annum* by way of jointure to his wife, under the power, & died without issue male, whereupon G. entered into possession. On error brought on the judgment of the Ct. of Exch.:—*Held*: G. was chargeable with legacy duty after the rate of £10 per cent. on the value of the rentcharge of £750 *per annum*.—*PICKARD v. A.-G.* (1840), 6 M. & W. 348; 9 L. J. Ex. 329; 151 E. R. 446, Ex. Ch.; *affg.* S. C. *sub nom.* *A.-G. v. PICKARD* (1838), 3 M. & W. 552.

*Annotations*:—*Apld.* Henniker v. A.-G. (1852), 8 Exch. 257. *Foll.* Sweeting v. Sweeting (1853), 22 L. J. Ch. 441. *Refd.* A.-G. v. Hertford (1845), 14 M. & W. 284.

**393. ———.]—***HENNIKER (LORD) v. A.-G.*, No. 338, *ante*.

**394. ——— Power exercised by deed.]—***SWEETING v. SWEETING*, No. 339, *ante*.

*Compare* Part II., Sect. 9, sub-sect. 1, B., *ante*.

**SUB-SECT. 8.—DOMICIL AND SITUS.**

Domicil generally, *see* CONFLICT OF LAWS, Vol. XI., pp. 309–340, Nos. 18–289.

**395. Situs of personal property—Liability to duty depends on domicile of deceased.]—**Personal property having no *situs* of its own follows the domicile of its owner, & the law of the domicile of a testator or intestate decides whether his personal property is liable to legacy duty. A British-born subject died, domiciled in a British Colony. At the time of his death he was possessed of personal property locally situate in Scotland. Probate of his will was taken out in Scotland for the purpose of those administering this property; & out of the fund thus obtained by the exor. legacies were paid to legatees residing in Scotland:—*Held*: legacy duty was not payable in respect of these legacies.—*THOMSON v. ADVOCATE-GENERAL* (1845), 12 Cl. & Fin. 1; 13 Sim. 153; 9 Jur. 217; 8 E. R. 1294, H. L.

*Annotations*:—*Apld.* A.-G. v. Napier (1851), 6 Exch. 217. *Consd.* *Re Capdevielle* (1864), 2 H. & C. 985; *Wallace v. A.-G.*, *Jeyes v. Shadwell* (1865), 1 Ch. App. 1. *Expld.* *Lyall v. Lyall* (1872), L. R. 15 Eq. 1. *Consd.* *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Colquhoun v. Brooks* (1887), 19 Q. B. D. 400. *Expld.* *Harding v. Queensland Stamps Comrs.*, [1898] A. C. 769. *Refd.* *R. v. Stamps & Taxes Comrs.* (1849), 13 Jur. 624; *Jefferys v. Boosey* (1854), 4 H. L. Cas. 815; *A.-G. v. Kent* (1862), 1 H. & C. 12; *A.-G. v. Rowe* (1862), 1 H. & C. 31; *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656; *Re Badart's Trusts* (1870), L. R. 10 Eq. 288; *Forbes v. Steven, Mackenzie v. Forbes* (1870), 39 L. J. Ch. 485; *A.-G. v. Campbell* (1872), L. R. 5 H. L. 524; *Chatfield v. Berchtoldt* (1872), 7 Ch. App. 192; *A.-G. v. Jewish Colonization Assoc.*, [1901] 1 K. B. 123; *Lambe v. Manuel*, [1903] A. C. 68; *Winans v. A.-G.*, [1910] A. C. 27; *Re Manchester, Duncannon v. Manchester*, [1912] 1 Ch. 540. *Mentd.* *Wilson v. Dunsany* (1854), 18 Beav. 293; *Re Steer* (1858), 32 L. T. O. S. 130; *Re Tootal's Trusts* (1883), 23 Ch. D. 532; *Smelting Co. of Australia v. I. R. Comrs.* (1896), 66 L. J. Q. B. 137.

**396. ———.]—**The estate of an ambassador or attache to a legation, domiciled in this country, is not exempt from legacy duty. Such a functionary does not by his appointment to an embassy to this country lose a domicile previously acquired here.

Testator, whose domicile origin was Portugal, came in 1818 to England as agent to a wine co., & was so employed until 1833, & from that time to his death in 1859 resided in England. In 1857 he was appointed, & continued to his death, an attache to the legation of the King of Portugal in England, & in 1858, in respect of that appointment, he claimed & obtained exemption from assessed taxes. In a testamentary paper testator stated that, as he was a foreigner who always intended to return to his country, & was besides an attache to the legation of the King of Portugal, his property was not subject to legacy duty:—*Held*: testator acquired a domicile in this country, & did not lose it by the appointment of attache, & his estate was liable to legacy duty.—*A.-G. v. KENT* (1862), 1 H. & C. 12; 31 L. J. Ex. 391; 6 L. T. 864; 10 W. R. 722; 158 E. R. 782.

*Annotations*:—*Refd.* *A.-G. v. Rowe* (1862), 1 H. & C. 31. *Re Capdevielle* (1864), 11 L. T. 89.

**397. Deceased domiciled abroad—Assets abroad—Remitted to England.]—**Legacies bequeathed by a British subject resident in the East Indies out of his personal estate, to persons living in England, are liable to the duty, if the exor. proves the will in England, & pays the legacies here, notwithstanding testator realised & possessed his property in India—resided there—made his will there—& died there—& although the exors. were in India at the time of their appointment, & the will was originally proved there.—*A.-G. v. COCKERELL* (1814), 1 Price, 165; 145 E. R. 1365.

*Annotations*:—*Distd.* *Re Bruce* (1832), 1 Cr. & J. 436;

**PART IV. SECT. 2, SUB-SECT. 7.**

**o. General power of appointment—Power not exercised.]—***H.M. ADVOCATE v. ROUTLEDGE'S TRUSTEES* (1907), 44 Sc. L. R. 305.—**SCOT.**

A.-G. v. Forbes (1834), 2 Cl. & Fin. 48. **Overd.** Thomson v. Advocate-General (1845), 12 Cl. & Fin. 1. **Refd.** A.-G. v. Hope (1834), 8 Bli. N. S. 44; Arnold v. Arnold (1837), 2 My. & Cr. 256. **Mentd.** Tyler v. Bell (1837), 2 My. & Cr. 89; Whyte v. Rose (1840), 9 L. J. Q. B. 342.

**398.** ———.]—Testator, resident in India, bequeathed to an infant a sum of money, to be invested in the Co.'s securities, of which the interest was to be applied to her maintenance, & the principal to be settled upon herself for life, with remainder to her children; he was lost on his voyage to England, leaving all his property in India; exors., resident in that country, proved his will at Calcutta, invested the legacy in the Co.'s securities, & for several years remitted the interest to their correspondents in London, for the benefit of the legatee, who had come to England; a part of that interest was brought into ct., in a suit instituted by her for the appointment of a guardian, & for the allowance of maintenance, & an order was made for the payment to her guardian, out of the fund so created, of £200 a year as maintenance:—**Held**: there was a specific appropriation in India of the legacy, & the payment of £200 a year was not liable to the legacy duty.—**HAY v. FAIRLIE** (1826), 1 Russ. 117; 4 L. J. O. S. Ch. 112; 38 E. R. 46.

**Annotations**:—**Distd.** *Re Ewin* (1830), 1 Cr. & J. 151. **Refd.** *Re Bruce* (1832), 2 Tyr. 475.

**399.** ———.]—Legacy duty on bequests of personal property in India, by will there, & administration granted under it there, is payable if it be remitted to England, & applied by another administrator in Scotland, under administration granted in England.—**A.-G. v. BEATSON** (1819), 7 Price, 560; 146 E. R. 1061.

**Annotations**:—**Distd.** *Re Bruce* (1832), 2 Cr. & J. 436; A.-G. v. Forbes (1834), 2 Cl. & Fin. 48. **Overd.** Thomson v. Advocate-General (1845), 12 Cl. & Fin. 1. **Refd.** A.-G. v. Hope (1834), 8 Bli. N. S. 44; Arnold v. Arnold (1837), Donnelly, 252; *Re Coales* (1841), 7 M. & W. 390.

**400.** ———.]—C., a surgeon in the army, residing in India, & having personal estate vested in funds there, as well as real estate & claims for prize money, made his will, noticing the state of his assets in India & his claims, & directing that his house & grounds should be sold by auction, & the produce placed to the credit of his estate; he left the whole of his property among his children equally, subject to certain regulations, & gave legacies to persons in England as well as in India, as expressed in his will. He thereby, also noticing that his son was at school in Scotland, desired that his other children, daughters, should be taken to England. To provide for their education, he directed that his exors. should place out his whole estate at interest, on landed property or in some public funds, suggesting that those of the East India Co. "were perhaps as secure as any," but leaving the investment to the discretion of his exors. In a letter, proved as a codicil, he directed that, after providing for certain expenses, the whole of his property at Bombay should be invested in the Co.'s next good loan. By another codicil he made a specific provision, calculated first in Indian & then in English money, to the amount of £8,000, for each of his daughters. He died in India. The exors. proved the will, & there collected the funds; & having there also administered them so far as it was necessary, transmitted them to England, where suits were instituted by parties claiming interests under the will. In the progress

of these suits, the accounts being taken, the amount of the funds was ascertained; & in a report made by the master & confirmed by the ct., deductions were made from certain legacies & annuities payable in England, on account of the legacy duty, but none for probate duty, or legacies paid in India, or for the shares of residue paid there. Upon a petition presented by the A.-G. on behalf of the Crown, claiming these duties:—**Held**: under the circumstances of the case, they were not payable under the statutes relating to this subject, 1815 Act, etc.—**A.-G. v. JACKSON** (1834), 8 Bli. N. S. 15; 3 Tyr. 982; 5 E. R. 853; *sub nom.* A.-G. v. FORBES, 2 Cl. & Fin. 48, H. L.; *affg.* S. C. *sub nom.* JACKSON v. FORBES (1832), 2 Cr. & J. 382.

**Annotations**:—**Appld.** Logan v. Fairlie (1835), 1 My. & Cr. 59. **Foldd.** Arnold v. Arnold (1837), Donnelly, 252. **Consd.** Thomson v. Advocate-General (1845), 12 Cl. & Fin. 1; A.-G. v. Napier (1851), 6 Exch. 217; *Re Tootal's Trusts* (1883), 23 Ch. D. 532. **Refd.** A.-G. v. Hope (1834), 8 Bli. N. S. 44; R. v. Stamps & Taxes Comrs. (1849), 18 L. J. Q. B. 201; Jefferys v. Boosey (1854), 4 H. L. Cas. 815; Colquhoun v. Brooks (1887), 19 Q. B. D. 400. **Mentd.** Tyler v. Bell (1837), 2 My. & Cr. 89.

**401.** ———.]—Testator, resident in India, & having all his property there, bequeathed his residuary personal estate to his brother J., & his sister H., in equal shares; but in case his sister should die before him, then to her children. The exor., who was also resident in India, having proved the will there, remitted the residue to his agent in England, with a letter, in which he desired the agent to appropriate the fund according to the annexed extract of the will, by which it would be perceived that half went to J., & half to H. or her children. H. had died in the lifetime of testator, leaving nine infant children. A suit having been instituted by the children against the agent, & also against the exor. & J., who were both out of the jurisdiction, for the purpose of having a moiety of the fund secured:—**Held**: no legacy duty was payable upon such moiety.—**LOGAN v. FAIRLIE** (1835), 1 My. & Cr. 59; 40 E. R. 298; *previous proceedings* (1825), 2 Sim. & St. 284.

**Annotations**:—**Dbtd.** A.-G. v. Napier (1851), 20 L. J. Ex. 173. **Refd.** Arnold v. Arnold (1837), 2 My. & Cr. 256. **Mentd.** Bond v. Graham (1842), 6 Jur. 620.

**402.** ———.]—Testator having died domiciled in India, & appointed by his will exors. in India & in England; & his exors. in India having collected his assets there, & paid his debts, & remitted the surplus to the English exors. for payment of legacies given by his will to legatees in England:—**Held**: such legacies were not subject to legacy duty, although the will was proved in this country, & a suit instituted here in respect of such legacies.—**ARNOLD v. ARNOLD** (1837), 2 My. & Cr. 256; Donnelly, 252; 6 L. J. Ch. 218; 1 Jur. 255; 47 E. R. 353, L. C.

**Annotations**:—**Expld. & Distd.** *Re Coales* (1841), 7 M. & W. 390. **Distd.** A.-G. v. Napier (1851), 6 Exch. 217. **Refd.** Charitable Donations Comrs. v. Devereux (1842), 13 Sim. 14; Thomson v. Advocate-General (1845), 12 Cl. & Fin. 1; Jefferys v. Boosey (1854), 4 H. L. Cas. 815; *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656; *Re Goodman's Trusts* (1881), 17 Ch. D. 266; Winans v. A.-G., [1910] A. C. 27. **Mentd.** Salkeld v. Johnston (1842), 1 Hare, 196.

**403.** ———.]—Testator, who was an English-born subject & an officer in the Royal Navy on half-pay, in 1829 obtained leave of absence for the purpose of going to India, & went to Calcutta, where he established a lucrative

#### PART IV. SECT. 2, SUB-SECT. 8.

**403 i. Deceased domiciled abroad—Assets abroad.**]—X., a native of Scotland was appointed a stipendiary magistrate at Tortola one of the Virgin

Islands where he resided for six years except for one visit to Scotland when he married a Scotch lady & returned with her to Tortola. He died at St. Kitts & received half pay till his death:—**Held**: X. had acquired a

domicile at Tortola & his estate was not liable for legacy duty.—**INLAND REVENUE COMRS. v. GORDON'S EXECUTORS** (1850), 12 Duul. (Ct. of Sess.) 657.—**SCOT.**

**403 ii.** ———.]—F. died in 1883,



*Sect. 2.—Legacies and succession upon intestacy:  
Sub-sect. 8.]*

business. In 1830 he married, &, subsequently, had three children, born in Calcutta. He continued to receive his half-pay & to obtain renewals of his leave of absence until 1839. In that year he made his will, & died at Calcutta without having at any time returned to England:—*Held*: at the time of his death testator's domicile was Indian, &, therefore, no legacy duty was payable on his personal property.—*COCKRELL v. COCKRELL* (1856), 25 L. J. Ch. 730; 27 L. T. O. S. 303; 2 Jur. N. S. 727; 4 W. R. 730.

*Annotations*:—*Refd.* A.-G. v. Fitzgerald (1856), 25 L. J. Ch. 743. *Mentd.* Lyall v. Paton (1856), 25 L. J. Ch. 746; *Re* Grove, Vaucher v. Treasury Solicitor (1888), 40 Ch. D. 216; *Casdagli v. Casdagli*, [1918] P. 89.

**404.** ———.]—Testator had a Scottish domicile of origin. In 1807 he sailed from England for the East Indies. The vessel was wrecked, & he was taken prisoner & confined at Verdun till 1814. In that year he was released. In 1815 he went to India, & set up in business there. In 1835 he made his will at Calcutta describing himself as of that place, & appointing two gentlemen resident at Calcutta his exors. In 1836 he sailed from India in a vessel bound for an English port, & died on the journey:—*Held*: (1) the domicile of testator at the time of his death was Indian, &, therefore, no legacy duty was payable upon his personal property; (2) where the Crown succeeded it was entitled to costs out of the property, but where it failed, there should be no costs.—*LYALL v. PATON* (1856), 25 L. J. Ch. 746; 27 L. T. O. S. 315; 4 W. R. 798.

*Annotation*:—*As to* (1) *Refd.* A.-G. v. Pottinger (1861), 6 H. & N. 733.

**405.** ———.]—Testator, a British-born subject, resided for many years at Hamburg under circumstances which afforded evidence of a domicile there. He came for a temporary purpose to England, where he made a will, in which he declared that it was not his intention to renounce his domicile of origin as an Englishman. He returned to Hamburg where he died, having also made a will there:—*Held*: testator's declaration of intention could not prevail against the foreign domicile, &, therefore, his personal property was not subject to legacy duty in England.—*Re STEER* (1858), 3 H. & N. 594; 28 L. J. Ex. 22; 32 L. T. O. S. 130; 157 E. R. 606.

*Annotations*:—*Refd.* A.-G. v. Pottinger (1861), 6 H. & N. 733. *Mentd.* *Re* Marrett, Chalmers v. Wingfield (1887), 3 T. L. R. 392; *Winans v. A.-G.*, [1904] A. C. 287; *Casdagli v. Casdagli*, [1919] A. C. 145.

**406.** ———.]—Testator, having a Scottish domicile of origin, went to India in 1840, where he purchased a coffee plantation & continued to reside & carry on his trade till 1858, when, on account of ill-health, he came over to this country, & resided here & in Scotland for eighteen months, after which he returned to his plantation in India, & lived there till his death, in 1860:—*Held*: testator had acquired an Anglo-Indian domicile, which was not changed at the time of his death, & his property was not liable to legacy duty.

*Semble*: the circumstance that a foreign fixed residence is adopted merely with the view to the acquisition of a fortune, & with an ulterior intention of returning home, is not sufficient to prevent the place of residence from becoming that of domicile.—

being at the time domiciled in England, & leaving movable property in Cape Colony, which he bequeathed to his wife for her life & after her death to his four children. English legacy duty

was claimed on the movable property left by F., & such duty was paid by H., one of the exors., as representing the estate:—*Held*: as English legacy duty depends upon the law of domicile

*ALLARDICE v. ONSLOW* (1864), 33 L. J. Ch. 434; 9 L. T. 674; 10 Jur. N. S. 352; 12 W. R. 397.

*Annotation*:—*Refd.* *Jopp v. Wood* (1865), 34 L. J. Ch. 212.

**407.** ———.]—A person whose name was English, but whose domicile of origin was not shown, held a commission in the English Army. He sold out in 1810 &, subsequently, resided down to his death, in France; where he formed a French connection. He educated his son as French, & there he died; & his whole property was in French rentes:—*Held*: his domicile at his death was French & legacy duty was not payable on his assets.—*U.S.A. (PRESIDENT) v. DRUMMOND* (1864), 33 Beav. 449; 4 New Rep. 7; 33 L. J. Ch. 501; 10 L. T. 321; 10 Jur. N. S. 533; 12 W. R. 701; 55 E. R. 442.

*Annotations*:—*Mentd.* *Whicker v. Hume* (1858), 7 H. L. Cas. 124; *U.S.A. v. Wagner* (1867), 2 Ch. App. 582; *Beaumont v. Oliveira* (1869), 4 Ch. App. 309; *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451.

**408.** ——— *Assets at home.*]—(1) Property in this country belonging to a foreigner, who dies abroad, & appoints an English exor., & bequeaths to English legatees, is not liable to legacy duty.

(2) A testator, born in America in 1764, went to Scotland when a minor for the purposes of education, &, after he had attained his majority in 1788, sailed for India, describing himself in the ship's books as an American; he remained in India thirty years, when he returned to Europe, leaving the bulk of his property in Bengal; & afterwards, having been in America, visited England, Scotland, & the Continent, when he returned to America, entered into agricultural pursuits there, & continued to draw his property to that country until his death at New York in 1826:—*Held*: he was an American citizen.—*Re BRUCE* (1832), 2 Cr. & J. 436; 2 Tyr. 475; 1 L. J. Ex. 153; 149 E. R. 185.

*Annotations*:—*As to* (1) *Fold.* *Charitable Donations Comrs. v. Devereux* (1842), 13 Sim. 14. *Refd.* *Tyler v. Bell* (1836), Donnelly, 190; *Thomson v. Advocate-General* (1845), 12 Cl. & Fin. 1; *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656. *As to* (2) *Refd.* *Re Stepney Election Petn., Isaacson v. Durant* (1886), 17 Q. B. D. 54. *Generally, Mentd.* *Salkeld v. Johnston* (1842), 1 Hare, 196.

**409.** ———.]—A British subject went to settle in France in 1762, & afterwards purchased an estate, & became naturalised there. In 1791 he left France & came to England in consequence of the French Revolution, &, shortly afterwards, his property was confiscated by the Revolutionary Govt. In Jan. 1802, he made a will in London, by which he left his property partly to a charity in Ireland, & partly to individuals resident in England, & appointed one of those individuals his exor. In Apr. 1802, emigrants were permitted to return to France, &, soon afterwards, he returned to that country. In 1804 he made a will in Paris, in which he stated that he was born at Waterford, & had come to France to obtain restitution of his estate; &, after referring to his former will, which he had mislaid in London, he recapitulated very nearly its contents, & concluded by expressly confirming it. He died in Paris in 1806, & his two testamentary papers were proved both in France & in England. Under the treaty of peace between England & France in 1815, a large sum of French stock was set apart by the then French Govt. for the purpose of compensating British subjects whose property had been confiscated by the Revolutionary Govt., & part of that sum was awarded, by comrs. appointed by the British

to testator, the beneficiaries were liable of the English import.—*FLETCHER'S ESTATE v. FLETCHER'S ESTATE* (1909), 26 S. C. 303; 19 C. T. R. 621.—*S. AF*



Govt., to testator's exors. for the loss of testator's property in France. The comrs., under the powers of an Act of Parliament, sold the stock so awarded, & paid the proceeds into the Ct. of Ch.:—*Held*: testator was domiciled in France at his death, & the fund in ct. was not subject to legacy duty.—*CHARITABLE DONATIONS COMRS. v. DEVEREUX* (1842), 13 Sim. 14; 11 L. J. Ch. 362; 6 Jur. 616; 60 E. R. 6.

410. ———.]—*THOMSON v. ADVOCATE-GENERAL*, No. 395, *ante*.

411. ———.]—(1) Legacy duty is not payable upon property in this country belonging to an alien when he is domiciled abroad at the time of his death, & by his will bequeaths his English property to alien legatees residing abroad.

(2) Probate duty is payable upon property of an alien in England, notwithstanding he may have died abroad & bequeathed the property to alien legatees.—*WEATHERBY v. ST. GEORGIO* (1846), 7 L. T. O. S. 367; *previous proceedings* (1843), 2 Hare, 624.

412. ———.]—C., a native of France, died in 1859, leaving personalty in England. Having left his country early in life, C. came in 1830 & settled in business at Manchester, where he continued to reside until his death. In the interval, he twice, for a short time only, visited his native country. He bought an estate at his native village, subscribed to local charities, & often expressed an intention to return to France. By his will he left all his property, real & personal, to his nephew:—*Held*: (1) C.'s domicile was French, he not having done all in his power to divest himself of his original domicile; (2) the personalty in England was subject to succession duty.—*Re CAPDEVIELLE* (1864), 2 H. & C. 985; 5 New Rep. 15; 33 L. J. Ex. 306; 11 L. T. 89; 10 Jur. N. S. 1155; 12 W. R. 1110; 159 E. R. 408.

*Annotations*:—*As to* (1) *Consd.* *Haldane v. Eckford* (1869), L. R. 8 Eq. 631. *As to* (2) *Appld.* *A.-G. v. Blucher De Wahlstatt* (1864), 3 H. & C. 374. *Follid.* *Re Badart's Trusts* (1870), L. R. 10 Eq. 288.

413. ———.]—A sum of stock standing in the English funds, in the name of a foreigner, or of a person domiciled in one of the British colonies, & bequeathed by such person by will, is liable neither to legacy duty nor to succession duty.—*WALLACE v. A.-G., JEVES v. SHADWELL* (1865), 1 Ch. App. 1; 35 L. J. Ch. 124; 13 L. T. 480; 11 Jur. N. S. 937; 14 W. R. 116, L. C.

*Annotations*:—*Distd.* *Re Badart's Trusts* (1870), L. R. 10 Eq. 288. *Expld. & Appld.* *Callanane v. Campbell* (1871), L. R. 11 Eq. 378. *Consd.* *A.-G. v. Campbell* (1872), L. R. 5 H. L. 524; *Lyll v. Lyll* (1872), L. R. 15 Eq. 1; *Colquhoun v. Brooks* (1887), 19 Q. B. D. 400. *Follid.* *A.-G. v. Felce* (1894), 10 T. L. R. 337. *Consd.* *A.-G. v. Jewish Colonization Assocn.*, [1901] 1 K. B. 123. *Refd.* *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Harding v. Queensland Stamps Comrs.*, [1898] A. C. 769; *Lambe v. Manuel*, [1903] A. C. 68; *A.-G. v. Johnson*, [1907] 2 K. B. 885; *Winans v. A.-G.*, [1910] A. C. 27; *Toronto General Trusts Corp'n. v. R.*, [1919] A. C. 679. *Mentd.* *Coventry v. L. B. & S. C. Ry.* (1867), L. R. 5 Eq. 104; *Carlington v. Wycombe Ry.* (1868), 1 Ch. App. 377.

414. ———.]—A Scotsman domiciled in Scotland married a Scotswoman, & resided with her in Scotland. After some years he went to Australia, with his wife's consent, & resided in Australia for 25 years up to his death. He never communicated with his wife after he left Scotland, & never expressed any intention or wish to return there. About sixteen years before his death he contracted a bigamous marriage in Australia. When this came to the knowledge of his wife she instituted proceedings for divorce in the Scottish Cts.; but she died before the case came on for hearing, leaving her husband surviving:—*Held*: (1) the husband's domicile was in Australia; (2) there was nothing in the circumstances of the

case to take it out of the ordinary rule that a wife's domicile was that of her husband, & therefore, the wife's domicile was in Australia, & consequently, legacy duty & succession duty were not chargeable upon her estate in the United Kingdom.—*LORD ADVOCATE v. JAFFREY*, [1921] 1 A. C. 146; 89 L. J. P. C. 209; 124 L. T. 129; 36 T. L. R. 820; 64 Sol. Jo. 713, H. L.

415. *Deceased domiciled in England—Assets abroad.*—American, Austrian, French & Russian stock, the property of a testator domiciled in this country is liable to legacy duty.—*Re EWIN* (1830), 1 Cr. & J. 151; 1 Tyr. 91; 9 L. J. O. S. Ex. 37; 148 E. R. 1371.

*Annotations*:—*Expld.* *Re Bruce* (1832), 1 Cr. & J. 436. *N.F.* *A.-G. v. Hope* (1834), 2 Cl. & Fin. 84. *Consd.* *Tyler v. Bell* (1837), 2 My. & Cr. 89. *Refd.* *A.-G. v. Dimond* (1831), 1 Cr. & J. 356; *A.-G. v. Jackson* (1834), 8 Bl. N. S. 15; *Thomson v. H.M.'s Advocate-General* (1845), 13 Sim. 153; *R. v. Stamps & Taxes Comrs.* (1849), 18 L. J. Q. B. 201; *A.-G. v. Napier* (1851), 6 Exch. 217; *Hervey v. Fitzpatrick* (1854), Kay, 421; *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656; *Blackwood v. R.* (1882), 8 App. Cas. 82; *Winans v. A.-G.*, [1910] A. C. 27. *Mentd.* *Re Coales* (1841), 7 M. & W. 390; *A.-G. v. Giles* (1860), 5 H. & N. 255.

416. ———.]—A., a British subject, domiciled in England, made his will & died in England, & by his will, disposed of certain govt. notes of the East India Co., issued at Calcutta & the amount of which was receivable only under an Indian probate, & appointed an English exor. The exor. executed a power of attorney to S., in India, who thereupon obtained letters of administration with the will annexed in India, under which he received the amount of the notes, & remitted to the exor. in England, who paid it over to the legatees:—*Held*: legacy duty was payable thereon.—*Re COALES* (1841), 7 M. & W. 390; 10 L. J. Ex. 207; 151 E. R. 817.

417. ———.]—(1) The law of the domicile of a testator or intestate decides whether his personal property is liable to legacy duty. A British-born subject, an officer on service in Her Majesty's army in India, died there intestate, leaving all his property situate in that country, with the exception of a small sum of money due to him from the War Office in England. His widow took out letters of administration in India, & after paying the debts, etc., invested the rest of the estate in India, in her own name, for her own benefit & that of the next of kin. She, afterwards, took out letters of administration in England, for the purpose of obtaining the debt due from the War Office:—*Held*: as deceased was on duty in India in Her Majesty's service, he did not acquire a domicile in that country, & the whole of his property, though chiefly situate abroad, was liable to legacy duty.

(2) An officer in the service of the East India Co., residing in the East Indies, does, thereby, acquire a domicile in that country.—*A.-G. v. NAPIER* (1851), 6 Exch. 217; 20 L. J. Ex. 173; 17 L. T. O. S. 28; 15 Jur. 253; 155 E. R. 520.

*Annotations*:—*As to* (1) *Consd.* *Re Tootal's Trusts* (1883), 23 Ch. D. 532. *Refd.* *Wallace v. A.-G., Jevés v. Shadwell* (1865), 1 Ch. App. 1; *Blackwood v. R.* (1882), 8 App. Cas. 82; *Colquhoun v. Brooks* (1887), 19 Q. B. D. 400; *Winans v. A.-G.*, [1910] A. C. 27; *Re Manchester, Duncannon v. Manchester*, [1912] 1 Ch. 540.

418. ———.]—Testator had an Irish domicile of origin. In 1790 he went to India, & entered into partnership in business there. In 1800 the partnership was dissolved. In 1802 he came to England, & took an assignment of a leasehold house in London, & purchased the furniture of the house. In 1811 he sold the house & furniture, & went to reside at Clifton. In 1812 he went to Madeira for his health, & in 1814, he there made his will. In 1815 he went to

*Sect. 2.—Legacies and succession upon intestacy:*  
*Sub-sect. 8. Sect. 3.]*

Lisbon by advice, & died there:—*Held*: the domicile of testator at the time of his death was English, & the Crown was entitled to legacy duty on the bequests in his will.—*A.-G. v. FITZGERALD* (1856), 3 Drew. 610; 25 L. J. Ch. 743; 27 L. T. O. S. 314; 4 W. R. 797; 61 E. R. 1036.

*Annotation*:—*Consd.* *Lyll v. Paton* (1856), 25 L. J. Ch. 746.

**419.** ———.]—Testator whose assets consisted partly of personal estate in the colony of Victoria, where duty was payable on the property of all deceased persons, died domiciled in England, & by his will gave many pecuniary legacies, & divided the residue among some of the pecuniary legatees:—*Held*: the duties attaching in Victoria, & all expenses of realisation, were payable out of the general estate before distribution, & the pecuniary legatees were entitled to their legacies free of all colonial duties & expenses except the English legacy duty.—*PETER v. STIRLING* (1878), 10 Ch. D. 279; 27 W. R. 469.

*Annotations*:—*Folld.* *Re Maurice, Brown v. Maurice* (1896), 75 L. T. 415. *Consd.* *Re Scott, Scott v. Scott*, [1914] 1 Ch. 847. *Refd.* *Re Brewster, Butler v. Southam*, [1908] 2 Ch. 365.

**420.** ———.]—(1) Notwithstanding the constitution of the Supreme Ct. of China & Japan, & the jurisdiction conferred on that Ct. over British subjects having a fixed place of residence in China, a British subject cannot acquire by residence in China a new domicile so as to exempt his personal estate on death from the operation of Legacy Duty Acts.

(2) British subjects resident in Chinese territory cannot acquire in China a domicile similar to that existing in India, & commonly known as Anglo-Indian.—*Re TOOTAL'S TRUSTS* (1883), 23 Ch. D. 532; 52 L. J. Ch. 664; 48 L. T. 816; 31 W. R. 653.

*Annotations*:—*As to* (1) *Refd.* *Re Manchester, Duncannon v. Manchester*, [1912] 1 Ch. 540. *As to* (2) *Apprvd.* *Abd-Ui-Messih v. Farra* (1888), 13 App. Cas. 431. *Consd.* *The Eumaeus* (1915), 85 L. J. P. 130; *Casdagli v. Casdagli*, [1919] A. C. 145. *Generally, Mentd.* *Re Vallance, Ex p. Linchouse Board of Works* (1883), 24 Ch. D. 177.

**421.** ——— *Assets at home.*]—A British subject domiciled & having real & personal estate in England, went abroad & purchased in 1828, the title, castle, & estate of R., in the Papal States. He hired Italian domestic servants, male & female, whom he kept at R. until his death. He expended large sums in repairing & improving the castle & grounds of R., which repairs & improvements were going on at the time of his death. He did not make R. his constant residence, but from 1828 to 1831 sometimes occupied it, sometimes lived in furnished lodgings in the towns adjacent, & at other times visited Rome, Florence, & other parts of Italy, residing in furnished lodgings. In 1831 he came to England, & resided in different parts of it until Sept. 1832. In Mar. 1832, he sent to R. several cases of plate, books & wearing apparel. In Sept. 1832, he made his will in London. In the same month he left England & went to Florence, where he remained two months, & thence to R. He then lived, sometimes in the castle of R., sometimes in furnished lodgings in the adjacent towns, till Oct. 1833, when he went to Rome & there lived in furnished lodgings until his death in Feb. 1834. Upon these facts:—*Held*: (1) there was no evidence of testator's having actually acquired a domicile at R., or elsewhere abroad, although they indicated an intention to make R. his domicile; (2) his English domicile therefore remained, & legacy duty was conse-

quently payable on the bequests contained in his will.—*A.-G. v. DUNN* (1840), 6 M. & W. 511; 151 E. R. 514.

*Annotations*:—*As to* (1) *Consd.* *Lyll v. Paton* (1856), 25 L. J. Ch. 746. *As to* (2) *Refd.* *Thomson v. Advocate-General* (1845), 12 Cl. & Fin. 1.

**422.** ———.]—An officer in the East India Co.'s service, who had attained the rank of full colonel, & was, consequently, by the rules of the service, relieved from the obligation of residing in India, came to England, where he bought & furnished a house which he occupied. He, subsequently, filled the successive offices of Governor of the Cape of Good Hope, & of Madras, during which time he let his house furnished, & at the expiration of those services he returned to England & reoccupied his house. Whilst there he made his will, describing himself as of No. 67, etc., i.e. the house in question. After a short residence in England he went to Malta for the benefit of his health, where he died, having made two codicils there to his will, in which he described himself as "of No. 67, Eaton-place, Belgrave-square, in the county of Middlesex, & now residing at La Valetta." There was evidence in letters of testator, & otherwise that he had expressed a wish, & in a certain event an intention, to return to India for good:—*Held*: the presumption of law, in favour of his English domicile, arising from his residence in England, his purchase & occupation of a house, & the description of himself in his will & codicils, was irresistible, & was not counter-balanced by the expressions of an intention, which he never carried into effect, of returning to end his days in India, & consequently, his domicile was English at the time of his death.—*A.-G. v. POTTINGER* (1861), 6 H. & N. 733; 30 L. J. Ex. 284; 4 L. T. 368; 7 Jur. N. S. 470; 9 W. R. 578; 158 E. R. 303.

*Annotations*:—*Refd.* *A.-G. v. Kent* (1862), 1 H. & C. 12; *Winans v. A.-G.*, [1904] A. C. 287; *Casdagli v. Casdagli*, [1919] A. C. 145.

**423.** ———.]—*A.-G. v. KENT*, No. 396, *ante*.

**424.** ———.]—R., a domiciled Englishman, born in England of English parents, resided in England, & practised at the bar until the year 1856; he was then appointed by her Majesty to be Chief Justice of the Island of Ceylon, where he went with his wife & family, & continued there, holding the office of chief justice until his death in the year 1859; he left his law books in England, but had invested large sums of money in Ceylon on mtge.; after his death his widow & extrix. obtained probate of his will from the district ct. of Colombo in Ceylon, & proved his will also in the principal registry of her Majesty's Ct. of Probate, but declined to pay legacy duty on the personal estate of testator, on the ground that he was, at the time of his death, domiciled in the island of Ceylon, & not in England. Upon information filed by the A.-G. on behalf of the Crown for the legacy duty:—*Held*: (1) England being the domicile of origin of R., the *onus probandi* was upon the party, who alleged R. had abandoned it & acquired another domicile, to establish that proposition; (2) the presumption of law was against the intention to abandon the domicile of origin; (3) as every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of abandoning his domicile of origin, this change must be *animo et facto*, & as there was no such intention or change, legacy duty was, therefore, payable for R.'s personal estate to the Crown.—*A.-G. v. ROWE (LADY)* (1862), 1 H. & C. 31; 31 L. J. Ex. 314; 6 L. T.



438; 8 Jur. N. S. 823; 10 W. R. 718; 158 E. R. 789.

*Annotation*:—*As to* (3) *Reid. Re Capdevielle* (1864), 2 H. & C. 985.

425. ———.]—B., an Englishwoman, left England in 1849, & lived with depts. from that date at Baden Baden, till her death in 1863, paying occasional visits only to England. All her personalty was vested in English securities. Her will, made in England, was made in conformity to the laws of England & Baden Baden:—*Held*: her domicile was English, the rule being that a man's domicile was not changed unless he had done all in his power to divest himself of his former domicile.—A.-G. v. *BLUCHER DE WAHLSTATT* (COUNTESS) (1864), 3 H. & C. 374; 5 New Rep. 135; 34 L. J. Ex. 29; 11 L. T. 454; 10 Jur. N. S. 1159; 13 W. R. 163; 159 E. R. 576.

*Annotations*:—*Reid. Haldane v. Eckford* (1869), L. R. 8 Eq. 631; *Douglas v. Douglas*, *Douglas v. Webster* (1871), L. R. 12 Eq. 617. *Mentd. Edinburgh Life Assco. v. Lord Advocate*, [1910] A. C. 143.

426. ——— *Assets at home & abroad.*]—Testatrix, who was born in France in the year 1793, her parents being French subjects, came with them, when she was of age, to England some time before 1837, & lived with them in London until their death, after which she resided with her brother in London till he gave up his house in 1853. She then left with the intention of living at Toulon, her native town, but, on the journey thither, fell ill at Paris, whence she returned to London for surgical treatment, & remained there till her death in 1875. She had taken no lodgings at Toulon, nor sent forward any funds to await her. By her will, which was in the English language, & made in 1869, & in which she was described as of English residence, she left several legacies. It was contended that, under the above circumstances, her French domicile was not lost, or, if lost, was revived by the visit to France in 1853, with the intention of living there, & that, therefore, legacy duty was not payable:—*Held*: as she had merely an ultimate intention of living at Toulon, her domicile was English, & legacy duty was payable.—A.-G. v. *GASQUET* (1877), 41 J. P. 487; 42 J. P. 346.

427. *Partnership share of realty abroad—Deceased domiciled in England.*]—*FORBES v. STEVEN, MACKENZIE v. FORBES*, No. 375, *ante*.

428. ———.]—*Re STOKES, STOKES v. DUCROZ*, No. 376, *ante*.

429. *Estate pur autre vie in British real estate—Deceased domiciled abroad.*]—*CHATFIELD v. BERCHTOLDT*, No. 377, *ante*.

430. *Domicil doubtful—Onus of proof.*]—The *onus* of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost. The domicile of origin continues unless a fixed & settled intention of abandoning the first domicile & acquiring another as the sole domicile is clearly shown. An American citizen left the United States & lived many years in England where he died, leaving by will a legacy on which

the Crown claimed legacy duty on the ground that testator had acquired a domicile in England:—*Held*: the *onus* of showing a change of domicile was upon the Crown & the proof of a fixed & settled purpose was not clearly made out, & legacy duty was not payable.—*WINANS v. A.-G.*, [1904] A. C. 287; 73 L. J. K. B. 613; 90 L. T. 721; 20 T. L. R. 510, H. L.; *reversg. S. C. sub nom. A.-G. v. WINANS* (1901), 85 L. T. 508, C. A.; *subsequent proceedings, sub nom. WINANS v. A.-G.*, [1910] A. C. 27, H. L.

*Annotations*:—*Reid. Re De Almeda, Sourdis v. Keyser* (1902), 18 T. L. R. 414; *Casdagli v. Casdagli*, [1919] A. C. 145; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146; *Rudd v. Rudd*, [1924] P. 72. *Mentd. Re James, James v. James* (1908), 98 L. T. 438; *Waddington v. Waddington* (1920), 36 T. L. R. 359.

### SECT. 3.—EXCEPTIONS FROM CHARGE OF DUTY.

431. *Legacy under £20—Gift of larger sum to be divided in sums under £20.*]—*Re FRANCKLIN'S CHARITY* (1829), 3 Sim. 147; 3 Y. & J. 544; 57 E. R. 954.

*Annotations*:—*Consd. Re Wilkinson* (1834), 1 Cr. M. & R. 142; A.-G. v. *Fitzgerald* (1843), 13 Sim. 83. *Reid. A.-G. v. Nash* (1836), 1 M. & W. 237; *Re Griffiths* (1845), 14 M. & W. 510; *Re Parker* (1859), 4 H. & N. 666.

432. ———.]—Exors. cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest "among poor pious persons, in ten or fifteen pounds, as they should see fit."—A.-G. v. *NASH* (1836), 1 M. & W. 237; *Tyr. & Gr.* 584; 5 L. J. Ex. 289; 150 E. R. 422, Ex. Ch.; *affg. S. C. sub nom. Re WILKINSON* (1834), 1 Cr. M. & R. 142.

*Annotations*:—*Consd. Re Parker* (1859), 4 H. & N. 666. *N.F. Harris v. Howe* (1861), 29 Beav. 261. *Consd. Cullen v. A.-G. for Ireland* (1866), 12 Jur. N. S. 531. *Reid. Re Griffiths* (1845), 14 M. & W. 510.

433. ———.]—Testator gave his residuary estate, which amounted to £13,000, to his exors., to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about Limerick:—*Held*: legacy duty was payable on the residue.—A.-G. v. *FITZGERALD* (1843), 13 Sim. 83; 1 L. T. O. S. 251; 7 Jur. 569; 60 E. R. 33.

*Annotations*:—*Folld. Re Griffiths* (1845), 14 M. & W. 510. *Reid. Re Parker* (1859), 4 H. & N. 666.

434. ———.]—A testator bequeathed to trustees a sum in the £3 per cent. Consols, in trust, as to £1,700 part thereof, to pay & apply the dividends in establishing & supporting a daily school at N., for the instruction of twenty boys, on the principal of a national school; the dividends to be retained by R. & B., two of the trustees, to be so applied; & he directed that B. should be the schoolmaster, & that the management of the school should always remain in the family of B.; & as to £400, other part of the said stock, testator directed that the dividends should be paid by the trustees to & applied by the schoolmaster for the time being of the said school, in providing the

### PART IV. SECT. 3.

p. *Legacy under £20—Gifts to different mission—Schemes of same Church—Regarded as distinct legacies.*]—A bequest under £20 being made to each of several mission, educational & church extension schemes of the Free Church of Scotland:—*Held*: these were not to be considered as several legacies to one legatee, the Free Church, but several & distinct legacies to different legatees; &, being each under £20, legacy-duty was not exigible therefrom.—*STEWART'S TRUS-*

*v. LORD ADVOCATE* (1858), 20 Dunl. (Ct. of Sess.) 453.—*SCOT.*

q. *Charitable gift—Bound by secret trust—Not exempt.*]—A legacy, absolute on the face of the will, but bound by a secret trust for charity accepted by the legatee in the lifetime of testatrix, is not exempt from legacy duty as being a charitable legacy under the Acts regulating the payment of legacy duty in Ireland.—*CULLEN v. A.-G. FOR IRELAND* (1866), 14 W. R. 869.—*IR.*

queathed £2,500 to trustees upon trust to invest the same, & to apply the interest in & towards the support of the nuns & Convent of the Good Shepherd, in Cork, when the same should be established:—*Held*: a good charitable purpose was disclosed by the will, & the legacy was within the exemption in 5 & 6 Vict. c. 82, s. 38, & not liable to legacy duty.—*MAHONEY v. DUGGAN* (1883), L. R. 11 Ir. 260.—*IR.*

s. ———.]—Testatrix, domiciled in Ireland, bequeathed a legacy to the Society for Irish Church Missions.



**Sect. 3.—Exceptions from charge of duty. Sect. 4.]**

boys with pinafores, caps, & shoes, & also with books & slates; such clothes, books, & slates to be left behind them on leaving the school:—*Held*: these bequests were subject to legacy duty.—*Re GRIFFITHS* (1845), 14 M. & W. 510; 15 L. J. Ex. 130; 153 E. R. 577.

*Annotation*:—*Folld. Re Parker* (1859), 4 H. & N. 666.

**435.** ———.]—Bequests to trustees of £2,000 consols, to divide the income yearly between twelve poor persons, but no person to be eligible two years in succession:—*Held*: liable to legacy duty.—*Re PEARCE* (1857), 24 Beav. 491; 53 E. R. 447.

**436.** ———.]—Legacy duty is chargeable upon a fund given for charitable purposes, although it is directed by the donor to be distributed in sums of less than £20 among the individual objects of the charity.—*HARRIS v. HOWE (EARL)* (1861), 29 Beav. 261; 30 L. J. Ch. 612; 25 J. P. 629; 7 Jur. N. S. 383; 9 W. R. 404; 54 E. R. 627.

*See, now*, 1881 Act, s. 42.

**437. Charitable gift—Building & endowing church.]**—A bequest of money for the purpose of building a church & parsonage-house, & of endowing & repairing the church, is subject to a legacy duty of £10 per cent.—*Re PARKER* (1859), 4 H. & N. 666; 29 L. J. Ex. 66; 33 L. T. O. S. 288; 23 J. P. 406; 5 Jur. N. S. 1058; 7 W. R. 660; 157 E. R. 1002.

**438. Money payable under policy of insurance—In Customs Annuity & Benevolent Fund.]**—*A.-G. v. ROWSELL* (1844), 36 Ch. D. 67, n.; 56 L. J. Ch. 942, n.; 36 W. R. 378, n.

*Annotations*:—*Reid. Re Pocock's Policy* (1871), 6 Ch. A. 449, n. *Mentd. Re Maclean's Trusts* (1874), 44 L. J. Ch. 145; *Re Phillips' Insa.* (1883), 23 Ch. D. 235; *Urquhart v. Butterfield* (1887), 36 W. R. 376.

**439. Annuity—Charged on realty & personalty.]**—Where there is a devise to A. for life, of the rents & profits of a real estate, & the interest & dividends of personal property, & after his death, the whole estates, both real & personal, to be divided between B. & C., the exors. & trustees are bound to pay to A. the annual produce of the personal as well as real property, without requiring a receipt stamped as for a legacy; such annual payment not being subject to the tax imposed on legacies.—*GREEN v. CROFT* (1792), 2 Hy. Bl. 30; 126 E. R. 412.

*Annotation*:—*Reid. Hill v. Atkinson* (1816), 2 Mer. 45.

**440.** ——— **Under general power—1805 Act, s. 4.]**—The Marquis of H., by indenture of Oct. 2, 1802, granted certain lands, etc., to trustees to the use of himself for his life, remainder to his son the Earl of Y., testator, for his life, with remainders over. The indenture contained a proviso that it should be lawful for the Earl of Y., by his last will, to limit to the use of himself, or

any other person, any annual sum of money or rent-charge, not exceeding the yearly sum of £700, to be payable out of & charged upon the lands, etc., in the indenture mentioned. The Earl of Y., after the death of his father, by a codicil to his will, limited to Lady S. the annual sum of £700 payable out of the said lands, & afterwards died:—*Held*: no legacy duty was payable in respect of the annuity, it not being clearly the intention of 1815 Act or 1805 Act, ss. 4, 5, to render such a gift liable to duty.—*A.-G. v. HERTFORD (MARQUIS)* (1845), 14 M. & W. 284; 14 L. J. Ex. 266; 5 L. T. O. S. 266; 153 E. R. 484; *subsequent proceedings* (1849), 3 Exch. 670.

**441. Legacy charged on realty—Under general power—1845 Act, s. 4.]**—A., by deed dated in 1802, conveyed certain lands to trustees, to the use of himself for life, remainder to B., his son for life, remainder to deft., his grandson for life, with remainders over. The deed provided, that it should be lawful for deft. & the survivor of A. & B. to declare any new uses of the lands. A. died in June, 1822, & by indenture of appointment of Oct. 1822, B. & deft. declared that it should be lawful for B. by deed or will to charge the lands with the payment of any sum not exceeding £47,000. In 1823, B. by his will charged the lands with payment to his exors. of £47,000 to be applied in payment of his debts, etc., & the residue in trust for deft. B. died in 1842, & in 1847 his exors. raised £11,259 11s. 8d., part of the £47,000, & paid it to deft., the debts having been previously paid:—*Held*: this was a gift by will, within 1845 Act, although it operated originally by virtue of a power, & legacy duty was chargeable on the sum of £11,259 11s. 8d. it not having been paid to deft. until after that Act came into operation, notwithstanding testator died before.—*A.-G. v. HERTFORD (MARQUIS)* (1849), 3 Exch. 670; 18 L. J. Ex. 332; 13 L. T. O. S. 121; 154 E. R. 1014.

*Annotation*:—*Mentd. A.-G. v. Theobald* (1890), 24 Q. B. D. 557.

**442. Fund held on permanent trust.]**—By Customs & Inland Revenue Act, 1885 (c. 51), s. 11, it is enacted that "whereas certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, & it is expedient to impose a duty thereon by way of compensation to the revenue . . . there shall be levied . . . in respect of all real & personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending Apr. 5, 1885, or during any subsequent yearly period ending on the same day in any year a duty at the rate of £5 per cent. upon the annual value, income, or profits of such property accrued to such body, corporate or unincorporate in the same yearly

The object of this Society, which had its head office in London, was "to promote the glory of God in the salvation of the souls of our Roman Catholic fellow-subjects in Ireland, through the instrumentality of the Church of Ireland":—*Held*: the legacy was for purposes in Ireland merely charitable, & was exempt from legacy duty.—*A.-G. v. BECHER*, [1910] 2 I. R. 251; 44 I. L. T. 67.—IR.

**t.** ———.]—Bequest by a parish priest in Ireland of "all my property & money to the poor." The assets were all in Ireland, & the will was proved there:—*Held*: liable to legacy duty. To bring a legacy, for a purpose merely charitable, within the exemption from legacy duty in 5 & 6 Vict. c. 82, s. 38,

it must appear by the will itself that the charitable purpose is to be restricted to Ireland.—*KENNY v. A.-G.* (1883), L. R. 11 Ir. 253.—IR.

**a.** ——— *Not masses for repose of testator's soul.]*—Legacies for masses for the repose of testator's soul directed to be said in a public church in Ireland:—*Held*: not to be exempted from legacy duty by 5 & 6 Vict. c. 82, s. 38.—*PERRY v. TUOMEY* (1889), L. R. 21 Ir. 480.—IR.

**b.** ——— *What amounts to.]*—A testator bequeathed money for the advancement, benefit, & support of certain missions & of a theological & training institution founded by the church of a particular denomination:—*Held*: (1) the words "charitable

bequests" in Charitable Gifts Duties Exemption Act, 1883, s. 2, being stated to include certain purposes, thereby excluded others; (2) the gift to the missions was for religious purposes, for promoting the tenets of the church; (3) the theological training institution was not a "public institution" within the meaning of sect. 2; (4) in neither case was the gift exempt from the payment of duty chargeable under Deceased Persons Estates Duties Act, 1881.—*Re PROBERT'S WILL* (1892), 10 N. Z. L. R. 578.—N.Z.

**c.** ——— *Restricted to purposes operating in New Zealand.]*—(1) In Death Duties Act, 1909, s. 43, the words "in New Zealand" qualify the words "charitable trust" & the sect. applies

period. . . .” By sect. 12 of the same Act, the term “body unincorporate” includes “every . . . trustee, or number of trustees, to or in whom respectively any real or personal property shall belong in such manner, or be vested upon such permanent trusts, that the same shall not be liable to legacy duty or succession duty.” By Statute Law Revision Act, 1898, c. 22, the recital in 1885 Act, s. 11, was repealed. In June, 1897, the Corpn. of the City of London for the purpose of paying off a debenture debt, & of raising further moneys, created an issue of debenture stock. In connection with the issue an indenture was entered into on June 24, 1897, between the Corpn. & certain officials of the City of London who, including their successors in office, were described as “the trustees.” By the indenture the Corpn. charged in favour of the trustees in trust for the stockholders all rents & income derived from their freehold & leasehold estates, & also, other income of the Corpn., with the payment of all moneys for the time being owing on the security of the indenture. It was also provided that for better securing & providing for the redemption of the stock the Corpn. should out of their annual income, after providing for the annual interest on the stock, set aside on Jan. 1, & July 1, in every year, so long as any of the stock should remain unredeemed, the half-yearly sums of £7,500 & should invest all such half-yearly sums & the resulting income thereof from time to time; & towards the fund so created should be applied by the Corpn. towards the redemption of the stock after it should have become redeemable. Certain powers were conferred upon the trustees in case of default by the Corpn. of the performance of their obligations under the indenture. Since the date of the deed the half-yearly sums of £7,500 had been regularly invested in the purchase of stock in the names of the trustees. The dividends & interest from the investments were as they arose applied by the Bank of England in the purchase of similar stocks. The purchases & investments were made with the consent of the Corpn. & at the request of the trustees:—*Held*: (1) the language in the recital to 1885 Act, s. 11, must be read in contradistinction to the language in the enacting part of the sect., which did not refer, as the recital did, to “certain property which escapes liability to probate, legacy, or succession duties,” but included “all real & personal property belonging to or vested in the Corpn. during any of the yearly periods”; (2) under the deed the holders of the debenture stock had no rights against or interest in the fund or its income which respectively belonged & accrued to the Corpn., provided they performed their obligations under the indenture, until the redemption period arrived when the debenture stock-holders were entitled to be paid out of the fund; (3) upon the assumption that the view that the fund belonged to the corpn. was wrong the trustees held the fund “upon such permanent trusts” that the same was not liable to legacy or succession duty within sect. 12 of the Act, inasmuch as the words “such permanent trusts” meant trusts of a sufficiently permanent

character to prevent property being liable to legacy or succession duty on the death of individuals, & the fund in the hands of the trustees was not liable to those duties; the duty imposed by sect. 11 was, therefore, chargeable upon the income of the fund.—*A.-G. v. LONDON (CITY) CORPN.*, [1913] 2 K. B. 497; 82 L. J. K. B. 698; 108 L. T. 661; 29 T. L. R. 494; 6 Tax Cas. 313, C. A.

**By directions of testator.**—See Sect. 7, sub-sect. 2, *post*.

#### SECT. 4.—RATES OF DUTY.

*See, now*, 1909–1910 Act, s. 58 (2), (4).

**443. Legacy to married woman not for her separate use—Rate not affected by marital right of husband.**—Bequest of all the rest, residue, etc., of the personal estate of a testator to his son-in-law, G. & to his, testator's, daughter P., his wife, their exors., administrators & assigns, for their absolute benefit:—*Held*: not to be chargeable under 1815 Act, Sched. III., with the highest duty of £10 per cent. on the whole amount, as being a legacy given to, or devolving to or for the benefit of G., the husband, a stranger in blood to deceased, nor to be chargeable wholly with the lowest duty of 1 per cent., as being a legacy given to, or devolved to or for the benefit of a child of deceased, in the person of the daughter, but to be chargeable by moieties as being a bequest for the benefit of each to the amount of one-half, & therefore, as to one moiety, chargeable to the highest, & as to the other to the lowest duty.—*A.-G. v. BACCHUS* (1823), 11 Price, 547; 147 E. R. 560, Ex. Ch.

*Annotations*:—*Folld. A.-G. v. Burnie* (1830), 3 Y. & J. 531. *Mentd. Atcheson v. Atcheson* (1849), 11 Beav. 485; *Ward v. Ward* (1880), 14 Ch. D. 506.

**444. ———.**—A bequest of a residue, of whatever it may consist, such money as arises from it to be invested in the public funds, the interest to be appropriated to testator's son & his wife, a stranger in blood, for their lives, with remainder to the grandchildren of testator, in equal proportions, is liable to legacy duty, to be calculated at the rate of £1 per cent. for the son's moiety, & £10 per cent. for that of the wife, upon the principle that the son & his wife each take a life interest in one moiety of the income of the residue.—*A.-G. v. BURNIE* (1830), 3 Y. & J. 531; 148 E. R. 1290.

**445. Probate revoked under compromise—Rate depends on relationship of next of kin.**—By an instrument purporting to be the will of S., deceased, the whole of S.'s personalty, amounting in the net to £12,748, was bequeathed to J., a stranger in blood, who was made exor. J. took out probate, & paid the duty of 10 per cent. on the whole net. Afterwards T., the next of kin to S., disputed the will, on the ground that S. was not of disposing mind. J. paid £6,000 to T., & consented that the will should be revoked, & administration taken out by T., who, in consideration thereof, released to J. her claim on the £12,748. T., from her nearness in blood, was liable to a duty of less

only to charitable trusts for the benefit of persons in New Zealand; (2) the exemption from stamp duty contained in Finance Act, 1915, Sched. 7, “Conveyances” Exemption (C.), must be similarly restricted to purposes operating in New Zealand for the benefit of the people there.—*GARLAND v. STAMP DUTIES (MINISTER OF)*, [1919] N. Z. L. R. 792.—N.Z.

**d. Money provided by antenuptial**

*contract.*—A husband, by antenuptial contract, provided £20,000 to the children of the marriage, payable after his death, reserving power of division or apportionment, & declaring it in full of bairns' part of gear, *legitim*, portion, natural, executory, or anything else which they could claim through his decease:—*Held*: this provision was not liable to legacy duty.—*ADVOCATE-GENERAL v. TROTTER* (1847), 10 Dunl. (Ct. of Sess.) 56.—SCOT.

#### PART IV. SECT. 4.

**e. Legacy released by order of court—Rate payable by next-of-kin.**—A competition between a person claiming a bequest on behalf of a class of beneficiaries under a will & the next-of-kin of testator was terminated by joint minute under which each party received one-half of the subject of the bequest:—*Held*: under 36 Geo. III., c. 52, s. 23, the bequest having been



*Sect. 4.—Rates of duty. Sect. 5.]*

than 10 per cent. :—*Held* : under 1796 Act, s. 37, J. was entitled to a return of duty, not only on the £6,000, but also on the remaining £6,748, & the duty on the whole £12,748, was to be accounted for between T. & the Comrs. of Stamps, as duty charged on T., at the lower rate.—*R. v. STAMPS COMRS.* (1844), 6 Q. B. 657; 1 New Pract. Cas. 106; 4 L. T. O. S. 154; 115 E. R. 248.

**446. Natural child legitimated according to law of father's domicile—Rate of legitimate child.]—**A testator of English birth, but domiciled in France, gave, by his will, shares in the proceeds of converted real estate in England to his two daughters, who were not born in wedlock, but had been legitimated according to the law of France :—*Held* : the status of the daughters in England must be their status according to the law of France, i.e. that of legitimate "children" & not of "strangers in blood," & legacy duty at the rate of £1 per cent. was payable upon the shares taken by them under their father's will.—*SKOTTOWE v. YOUNG* (1871), L. R. 11 Eq. 474; 40 L. J. Ch. 366; 24 L. T. 220; 19 W. R. 583.

*Annotations* :—*Reid. Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Re Andros, Andros v. Andros* (1883), 24 Ch. D. 637. *Mentd. Re Grey's Trusts, Grey v. Stamford*, [1892] 3 Ch. 88.

**447. Settlement on wife, husband & children—Subsequent bequest to children—Rate as child or stranger.]—***Re PALMER* (1858), 3 H. & N. 26; 30 L. T. O. S. 309; 157 E. R. 374.

**SECT. 5.—VALUE CHARGEABLE.**

*See* 1796 Act, ss. 8–12, 15–19, 23.

**448. What is gross value—Value at date of delivery of account for computation.]—**The legacy duty is to be paid upon the aggregate amount of the residue of testator's property at the time of the exor.'s delivering into the stamp office the note of what he intends to retain as residuary legatee.

The duty which is to be charged & paid in respect of any legacy, "according to the amount or value of the property taken in satisfaction thereof," must mean according to the value of the property at the time of taking it in satisfaction for the legacy (*MACDONALD, C.B.*).

The public had a right to the £10 at first, & so have they to the profit made by that £10, after it had legally vested in the govt. (*MACDONALD, C.B.*).—*A.-G. v. CAVENDISH* (1810), Wight. 82; 145 E. R. 1183.

*Annotation* :—*Mentd. A.-G. v. Giles* (1860), 5 H. & N. 255.

**449. ——— Including accretions of income to date.]—**When a legacy is not paid at the time appointed by testator, legacy-duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital & interest, which is ultimately received by the legatee.

A certain sum has been appropriated to the satisfaction of the legatees, & the payment of the

duty; for a sum appropriated for the legacies, must be considered as appropriated in part for the payment of the duty which attaches upon the legacies. It must be considered as so appropriated, from the time when the legacies were payable; at that time, a certain proportion of the appropriated sum would have belonged to the legatees, & a certain proportion of it would have belonged to the Crown; & it appears to me to be the justice of the case & not contrary to the Acts of Parliament, but rather consonant to their whole tone & spirit, that the legatees should have that part of the fund which they would have had, if the appropriation had been made at the time fixed by the will, & that the Crown should have the full benefit of that part of the fund, which it would have been incumbent on the ct., at the same time, to have set apart for the discharge of the duty (*LORD LYNDHURST, C.*).—*THOMAS v. MONTGOMERY* (1827), 3 Russ. 502; 38 E. R. 664, L. C.

*Annotations* :—*Reid. Wright v. Barnwall* (1849), 13 Jur. 1041. *Mentd. A.-G. v. Giles* (1860), 5 H. & N. 255.

**450. ———.]—**An exor. allowed the legatee of leasehold to occupy for fifteen years, the legacy duty being unpaid. The exor. was then called upon to pay duty on the profits accruing for the fifteen years as well as on the principal value of the premises :—*Held* : he was liable to the whole of such duty, & he might recover all the money paid on that account, as money paid to the use of the legatee.—*BATE v. PAYNE* (1849), 13 Q. B. 900; 18 L. J. Q. B. 273; 13 Jur. 609; 116 E. R. 1507; *previous proceedings* (1848), 12 L. T. O. S. 124.

**451. Legacy compounded—Value of property taken in satisfaction at time of taking.]—***A.-G. v. CAVENDISH*, No. 448, *ante*.

**452. Forgiveness of debt—Interest from death not added.]—***A.-G. v. HOLBROOK*, No. 328, *ante*.

**453. Bequest of sum to purchase annuity—Duty charged on sum bequeathed.]—**(1) Devise to the devisor's wife for life, & from & after her decease to trustees, upon trust to sell, & among other bequests to lay out £500 in an annuity for the life of his son :—*Held* : this gave a vested interest to the son, surviving the devisor, but dying in the lifetime of the wife, the period of enjoyment being deferred with reference to the circumstances of the estate, not of the legatee.

It is clear he meant an annuity to be purchased with the £500; which is the same in effect as giving a legacy of £500 to his son; for upon a bill filed he might have received the money; & the ct. would not have compelled the trustees to lay it out in an annuity (*GRANT, M.R.*).

(2) Where a sum of money was bequeathed in trust to lay it out upon Govt. or other securities in the purchase of an annuity for life :—*Held* : this was a direction to lay it out in an annuity for life, the will making several dispositions of stock, both as to the dividends & the capital.—*BAYLEY v. BISHOP* (1803), 9 Ves. 6; 32 E. R. 501.

*Annotations* :—*As to* (1) *Consd. Palmer v. Craufurd* (1819),

released for payment of one-half of its amount, duty at the rate of 10 per cent. was payable on that half only, & the half payable to the next-of-kin was liable to 3 per cent. duty.—*LORD ADVOCATE v. FRECKLETON'S JUDICIAL FACTOR* (1894), 21 R. (Ct. of Sess.) 743; 31 Sc. L. R. 637.—*SCOT.*

**PART IV. SECT. 5.**

**448 i. What is gross value—Value at date of delivery for computation.]—**Testator conveyed the benefit which belonged to him, in Scottish & English patents for an invention, to trustees, directing them to hold his share till the

expiry of the patents to accumulate the profits into a fund for the protection of his estate from unexpected claims, & then to divide & appropriate the same to parties in certain proportions of shares. In a suit for legacy duty on the deceased's interest in the Scottish patent :—*Held* : duty is due upon the whole sum realised, & forming the fund for division.—*ADVOCATE-GENERAL v. OSWALD* (1848), 10 Dunl. (Ct. of Sess.) 969.—*SCOT.*

**449 i. ——— Including accretions of income to date.]—**A legatee sold an "annuity of £2,500 a year, such annuity to be receivable by

the purchaser from June 7, 1831," the period at which it had vested in the legatee :—*Held* : the purchaser was liable for the legacy duty upon a sum of £12,000 which constituted a part of the capital from which the annuity was derivable, & upon the interest of this sum from June, 1831, the date at which he acquired right to it, down to 1842 at which period the duty had been settled for with government by the trustees of testator.—*NISBETT'S TRUSTEES v. LEARMONTH* (1845), 8 Dunl. (Ct. of Sess.) 69; 18 Sc. Jur. 34.—*SCOT.*



3 Swan. 482. **Expld.** *Day v. Day* (1854), 23 L. T. O. S. 216. **Consd.** *Power v. Hayne* (1869), L. R. 8 Eq. 262; *Re Robbins, Robbins v. Legge*, [1906] 2 Ch. 648. **Refd.** *Dawson v. Hearn* (1831), 1 Russ. & M. 606; *Walters v. Corpe* (1851), 15 Jur. 764; *Hatton v. May* (1876), 3 Ch. D. 148; *Re Mabbett, Pitman v. Holborrow*, [1891] 1 Ch. 707.

**454. Annuity—Gift of income to A. for life subject to annuity to B. for life—Duty payable as on annuity for life of A.]—**A testator, by his will, directed his exors. to assign the residue of his personal estate to the trustees of the settlement of his niece Mrs. A., the wife of A., on trust out of the annual income to pay to her during the joint lives of herself & husband an annuity of £2,000 for her separate use, & that they should stand possessed of the residue upon such trusts & for such persons, interests, etc., as were expressed in a deed of settlement of the said Mrs. A. The deed of settlement provided that the trustees should stand possessed of the settled property upon trust, during the joint lives of the said A. & his intended wife Mrs. A. to pay her an annuity of £500, upon trust to pay the residue or surplus of the dividends & annual produce of the stocks, funds, etc., unto A., & authorised him to receive the same during his life, & after the decease of either of them, to pay the dividends to the survivor, & authorised him, her or them to receive the same during the life of the survivor. 1796 Act, imposing duties on legacies, by sect. 8, enacted that the value of any legacy given by way of annuity for life or for years determinable on any life or for years or other period of time should be calculated, & the duty charged according to the tables in the sched.:—**Held:** the duty was to be charged on the value of £2,000 a year to Mrs. A. for the joint lives of herself & her husband A., & on the value of the residue of the income for the single life of A.—*A.-G. v. WYNFORD* (LORD) (1854), 9 Exch. 746; 2 C. L. R. 1129; 23 L. J. Ex. 223; 156 E. R. 319.

**455. — How value ascertained—1853 Act, s. 31, Sched.]—**1853 Act, s. 31, which enacts, that where it shall be required to calculate for the purpose of legacy duty, the value of any annuity, such value shall, after the time appointed for the commencement of that Act, be calculated according to the tables in the Sched. to that Act, & not according to the tables in 1796 Act, is confined to cases where testator died after the commencement of the Act, & does not extend to cases where, the death being before, the acts of calculation & payment occur after the commencement of the statute.—*Re CORNWALLIS* (1856), 11 Exch. 580; 25 L. J. Ex. 149; 26 L. T. O. S. 295; 4 W. R. 711; 156 E. R. 902.

**Annotation:—Consd.** *Bell v. Master in Equity of Supreme Court of Victoria* (1877), 2 App. Cas. 560.

**456. Joint tenancies—Proportionate charges.]—***A.-G. v. BACCHUS*, No. 443, *ante*.

**457. — — —.]—***A.-G. v. BURNIE*, No. 444, *ante*.

**458. Successive beneficiaries — Beneficiaries liable to same rate of duty—Duty payable in same manner as if legacy to one person—Unless given as annuity to A. & fund to B.]—**A testator bequeathed annuities to persons all subject to the same rate of duty, & directed his trustees to continue at interest sums which should be amply sufficient to pay out of the income thereof such of the annuities as should be existing & to divide the residue of the principal monies between the surviving annuitants & their respective children, including the children of deceased annuitants, & to divide among the children of the first-named annuitants, on the death of one or more of the

others, such part of the principal monies as would not be required for payment of the subsisting annuities until all the principal money provided by the sale of his residuary estate should be paid & divided among such children to whom he bequeathed the same. In other parts of the will testator spoke of the annuities & residuary estate distinctly:—**Held:** the legacy duties were payable on the annuities as annuities, & not at once on the whole residuary estate as bequeathed in succession to persons chargeable with the same rate of duty.—*CROW v. ROBINSON* (1862), 4 De G. F. & J. 337; 31 L. J. Ch. 516; 6 L. T. 372; 10 W. R. 306; 45 E. R. 1213, L. JJ.

**459. — — — — —.]—**J., by will, gave all his real & personal estates, not specifically bequeathed, to trustees, upon trust to pay an annuity of £100 a year to his wife for life, & after her decease to pay to his natural daughter, M., the sum of £600; & after making several other bequests, then as to a certain freehold public-house, after the decease of his wife, upon trust to pay the rents & annual income to be derived therefrom unto his natural daughter E. for her life, & after her death to stand possessed of the said public-house, in trust for such of the children of the said E. as might be then living, & the issue of any that might be dead, share & share alike; & as to all the residue of his estates, after answering the several purposes aforesaid, he directed his said trustees to invest the same, & pay two-thirds of the dividends thereof unto the said E. during her life, & after her death the principal to be equally divided between her children on attaining 21 years; the remaining one-third to be paid unto the said M. during her life, & after her death the principal to be equally divided between her children. By a codicil to his will testator stated that the said freehold public-house had been sold & realised £2,200, & he, therefore, revoked the devise of the said public-house in his will mentioned in favour of the said E. & her children, & in lieu thereof he directed his said trustees to stand possessed of the sum of £2,200 & invest the same, & to pay the interest arising therefrom unto the said E. for her life, in manner in his said will expressed with reference to the rents of the said public-house so sold as aforesaid; & after her death to stand possessed of the said sum of £2,200 for the benefit of the children of the said E. as in the said will mentioned, & he thereby gave & bequeathed the same to them accordingly. Upon testator's death, his widow being still alive, the exor. in the residuary account deduced from the net amount of the residue on which duty was now payable the sum of £2,800 which he claimed to detain to answer the above outstanding legacies of £600 & £2,200. The Comrs. of Inland Revenue, on the other hand, claimed payment of duty on the said two legacies as having fallen into the residue:—**Held:** (1) legacy duty at the rate of £10 per cent. was payable at once by the exor. upon the two several sums of £600 & £220; (2) as to both sums, under the express provisions of 1796 Act, s. 12, as "a legacy or residue, or part of any personal estate given over for the benefit of, or so that the same shall be enjoyed by, different persons in succession, chargeable with duties at one & the same rate; (3) according to the provisions of that sect. or of sects. 1, 2, 3, of the Act, or of the whole of them taken together, the Crown was entitled to that amount of duty.

In this case, which was a writ of summons from the Exchequer, calling on the exor. to show cause why he should not deliver an account of deceased's estate, & pay the legacy & succession duties

*Sect. 5.—Value chargeable. Sect. 6: Sub-sect. 1.]*

chargeable thereon, the practice as to the right to begin being stated to have varied, the Ct. decided to hear counsel for the Crown in the first instance.—*Re GREENWOOD* (1869), as reported in 21 L. T. 25.

**460. — Beneficiaries liable to different rates of duty—Life interests chargeable as annuities.]—**A testator gave his residuary estate upon trusts for sale & conversion & to pay the income of the proceeds to three persons during their joint lives in equal shares, with remainder, in the events that happened, both as to income & capital, to all their children living at the death of the survivor of them who should attain 21, or being female marry. The will contained no gift over in the event of the life tenants dying without issue who would take a vested interest. At the death of testator the life tenants were all under thirty years of age & unmarried. The life tenants were chargeable with legacy duty at 10 per cent. upon their interests, & their issue would also be chargeable at the same rate. The next of kin of testator who were entitled in default of the contingent class of issue consisted of several persons who would be chargeable with legacy duty at 1 per cent. & 5 per cent. respectively:—*Held*: different persons being entitled in succession, & the rates of payment being different, the case fell within the latter part of 1796 Act, s. 12, & sect. 17 of that Act did not apply; (2) accordingly, the exors. should pay duty calculated at 10 per cent. on the value of the life interests out of income, by instalments spread over four years; (3) should the life tenants die during that period the instalments would cease, & the ultimate duty be payable by the remainderman at the proper rate.—*Re DUPPA, FOWLER v. DUPPA*, [1912] 2 Ch. 445; 81 L. J. Ch. 737; 107 L. T. 522; 56 Sol. Jo. 721.

**461. Money directed to be applied in purchase of real estate—Beneficiary becoming entitled in possession before application—Duty charged as on absolute bequest of personalty.]—**A testator, who died in 1800, by his will bequeathed to trustees a fund to be laid out in land, which was to be conveyed to the use of C., his eldest son, for life, remainder to C.'s first & other sons in tail male, remainder to J., his second son, for life, remainder to J.'s first & other sons in tail male, remainder to his own right heirs. C. & J. died without issue & intestate, & S., testator's only daughter, became entitled to the fund, being heir-at-law to testator, as well as to C. & J. She died intestate, & at her death, the fund, which had never been invested in land, passed to E., who was grand-nephew of testator & heir-at-law of testator & of C., J., & S.:—*Held*: under 1796 Act, s. 19, duty was payable by E. at 5 per cent. as on a bequest from S.—*DE LANCEY v. R.* (1872), L. R. 7 Exch. 140; 41 L. J. Ex. 64; 26 L. T. 400; 20 W. R. 441, Ex. Ch.

*Annotation*:—*Mentd. Macfarlane v. Lord Advocate*, [1894] A. C. 291.

**462. — — — — —.]—**T., who died in 1854, devised his real estate, in the events which happened, to the use of B. for life, with remainder to the use of his first & other sons in tail male,

**461 i. Money directed to be applied in purchase of real estate—Beneficiary becoming entitled in possession before application—Duty charged as on absolute bequest of personalty.]—**Where a testator by his will directs his trustees within six years of his death to realise his whole estate & to purchase at their discretion land in Scotland & settle it

in tail, & the heir of entail, after valuing the succeeding interests, dis-entails, the Crown is entitled to legacy duty upon the capital value of the entire residue, the heir of entail having "become entitled to an estate of inheritance in possession in the real estate to be purchased therewith," within the proviso to 36 Geo. 3, c. 52,

with remainder to the use of B. in fee: & testator bequeathed his residuary personal estate to trustees in trust for sale & to invest the proceeds in the purchase of land to be settled to the like uses, the income of the proceeds until such investment being payable in the same manner as the rents & profits of the land when purchased. In 1864 B. became tenant for life, & legacy duty was paid at 1 per cent. on his life interest in the residuary personal estate not invested in the purchase of land. In 1893 B. died without male issue, having by his will declared that all money liable to be laid out in land under T.'s will, & to which he, B., should be absolutely entitled in default of male issue, should be considered as part of his personal estate. Under 1881 Act, B.'s exors. paid affidavit duty at 3 per cent. on his personal estate, including the residuary personal estate subject to the trusts of T.'s will & not yet laid out in land, after deduction for B.'s debts:—*Held*: at the moment of his death without male issue, B. "began to enjoy the benefit" of the capital of T.'s then subsisting residuary personal estate, within 1796 Act, s. 12, & therefore, on his death legacy duty at 1 per cent. became, by that sect. & sect. 19, payable under T.'s will on such capital, notwithstanding the affidavit duty already paid on B.'s estate.

I think it impossible to say that B. ever reserved his legacy, because he did not; but I do think it possible & right to say that "he began to enjoy the benefit" of it. No doubt that was only at the moment of his death (*KEKEWICH, J.*).—*KENLIS (LORD) v. HODGSON*, [1895] 2 Ch. 458; 64 L. J. Ch. 585; 72 L. T. 866; 13 R. 603.

**Deductions allowed in estimating value of residue.]—**See 1815 Act, s. 2, Sched., Part III.

## SECT. 6.—COLLECTION OF DUTY.

## SUB-SECT. 1.—WHEN DUTY PAYABLE.

See 1796 Act, ss. 6, 8–14, 19, 26; 1909–1910 Act, s. 63.

**463. Vests in Crown at death.]—***A.-G. v. CAVENDISH*, No. 448, *ante*.

**464. Appropriated to Crown when payable.]—***THOMAS v. MONTGOMERY*, No. 449, *ante*.

**465. On payment of legacy.]—**A testator died in Aug. 1861, & his exors. remitted to their solr. £80 to obtain probate & £25 to pay legacy duty. The solr. became bkpt. in Nov. 1861, & the money was lost:—*Held*: the exors. would be allowed the £80 but not the £25, the latter advance being premature, the legacies not having been paid by 1863.—*CASTLE v. WARLAND* (1863), 32 Beav. 660; 2 New Rep. 433; 55 E. R. 259.

*Annotation*:—*Mentd. Re Mackay, Griessemann v. Carr*, [1911] 1 Ch. 300.

**466. What amounts to retainer—Settled legacy—Money retained by executor & interest paid to tenant for life.]—**A legacy bequeathed by will of a person dying in 1771 of a sum of money to an

s. 19.—*MACFARLANE v. LORD ADVOCATE* (1894), 6 R. (Ct. of Sess.) 287, H. L.—SCOT.

## PART IV. SECT. 6, SUB-SECT. 1.

**1. When legacy is paid—Not when right to it accrues.]—**On the death of a son intestate, money in the funds devolved upon his father, who did not



exor. to pay the interest thereon to testator's natural child for his life, & on his death to pay over the principal to his children, the interest of which had accordingly been regularly paid to the legatee for life up to his death, which happened in 1812, his two sons, his only children, having died long before that time & previously disposed of their interest in the bequest:—*Held*: the legacy was within 1808 Act, Sched. III., as being a legacy given by will of a person dying before Apr. 5, 1805, & not paid, retained, satisfied or discharged till after Oct. 10, 1808, & consequently liable, as to the interest taken by the representatives of the children, to the duty of 8 per cent., imposed by that statute on such legacies when given for the benefit of strangers in blood to testator, & notwithstanding the principal, had, in 1794, been invested in the funds by the exors., in their own names, to answer the purposes of the will.—*A.-G. v. MANNERS (LADY) (1815), 1 Price, 411; 145 E. R. 1446.*

*Annotations*:—*Consd. Hill v. Atkinson (1816), 2 Mer. 45. Foll. A.-G. v. Wood (1828), 2 Y. & J. 290. Consd. A.-G. v. Loscombe (1860), 5 H. & N. 564.*

**467.** — — — — —.]—A., who died in 1794, bequeathed a legacy, in consolidated stock, to exors., in trust to pay the interest to B. for life; remainder, after B.'s decease, to the surviving children of B. on their attaining 21; remainder, if no surviving children, to the appointment of B.; remainder, in default of appointment, to B.'s next of kin: upon A.'s death the exors. transferred the legacies into their own names from that of testator, paid testator's debts, & accounted for the residuary estate to the residuary legatee; the dividends were regularly paid by the exors. to B. until 1826, when B. died, leaving three children:—*Held*: the transfer did not amount to a payment, delivery, retainer, satisfaction, or discharge of the legacy, before Aug. 31, 1815, & was, therefore, liable to the duty under 1815 Act.

All that the Lord Chancellor [Lord Eldon in *Hill v. Atkinson*] says is, that a transfer by an exor. to himself as trustee is an appropriation of the legacy. It has been so held for a considerable length of time. For particular purposes unquestionably, it is an appropriation. If an exor. transfer into his own name as trustee the amount of a particular legacy, & acts upon that transfer, that is an appropriation as against many persons & in particular as against himself. But the question here is, whether that act so done is to be considered as a delivery of the legacy as against the revenue, & this Act of Parliament: whether it is a retainer, or a satisfaction, or a discharge. . . . Can anybody of good sense contend, that it has been delivered, retained, satisfied, or discharged when the same money is now in his hands, & he is liable for it to the persons beneficially entitled to this legacy? (ALEXANDER, C.B.).

Satisfied & discharged means, when it is paid; these words are synonymous to those which precede them (HUBBOCK, B.).—*A.-G. v. WOOD (1828), 2 Y. & J. 290; 148 E. R. 928.*

*Annotation*:—*Dist. A.-G. v. Loscombe (1860), 5 H. & N. 564.*

**468.** — — — — —.]—*A.-G. v. HANCOCK, No. 322, ante.*

**469.** — — — — —.]—*Payment of fund into court—Under order of court.*—*HILL v. ATKINSON, No. 321, ante.*

**470.** — — — — —.]—A testator bequeathed a sum of money to A. for life, & after her decease to her children, as she should appoint, & in default of appointment, equally among all her children, who, if sons, should attain 21, or, if daughters, should attain that age or be married; & if she should have no such children, then according to her appointment, & in default of appointment, over. Upon the death of testator, a suit was instituted for the purpose of having this legacy secured; under the decree made in that suit in the year 1798, the exors. paid the amount into ct., & prior to Nov. 1802, the whole of it was invested in stock in the name of the Accountant-General, & placed to the separate account of A., who continued to receive the dividends during her life:—*Held*: this was a sufficient payment of the legacy within 1815 Act, & therefore, upon A.'s death in 1834, the parties interested in remainder, who were the children of A., were entitled to receive their several shares of the fund, without producing receipts for the legacy duty.—*COOMBE v. TRIST (1835), 1 My. & Cr. 69; 40 E. R. 302, L. C.*

*Annotation*:—*Apld. A.-G. v. Loscombe (1860), 5 H. & N. 564.*

**471.** — — — — —.]—*To credit of administration action.*—W., having, by way of provision, under a marriage settlement, executed a bond to the trustees of the settlement, for securing £16,000 after his death, in trust for C. & his wife, & then, subject to certain trusts in favour of their issue, upon trust for W. absolutely, by his will, bequeathed the said sum of £16,000, in case it reverted into the residuum of his estate at any time, in trust, as to £14,000 thereof, for L. Upon the death of W., in 1794, a Chancery suit was instituted for carrying his will into effect, & the Master having reported that the £16,000 was a specialty debt, due from the estate of W. to the trustees of the settlement, certain stock, paid into court by W.'s exors., to the value of £16,000, was, in 1807, under an order of the ct., transferred to the account of C. in the cause. C. died without issue between the date of the order & the transfer; & the dividends of the stock were paid to his widow until her death, in 1848, when, upon the petition of L., the ct. ordered the stock to be sold, & the £14,000 to be paid to him:—*Held*: the legacy was paid, delivered, retained, satisfied or discharged before Aug. 31, 1815, within 1815 Act, Sched. III., Part III., & consequently, no legacy duty was payable on the actual receipt of the £14,000 by L. in 1848.—*A.-G. v. LOSCOMBE (1860), 5 H. & N. 564; 29 L. J. Ex. 305; 157 E. R. 1305.*

**472.** — — — — —.]—*Carrying in residuary account.*—Where a person appointed exor. & trustee under a will carries in a residuary account, the presumption is that he is declaring that he has brought the administration of the estate to an end & is holding the residue as a trustee; but this presumption can be rebutted.—*Re CLAREMONT, [1923] 2 K. B. 718; 93 L. J. K. B. 147.*

**473.** *Satisfaction of legacy without payment—Bequest of money charged on realty to owner of realty.*—*A.-G. v. METCALFE, No. 374, ante.*

**474.** *Legacy enjoyed in succession—Duty payable when benefit begins to be enjoyed—May be at death of legatee.*—*KENLIS (LORD) v. HODGSON, No. 462, ante.*

take out administration, but bequeathed the money to his daughter prior to Oct. 10, 1842, & which was not transferred until after that date:—*Held*:

it was liable to pay the duty imposed by 5 & 6 Vict. c. 82, which came into operation upon that day; & the true criterion of the duty payable was the

day of the satisfaction, payment, or discharge of the legacy, & not the accruer of the right.—*Re HILLAS (1850), 2 Ir. Jur. 36.—[R]*



**Sect. 6.—Collection of duty: Sub-sect. 2, A. (a).]****SUB-SECT. 2.—BY WHOM DUTY PAYABLE.****A. The Accountable Person.****(a) In General.**

See 1796 Act, ss. 6, 10, 13, 14, 17, 26.

**475. Executor or administrator—As surety for legatee.]**—A trustee under a will, who pays the legacy duty upon an annuity after the expiration of four years from the death of testator, may recover the amount of the duty from the legatee, notwithstanding a previous assignment of the annuity by such legatee.

The exor., here, is only made liable for the benefit of govt., & not on his own account. He has not paid the money voluntarily, but upon compulsion. He pays, not on his own account, but on that of the legatee. The exor. is no more than surety for the legatee, & his case falls within the principles applied to the case of sureties (PARK, J.).

It is urged that the exor. cannot recover from the legatee, because the duty is the debt of both of them; but the contrary seems to result. The exor. stands in the situation of a surety, & his principal becomes liable to him for whatever he has paid (RICHARDSON, J.).—HALES v. FREEMAN (1819), 1 Brod. & Bing. 391; 4 Moore, C. P. 21; 129 E. R. 773.

**Annotations:—**Refd. Smith v. Anderson (1828), 4 Russ. 352; Stow v. Davenport (1833), 5 B. & Ad. 359; Gude v. Mumford (1837), 2 Y. & C. Ex. 445. **Mentd.** Smith v. Alsop (1824), M'Cle. 622.

**476. — Discretion of court to order executor to account.]**—A rule was obtained under 42 Geo. 3, c. 99, s. 2, for the surviving exor. of the extrix. of the exor. of a testator, to account for legacy duties due on the estate of the original testator. It appeared that the original testator died in 1812, that the surviving exor. had never acted, except in signing documents; that he knew nothing of the estate of his testatrix, & that he had received no assets of hers, or of the original testator:—**Held:** the power given to the ct. by the above statute was discretionary, & the case was not one in which they ought to exercise it.—*Re PIGOTT* (1833), 1 Cr. & M. 827; 3 Tyr. 859; 2 L. J. Ex. 298; 149 E. R. 633.

**477. — Legacy paid without duty deducted.]**—(1) The pendency of a suit in equity, at the instance of a legatee, praying that an account may be taken of the personal estate & effects of a testator received by the exors., & that the personal estate may be administered, & his legacy paid, is no answer to an application by the comrs. of stamps under 42 Geo. 3, c. 99, if any duties have become payable on legacies which have been paid, notwithstanding 1796 Act, which provides that the ct. in which such suit shall be instituted shall, in giving directions concerning the payment of legacies, take care that no allowance shall be made in respect of any legacy, etc., without due proof of the payment of the duties thereby imposed.

(2) It is the duty of an exor. to deduct the amount of legacy duty on payment of the legacy; & if he omit to do so, he will become personally responsible for it.—*Re SAMMON* (1838), 3 M. & W. 381; 150 E. R. 1192.

**478. — Duty deducted but not paid.]**—A testator by his will gave certain annuities & legacies, & directed, as to some of them, that the legacy duty thereon should be paid out of his

residuary estate, but as to others, he directed that the legacy duty should be deducted. The exor. only partially paid the legacy duties, & left various sums unpaid on both descriptions of annuities & legacies. The Comrs. of Stamps & Taxes claimed a lien upon the residuary estate of testator for the unpaid legacy duties in priority over the costs of the suit & the unpaid legacies:—**Held:** the exor. was personally a debtor to the Crown for the amount of legacy duty where he had deducted it, & where a payment had been made to the legatee without deduction, the legatee, as well as the exor., was liable with respect to the duty which the legatee ought to have seen paid, but the Crown had no claim upon the residuary fund.—*WRIGHT v. BARNEWALL* (1849), 19 L. J. Ch. 38; 14 L. T. O. S. 248; 13 Jur. 1041.

**479. — Compromise of debts by administrator.]**—*GREVILLE v. GREVILLE* (No. 2), No. 508, *post*.

**480. Annuity charged on realty—Liability of devisees.]**—Testator gave the residue of his freehold & copyhold messuages, lands, & tenements, not being rentcharges for life or lives, to R. & W., to the use of C., the wife of J., for life; & from & after her decease, "to the use & intent, that J. should, during his life, receive by & out of the said hereditaments, & the rents thereof, one annuity or clear yearly rentcharge of £500, clear of taxes & without any deduction or abatement whatsoever, to be payable quarterly, etc., with such powers & remedies of distress & entry, & perception of rents, in case the said annuity of £500 should be in arrear, as are reserved to lessors for the recovery of rents on leases for years;" & subject to the said annuity or yearly rentcharge, to certain other uses; & on failure thereof, as to one moiety, to the use of R., his heirs & assigns for ever; & as to the other moiety, to W., & his assigns for life:—**Held:** (1) the interest or benefit passing to J. was subject to the legacy duty, being "a gift by way of annuity, out of or charged upon testator's real estate," within 1815 Act, Sched., Part III.; (2) R. & W. were jointly bound to pay such duty, but were entitled, on payment of the annuity, to retain the amount thereof.—*A.-G. v. JACKSON* (1831), 2 Cr. & J. 101; 2 Tyr. 50; 1 L. J. Ex. 21; 149 E. R. 43.

**Annotations:—**As to (1) **Foll.** Stow v. Davenport (1833), 5 B. & Ad. 359. **Distd.** Shirley v. Ferrers (1842), 11 Jur. 1047. **Consd.** *Re De Hoghton*, *De Hoghton v. De Hoghton*, [1895] 2 Ch. 517; *A.-G. v. Wade*, [1910] 1 K. B. 703. **Refd.** *Sweeting v. Sweeting* (1853), 22 L. J. Ch. 441.

**481. Legacy enjoyed in succession—Fund transferred to trustees—Liability of trustees.]**—A testator bequeathed the residue of his personal estate to his exors., in trust for his wife for life & after her decease, for his nephews & nieces, whereby legacy duty would be payable at the death of the wife:—**Held:** under 1896 Act, s. 13, the extrix. of the surviving exor. might, during the life of the widow, transfer the trust fund to new trustees of the will appointed by the ct.—*Re JONES'S TRUST* (1852), 21 L. J. Ch. 566.

**482. Payment of legacy without duty deducted—Executor's right to be recouped by legatee—Legacy assigned.]**—HALES v. FREEMAN, No. 475, *ante*.

**483. — Payment by order of court.]**—*FOSTER v. LEY*, No. 332, *ante*.

**484. — —.]**—*BATE v. PAYNE*, No. 450, *ante*.

**PART IV. SECT. 6, SUB-SECT. 2.—****A. (a).**

**g. Legatee.]**—Testator having in his lifetime entered into a contract for

the erection of buildings on land belonging to him:—**Held:** the devisee, in the absence of any different disposition in the will, must pay the stamp duty on the enhanced value of the land.

Testator bequeathed to his widow for life the income of such portion of the existing investments of his personal estate, to the value of £15,000; as she should within three months after

**485. — Sale of legacy with concurrence of executor.]**—A *cestui que trust* of a portion of the proceeds of a contingent reversionary interest in an estate directed to be sold, in case of & upon the happening of the contingency, bequeathed his reversionary interest by his will to a legatee, who sold the same before the happening of the contingency. The exor. was a party to the assignment, to obviate all question as to the existence of debts of the *cestui que trust*, & the purchase-money was thereby expressed to be paid to him, but was in fact paid to the legatee by the purchaser:—*Held*: the exor. had no claim on the purchaser to be reimbursed the legacy duty which, after the happening of the contingency, he was compelled to pay on the full value of the share.—*FARWELL v. SEALE* (1849), 3 De G. & Sm. 359; 18 L. J. Ch. 189; 13 L. T. O. S. 23; 13 Jur. 483; 64 E. R. 515.

**486. — Duty misappropriated by agent of executor.]**—The exor. of a will, in every instance, made the half-yearly payments due to the tenant for life of the residuary estate through the solr. employed by him in the administration of the trusts of the will. The solr. having neglected to retain the legacy duty out of several such payments, applied to the tenant for life for a return of the amount of such duty. Having accordingly received the amount from the tenant for life, the solr., instead of paying the same to the Crown, retained it for his own purposes, & soon afterwards absconded. The exor. subsequently paid the said duty to the Crown:—*Held*: he was not entitled to retain out of the life interest of the tenant for life what he had so paid.—*HORN v. COLEMAN* (1856), 26 L. J. Ch. 213; 28 L. T. O. S. 96; 2 Jur. N. S. 1127; 5 W. R. 32.

**487. — Recital of payment in deed of release & indemnity.]**—A party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact, & not through fraud or deception on his part. Where, therefore, a deed of release & indemnity to the exor. of a testator contained a recital to the effect that out of testator's residuary estate the exor. had retained the sum of £19 8s., being the amount of the legacy duty on the bequests contained in the will, & in fact the sum so mentioned was only part of such legacy duty:—*Held*: the exor., who was afterwards called on to pay the balance of the duty, was not precluded from recovering such amount from the estate of the residuary legatees under the covenant for indemnity in the deed.—*BROOKE v. HAYMES* (1868), L. R. 6 Eq. 25.

**488. — Executors' right to be recouped by assignee.]**—A. & his wife were, under a will, entitled to successive life interests in a fund in ct. The legacy duty on the wife's interest was paid. The life interests were assigned by way of mtge., & part of the dividends were paid to the assignees during the wife's life. Upon the death of the wife an order was made for payment of the dividends to the assignees, but no provision was made for the payment of the duty on A.'s interest. On the death of A. this mistake was discovered. On the petition of the A.-G.:—*Held*: the assignees would be ordered to pay the duty & the costs of the application.

The solr. . . . knows that the ct. has no power to make an order paying away a legacy or the amount of a legacy or an annuity without first providing for the duty. That is what the legislature has imposed as a duty upon the ct. &, therefore, any solr. who makes himself ancillary to getting out money which is in truth a legacy, letting the ct. make the order in ignorance make it improperly not providing for the payment of the legacy duty is, I think, ancillary in enabling the ct. to commit an act of injustice & I think he is certainly highly to be reprehended (*LORD CRANWORTH, C.*).—*BRYAN v. MANSION* (1857), 20 L. J. Ch. 510; 29 L. T. O. S. 84; 3 Jur. N. S. 473; 5 W. R. 483, L. C.

*Annotation*:—*Appld. A.-G. v. Bruce*, [1901] 2 K. B. 391.

**489. — Executor's right to be recouped by purchaser—Purchaser not liable for duty on other legacy to same legatee.]**—A testator directed his estates to be sold, & gave the dividends of one portion of the proceeds to his wife, for life, & after her death he gave the capital to A. The second portion he gave to A., subject to various annuities. By an arrangement between the widow & A., the first portion was paid over by the exors. to A. during the widow's life, & no sum was retained to answer the legacy duty, which would become payable on the widow's death. A. sold the second portion to pltf., & the surviving exors. of the surviving exor. of testator joined in the assignment for the purpose of admitting A.'s title to the property, & stating that they knew of no incumbrance upon it. Upon the death of the annuitants, the purchaser filed a bill against the exors. for a transfer of the fund:—*Held*: debts. were not entitled to retain the legacy duty payable upon the first portion of the property.—*BIGNOLD v. GILES* (1858), 28 L. J. Ch. 238; 32 L. T. O. S. 218; 7 W. R. 99; *subsequent proceedings, sub nom. A.-G. v. GILES* (1860), 5 H. & N. 255.

**490. — — — — —.]**—A testator, who died in 1820, by his will directed his estate to be divided into two moieties, in one of which a sum of £4,300 £3 per cent. consols then standing in his name was to be included; & as to this moiety he directed that, after payment of certain debts, the surplus beyond the £4,300 consols should be invested in the funds in the names of his exors., in trust to pay the dividends thereon & also on the £4,300 consols to his wife for life; & upon her death he bequeathed this moiety to A., save & except the £4,300 consols, the dividends upon which, amounting to £129 a year, he directed to be paid to three annuitants of £20 a year each, & the remainder to a nephew during his life. He then bequeathed the annuities of £20 to three other annuitants, & after the decease of the survivor of them he bequeathed the £4,300 consols to A. absolutely. The exors. realised the property, & it was ascertained that £5,099 was the amount to be invested to make up, together with the £4,300 consols, the moiety of the dividends on which were to be paid to the wife for life. The exors. entered into an arrangement with the widow & A. & her husband by which the £5,099 was paid over to the latter, but no legacy duty was paid upon it. The widow died in May, 1835, & in May, 1837, A. sold & assigned to B. the £4,300 consols, subject to the annuities then in existence & legacy duty chargeable on A. in respect thereof:—*Held*:

his death select, & failing such selection by the widow, directed his executors to make the selection, with remainders over absolutely:—*Held*: the stamp duty on the bequest should be borne

by the legatees.

Testator bequeathed pecuniary legacies to his executors in lieu of any remuneration which might otherwise be conferred upon them by the ct.:—

*Held*: the stamp duty on the legacies must be borne by the legatees.—*WEBB v. WEBB* (1900), 21 N. S. W. Eq. 245; 17 N. S. W. W. N. 188.—*AUS.*



*Sect. 6.—Collection of duty: Sub-sect. 2, A. (a), (b) & (c) & B. Sect. 7: Sub-sect. 1.]*

(1) the £5,099 & £4,300 were separate legacies, & B. was not a debtor to the Crown in respect of the legacy duty payable on the £5,099; (2) the Crown had no lien on the £4,300 in respect of such duty.—*A.-G. v. GILES* (1860), 5 H. & N. 255; 29 L. J. Ex. 176; 1 L. T. 553; 8 W. R. 342; 157 E. R. 1179.

**491. — Liability of executor.]—***Re SAMMON*, No. 477, *ante*.

**492. Property not reduced into money—Valuation under 1796 Act, s. 22—Liability of executor where property undervalued.]—**(1) By sect. 6 of above Act, legacy duty shall be paid by the person taking the burden of the execution of the will upon delivery or payment of the residue of any personal estate to the person entitled, & by sect. 22, where the residue shall consist of "property which shall not be reduced into money," the exor. may set a value thereon, & the Comrs. of Inland Revenue may accept duty upon that value. Shortly after the death of testatrix her exor. brought into the Inland Revenue Office the residuary account of her property, in which a value was set upon certain pictures & other personal property not reduced into money, & the Comrs. accepted duty upon that value. Subsequently, the residuary legatee & the exor. having always intended that the pictures should be sold in the course of the administration, the exor. sold them for a sum greatly in excess of the value upon which duty had been paid, & accounted to the residuary legatee for the proceeds:—*Held*: the provisions of sect. 22 apply to property which shall not be reduced into money during the course of the administration by the exor., & not merely to property which shall not have been reduced into money when the residuary account is brought in; the pictures, etc., therefore did not satisfy the description in sect. 22, & the Crown were entitled to duty under sect. 6 upon the amount paid to the legatee.

We read those words as meaning "which shall not be reduced into money during the administration" (*POLLOCK, B.*).

(2) In cases of specific legacies, & where the residue of any personal estate shall consist of property which shall not be reduced into money the exor. or the person by whom the duty ought to be paid, may set a value thereon, & offer to pay the duty according to such value, or may require the Comrs. to appoint a person to set a value, & the Comrs. may accept the duty offered upon the value set by the exors., or by the person by whom the duty is payable, without such appraisal if they think fit. If the Comrs. are not satisfied with the value so set they may appoint a person to appraise the effects & set a value, & assess the duty upon such value. Further, if the person by whom the duty is payable is not satisfied with the valuation made under the authority of the Comrs., he may cause the valuation so made to be reviewed by the Comrs. of Land Tax, who may appoint a person to appraise the effects & set a value thereon, & hear & determine the appeal (*POLLOCK, B.*).—*A.-G. v. DARDIER* (1883), 11 Q. B. D. 16; 52 L. J. Q. B. 329; 48 L. T. 582; 47 J. P. 484; 31 W. R. 499, D. . .

*Annotations:—As to (1) Consd. Re Claremont*, [1923] 2 K. B. 718. *Generally, Mentd. A.-G. v. Smith*, [1892] 2 Q. B. 289.

**493. Settled articles not yielding income—Liability of trustees on resettlement.]—**By 1796 Act, s. 14, no legacy duty shall be paid on articles or things not yielding any income, & given for the

benefit of or to be enjoyed by different persons in succession, whilst the same shall be so enjoyed in kind only by persons not having any power of selling or disposing thereof so as to convert the same into money or other property yielding an income; but if the same shall come to any persons "having an absolute interest therein," then legacy duty shall be chargeable & paid thereon by those persons. By the will of the second Marquis of Ailesbury certain articles & things were directed to be enjoyed as heirlooms by the person or persons for the time being beneficially entitled to testator's mansion house under the limitations of existing settlements. At testator's death the mansion house stood limited, under those settlements, to the use of the third Marquis for life, with the remainder to the use of Viscount Savernake in tail male, with remainders over. Subsequently, by a resettlement made in the lifetime of the third Marquis, the estate tail in expectancy of Viscount Savernake was cut down to a life interest, with limitations over; & the heirlooms were assigned to trustees upon trust to allow them to go, devolve, & remain as heirlooms, together with the mansion house, according to the limitations of the resettlement. Viscount Savernake died, having survived the third Marquis:—*Held*: the trustees of the resettlement were persons "having an absolute interest" in the articles & things within sect. 14, & were, therefore, liable to pay legacy duty in respect of them.—*A.-G. v. BRUCE*, [1901] 2 K. B. 391; 70 L. J. K. B. 767; 85 L. T. 114; 65 J. P. 329; 49 W. R. 519; 17 T. L. R. 475; 45 Sol. Jo. 522, D. C.

*Annotation:—Consd. Re Egmont's S. E., Lefroy v. Egmont*, [1912] 1 Ch. 251.

**494. Liability of assignee of reversion.]—**(1) In all cases of assignment of reversionary interests the legacy duty which becomes payable on their falling into possession falls, in the absence of express contract, on the assignee.

(2) Where the owner of a reversionary interest settles a part of it, there is no rule which throws the burden of the legacy duty upon the part retained, & a covenant for further assurance does not bind the settlor to indemnify the settled fund against legacy duty.—*Re REPINGTON, WODEHOUSE v. SCOBELL*, [1904] 1 Ch. 811; 73 L. J. Ch. 533; 90 L. T. 663; 52 W. R. 522.

**Directions to pay debts—Liability of creditors.]—***See Nos. 330, 331, 332, ante.*

**Directions to pay duty.]—***See Sect. 7, sub-sect. 2, post.*

(b) *In Administration Actions.*

*See* 1796 Act, s. 25; County Courts Act, 1888 (c. 43), s. 56; County Courts Act, 1903 (c. 42), s. 3; Supreme Court Fund Rules, 1915, rr. 20, 52 (b), 66.

**495. Power of court to provide for payment.]—**Testator having directed the legacy duty to be paid out of his estate, the ct. directed a reference, to compute the amount of that duty, in respect to the life interests, & ultimate interests, & ordered sufficient of the fund to be retained, to answer the duty when due; the dividends, in the meantime, to be paid to the persons entitled to the income for the time being.—*HOUSTOUN v. HOUSTOUN* (1831), as reported in 1 L. J. Ch. 50.

*Annotations:—Mentd. Ricketts v. Loftus* (1841), 4 Y. & C. Ex. 519; *Paske v. Haselfoot* (1863), 33 Beav. 125.

**496. — Before payment to legatee.]—***HICKS v. KEAT*, No. 947, *post*.

**497. — Duty of solicitor to assist court.]—***BRYAN v. MANSION*, No. 488, *ante*.

**498. — Duty of executor to see duty provided for.]—**(1) The dividends on a fund in ct. were



ordered to be paid to the tenant for life under a will. After her death it was discovered that legacy duty had not been paid on her life interest:—*Held*: neither the exor. nor an assignee from the tenant for life had any claim to be recouped out of the reversion what they might be compelled to pay in respect of duty.

(2) Assuming that it is the duty of the ct. to set apart the legacy duty, it is no less the duty of the exor., being a party to the suit, to see that it is provided for; &, after standing by for a lengthened period, he cannot claim it against the estate on the death of the tenant for life; but the ct. will decide none of these questions in the absence of the Crown.—*BOWRA v. RHODES* (1862), 8 Jur. N. S. 1050; 10 W. R. 747.

**499. — Does not extend to future duties.]—***Re BOWES, STRATHMORE v. VANE*, [1907] W. N. 198.

(c) *Receipts.*

See 1796 Act, ss. 5, 27, 29, 35, 41.

**500. Copy of entry in Stamp Office books—Evidence of payment.]—**A copy of an entry in the books of the Stamp Office of payment of the legacy duty is under 1796 Act, s. 27, evidence of the payment of such duty for all purposes, but such copy signed by the Comptroller of the Stamp Duties & not proved by a witness who examined it with the original, is not admissible.—*HARRISON v. BORWELL* (1839), 10 Sim. 380; 9 L. J. Ch. 72; 4 Jur. 245; 59 E. R. 662.

**501. Certificate of payment of duty—Refused on other grounds—Payment out of court of legacy on notice to commissioners.]—**On petition for payment of a fund out of ct., the usual certificate from the Inland Revenue Department of payment of legacy duty ought to be produced. Where that certificate was refused on other grounds, although duty had been paid, & an affidavit to that effect was produced, the ct. ordered such affidavit to be served on the solr. for the Inland Revenue, together with notice to show cause within seven days why the fund should not be paid out, & in default, that it should be so paid.—*Re MARSHAM* (1863), 9 L. T. 533; *sub nom. Re MARSHAM, Ex p. PLAYFORD*, 12 W. R. 45.

**502. — Discharge of legacy.]—**Where trustees for sale under a will, who had entered into a contract with a purchaser, & paid legacy duty on the amount of the purchase-money, afterwards vested the estate in the person to whom, subject to the trust, the land was devised, whereby he became the proper party to convey:—*Held*: a certificate from the Inland Revenue Office that the duty was paid, discharged the land, & the purchaser could require no further evidence on the subject.—*HOWE (EARL) v. LICHFIELD (EARL)* (1867), 2 Ch. App. 155; 36 L. J. Ch. 313; 16 L. T. 436; 15 W. R. 323, L. C.

*B. Limitation of Personal Liability.*

See 1880 Act, s. 12, 1889 Act, s. 14.

**SECT. 7.—OUT OF WHAT PROPERTY DUTY PAYABLE.**

**SUB-SECT. 1.—IN GENERAL.**

**By whom duty payable.]—**See Sub-sect. 2, *ante*.

**503. Duty follows legacy.]—**A., being entitled

to a legacy, & being indebted to C., by a deed which represented that it was “unincumbered,” assigned it to C. upon trust to retain a moiety, & as to the residue in trust for A. The fund was in ct., & liable to legacy duty:—*Held*: (1) C.’s moiety must bear its share of the legacy duty; (2) C. was not entitled, as against A.’s share, to the costs of the proceedings to clear & ascertain the fund & obtain payment.

The legacy duty being a govt. charge on the fund, does not, I think, come within the view of the parties under the word incumbrance (*LORD LANGDALE, M.R.*).—*BLISS v. PUTNAM* (1843), 7 Beav. 40; 2 L. T. O. S. 94; 49 E. R. 977.

*Annotations:—Refd. A.-G. v. Bruce* (1901), 85 L. T. 114. *Mentd. Saunders v. Dunman* (1878), 47 L. J. Ch. 338.

**504. —.]—***WRIGHT v. BARNEWALL*, No. 478, *ante*

**505. —.]—***WARBRICK v. VARLEY* (No. 1), No. 526, *post*.

**506. —.]—***Re REPINGTON, WODEHOUSE v. SCOBELL*, No. 494, *ante*.

**507. — Payment in specie.]—**A proportionate part of stock in the funds was ordered to be transferred to the comptroller in lieu of legacy duty thereon.—*KILPIN v. KILPIN* (1834), 4 L. J. Ch. 17.

**508. Sum accepted in release of all claims—Duty payable by administrator.]—**A specific fund was bequeathed for payment of debts. A claim being made in respect of a debt barred by the statute, the administrator offered £1,150 as the price to be paid for a release of all claims. Legacy duty was claimed on this account:—*Held*: it must be borne by the administrator, & not by the creditor.—*GREVILLE v. GREVILLE* (No. 2) (1859), 27 Beav. 596; 54 E. R. 236.

**509. Duty on life interest—Whether paid out of capital.]—***BOWRA v. RHODES*, No. 498, *ante*.

**510. —.]—**Testator bequeathed a sum of £20,000 to M. for life, & directed that on her death such sum should fall into his residuary estate, & he appointed special trustees of the fund. Under 1796 Act, s. 12, the legacy duty was payable by four equal payments out of the income derived from the fund. By inadvertence the exors., two of whom were residuary legatees, paid this duty out of capital, & transferred the residue of the £20,000 to the special trustees:—*Held*: the error must be rectified, the sum paid as legacy duty, on all proper adjustments being made, being retained out of the future payments of income to M.—*Re AINSWORTH, FINCH v. SMITH*, [1915] 2 Ch. 96; 84 L. J. Ch. 701; 113 L. T. 368; 31 T. L. R. 392.

*Annotation:—Refd. Re Musgrave, Machell v. Parry*, [1916] 2 Ch. 417.

**Power of advancement in trustees.]—**Under a will, & in the events which happened, one-third of testator’s residuary estate was held in trust for his daughter, a married woman, for her life without power of anticipation, & after her death for her issue, with a gift over in default of her issue for his sons & their issue respectively. The will empowered the trustees to raise not more than a moiety of the vested share for the time being of any of testator’s children & to apply the same for the advancement or benefit of such children in such manner as his trustees should think fit. Owing to the circumstances

was agreed to be paid in this country, & full & ample discharges granted:—*Held*: the legacy duty was a burden on the legacy so compounded. *FISCHER v. SEAFIELD (EARL)* (1825), 4 Sh. (Ct. of Sess.) 192. —*SCOT*.

**PART IV. SECT. 7, SUB-SECT. 1.**

**503 i. Duty follows legacy.]—**In an action for construction of a will:—*Held*: the legacy duty was to be deducted from the legacies, & the exors. had no discretion to pay such duty out of the residue.—*MANNING v.*

*ROBINSON* (1898), 29 O. R. 483.—*CAN.*

**h. Legacy compounded for — Duty a burden on amount of composition.]—**A legacy having been bequeathed to foreigners, & which, in consequence of a dispute, was compounded in a foreign county for a specific sum, but which

**Sect. 7.—Out of what property duty payable: Sub-sects. 1 & 2, A. & B.]**

of her birth & to the increased cost of living caused by the war, the daughter was unable to pay the legacy duty, which was at the rate of 10 per cent., on her settled share out of her income, & applied to the trustees for assistance. On a summons by the trustees the ct. was of opinion that the trustees could, in the exercise of their discretion under the power of advancement, raise & pay the duty out of the *corpus* of the settled share, & left them to decide whether they would so exercise their discretion. One of the trustees was willing to exercise the discretion in aid of the daughter, but the other trustee, testator's widow, declined to exercise it because her daughter had married without her consent:—*Held*: the ct., in the exercise of its control over the discretion of the trustees, could direct the trustees out of the *corpus* of the settled share a sum sufficient to pay the duty.—*KLUG v. KLUG*, [1918] 2 Ch. 67; 62 Sol. Jo. 471; *sub nom. Re KLUG*, *KLUG v. KLUG*, 87 L. J. Ch. 569; 118 L. T. 696.

**512. Legacy payable free of duty out of fund—Duty payable out of same fund.]**—Where legacies are to be raised by the sale of lands given, payable in full, under a direction in the will that the legacy shall be paid without any deduction in respect of the duty, the duty must be paid out of the same fund as is charged with the bequest.—*NOEL v. NOEL* (1823), as reported in 12 Price, 213; 147 E. R. 702, H. L.; *varying S. C. sub nom. NOEL v. HENLEY (LORD)* (1819), 7 Price, 241, Ex. Ch.

*Annotations*:—*Refd.* *Louch v. Peters* (1834), 1 My. & K. 489; *A.-G. v. Giles* (1860), 5 H. & N. 255; *Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726. *Mentd.* *Vandeleur v. Vandeleur* (1835), 9 Bli. N. S. 157; *Attwood v. Small* (1840), 4 Cl. & Fin. 232; *Archbold v. Comrs. of Charitable Bequests for Ireland* (1849), 2 H. L. Cas. 440; *Jenkinson v. Harcourt* (1854), Kay, 688; *Dacre v. Patrickson* (1860), 1 Drew. & Sm. 182; *Re Hooper, Banco de Portugal v. Waddell* (1880), 5 App. Cas. 161.

**SUB-SECT. 2.—DIRECTIONS BY TESTATOR.**

**A. General Directions to pay Duty.**

**513. Direction contained in will—Legacies given by codicil.]**—Testator by his will bequeathed certain legacies to charitable institutions, & directed that they should be paid as follows: "Which charitable legacies I direct may be paid out of my personal estate, prior to the payment of my debts & the said legacies hereby by me given & bequeathed." He then directed all his legacies to be paid within two years after his decease, free of any deduction for tax or duty. By a codicil he bequeathed legacies payable & raiseable immediately:—*Held*: the charitable legacies, & the legacies given by the codicils, raiseable immediately, were payable free from legacy duty.—*BYNE v. CURREY* (1834), 2 Cr. & M. 603; 4 Tyr. 478; 3 L. J. Ex. 177; 149 E. R. 901.

*Annotation*:—*Consd. Re Sealy, Tomkins v. Tucker* (1901), 85 L. T. 451.

**514. ——— Legacies "hereinbefore" bequeathed.]**—Testator, by his will, directed the legacy duty on the legacies therein given to be paid out of a certain fund. By a codicil, which he directed should be considered & taken as part of the will, he gave other legacies:—*Held*: the legacies given by the codicil were not given free from duty.

I cannot hold that the word "herein" meant more than the particular instrument in which it was used, & therefore, I cannot extend it to this codicil (*KNIGHT-BRUCE, V.-C.*).—*EARLY v.*

*BENBOW* (1846), 2 Coll. 354; 7 L. T. O. S. 3; 10 Jur. 280; 63 E. R. 762.

*Annotations*:—*Consd. Re Sealy, Tomkins v. Tucker* (1901), 85 L. T. 451. *Mentd.* *Early v. Middleton* (1851), 14 Beav. 453; *Williams v. Hughes* (1857), 4 Jur. N. S. 42; *Townsend v. Early* (1860), 28 Beav. 429; *Almack v. Horn* (1863), 1 Hem. & M. 630; *Donnellan v. O'Neill* (1870), 18 W. R. 1188; *Re Courtauld, Courtauld v. Cawston* (1882), 47 L. T. 647; *Locke v. Dunlop* (1888), 39 Ch. D. 387; *Re Joseph, Pain v. Joseph*, [1908] 2 Ch. 507.

**515. ——— "Foregoing legacies."]**—Testatrix, having a power of appointment over her late brother's property, subject to the life interest of A., by her will gave some legacies "out of her own personal estate," payable immediately after her decease, & other legacies "out of her brother's estate," payable on the death of A. She directed the duty on all the foregoing legacies to be paid, & charged them on the real estate. By a codicil she directed the second legacies to be paid immediately after her own death & gave other legacies:—*Held*: all the legacies by the will & codicil were charged on the real estate & payable duty free.—*WILLIAMS v. HUGHES* (1857), as reported in 24 Beav. 474; 53 E. R. 441.

**516. ——— Amount of legacy varied.]**—By a will some legacies were given free of duty, & their amounts were varied by a codicil:—*Held*: they were still exempt from duty.—*FISHER v. BRIERLEY (No. 2)* (1861), 30 Beav. 267; 54 E. R. 891.

*Annotation*:—*Mentd. Re Boden, Boden v. Boden*, [1907] 1 Ch. 132.

**517. ——— Legacies "in addition to those already bequeathed."]**—By her will testatrix gave a number of legacies & directed that "all the legacies & bequests given by this my will be paid & given free of all deduction for legacy or other duty." By codicil she said: "I give & bequeath the following legacies in addition to those named in my will." Then followed a number of legacies to legatees of the will & this legacy to a legatee not named in the will, & she added the words, "given in addition to those already bequeathed":—*Held*: the legacy to the legatee not named in the will was also free of duty.—*Re SEALY, TOMKINS v. TUCKER* (1901), 85 L. T. 451.

**518. ——— Legacies given in trust in lieu of direct—Fresh beneficiaries added.]**—A direction to pay legacies given by "this my will" free of duty does not apply *prima facie* to every legacy subsequently given by codicil; & though the direction applies to legacies given in substitution for those in the will, & to the same beneficiaries, yet where the codicil gives legacies in trust, in lieu of direct, & under the trust fresh beneficiaries are added, these trust legacies must bear their own duty.—*Re TRINDER, SHEPPARD v. PRANCE* (1911), 56 Sol. Jo. 74.

**519. Direction contained in codicil—Legacies given by subsequent codicil.]**—*Re DRESDEN, LINDO v. LONDON HOSPITAL* (1910), *Times*, July 22.

**520. Direction to pay "above-mentioned sums" free of duty—Shares.]**—Testator, after giving several pecuniary legacies to different persons, bequeathed two shares in a joint-stock co., stating that they were of the value of £250 each." He then directed that the legacy duty "on the several above-mentioned sums" should be paid & charged on his residuary personal estate:—*Held*: the words "above-mentioned sums" did not include the shares, but the legatees of those shares must pay the whole of the legacy duty upon them.—*DAKERS v. LILBURN* (1865), 12 L. T. 167; 11 Jur. N. S. 292; 13 W. R. 568, L. JJ.

**521. Effect of marginal note in holograph will**



—“**All free of legacy duty.**”]—In his holograph will, testator wrote along the margin opposite to legacies to servants these words, “All free of legacy duty.” There was no circumflex or mark to show where they were intended to be read:—*Held*: all the legacies given in the will, both those to relatives & those to servants, were free of legacy duty.—*KIRKPATRICK v. BEDFORD*, *BEDFORD v. KIRKPATRICK* (1878), 4 App. Cas. 96, H. L.

### B. Legacies free of Duty.

*Sec. generally, WILLS.*

**522. What amounts to direction to pay free of duty—“Without deduction.”**]—Testator having directed legacies to be paid at the expiration of six months after his decease, without deduction, the legacies are entitled to the full amount, & the legacy duty must be paid by the exors.—*BARKSDALE v. GILLIAT* (1818), 1 Swan. 562; 36 E. R. 506, L. C.

*Annotations*:—*Consd.* *Smith v. Anderson* (1828), 4 Russ. 352; *Louch v. Peters* (1834), 1 My. & K. 489; *Gudo v. Mumford* (1837), 2 Y. & C. Ex. 445. *Reid.* *Stow v. Davenport* (1833), 5 B. & Ad. 359. *Mentd.* *Festing v. Taylor* (1862), 26 J. P. 261; *Re Grainger, Dawson v. Higgins*, [1900] 1 Ch. 756.

**523. — “Clear of property tax & all expenses attending same.”**]—Testator directs his exors. & trustees to pay certain annuities & legacies, “clear of the property-tax, & all expenses attending the same”; the legacy duty ought to be paid by the exors. out of the assets of testator, & annuitants & legatees are entitled to receive the full amount of their respective legacies & annuities without any deduction in respect of legacy duty.—*COURTOY v. VINCENT* (1823), Turn. & R. 433; 37 E. R. 1167.

**524. — “Free from all expense.”**]—Testator bequeathed to his sister a legacy of £100 of good & lawful money of Great Britain, to be paid to her free from all expense, & a legacy of £20 to his nephew, & the rest of his money to be equally divided between his brother & his niece. At his decease his property consisted of £600 3 per cent. consols, & £119 in sovereigns:—*Held*: (1) the stock did not pass under the words “money”; (2) under the words “free from all expense,” the legacy of £100 was to be paid discharged of duty.—*GOSDEN v. DOTTERILL* (1832), 1 My. & K. 56; 2 L. J. Ch. 15; 39 E. R. 602.

*Annotations*:—*As to* (1) *Consd.* *Dowson v. Gaskoin* (1837), 1 Keen, 14. *Folld.* *Lowe v. Thomas* (1854), Kay, 369. *Consd.* *Cowling v. Cowling* (1859), 26 Beav. 449. *Reid.* *Re Taylor, Taylor v. Tweedie* (1922), 91 L. J. Ch. 801.

**525. — “To be paid clear.”**]—A direction that all testator’s legacies shall be paid clear, means that they shall be paid clear of legacy duty.—*FORD v. RUXTON* (1844), 1 Coll. 403; 63 E. R. 474.

**526. — “Free from any charge or liability in respect thereof.”**]—(1) Bequest of legacy “free from any charge or liability in respect thereof”:—*Held*: it was given free from the legacy duty.

(2) Testator gave his residue, in trust to convert & divide into two equal parts, & he bequeathed one equal part to A., free from any duty in respect

thereof, & the other equal part to be given to his nephews (but without the addition of the latter words):—*Held*: the legacy duty on the first moiety was payable out of any lapsed residue, & if none, out of the second moiety.

(3) Legacy duty is a charge to which a legacy is liable (*ROMILLY, M.R.*).—*WARBRICK v. VARLEY* (No. 1) (1861), 30 Beav. 241; 54 E. R. 881.

*Annotation*:—*As to* (2) *Apld.* *Re Robins, Nelson v. Robins* (1888), 58 L. T. 382.

**527. — Free of all outgoings & payments except the annual & other rent.**]—Testator bequeathed to F. a leasehold messuage, “free of all outgoings & payments, except the annual & other rent.” The will provided that all bequests, whether of legacies or annuities, should be paid free from legacy duty. Upon the question whether F. was entitled to the premises free from legacy duty, & whether or not free & discharged from the covenants & liabilities under the lease, except the rents:—*Held*: the bequest was free from legacy duty, but subject to the covenants & liabilities.—*Re TABER, ARNOLD v. KAYESS* (1882), 51 L. J. Ch. 721; 46 L. T. 805; 30 W. R. 883.

**528. — Implied direction—Deficiency of fund if duty deducted.**]—Where a charitable legacy was given in favour of a specified number of objects:—*Held*: the mere fact that if the legacy duty were deducted the legacy would be insufficient was not sufficient to show that the legacy duty was intended to be paid out of the residuary estate.—*Re DE ROSAZ, RYMER v. DE ROSAZ* (1886), 2 T. L. R. 871.

**529. — Bequest of six months’ full salary.**]—A gift of six months’ full salary is not a gift free from legacy duty.—*Re MARCUS, MARCUS v. MARCUS* (1887), 56 L. J. Ch. 830; 57 L. T. 399; 3 T. L. R. 816.

*Annotation*:—*Mentd.* *Re Trotter, Trotter v. Trotter*, [1899] 1 Ch. 764.

**530. — Gift of residue “after full payment & satisfaction” of legacies.**]—*Re TOWNEND, KNOWLES v. JESSOP*, [1914] W. N. 145.

**531. — “Free of all death duties.”**]—*Re WEDGWOOD, ALLEN v. PUBLIC TRUSTEE*, No. 226, ante.

**532. — “Pecuniary legacies” free of duty—Gift of stock.**]—Testator gave to M. £50,000 3 per cent. Consols to be transferred within six months after his decease, & after giving a variety of specific & pecuniary legacies, he directed that the duty upon all the pecuniary legacies thereinbefore bequeathed should be paid out of his general personal estate:—*Held*: the legacy of the stock was not a pecuniary legacy, & consequently not exempted under this clause of the will from the payment of legacy duty.—*DOUGLAS v. CONGREVE* (1836), 1 Keen, 410; 6 L. J. Ch. 51; 48 E. R. 364.

*Annotations*:—*Mentd.* *Taylor v. Clark* (1841), 1 Hare, 161; *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Butcher v. Butcher* (1851), 14 Beav. 222; *Morgan v. Morgan* (1851), 14 Beav. 72; *Ker v. Ruxton* (1852), 19 L. T. O. S. 268; *Macpherson v. Macpherson* (1852), 19 L. T. O. S. 221; *Ramsden v. Smith* (1854), 2 Drew. 298; *Re D’Estampes’ Settlement, D’Estampes v. Crowe* (1884), 53 L. J. Ch. 1117.

### PART IV. SECT. 7, SUB-SECT. 2.—B.

**k. What amounts to direction to pay free of duty—“Without deduction”**—*Effect of codicil substituting new legatee.*]—Testator in her settlement directed her trustees “to pay over & deliver” certain legacies bequeathed by her “without any deduction or abatement whatever for legacy or succession-duty, or otherwise.” Among her legacies was one of all her silver-plate, furniture, etc. This legacy she recalled by a codicil in which she bequeathed them to other legatees.

The codicil contained this clause, “I hereby declare that these presents shall in no way infer a revocation of my said deed of settlement before written, but that the same shall stand in full force, with this alteration thereon. . . .”—*Held*: the clause of relief of legacy-duty applied to the altered bequest contained in the codicil.—*M’ALPINE v. STODHOLME* (1883), 10 R. (Ct. of Sess.) 837; 20 Sc. L. R. 551.—*SCOT.*

**l. — Free of duty & other charges.**]—Testator by his will, after a number of specific & pecuniary

bequests & legacies & devises of real & personal estate declared that “all gifts devises & bequests made by me shall be free of stamp duty, which I direct shall be paid out of my general estate.” By a codicil the testator after revoking certain provisions in the will bequeathed three legacies “free of duty & other charges”:—*Held*: the legacies given by the codicil were free of the duty.—*BUCHANAN v. RIDDLE* (1920), 20 S. R. N. S. W. 544.—*AUS.*

**m. — “Free of expense of every kind.”**]—*Held*: although testator could



**Sect. 7.—Out of what property duty payable: Subsect. 2, B. & C.]**

**533.** ———.]—Testatrix directed all her personal estate to be converted into money, & her debts & funeral expenses & legacies to be paid out of the proceeds, & that out of the residue large sums of stock should be appropriated upon certain trusts. She then gave some pecuniary legacies of small amount, & directed that all the legacies, & all legacies thereafter given, should be paid free from legacy duty:—*Held*: the exemption from legacy duty applied to the bequest of stock as well as to the pecuniary legacies.—*ANSLEY v. COTTON* (1846), 16 L. J. Ch. 55; 8 L. T. O. S. 209, L. C.; *affg. S. C. sub nom. ANSTEY v. COTTON*, 7 L. T. O. S. 488.

*Annotation*:—*Folld. Re Johnston, Cockerell v. Essex* (1884), 26 Ch. D. 538.

**534.** ——— **Forgiveness of debt.**]—Forgiveness of a debt in a will, followed by a direction for the payment of the legacy duty, on all pecuniary legacies out of the personal estate:—*Held*: the legacy duty was to be paid out of the personal estate, in respect of this forgiveness of debt.—*MORRIS v. LIVIE* (1842), 1 Y. & C. Ch. Cas. 380; 11 L. J. Ch. 172; 62 E. R. 934.

*Annotations*:—*Mentd. Barnett v. Sheffield* (1852), 1 De G. M. & G. 371; *Irby v. Irby* (No. 3) (1858), 25 Beav. 632; *Wilkins v. Sibley* (1863), 4 Giff. 442; *British Mutual Investment Co. v. Smart* (1875), 10 Ch. App. 567; *Re Knapman, Knapman v. Wreford* (1881), 18 Ch. D. 300; *Re Hervey, Short v. Parratt* (1889), 61 L. T. 429; *Edgar v. Plomley*, [1900] A. C. 431; *Re Jewell's Settlement*, *Watts v. Public Trustee*, [1919] 2 Ch. 161; *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38.

**535.** ——— **Specific legacy.**]—Testatrix by a codicil to her will bequeathed to A. C., sixth Earl of E., & to his successors, all her plate, & also gave, devised, & bequeathed a leasehold house to him & "to his successors, & to be enjoyed with & to go with the title," & as to all her household furniture, paintings, books, china, & the whole contents of her house, she bequeathed the same to her trustees & exors. upon trust that they should in the first place "select & set aside a collection of the best paintings, statuary, & china for the Earl of E. & his successors, to be held & settled as heirlooms, & to go with the title," & she authorised them to give the Earl or his successors any articles of furniture which they should think fit, & as to all the rest & residue of the contents of her house upon trust for her trustees to select presents for her friends, & directed them to present any portion of the residue of the contents of her house to her cousins if they should think fit, or to sell the same, & the moneys so received to form part of her residuary personal estate, & she directed all the legacies left by her will & codicil to be paid free of legacy duty. Testatrix died possessed of considerable personal estate, which comprised amongst other things a number of articles of jewellery which were at her death in a box at her banker's, which jewellery had been bequeathed to her. It was proved that it had been the practice of testatrix, & also of the former owner, to send such box for safe custody to the bankers when they respectively were away from London:—*Held*. (1) the plate & leasehold house passed to the sixth

Earl absolutely; the words "to be enjoyed with & go with the title" not being sufficient in themselves to create an executory trust or to cut down the interest to a life estate; (2) the gift to the trustees of the whole contents of the house upon trust to "select & set aside a collection of the best paintings, statuary, & china, for the Earl of E. & his successors, to be held & settled as heirlooms & to go with the title" was a clear direction to settle & created an executory trust, & a settlement was directed giving a life interest to the sixth Earl with remainder to the next heir to the Earldom for his life; (3) the box of jewellery passed to the trustees as part of the contents of the house, that being the locality to which the property ought to be ascribed, although jewellery is merely for personal use & is not appropriated to a house; (4) under the words "all the legacies left by my will & codicil to be paid free of legacy duty" the legacy duty was to be paid out of the estate on all legacies as well pecuniary as specific, the word "paid" not being sufficient under the circumstances to cut down the direction to pecuniary legacies only.

(5) It is quite plain, having regard to sect. 19 of the Act, that the duty payable in respect of the leasehold house is succession duty & not legacy duty . . . Legacy duty is payable once & for all. . . . Succession duty is entirely different in its nature. . . . I should be straining words if I were to hold that in this codicil legacy duty included succession duty. I am clear it does not (*CHITTY, J.*).—*Re JOHNSTON, COCKERELL v. ESSEX (EARL)* (1884), 26 Ch. D. 538; 53 L. J. Ch. 645; 52 L. T. 44; 32 W. R. 634.

*Annotations*:—*As to* (1) *Reid. Re Hill, Hill v. Hill*, [1902] 1 Ch. 807. *As to* (3) *Reid. Re Miller, Daniel v. Daniel* (1889), 61 L. T. 365; *Re Zouche, Dugdale v. Zouche*, [1919] 2 Ch. 178. *As to* (4) *Folld. Re Pettitt, Flaxman v. Pettitt* (1894), 38 Sol. Jo. 531. *As to* (5) *Reid. Re Rayer, Rayer v. Rayer* (1903), 87 L. T. 712. *Generally, Mentd. Hill v. Hill*, [1897] 1 Q. B. 483; *Re Finch & Chew's Contract*, [1903] 2 Ch. 486.

**536.** ———.]—*Re DRESDEN, LINDO v. LONDON HOSPITAL* (1910), *Times*, July 22.

**537.** ——— **Share of residue.**]—*Re PETTITT, FLAXMAN v. PETTITT* (1894), 38 Sol. Jo. 531.

**538.** ——— **Legacy payable in futuro.**]—Testator by his will, after providing for the sale & conversion of his residuary estate & the payment of his debts, certain legacies & annuities, & also all estate, legacy, & other duties payable in respect of his estate & in respect of the legacies & annuities payable under his will, directed that his trustees should, at such time or times, & from time to time as they should think fit, but nevertheless as soon after his death as circumstances would permit having regard to the amount of his residuary estate at his death & the facilities of sale & realisation, & having regard to the directions thereinbefore contained, set apart & appropriate out of the residue a sum as nearly as might be but not exceeding £1,000,000, to be held upon trust for the Whiteley Homes Trustees:—*Held*: (1) legacy duty in respect of the bequest to the Whiteley Homes Trustees was payable out of the residuary estate & not out of the legacy; (2) as the legacy was not payable at any definite time it carried

not have had legacy duty in his mind, the words "free of expense of every kind" were wide enough to cover legacy duty, & the duty on the specific legacies ought to be paid out of the residuary estate.—*Exemption from duty.*

**n. Direction to pay legacy free of duty—No fund or residue available—Duty payable by legatee.**]—Where a

legacy is left by any will free of legacy duty, but there is no special fund set apart for the payment of such duty, & no residue out of which such payment can be made, the legatee is liable in duty on the amount of the legacy including the portion thereof to be applied in payment of duty.—*LORD ADVOCATE v. MILLER'S TRUSTEES* (1884), 11 R. (Ct. of Sess.) 1046; 21 Sc. L. R. 709.—*SCOT.*

**o. ——— Must be strictly construed.**]—*BROWN'S TRUSTEES v. GOW* (1902), 40 Sc. L. R. 62.—*SCOT.*

**p. ——— ———.] — MACDONALD'S TRUSTEES v. ABERDEEN CORPN.** (1902), 39 Sc. L. R. 745.—*SCOT.*

**q. Legacy bequeathed in satisfaction of a debt—Exempt from duty.**]—A statement in a will that a legacy

interest from the end of a year after the testator's death.—*Re WHITELEY, WHITELEY v. LONDON (BP.) (1909), 101 L. T. 508; 26 T. L. R. 16, C. A.*

539. ———.]—*Re SARSON, PUBLIC TRUSTEE v. SARSON, No. 239, ante.*

540. ——— Duties payable in futuro.]—*Re PARKER, WHITE v. STEWART, No. 233, ante.*

541. ——— Extends to duty payable on sale by legatee—Objects of national, scientific, historic or artistic interest.]—*Re SCOTT, SCOTT v. SCOTT, No. 124, ante.*

542. Direction to pay "all legacies & bequests" free of duty—Proceeds of sale of realty.]—Testator gave several pecuniary & specific legacies, & directed that "all the legacies & bequests" by his will given should be paid or satisfied free of duty, & he devised his residuary real estate to A. for life, & afterwards upon trust for sale:—*Held*: upon the ordinary meaning of the words, "legacies & bequests," & also upon the general construction of the will, the legacy duty which would become payable on the proceeds of the real estate, was not payable out of the personal estate.—*WHITE v. LAKE (1868), L. R. 6 Eq. 188.*

543. Duty ranks as pecuniary legacy—Abates with other pecuniary legacies.]—A gift of the legacy duty payable on a specific legacy ranks as a pecuniary legacy, & in the case of a deficiency of assets must abate along with other pecuniary legacies.—*FARRER v. ST. CATHARINE'S COLLEGE, CAMBRIDGE (1873), L. R. 16 Eq. 19; 42 L. J. Ch. 809; 28 L. T. 800; 21 W. R. 643.*

*Annotations*:—*Consd.* *Re Turnbull, Skipper v. Wade, [1905] 1 Ch. 726. Mentd.* *Burton v. Newbery (1875), 1 Ch. D. 234; Green v. Tribe (1878), 8 Ch. D. 231; Follett v. Pettman (1883), 23 Ch. D. 337; Re Yates, Singleton v. Povah (1922), 128 L. T. 619.*

544. ———.]—*Re TURNBULL, SKIPPER v. WADE, No. 317, ante.*

545. Charitable gift free of duty—Duty cannot be paid out of impure personalty.]—The legacy duty on a charitable legacy, given free of duty, cannot be paid out of impure personalty.—*WILKINSON v. BARBER (1872), L. R. 14 Eq. 96; 41 L. J. Ch. 721; 26 L. T. 937; 20 W. R. 763.*

546. ———.]—Testator gave charitable legacies, to be paid out of pure personalty, & afterwards directed the duties on all legacies to be paid out of residue in exoneration of the legacies:—*Held*: the charitable legacies were exonerated from duty only in the proportion to which the residue consisted of pure personalty.—*Re JARMAN'S ESTATE, LEAVERS v. CLAYTON (1878), 8 Ch. D. 584; 47 L. J. Ch. 675; 39 L. T. 89; 42 J. P. 662; 26 W. R. 907.*

*Annotations*:—*Mentd.* *Re Riland's Estate, Phillips v. Robinson, [1881] W. N. 173; Re Hewitt's Estate, Gateshead Corp'n. v. Hudspeth (1883), 53 L. J. Ch. 132; A.-G. for New Zealand v. Brown, [1917] A. C. 393; Bowman v. Secular Soc., [1917] A. C. 406.*

*See, now, Mortmain & Charitable Uses Act, 1891 (c. 73).*

547. Where residue insufficient to pay duty—Duty payable from legacy.]—Testator gave certain legacies free of legacy duty, *simpliciter*, & other legacies free of legacy duty, with a direction that the duty should be paid out of his residuary estate. The *corpus* of the legacies & the duty having been paid, it was ascertained that the estate was deficient, so that there was no residue available for payment of the duty directed to be thereby borne:—*Held*: the gift of duty out of the residuary estate failed *pro tanto*, & the legatees whose

legacy duty was to be borne by the residuary estate must themselves bear the legacy duty to the extent to which the general personal estate was insufficient to pay the same.—*WILSON v. O'LEARY (1874), L. R. 17 Eq. 419.*

*Annotation*:—*Reid.* *Re Wilkins, Wilkins v. Rotherham (1884), 27 Ch. D. 703.*

#### C. Annuities free of Duty.

548. What amounts to direction to pay free of duty—Bequest to purchase annuity "Clear for A."—A devise of an annuity clear for A. means free from taxes.—*HODGWORTH v. CRAWLEY (1742), 2 Atk. 376; 26 E. R. 628, L. C.*

549. ——— "Clear of property tax & all expenses attending same."—*COURTOY v. VINCENT, No. 523, ante.*

550. ——— "Without any deduction whatsoever."—Where testator gives annuities, & directs them to be paid without any deduction whatsoever, & where, from the nature of the property out of which the annuities are to be paid, there could be no deduction, except in respect of the legacy duty,—there the annuities shall be paid clear of legacy duty.—*SMITH v. ANDERSON (1828), 4 Russ. 352; 6 L. J. O. S. Ch. 105; 38 E. R. 838.*

*Annotations*:—*Consd.* *Stow v. Davenport (1833), 5 B. & Ad. 359; Louch v. Peters (1834), 1 My. & K. 489. Reid.* *Banks v. Braithwaite (1862), 32 L. J. Ch. 35.*

551. ——— "Clear of all deductions."—An annuity was given by a will, clear of all deductions, & was directed to be paid out of certain sums of stock standing in testator's name:—*Held*: it was not subject to legacy duty.—*DAWKINS v. TATHAM (1829), 2 Sim. 492; 57 E. R. 872.*

*Annotations*:—*Consd.* *Stow v. Davenport (1833), 5 B. & Ad. 359. Reid.* *Banks v. Braithwaite (1862), 32 L. J. Ch. 35.*

552. ——— "Clear of all taxes & deductions whatsoever."—*STOW v. DAVENPORT, No. 335, ante.*

553. ——— Clear of legacy duty & all other deductions.]—Testator bequeathed some specific chattels & a sum of £200 to A., & he directed his exors. to invest in the funds, such a sum as would produce £200 a year, clear of legacy duty & all other deductions, which annual sum was to be paid to A. for her life, & after her decease, the principal was to be paid to other parties; & testator directed his exors. to pay legacy duty on the specific & pecuniary legacies & yearly sum given to A. A. & the legatees in remainder were strangers in blood to testator:—*Held*: the legacy duty was payable out of testator's residuary estate, both in respect to the interest given to A. & to those in remainder.—*CALVERT v. SEBBON (1838), 2 Keen, 672; 7 L. J. Ch. 275; 48 E. R. 788; sub nom. CALVERT v. SEVERNE, 2 Jur. 438.*

554. ——— "Clear of all deductions whatsoever."—Testator directed his exors. to set apart a sum not more than £7,500, the dividends of which, when invested as after directed, would amount to or produce the clear yearly sum of £300, clear of all deductions whatsoever, & to invest the sum so to be set apart in govt. or other securities: & he directed that if at any time the dividends of the trust monies should, from any cause whatsoever, prove insufficient to answer the purposes aforesaid, the trustees should, out of the residue of the monies that should come to their hands, raise such further sum as should be sufficient to make good any deficiency; & apply the same

is bequeathed in satisfaction of a debt is sufficient *prima facie* evidence of the testator's indebtedness to exempt the legacy from duty.—*Re O'LEARY'S ESTATE, [1896] 1 I. R. 283.—IR.*

PART IV. SECT. 7, SUB-SECT. 2.—C.  
r. What amounts to direction to pay free of duty—"Free yearly annuity."—*Now.* a party to whom a "free yearly annuity of £60" had

been bequeathed, was entitled to claim the full amount without deduction of legacy duty.—*BULLOCK v. BEATON (1853), 15 Durl. (Ct. of Sess.) 373; 25 Sc. Jur. 229.—SCOT.*



*Sect. 7.—Out of what property duty payable: Subsect. 2, C., D. & E.]*

accordingly; & he gave the annuity to pltf. for life:—*Held*: the annuity was free from legacy duty.—*MARRIS v. BURTON* (1840), 11 Sim. 161; 9 L. J. Ch. 373; 59 E. R. 836.

*Annotations*:—*Consd.* *Baily v. Boulton* (1851), 14 Beav. 595. *Distd.* *Banks v. Braithwaite* (1862), 32 L. J. Ch. 35.

**555.** — “Clear of all taxes & outgoings.”—Testatrix gave to L. for his life an annuity or clear yearly sum of £500, to be paid & payable half yearly, out of real estate, clear of all taxes & outgoings. The annuitant takes it clear of the legacy duty.—*LOUCH v. PETERS* (1834), 1 My. & K. 489; 3 L. J. Ch. 167; 39 E. R. 766, L. C.

*Annotations*:—*Refd.* *Gude v. Mumford* (1837), 2 Y. & C. Ex. 445; *Banks v. Braithwaite* (1862), 32 L. J. Ch. 35.

**556.** — “Clear yearly sum.”—Testatrix gave to trustees such a sum of money as that the annual produce thereof, when invested in the funds, would produce the clear yearly sum of £500, & she declared trusts of the fund for some of her relations & other persons, in succession, some of them not being ascertained at her death:—*Held*: the fund was not exempted from legacy duty.—*SANDERS v. KIDDELL* (1835), 7 Sim. 536; 5 L. J. Ch. 29; 58 E. R. 943.

*Annotations*:—*Distd.* *Marris v. Burton* (1840), 11 Sim. 161. *Folld.* *Pridie v. Field* (1854), 19 Beav. 497. *Refd.* *Baily v. Boulton* (1851), 14 Beav. 595; *Banks v. Braithwaite* (1862), 32 L. J. Ch. 35; *Re Saunders, Saunders v. Gore*, [1898] 1 Ch. 17.

**557.** — — —.]—Testator devised to M. for his life “one annuity or clear yearly sum of £100,” & charged his estates at C. with the payment of the annuity. He then devised the estates at C. to trustees, in trust to levy & raise the annuity & pay the same to J. M.; & subject thereto, & all costs, charges, & expenses attending the raising & paying the same, in trust for A. for life, with remainder to B. in fee:—*Held*: (1) M. was entitled to the annuity clear of all deductions for legacy duty.

(2) The question whether a legatee is to take his legacy free from legacy duty, depends upon the intention of testator as manifested upon the face of the will. Therefore, the words “without deduction,” “clear of all deductions,” etc., may be sufficient to free the legacy from duty, although there be, from the nature of the property on which it is charged, other outgoings to which those words may be applied.

(3) It is clear if you can collect from any direction contained in the will that testator’s intention was that legacy duty should be paid by exor. the ct. will carry that direction into effect (*ALDERSON, B.*).—*GUDE v. MUMFORD* (1837), 2 Y. & C. Ex. 445; 160 E. R. 471.

*Annotations*:—As to (1) *Folld.* *Baily v. Boulton* (1851), 14 Beav. 595. *Distd.* *Pridie v. Field* (1854), 19 Beav. 497. *Refd.* *Banks v. Braithwaite* (1862), 32 L. J. Ch. 35; *Re Grant, Nevins v. United Kingdom Temperance & General Provident Institution* (1915), 59 Sol. Jo. 316.

**558.** — — —.]—Direction to set apart a fund to produce a clear yearly sum of £300 during the life of A.:—*Held*: legacy duty must be paid out of the residue of testator’s estate.—*HARPER v. MORLEY* (1838), 2 Jur. 653.

**559.** — — —.]—Testator directed the investment of a sufficient sum “to raise & pay an annuity or clear yearly sum of £100,” which was given to parties in succession:—*Held*: it was not free from legacy duty.—*PRIDIE v. FIELD* (1854), 19 Beav. 497; 23 L. T. O. S. 304; 2 W. R. 632; 52 E. R. 443.

*Annotations*:—*Refd.* *Banks v. Braithwaite* (1862), 32 L. J. Ch. 35; *Re Saunders, Saunders v. Gore* (1897), 67 L. J. Ch. 55.

**560.** — — —.]—Testator left all his property to trustees upon trust to pay legacies, & one annuity or clear yearly sum of £100 to S. for life, with remainder as to the principal to J. The trustees & exors. renounced, & administration with the will annexed was granted to B., who sold under decree & paid the proceeds into S. & Co.’s bank with the knowledge of the solr. & legatees; there being no direction in the suit to pay it into ct. nor in the will to invest it, & S. & Co. being bkpt., the money was lost, B. claimed to be allowed it in her account:—*Held*: the annuity was free from legacy duty.—*WILKS v. GROOM* (1856), as reported in 27 L. T. O. S. 270; 2 Jur. N. S. 798; 4 W. R. 697.

**561.** — — —.]—“One clear yearly rentcharge or annuity.”—Testator devised real estate to A. subject to the payment of “one clear yearly rentcharge or annuity of £100” to B.:—*Held*: B. took the annuity free of legacy duty.—*BAILY v. BOULT* (1851), 14 Beav. 595; 21 L. J. Ch. 277; 18 L. T. O. S. 83; 15 Jur. 1049; 51 E. R. 413.

*Annotations*:—*Distd.* *Pridie v. Field* (1854), 19 Beav. 497. *Refd.* *Banks v. Braithwaite* (1862), 32 L. J. Ch. 35.

**562.** — — —.]—“Clear annuity or yearly sum.”—Testator bequeathed to a legatee for his life a clear annuity or yearly sum of £100:—*Held*: it was given free of legacy duty.—*HAYNES v. HAYNES* (1853), 3 De G. M. & G. 590; 1 W. R. 204; 43 E. R. 232, L. J. J.

*Annotations*:—*Folld.* *Wilks v. Groom* (1856), 27 L. T. O. S. 270; *Re Coles’ Will* (1869), 22 L. T. 221. *Appld.* *Re Currie, Bjorkman v. Kimberley* (1888), 57 L. J. Ch. 743. *Consd.* *Re Saunders, Saunders v. Gore*, [1898] 1 Ch. 17. *Refd.* *Banks v. Braithwaite* (1862), 32 L. J. Ch. 35.

**563.** — — —.]—“Clear yearly income.”—Testator gave the residue of his personal estate to trustees, upon trust to set apart £10,000, Consols, & pay the dividends to his sister for life, & after her decease to retain so much of the sum of £10,000 as should be sufficient to realise the clear yearly income of £150; & he directed the trustees to pay the dividends & other income of the stock so directed to be retained by them to his nephew:—*Held*: the nephew took the annuity, subject to legacy duty.—*BANKS v. BRAITHWAITE* (1862), 32 L. J. Ch. 35; 7 L. T. 149; 10 W. R. 612.

*Annotations*:—*Consd.* *Re Coles’ Will* (1869), L. R. 8 Eq. 271. *Dbtd.* *Re Saunders, Saunders v. Gore*, [1898] 1 Ch. 17.

**564.** — — —.]—“Clear income or sum.”—Testator directed his exors. to appropriate so much Consols as would produce the clear income or sum of £100 a year, & pay such income or yearly sum to a charity:—*Held*: the legacy was given free of duty.—*Re COLES’ WILL* (1869), L. R. 8 Eq. 271; 22 L. T. 221.

*Annotation*:—*Mentd.* *Re Briscoe’s Trusts* (1872), 26 L. T. 149.

**565.** — — —.]—“Clear yearly annuity”—Explicit direction to pay another annuity free of duty.—R. by will gave all his real & personal estate to trustees upon trust for sale & conversion, & directed them, “out of the proceeds to pay to S. R., until she shall marry, a clear yearly annuity of £250, & after her marriage upon trust to pay to S. R., a clear yearly annuity of £100 during the remainder of her natural life.” Testator proceeded, “after payment of the annuity of £250 or £100 as the case may be, out of the net moneys to arise as aforesaid, upon trust to pay E. R. a clear yearly sum of £31 4s. 0d. free of legacy duty.” This was a summons taken out by the trustees for the determination of the question whether S. R.’s annuity was given free of legacy duty:—*Held*: the words “clear yearly annuity” properly mean an annuity free from legacy duty, & this meaning could not be cut down by the fact that



in another case testator had added the words "free of legacy duty."—*Re ROBINS, NELSON v. ROBINS* (1888), 58 L. T. 382.

**566. Included in gift of pecuniary legacies free of duty.]—**P. by his will gave all his property to trustees to the use of certain persons for successive estate tail, with a direction that parties becoming first entitled to the rents should allow various specified sums to other parties. Then followed a charge on his realty of all the "annuities" thereinbefore mentioned, with a trust to convert & invest. Testator made five codicils by which he gave various annuities, & directed that an annuity to F. B. & all the pecuniary & specific legacies given by his will, should be payable to the legatees free of legacy duty. On the question, whether annuities as well as legacies were given free of duty:—*Held*: they were.—*PEARSE v. PEARSE* (1853), 2 W. R. 129.

**567. Annuity from husband to wife.]—***Re WALLER, MARGARISON v. WALLER*, No. 293, *ante*.

**568. Duty ranks as pecuniary legacy—Abates with other pecuniary legacies.]—**Testator gave an annuity of £150 to his widow, an annuity of £100 to a stranger in blood, & he directed that the second annuity should be paid free of legacy duty, which should be paid out of his estate. After payment of his debts, the estate was insufficient to pay the annuities in full:—*Held*: legacy duty payable on the sum apportioned to the second annuitant must be deducted from the whole fund, & the balance then divided in the same proportion between the two annuitants.—*Re WILKINS, WILKINS v. ROTHERHAM* (1884), 27 Ch. D. 703; 54 L. J. Ch. 188; 33 W. R. 42.

*Annotation*:—*Consd. Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726.

**569. Life interest in residue.]—***LONDESBOROUGH (LORD) v. SOMERVILLE*, No. 576, *post*.

#### D. Substituted and Additional Legacies.

**570. Substituted legacy.]—**Testator gives £4,000 to trustees upon trust for his two daughters at 21; & directed that legacy duty due in respect thereof shall be paid by his exors. out of the residue. By codicil, reciting this bequest, & that he is desirous of increasing the same to £5,000, he revokes the gift of £4,000, & gives £5,000, upon the same trusts, etc. By a second codicil, reciting the former, & that he is desirous of further increasing to £6,000, he revokes the gift of £5,000 & gives in lieu thereof £6,000, upon the same trusts:—*Held*: this was not a revocation, but substitution, in each instance; & the £6,000 was therefore exempt from legacy duty.—*COOPER v. DAY* (1817), 3 Mer. 154; 36 E. R. 59.

*Annotations*:—*Consd. Johnson v. Johnson* (1844), 14 Sim. 313. *Refd. Byne v. Currey* (1834), 2 Cr. & M. 603.

**571. — To husband of deceased legatee.]—**Testator bequeathed to his daughter £50,000 of which £20,000 was to be paid to her absolutely, & as to the remaining £30,000, she was to receive the interest to her separate use during her life, & after her death, the principal was to be paid to such person or persons as she might by her will appoint; & after giving various other legacies, & bequeathing to the same daughter a share of the residue of his personal estate, he directed, that all the specific & pecuniary legacies thereinbefore bequeathed should be paid to the respective legatees free of the legacy duty; the daughter having died, in his lifetime, he afterwards by a codicil, "instead of the legacies given to her by

my will, which are now lapsed," bequeathed to her husband £20,000:—*Held*: the husband was not entitled to have the £20,000 paid to him free of legacy duty.—*CHATTERIS v. YOUNG* (1827), 2 Russ. 183; 38 E. R. 304, L. C.

*Annotations*:—*Refd. Byne v. Currey* (1834), 2 Cr. & M. 603. *Mentd. Re Joseph, Pain v. Joseph*, [1908] 1 Ch. 507.

**572. — Gift on different conditions.]—**Testator gave an annuity of £300, free from all taxes & stamp duties, to I. & H. during their joint lives, & to the survivor during her life, & after the death of the survivor, to G. for her life. By a codicil he revoked the annuity of £300 given to I. & H., & gave them an annuity of £100 each, with benefit of survivorship. The annuities of £100 are subject to the legacy duty.—*BURROWS v. COTTRELL* (1830), 3 Sim. 375; 57 E. R. 1038.

**573. —.]—**Testator by his will gave an annuity to his grandson, & directed his exors. to pay legacy duty on all legacies & annuities given by his will. By a codicil he gave an annuity to his grandson in lieu of the annuity given by his will:—*Held*: the annuity given by the codicil was free from legacy duty.—*SHAFTESBURY (EARL) v. MARLBOROUGH (DUKE)* (1835), 7 Sim. 237; 58 E. R. 827.

*Annotations*:—*Appld. Johnstone v. Harrowby* (1859), 1 De G. F. & J. 183. *Mentd. Hargreaves v. Pennington* (1864), 31 L. J. Ch. 180; *Donnellan v. O'Neill* (1870), 18 W. R. 1188; *Re Boddington, Boddington v. Clairat* (1884), 25 Ch. D. 685; *Re Joseph, Pain v. Joseph*, [1908] 1 Ch. 599.

*See No. 518, ante*.

**574. Additional legacy.]—**Legacy given *simpliciter* by a codicil to a legatee to whom another legacy was given by a prior codicil:—*Held*: to be cumulative & payable out of the same funds & upon the same conditions, including exemption from legacy duty.—*JOHNSTONE v. HARROWBY (EARL)* (1859), 1 De G. F. & J. 183; 29 L. J. Ch. 145; 1 L. T. 390; 6 Jur. N. S. 153; 8 W. R. 105; 45 E. R. 328, L. C.

*Annotations*:—*Distd. Re Howe, Wilkinson v. Ferniehough* (1910), 103 L. T. 185. *Refd. Re Boden, Boden v. Boden*, [1907] 1 Ch. 132. *Mentd. Re Gibson* (1861), 2 John. & H. 656; *Re Smith* (1862), 2 John. & H. 594; *Cresswell v. Cresswell* (1868), L. R. 6 Eq. 69; *Donnellan v. O'Neill* (1870), 18 W. R. 1188; *Re Courtauld, Courtauld v. Cawston* (1882), 47 L. T. 647; *Re Colyer, Millikin v. Snelling* (1886), 55 L. T. 344; *Re Joseph, Pain v. Joseph*, [1908] 1 Ch. 599.

**575. — Further benefit of different nature given by same will.]—**Testator, after appointing exors., gave his house T. & all his household furniture & effects in it to F. "free of all succession, estate, & legacy duties" & continued: "I give to her also an annuity of £520 a year." The residuary devisee & legatee having asked for a declaration that the annuity was chargeable with legacy duty:—*Held*: the rule in *Johnstone v. Harrowby (Earl)*, No. 574, *ante*, that a legacy substituted for or added to a legacy given free of duty is itself freed from legacy duty was confined to cases where the character of each of the legacies is the same, & did not therefore apply to the present case, where one legacy was a specific legacy of chattels & the other a pecuniary one, the latter legacy not being an added legacy within the meaning of the rule applied in that case, & on the true construction of testator's will, the annuity was not bequeathed free of legacy duty.—*Re HOWE, WILKINSON v. FERNIEHOUGH* (1910), 103 L. T. 185; 54 Sol. Jo. 704.

#### E. Bequests of Residue.

**576. Life interest in residue—Direction to pay annuities free of duty.]—**Testator directed legacy duty to be paid out of his general personal estate

*Sect. 7.—Out of what property duty payable: Sub-sect. 2, E. & F. Sects. 8, 9 & 10: Sub-sects. 1, 2 & 3. Sect. 11. Part V. Sects. 1 & 2: Sub-sect. 1.]*

on the annuities & pecuniary legacies given by his will:—*Held*: the income of residuary personal estate directed to be invested in land & settled to uses was not, while uninvested, an annuity within such direction.—*LONDESBOROUGH (LORD) v. SOMERVILLE* (1854), 19 Beav. 295; 23 L. J. Ch. 646; 23 L. T. O. S. 291; 52 E. R. 363.

*Annotations*:—*Mentd.* *Scholefield v. Redfern* (1863), 2 Drew. & Sm. 173; *Freman v. Whitbread* (1865), L. R. 1 Eq. 266; *Bulkeley v. Stephens*, [1896] 2 Ch. 241.

**577.** ———.]—Testator, after giving certain specific & pecuniary legacies & life annuities & making a specific devise, declared (clause 6) that “all the legacies, annuities & bequests” bequeathed by his will should be given & paid free of all “death duties.” He gave his residuary estate on trust for sale & conversion & directed that his trustees should pay his funeral & testamentary expenses, “death duties,” debts, legacies, & annuities out of the proceeds & invest the residue thereof & hold same upon trust to pay certain annual sums to A. & B. during the life of C., & subject thereto upon trust for C. for life, with remainder to A. & B. absolutely:—*Held*: C.’s life interest in the residue was a “bequest bequeathed by the will” within clause 6, & the legacy duty payable in respect thereof was payable out of the corpus of the estate & not out of C.’s income.—*Re KENNEDY, CORBOULD v. KENNEDY*, [1917] 1 Ch. 9; 86 L. J. Ch. 40; 115 T. 690; 33 T. L. R. 44; 61 Sol. Jo. 55, C. A.

*Annotations*:—*Apld.* *Re Eve, Hall v. Eve*, [1917] 1 Ch. 562; *Re Hampton, Hampton v. Mawer* (1918), 62 Sol. Jo. 585.

**578. Share of residue given free of duty—Duty payable from lapsed share.]—WARBRICK v. VARLEY** (No. 1), No. 526, *ante*.

**579.** ———.]—After giving certain legacies to males & females testatrix declared that all legacies, devises, & bequests thereinbefore or thereafter given or made in favour of females should be free of legacy duty, the residue being given to three males & three females as tenants in common:—*Held*: the legacy duty in respect of the shares of the females in the residue were to be paid out of their respective shares.—*Re DALRYMPLE, BIRCHAM v. SPRINGFIELD* (1901), 49 W. R. 627; 45 Sol. Jo. 555.

#### *F. New Duties.*

**580. By whom new duties paid—1909–1910 Act, s. 58.]—Re BRISCOE, ROYDS v. BRISCOE**, No. 193, *ante*.

**581.** ———.]—*Re WALLER, MARGARISON v. WALLER*, No. 293, *ante*.

### SECT. 8.—REMISSION OF DUTY AND INTEREST.

*See Part I., Sect. 2, ante.*

### SECT. 9.—COMMUTATION OF DUTY AND COMPOSITION OF CLAIMS.

**Commutation of duty.]—See 1880 Act, s. 11.**

**Composition of claims.]—See 1881 Act, s. 43.**

*FITZHERBERT v. WATERHOUSE* (1908), 27 N. Z. L. R. 600.—N.Z.

#### PART IV. SECT. 10, SUB-SECT. 1.

**t. Interest on duty erroneously paid by executor—Liability of executor to legatee.]—Executors, in passing their residuary account, erroneously represented the legatees as strangers in blood to the testator, whereby a large**

sum for legacy duty was paid to the Crown.

A suit having been instituted to take an account of the trust funds:—*Held*: (1) the executors could properly be charged with interest on further directions; (2) interest was chargeable on the principal money erroneously paid.—*SHAW v. TURBETT* (1862), 14 L. Ch. R. 476.—IR.

### SECT. 10.—INTEREST, PENALTIES AND PROCEEDINGS.

#### SUB-SECT. 1.—INTEREST.

*See, now, 1896 Act, s. 18 (2).*

#### SUB-SECT. 2.—PENALTIES.

*See 1796 Act, ss. 28–31, 35, 38, 39, 43, & 44; 1808 Act, s. 44; 1868 Act, s. 9; 1890 Act, ss. 22 (2), 32, 33 (1), 35 (1) & (2).*

#### SUB-SECT. 3.—PROCEEDINGS.

*See 1796 Act, Sects. 22, 24; 1865 Act, s. 55.*

**582. Rule for attachment for not accounting—Absolute unless cause shown.]—Re VIVIAN’S ESTATE** (1831), 1 Cr. & J. 409; 148 E. R. 1482; *sub nom.* *Re VYVYAN’S ESTATE*, 1 Tyr. 379.

**583.** ———.]—The ct. will grant a rule, absolute in the first instance, for an attachment at the suit of the Crown against a person having unpaid legacy duty in his hands, where a rule absolute to pay it has been served upon him & has not been obeyed, & no cause has been shown.—*Re EVANS* (1865), 3 H. & C. 562; 5 New Rep. 336; 11 L. T. 717; 11 Jur. N. S. 182; 13 W. R. 350; 159 E. R. 651; *sub nom.* *Re EATON*, 34 L. J. Ex. 87.

**Attachment generally.]—See CONTEMPT OF COURT**, Vol. XVI., pp. 6 *et seq.*; Nos. 1 *et seq.*

**584. Money paid to attorney for purpose of paying duty—Application by Crown for rule for payment refused.]—The ct. refused a rule made on behalf of the Crown, calling on an attorney to pay over to the receiver of stamp duties a sum of money which the attorney had received from his client, an exor., for the purpose of paying legacy duty, but which he had not in fact paid.—*Re FENTON* (1835), 3 Ad. & El. 404; 1 Har. & W. 310; 5 Nev. & M. K. B. 239; 4 L. J. K. B. 204; 111 E. R. 467.**

*Annotation*:—*Mentd.* *Re Cross* (1843), 2 L. T. O. S. 227.

**585. Rule calling on executors to account—Form.]—Upon making absolute a rule calling on exors. to account for legacy duty the ct. ordered that in future it should form part of such rules, that “if upon the delivery of the account there should be found to be any duty payable to His Majesty that the exors. should pay the costs of the Crown, to be taxed in the usual manner.—*Re ROBINSON* (1837), 2 M. & W. 407; 5 Dowl. 609; Murp. & II. 71; 6 L. J. Ex. 158; 150 E. R. 816.**

**586. Information for payment of duty—Parties.]—Qu.:** in an information for the payment of legacy duty, whether all the exors. living, & the representatives of such as may be dead, are necessary parties?—*A.-G. v. HUGHES* (1842), 11 L. J. Ch. 329.

Proceedings on Revenue side of K. B. Div., generally, *see CROWN PRACTICE*, Vol. XVI., pp. 214–236, Nos. 1–316.

**587. Right of Crown to begin.]—Re GREENWOOD**, No. 459, *ante*.

*See, further, CONSTITUTIONAL LAW*, Vol. XI., p. 528, Nos. 325–327.

### SECT. 11.—REPAYMENT OF OVERPAID DUTY.

*See 1796 Act, ss. 8, 34, & 37.*

#### PART IV. SECT. 10, SUB-SECT. 3.

**a. Crown costs—When disallowed.]—If, in a suit for legacy duty, the Crown takes a verdict for more than it is entitled, upon an appeal on this & other grounds, the Crown will not be allowed costs.—*WILLIAMSON v. ADVOCATE-GENERAL* (1843), 2 Bell, Sc. App. 89; *affg.* 13 Dunl. (Ct. of Sess.) 436.—SCOT.**

## Part V.—Succession Duty.

NOTE.—In this Part Succession Duty Act, 1853 (c. 51), *Crown Suits, etc. Act*, 1865 (c. 104), *Customs and Inland Revenue Act*, 1880 (c. 14), *Customs and Inland Revenue Act*, 1881 (c. 12), *Customs and Inland Revenue Act*, 1888 (c. 8), *Customs and Inland Revenue Act*, 1889 (c. 7), *Finance Act*, 1894 (c. 30), *Finance Act*, 1896 (c. 28), *Finance Act*, 1900 (c. 7), *Finance Act*, 1907 (c. 13), *Finance (1909–1910) Act*, 1910 (c. 8), are referred to as 1853 Act, 1865 Act, 1880 Act, 1881 Act, 1888 Act, 1889 Act, 1894 Act, 1896 Act, 1900 Act, 1907 Act, 1909–1910 Act respectively.

### SECT. 1.—IN GENERAL.

**588. Incidence of duty—Falls on beneficiary.]—**WINANS *v.* A.-G., No. 1, *ante*.

**589. — Distinguished from legacy duty.]—**Re JOHNSTON, COCKERELL *v.* ESSEX (EARL), No. 535, *ante*.

**590. 1853 Act—Construed in popular sense.]—**A.-G. *v.* MIDDLETON (LORD), No. 614, *post*.

**591. — — — Technicalities of English or Scotch real property law disregarded.]—**The Dowager Lady S. executed a deed of entail, dated June 9, 1846, of certain estates in Inverness-shire in favour of her eldest son, Lord S., & the heirs of his body; whom failing, in favour of his nephew, her grandson, A., & the heirs of his body. Lord S. took as institute. He died without issue in Aug. 1853; whereupon the said A., now Lord S., took as *nominatim* substitute:—*Held*: (1) he was chargeable with duty at the rate of 1 per cent. only; (2) the grandmother, & not the uncle, was the predecessor within the above Act.

(3) In construing the statute on which his case depends we must bear in mind that it applies to the whole of the United Kingdom. . . . The technicalities of the laws of England & Scotland where they differ must be disregarded & the language of the Legislature must be taken in its popular sense (LORD CAMPBELL, C.).

(4) The rate of duty is to be regulated by considering who is the predecessor, & this may be determined by considering whether the succession is by "disposition" or by "devolution."

(5) In fixing the rate of duty to be paid by the successor the Legislature was perhaps influenced by a consideration of the probability he before had of enjoying the inheritance, & by a consideration of the probability of his being able to pay a heavier duty without hardship, if the property came to him from a distant relation or from a stranger. This object, I think, will best be obtained by holding that where the succession is by disposition the settlor is the predecessor, &

where by devolution the last possessor is the predecessor (LORD CAMPBELL, C.).

(6) In the present case applt. is named & circumstantially described in the deed, he takes directly from the donor by virtue of the deed, & she unquestionably was the "settlor," "disponer," & "ancestor," from whom in one sense his interest in the estate was derived (LORD CAMPBELL, C.).

(7) I think that the position of the *nominatim* substitute in this deed of tailzir is precisely analogous to that of a person who in an English settlement is named as the remainderman in tail after a previous estate tail, & who . . . would be considered as taking by disposition from the author of the settlement, & not by devolution from the previous tenant in tail (LORD CHELMSFORD).—SALTOUN (LORD) *v.* ADVOCATE-GENERAL (1860), 3 Macq. 659; 3 L. T. 40; 8 W. R. 565, H. L.

*Annotations*:—As to (3) FOLLD. A.-G. *v.* LILFORD (1864), 3 H. & C. 239. *Consd.* Special Purposes Income Tax Comrs. *v.* PEMSSEL, [1891] A. C. 531; Lord Advocate *v.* MORAY, [1905] A. C. 531. *Refd.* A.-G. *v.* FLOYER (1861), 7 H. & N. 238; *Re* BARKER (1861), 30 L. J. Ex. 404; *Braybrooke v.* A.-G. (1861), 31 L. J. Ex. 177; A.-G. *v.* UPTON (1866), L. R. 1 Exch. 224; *Re* COWLEY (1866), L. R. 1 Exch. 288; *Fryer v.* MORLAND (1876), 3 Ch. D. 675; *R. v.* Income Tax Comrs. (1888), 22 Q. B. D. 296; *Macfarlane v.* Lord Advocate, [1894] A. C. 291. As to (5) *Apld.* *Re* De LANCEY (1869), L. R. 4 Exch. 345. *Refd.* *Charlton v.* A.-G. (1879), 4 App. Cas. 427; A.-G. *v.* MITCHELL (1881), 44 L. T. 580; *Buchan v.* Lord Advocate, [1909] A. C. 166; *Hamilton v.* Lord Advocate, [1920] A. C. 50. As to (7) *Consd.* ZETLAND *v.* Lord Advocate (1878), 3 App. Cas. 505.

**592. — — — — —.]—**BRAYBROOKE (LORD) *v.* A.-G., No. 694, *post*.

**593. — — — — —.]—**ZETLAND (EARL) *v.* LORD ADVOCATE, No. 702, *post*.

**594. — To what persons applicable.]—**A.-G. *v.* LITLEDALE, No. 652, *post*.

**Estate duty in successions.]—**See No. 9, *ante*.

### SECT. 2.—THE SUCCESSION.

#### SUB-SECT. 1.—IN GENERAL.

See 1853 Act, s. 1.

**595. Interpretation of "succession"—All property passing on death—By gift or descent—Not by contract of purchase.]—**FLOYER *v.* BANKES, No. 754, *post*.

**596. — — — — — By any disposition.]—**SOLICITOR-GENERAL *v.* LAW REVERSIONARY INTEREST SOCIETY, No. 797, *post*.

**597. — Property not capable of assessment.]—**A.-G. *v.* SEFTON (EARL), No. 799, *post*.

**598. — Money payable under engagement.]—**A.-G. *v.* MONTEFIORE, No. 606, *post*.

#### PART V. SECT. 1.

**b. Incidence of duty—Falls on beneficiary—Intra vires provincial legislature.]—**The tax imposed by Succession Duty Act is not an indirect tax, & the Act is within the powers of the Provincial Legislature. The impost is laid expressly upon the property passing on death, & there is no legal obligation to pay the duty imposed upon any person or persons other than the beneficiaries, & even as to them the liability is only inferential, or arises under an order of the Ct. made in the course of the enforcement of the charge upon the property.—*Re* DOE (1914), 19 B. C. R. 536; 16 D. L. R. 740; 27 W. L. R. 803; 6 W. W. R. 510.—CAN.

**c. Not a testamentary expense.]—**

Succession duty is not a testamentary expense, & a testator wishing such duty to be paid by his exors. out of the corpus of his estate & not to be borne by the successors must give a specific direction to that effect.—*Re* HOLMES, BEETHAM *v.* HOLMES (1913), 32 N. Z. L. R. 577.—N.Z.

#### PART V. SECT. 2, SUB-SECT. 1.

**596 i. Interpretation of "succession"—All property passing on death—By any disposition.]—**LORD ADVOCATE *v.* CONSTABLE'S TRUSTEES (1880), 17 Sc. L. R. 611.—SCOT.

**598 i. — Money payable under engagement.]—**A sum of £2,000 was settled by antenuptial contract, to which the wife's father was a party.

He bound himself to pay that sum to the marriage contract trustees, at the first term after his death; the interest being declared payable from that term, first to the wife during her life, & then to the husband in the event of his survivance, the fee being destined to the children of the marriage, whom failing, to the grantor's testamentary trustees:—*Held*: this was a succession within 16 & 17 Vict. c. 51, & succession duty was chargeable thereon.—LORD ADVOCATE *v.* ROBERTS' TRUSTEES (1858), 20 Dunl. (Ct. of Sess.) 449.—SCOT.

**d. — Movables in the colony—Testator domiciled out of the colony.]—***Held*: Queensland Succession & Probate Duties Act, 1892, s. 4, defining a



*Sect. 2.—The succession: Sub-sects. 1 & 2, A.]*

599. "Property"—Includes covenant to pay annuity.]—*Re MICKLETHWAIT*, No. 824, *post*.

600. "Disposition" & "devolution"—Every mode whereby property passes.]—*NORTHUMBERLAND (DUKE) v. A.-G.*, No. 602, *post*.

"New succession"—When arising.]—*See* No. 602, *post*.

## SUB-SECT. 2.—SUCCESSIONS UNDER DISPOSITIONS.

## A. Dispositions.

*See* 1853 Act, s. 2.

601. Extent of "dispositions"—Includes all modes—By will, deed, or settlement *inter vivos*.]—*A.-G. v. FITZJOHN*, No. 613, *post*.

602. ———.]—A., tenant for life of real property, & B., tenant in tail in remainder, executed a distailing deed & sold & conveyed the property to C. On C.'s death D., as C.'s devisee, became entitled in possession to the property & paid succession duty thereon. Then A. died & the Crown claimed succession duty from B. & D. as on a succession from A.:—*Held*: succession duty was payable by D., to be calculated on the life of D.

(1) A succession within the Act once established, no manipulation of the parties afterwards can get rid of it; & the observation is equally true whether there be one or two successions (*LORD HALSBURY, C.*).

(2) It is clear that the terms "disposition" & "devolution" must have been intended to comprehend & exhaust every conceivable mode by which property can pass, whether by act of parties or by act of law. . . . It is to be borne in mind that a "successor" must be beneficially entitled. When a person takes a succession he may not have actual possession. A husband, for instance, may have possession in right of his wife. . . . But a successor to be a true successor within the Act, must have the beneficial interest in the property subject to duty, whoever may have the actual possession or the right of management (*LORD MACNAGHTEN*).

(3) In many cases the purposes of the Act would be defeated unless you give to the term "disposition" the largest possible signification, not only so, but the Act shows on the face of it that the term "disposition" includes a sale (*LORD MACNAGHTEN*).

(4) He [the alienee of a succession] becomes a successor within the Act, though the succession conferred on him is not a new succession (*LORD MACNAGHTEN*).

(5) The cardinal fact to be borne in mind in the construction of sects. 14 & 15, is that in the case of real estate the successor, although entitled in fee simple, is charged only on an annuity commensurate with his personal enjoyment, *i.e.* in most cases for life (*LORD DAVEY*).

(6) I think that a new succession can only be conferred by a new disposition or devolution by law to take effect on death, & conversely every derivative title by reason of death confers a new succession under sect. 2 of the Act (*LORD DAVEY*).

"succession" being the same as English Succession Duty Act, 1853, s. 2, must be read in the sense affixed to the English Act by the English tribunals; & it does not include movables locally situated in Queensland which belonged to a testator whose domicile was in Victoria.—*HARDING v. QUEENSLAND STAMPS COMRS.*, [1898] A.C. 769.—AUS.

## PART V. SECT. 2, SUB-SECT. 2.—A.

a. What amounts to a disposition—Bond or contract for payment of money.]—The deceased covenanted to pay £200,000 to his children with interest at 1½ per cent. *per annum*, the debt being payable at call. He regularly paid the interest, but no portion of

(7) He became thereby in the position of a successor whose title in possession has been accelerated by the surrender or extinction of the prior interest, & apart from the provision at the end of sect. 15, would have been presently liable to pay the duty, but by that provision for the benefit of the successor the duty is made payable only at the same time, & in the same manner as such duty would have been payable if no acceleration had taken place. The words "in the same manner" are a little puzzling, but I think they mean that the Crown is not to lose the duty by reason of the estate of the successor having become an estate in possession or the limitations of the existing settlement being exhausted, & the duty is to be paid on the happening of the same event, as it would if there had been no surrender of the prior interest, although nothing passed & no title in possession was acquired on that event (*LORD DAVEY*).

(8) The "successor" means the person entitled to the succession at the date when it becomes an interest in possession. The applt. is in the position of such a successor, & . . . the duty should be assessed on the value of an annuity according to the tables for the residue of her life (*LORD DAVEY*).—*NORTHUMBERLAND (DUKE) v. A.-G.*, [1905] A.C. 406; 74 L.J.K.B. 731; 93 L.T. 88; 54 W.R. 31; 21 T.L.R. 639, H.L.; *affg.* S.C. *sub nom.* *A.-G. v. NORTHUMBERLAND (DUKE)*, [1904] 1 K.B. 762, C.A.

*Annotations*:—As to (1) *Consd.* *Buchan v. Lord Advocate*, [1909] A.C. 166. *Refd.* *A.-G. v. Assheton-Smith*, [1924] 2 K.B. 25; *Lord Advocate v. Macalister*, [1924] A.C. 586. As to (6) *Refd.* *A.-G. v. Assheton-Smith*, [1924] 2 K.B. 25; *Lord Advocate v. Macalister*, [1924] A.C. 586.

603. ——— Sale of property.]—*FRYER v. MORLAND*, No. 755, *post*.

604. ———.]—*NORTHUMBERLAND (DUKE) v. A.-G.*, No. 602, *ante*.

605. ——— Bond or contract for payment of money—Life insurance policy.]—*FRYER v. MORLAND*, No. 755, *post*.

606. ——— Covenant to transfer stock & shares.]—By deed making provision for an endowment the donor covenanted that he or his exors. or administrators after his death would transfer certain Bank stock & certain shares into the names of trustees, & by another deed of the same date he declared that the trustees should stand possessed of the stock & shares upon trust for certain charitable purposes. By a subsequent deed he covenanted that he, or his exors. or administrators after his death, would transfer a further amount of Bank stock into the names of the trustees, & declared that they should stand possessed of it on the same trusts. After the death of the donor, his exors. transferred the stock & shares into the names of the trustees:—*Held*: the deeds showed a "disposition of property" within 1853 Act, s. 2, & the stock & shares so transferred were chargeable with succession duty.

As regards the statutory definitions, "money payable under an engagement" is expressly included in the term "property," the founder is clearly a "predecessor" & a trustee of the charity is equally clearly a "successor" according to the interpretation clause (*MANISTY, J.*).—*A.-G. v.*

the principal:—*Held*: this covenant, in the absence of evidence to the contrary, conferred on the children complete ownership of the debt, & was a non-testamentary disposition of property within South Australian Succession Duties Act, 1893, s. 16, not subject to duty under s. 17, as the testator died more than three months

MONTEFIORE (1888), 21 Q. B. D. 461; 59 L. T. 534; 37 W. R. 237; 4 T. L. R. 658, D. C.

**607. — Sums payable under insurance policies—Effected under customs annuity & benevolent fund—56 Geo. 3, c. lxxiii.]—**(1) By above Act it was enacted that a fund should be raised for the benefit of the widow & children or other relatives of officers of the Customs. A code of rules was drawn up, by which it was provided that the admission by the directors of a nominee of a subscriber should take place during the lifetime of such subscriber; & it was also provided that if an annuity were insured for the benefit of the widow equal to one-third of the insurance money, the subscriber should have power by any instrument, signed in the presence of two witnesses, & deposited with the directors, to direct that the whole capital money insured should be applied or paid in any manner or proportion he might think proper for the benefit of his nominee, who should have been duly admitted by the directors. In 1826 P. became a subscriber. In the same year one of his daughters was married, & by a deed, dated & executed in 1832, P. covenanted that upon his decease his daughter & her husband should take a share equal with his two other daughters of all the property, real & personal & of every other kind & description whatsoever which he P. should be seised or possessed of, or in any manner entitled to or interested in at his decease. The married daughter died in 1842, & in 1845 P., in consequence of a communication from the directors of the fund, by an instrument signed in the presence of two witnesses, directed that the whole of the insurance money forthcoming at his decease should be invested, & the interest paid for the benefit of his wife for her life, & then to be divided between his two surviving daughters. This latter instrument was deposited with the directors, but not the former. In 1847 the wife died, & in 1855 P. died. The two daughters of P. applied for the insurance money, upon which the husband of the deceased daughter claimed a third under the deed of covenant of 1832:—*Held*: the covenant of P. did not affect the particular fund in question, as it was not a part of his general estate, & that it must pass to the daughters who were nominees of the fund under a distinct instrument of nomination.

(2) P. declared that a sum of money should be divided between his two daughters in equal proportions, share & share alike, & in the event of either of his said daughters marrying & leaving issue, then her or their respective shares should go to her or their children respectively; & in case both his daughters should die without issue, then to his son C. If he, P., should survive his wife, which happened, he directed the whole sum to be paid to his said daughters or their children, if any, or to his said son C. in manner thereinbefore directed. C. was dead, & the two daughters were unmarried at the death of P.:—*Held*: the daughters in the events which had happened were entitled to the fund absolutely. (3) *Semble*: the above mentioned fund was not liable to succession duty.—*Re POWELL'S TRUSTS OF INSURANCE IN CUSTOMS ANNUITY & BENEVOLENT FUND* (1856), 28 L. T. O. S. 19; 2 Jur. N. S. 799.

thereafter.—*SIMMS v. REGISTRAR OF PROBATES*, [1900] A. C. 323.—*AUS.*

**f. — Immediate benefit secured to beneficiary—By private Act of Parliament.]—**Where deeds of truster & his widow conferred no right on the beneficiaries other than a right to the conveyance of the heritage on the

termination of the trust:—*Held*: payments made to the beneficiaries under a private Act of Parliament were not acquired by disposition & were not liable for duty.—*LORD ADVOCATE v. JAMIESON* (1886), 23 Sc. L. R. 510; 13 R. (Ct. of Sess.) 737.—*SCOT.*

**g. — Income of fund settled**

**608. — — — — —.]—**By above Act a fund was raised by subscription, upon the principle of life insurance, which, together with the contributions of poundage granted by the Act, formed a fund for the widows' children & relatives, & also the nominees of officers or persons belonging to the department of Customs, according to the tables therein described; a subscriber having the power by will to direct the whole capital money to be applied in any manner he may think proper for the benefit of his widow, children, or relatives or otherwise as in the rules provided. An officer of the Customs & a subscriber to the fund, died unmarried & without children, having by his will given to his sister £498 13s. 1d., being the amount of the capital money forthcoming by virtue of his insurance in the Customs Fund, & placed at his disposal by the rules & regulations of the said fund:—*Held*: this was a disposition of "property" by testator, & conferred upon deft., entitled by reason of such disposition, a succession, within sect. 2 of 1853 Act. The relationship of predecessor & successor existed between the officer & the nominee.—*A.-G. v. ABDY* (1862), 1 H. & C. 266; 32 L. J. Ex. 9; 6 L. T. 756; 8 Jur. N. S. 798; 158 E. R. 884.

*Annotations*:—*Distd. Re Maclean's Trusts* (1874), L. R. 19 Eq. 271. *Refd. Urquhart v. Butterfield* (1887), 36 Ch. D. 55; *Caddick v. Highton* (1899), [1901] 1 Ch. 476, n. *Mentd. Re William Phillips' Insee.* (1883), 23 Ch. D. 235.

**609. — — — — —.]—**A subscriber to above fund, by instrument duly executed & deposited with the directors, irrevocably assigned two-thirds of the portion payable on his death to mtgees. to secure an advance made to him, & the mtgees. were duly admitted by the directors as his nominees:—*Held*: (1) the mtge. was valid as against the widow, children & relations of the subscriber; (2) by virtue of sect. 17 of 1853 Act, the interest of the mtgees. in the fund was not liable to succession duty.—*Re MACLEAN'S TRUSTS* (1874), L. R. 19 Eq. 274; 44 L. J. Ch. 145; 31 L. T. 633; 23 W. R. 206.

*Annotations*:—*Mentd. Re Phillips' Insee.* (1883), 48 L. T. 81; *Urquhart v. Butterfield* (1887), 37 Ch. D. 357.

**610. — — — — —.]—***FRYER v. MORLAND*, No. 755, *post*.

**611. — — — — —.]—***A.-G. v. BUMSTED* (1893), 37th Report of Inland Revenue Comrs., App. LI.

**612. Disposition made prior to 1853 Act—Possession acquired subsequent to Act—Duty payable.]—***WILCOX v. SMITH*, No. 625, *post*.

**613. — — — — —.]—**A testator bequeathed to trustees £5,000 in trust to invest the same & pay the dividends to his daughter during her life, & upon further trust after her death for her children, equally to be divided amongst them. Testator died in 1803, at which time no duty was payable on legacies to children or grandchildren. His daughter died after 1853 Act came into operation. By sect. 2 of that Act, "every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property upon the death of any person dying after the commencement of that Act, shall be deemed to have conferred, or to confer, on the person entitled by reason of such disposition a 'succession.' " By sect. 18, no duty shall be

*under marriage contract—Paid to wife as legal consequence of divorce.]—*In consequence of a dissolution of a marriage by decree of divorce on the ground of the husband's adultery, the income of a fund—which under the marriage-contract was settled by the husband's father on him, & after his death on his wife, for their liferent alimentary



**Sect. 2.—The succession: Sub-sect. 2, A. & B.]**

payable "by any person in case of a succession, who, if the same were a legacy would be exempted from the payment thereof under the Legacy Duty Acts":—*Held*: (1) the interest of testator's grandchildren in the property bequeathed to them was a "succession" within the Act; (2) it was not within the exemption of sect. 18, since that applied only to express exemptions by former Acts, & consequently succession duty was chargeable.

The term "disposition" extends to all modes of disposition, whether by will, or by deed or settlement *inter vivos* (WATSON, B.).—A.-G. v. FITZJOHN (1857), 2 H. & N. 465; 27 L. J. Ex. 79; 29 L. T. O. S. 294; 5 W. R. 876; 157 E. R. 192.

*Annotations*:—As to (1) *Consd.* A.-G. v. Middleton (1858), 3 H. & N. 125. As to (2) *Apld.* *Re Wallops Trust* (1864), 1 De G. J. & Sm. 656.

614. ————.]—A testator devised his real estate to D. for life, & after D.'s decease to his eldest & other sons in tail male; & in default of such issue to H. for life, & after his decease to the eldest son of H. for life, with remainders over. Testator died in June, 1835, leaving D. & H., & deft., the eldest son of H., him surviving. H. died in Nov. 1849, leaving deft. him surviving. On May 19, 1853, Succession Duty Act, 1853 (c. 51), came into operation. In Nov. 1856, D. died, whereupon deft. succeeded to the estate under testator's will:—*Held*: deft. was chargeable with duty under sect. 2 of the above Act.

Whenever any person obtained, by the death of another, any benefit under an arrangement, though made before the Act, that benefit should be liable to duty (POLLOCK, C.B.).

This Act speaks in common parlance, & does not use terms of art (BRAMWELL, B.).—A.-G. v. MIDDLETON (LORD) (1858), 3 H. & N. 125; 27 L. J. Ex. 229; 30 L. T. O. S. 323; 6 W. R. 300; 157 E. R. 413.

*Annotation*:—*Consd.* A.-G. v. Deane (1861), 5 L. T. 122.

615. ————.]—BRAYBROOKE (LORD) v. A.-G., No. 694, *post*.

616. ————.]—A.-G. v. GELL, No. 640, *post*.

617. ———— Nature immaterial.]—BRAYBROOKE (LORD) v. A.-G., No. 694, *post*.

618. ————.]—*Re RAMSAY'S SETTLEMENT*, No. 670, *post*.

619. New disposition—Arising on re-settlement of entailed property—Succession of remainderman to tenant for life.]—BRAYBROOKE (LORD) v. A.-G., No. 694, *post*.

620. ————.]—A.-G. v. SMYTHE, No. 697, *post*.

———.]—CHARLTON v. A.-G., No. 699, *post*.

622. ———— Succession to charges upon property.]—A. in 1776 devised certain estates to his son H. for life, with remainder to the first & sons of H. successively in tail male. In H. & his eldest son W. J. executed a disentailing deed, & then resettled the estates to such uses as H. & W. J. should jointly appoint, in default to H. for life, remainder to such uses as W. J. should appoint, in default to the uses limited by the will of A. In 1821 H. & W. J. executed a joint appointment of the previous settled estates, & also of some now first brought into settlement by H., to such uses as they should jointly appoint, then to H. for life, remainder to W. J. for life,

uses respectively—was paid to the wife until her death, after which event it again became payable to the husband:—*Held*: succession-duty was payable on the property passing to the husband

on the wife's death, the exemption created by Succession Duty Act, 1853, s. 12, being inapplicable, in respect that the wife had acquired the income as a legal consequence of the

remainder to the first & other sons of W. J. in tail male, remainder to the use of G. & E. (two brothers of W. J.) successively in tail male. No other appointment was made. H. died; W. J. entered, & died without issue. G. then entered, & by a deed executed in 1855 between G. & his eldest son E. G., the entail previously created was destroyed & the estates were conveyed to a trustee for such uses as G. & E. G. should jointly appoint, & in default, to the uses of the settlement of 1821. An appointment was afterwards made, to which G., E. G. & resp. F. were parties, by which the estates were settled to such uses as G. & E. G. should jointly appoint, & in default to trustees to pay an annuity of £800 to E. G. during the life of his father, then to G. for life, then to trustees to pay E. G. £4,000 a year, remainder to the use of E. G.'s sons successively in tail male. Under powers reserved to the existing tenant for life in the deed of 1821 & 1855, G. charged the estates with certain sums for the benefit of younger children. G. died, & the trusts then came into operation:—*Held*: (1) G.'s succession was liable to a payment of £3 per cent., his predecessor having been W. J.; (2) E. G. took under his own disposition, on a succession likewise derived from W. J., & was liable to a duty of £3 per cent.; (3) G.'s younger children were also (as to some part of their interest) liable to a duty of £3 per cent., as deriving their succession from their brother, E. G.; (4) but as to certain estates newly bought into settlement by their grandfather H., they were held liable to a duty of only £1 per cent., & the account of the whole duty due from them was directed to be taken with reference to this allowance; (5) in taking the account of what was due from E. G. allowance was ordered to be made for the annuity of £800 charged upon the estates, the subject of his succession.—A.-G. v. FLOYER (1862), 9 H. L. Cas. 477; 31 L. J. Ex. 404; 7 L. T. 47; 26 J. P. 708; 9 Jur. N. S. 1; 10 W. R. 762; 11 E. R. 814, H. L.; *reversg.* (1861), 7 H. & N. 238.

*Annotations*:—As to (1) *Folld.* A.-G. v. Lilford (1864), 3 H. & C. 239; A.-G. v. Cecil (1870), 18 W. R. 949. *Consd.* Charlton v. A.-G. (1879), 4 App. Cas. 427. *Folld.* A.-G. v. Chapman, [1891] 2 Q. B. 526. *Consd.* A.-G. v. Wolverton, [1896] 2 Q. B. 389. *Expld. & Apld.* A.-G. v. Parr, [1924] 1 K. B. 916. *Generally, Refd.* *Re Peyton* (1861), 7 H. & N. 265; I. R. Comrs. v. Harrison (1874), L. R. 7 H. L. 1; Le Marchant v. I. R. Comrs. (1875), L. R. 10 Exch. 292; A.-G. v. Mitchell (1881), 6 Q. B. D. 548; A.-G. v. Maule (1886), 56 L. T. 611.

623. ————.]—A.-G. v. CECIL, No. 662, *post*.

When "new succession" arises.]—See Nos. 662–666, *post*.

The predecessor.]—See Sub-sect. 5, *post*.

**B. Successions.**

See 1853 Act, s. 2.

624. When succession accrues—Bequest to tenant for life.]—WOLVERTON v. A.-G., No. 660, *post*.

625. "Beneficially entitled"—Distinguished from title as trustee.]—(1) Devise in 1826 to A. for life, remainder to A.'s first & other sons in tail. A. died in 1827, leaving his son the tenant for life. The tenant for life died on July 18, 1853, leaving B., his eldest son, surviving, who was born before May 19, 1853. 1853 Act was passed on Aug. 4, 1853, but came into operation on

decree of divorce & not by a "disposition" from her husband.—LORD ADVOCATE v. MONCREIFFE (MONTGOMERY'S TRUSTEES), [1914] S. C. 414.—SCOT.



May 19:—*Held*: B. was within the Act, & succession duty attached.

(2) “Beneficially” means, of course, “for his own benefit,” in contradistinction to being entitled as a trustee (KINDERSLEY, V.-C.).—WILCOX v. SMITH (1857), 4 Drew. 40; 26 L. J. Ch. 596; 3 Jur. N. S. 604; 5 W. R. 667; 62 E. R. 16; *sub nom.* WILCOX v. SMITH, WILCOX v. BROWN, 29 L. T. O. S. 235.

*Annotations*:—As to (1) *Follis*. A.-G. v. Middleton (1858), 3 H. & N. 125. *Consd.* A.-G. v. Deane (1861), 5 L. T. 122; A.-G. v. Noyes (1881), 8 Q. B. D. 125. *Refd.* *Re* Cooper & Allen’s Contract for Sale to Harlech (1876), 4 Ch. D. 802.

**626. — Distinguished from mere legal interest.**—In 1803 certain estates were settled to the use of P. for life, with remainder to his first son in tail male. In May, 1826, P. & his first son suffered a recovery & conveyed the estates to the use of P. for life, with remainder to the use that the wife of P., in case she should survive him, should yearly receive during her life a rent of £1,000; with remainder to such uses & subject to such charges as P. & his son should appoint, & in default of appointment to the use of the son for life, with remainder to his first & other sons in tail male. In Dec. 1826, P. & his son, in execution of the power, appointed the estates to such uses & subject to such charges as they, during their joint lives, should appoint; & in default of appointment to the son for life, with remainders over. Subsequently P. & his son, in exercise of the power, mortgaged the estates for money lent to them, & for the repayment of which they jointly & severally covenanted. They also mortgaged the estate for a debt then due from P., & for the repayment of which he alone covenanted. They also charged the estates with an annuity of £500 for the grandson of P. during his life & the life of P. & his son, or the survivor:—*Held*: (1) on the death of P. his son was entitled on estimating the value of his succession, to an allowance in respect of the rentcharge of £1,000 during the life of the wife of P., inasmuch as she was chargeable with duty in respect of it; (2) the annuity of £500 to the grandson of P., & the mtge. debts, were incumbrances on the succession created by the son & not made in execution of a prior special power of appointment, within 1853 Act, s. 34, & consequently the son was not entitled to any allowance in respect of either of them.

Nor do I think we can regard the words “beneficial interest” in the second section as giving any assistance in deciding this case; I think these words mean beneficial as distinguished from mere legal interest (BRAMWELL, B.).—*Re* PEYTON (1861), 7 H. & N. 265; 31 L. J. Ex. 50; 5 L. T. 313; 7 Jur. N. S. 921; 158 E. R. 475; *sub nom.* *Re* PEYTON & INLAND REVENUE COMRS., 9 W. R.

*Annotations*:—Generally, *Refd.* A.-G. v. Yelverton (1861), 30 L. J. Ex. 333; A.-G. v. Cecil (1870), L. R. 5 Exch. 263; Wolverton v. A.-G., [1898] A. C. 535.

**627. —**—It is not necessary to say whether “beneficially interested” means “in possession.” With submission to the Master of the Rolls, I should have thought not. I should think they meant beneficially as distinguished from merely “legally” (BRAMWELL, B.).—A.-G. v. CHARLTON (1877), 2 Ex. D. 398; 46 L. J. Q. B. 750; 37 L. T. 211; 26 W. R. 154, C. A.; *affd.* *sub nom.* CHARLTON v. A.-G. (1879), 4 App. Cas. 427, H. L.

*Annotations*:—*Refd.* A.-G. v. Mitchell (1881), 6 Q. B. D. 548; A.-G. v. Chapman, [1891] 2 Q. B. 526; Wolverton v. A.-G., [1898] A. C. 535; A.-G. v. Selborne, [1902] 1 K. B. 388.

**628. — Whether property must be “in pos-**

**session.”]**—Where an apparent heir died without taking possession, without making up a title, without drawing rent, & without incurring representation:—*Held*: the case did not come within the meaning of the statute, & succession duty was not demandable by the Crown.

The “beneficial interest” must be regarded as an interest to which the successor has become entitled in possession (LORD HARTHERLEY, C.).—LORD ADVOCATE v. STEVENSON (1869), L. R. 1 Sc. & Div. 411, H. L.

**629. —**—*]*—FRYER v. MORLAND, No. 755, *post*.

**630. —**—*]*—A.-G. v. CHARLTON, No. 627, *ante*.

**631. —**—*]*—NORTHUMBERLAND (DUKE) v. A.-G., No. 602, *ante*.

**632. — Beneficiary providing benefit—Payment of insurance premiums.**—(1) F. assigned in 1883 to his daughter policies of insurance on his own life on which he had for some years paid the premium. After the assignment until the death of F., the premium was paid solely by the daughter. In 1890, the father died, & the daughter received the money due under the policies:—*Held*: the daughter was liable to neither succession duty nor account duty in respect of the money so received.

(2) The person entitled ultimately to this money, herself in one sense created the property—that is, she continued the contract under which, if she continued to pay premiums, certain money would be payable on the death. She continued that for a period of seven years, & therefore, reading simply the words as they stand, I do not think she has “become beneficially entitled” upon the death of any person; because she has become entitled by reason, among other things, of her own payments during the period of seven years; & it appears to me, under that sect., in order to make this a “succession” we must introduce some words of this kind: “disposition of property by reason whereof *either partly or wholly* a person has become entitled.” . . . I find no such words in the statute, & I decline to do anything else than construe the words which I find there (LORD HALSBURY, C.).—LORD ADVOCATE v. FLEMING, [1897] A. C. 145; 66 L. J. P. C. 41; 61 J. P. 692; 13 T. L. R. 216; *sub nom.* LORD ADVOCATE v. ROBERTSON, 76 L. T. 125; 45 W. R. 674, H. L.

*Annotation*:—As to (1) *Consd.* A.-G. v. Lethbridge (1901), 92 L. T. 88.

**633. Alternative conditions of succession—End of term or death—Succession accruing by death.**—A.-G. v. NOYES, No. 708, *post*.

**634. Annuity carved out of residuary bequest.**—WOLVERTON v. A.-G., No. 660, *post*.

**635. Annuity charged on realty.**—A.-G. v. WADE, No. 384, *ante*.

**636. Avoidance of established succession—By substitution of other succession.**—SOLICITOR-GENERAL v. LAW REVERSIONARY INTEREST SOCIETY, No. 797, *post*.

**637. —**—*]*—*Re* COOPER & ALLEN’S CONTRACT FOR SALE TO HARLECH, No. 657, *post*.

**638. —**—*]*—WOLVERTON v. A.-G., No. 660, *post*.

**639. —**—*]*—NORTHUMBERLAND (DUKE) v. A.-G., No. 602, *ante*.

**640. Contingent succession—Period of accumulation.**—Testator bequeathed his property to trustees upon trust during the joint lives of T. & his wife, I., to accumulate, subject to the following & certain other provisos for cesser: “That in case I. died before T., or without issue by any other husband surviving her, the trustees were to convey the estates to P. for life, with remainder to the

*Sect. 2.—The succession: Sub-sect. 2, B.; sub-sects. 3 & 4.]*

use of his second & other sons, the eldest excepted, as he should appoint; & after his decease, & in default of appointment, unto the use of the second & other sons, the eldest excepted, in remainder successively, with remainders over, on certain conditions. If, at the end of 21 years, T. & I. should be living, then the accumulation to cease & the rents, during the joint lives of T. & I. should be paid, "to or for the benefit of the person or persons who for the time being, under the hereinbefore mentioned direction, would have been entitled to such rents, in case I. were then dead without issue by any other husband." Testator died before 1853 Act. T. & I. were both living. P. died six days before the expiration of 21 years, without appointing. Deft. performed conditions & became beneficially entitled, subject to the trust for accumulation for the remaining six days, & to the rents of the estate for the joint lives of T. & I. The Crown claimed succession duty from deft., as having become beneficially entitled to a succession upon the death of his father, after the interval between that death & the expiration of the term:—*Held*: deft. was liable to pay succession duty, inasmuch as on his father's death he became beneficially entitled, after an interval, to possession: & sect. 2 of the Act applied to cases where the title has accrued before the Act, but is made an interest in possession at once, or after an interval, upon a death occurring after the Act, so that the Act applied where the death was the occasion of the successor's being entitled to possession immediately, or after an interval.—*A.-G. v. GELL* (1865), 3 H. & C. 615; 6 New Rep. 299; 34 L. J. Ex. 145; 12 L. T. 461; 29 J. P. 566; 11 Jur. N. S. 566; 13 W. R. 900; 159 E. R. 673.

*Annotations*:—*Folld. Ring v. Jarman* (1872), L. R. 14 Eq. 357. *Consd. A.-G. v. Eyres*, [1909] 1 K. B. 723.

**641.** — — —.]—A testator died in 1850, having devised his real estates to trustees upon trust to accumulate the rents for 21 years, & then to convey & assure the estates & accumulations to the person or persons who should then answer the description of his "heir or co-heiresses at law." He died a bachelor, leaving an heir at law, who died in 1865. Four co-heiresses of testator succeeded to the property in 1871:—*Held*: succession duty was payable.—*RING v. JARMAN* (1872), L. R. 14 Eq. 357; 41 L. J. Ch. 535; 26 L. T. 690; 20 W. R. 741; *on appeal*, 21 W. R. 213, L. J.J.

**642. Death as cause or occasion of succession—1853 Act applicable.**—*A.-G. v. GELL*, No. 640, *ante*.

**643. Interest in possession of deceased—Derived from different disposition—To one under which successor takes.**—(1) In 1852 A., the tenant for life, & B., his nephew, & tenant in tail, entered into an arrangement, by which they barred the entail, & conveyed the property to such uses as they should jointly appoint, & subject thereto to the old uses. By a contemporaneous deed, in execution of the joint power, A. secured to B. a life annuity on the property, & B. secured £25,000, payable when he, B., came into possession. Of this, £20,000 was settled, contemporaneously, on A.'s daughters, & the remainder on A.:—*Held*: on the death of A., in 1855, succession duty under 1853 Act was payable on the £20,000 as a succession from A., but no succession duty was payable on the remaining £5,000.

(2) The case would be materially altered as to the rate of duty to be paid by petitioners, though it might not affect the rate of duty to be paid by

[B.] to the Crown, which is a separate & independent matter, if there had been no consideration whatever paid to [B.] as then his only motive for joining in the settlement would have been "natural love & affection" to persons who were related to him in blood, though not very closely (*ROMILLY, M.R.*).—*Re JENKINSON* (1857), 24 Beav. 64; 26 L. J. Ch. 241; 28 L. T. O. S. 280; 3 Jur. N. S. 279; 5 W. R. 301; 53 E. R. 281.

*Annotations*:—*As to* (1) *Appld. A.-G. v. Deane* (1861), 5 L. T. 122. *Distd. A.-G. v. Abdy* (1862), 32 L. J. Ex. 9. *Refd. A.-G. v. Floyer, A.-G. v. Smythe* (1861), 31 L. J. Ex. 404; *A.-G. v. Yelverton* (1861), 7 H. & N. 306; *Re Ramsay's Settlement*, (1861), 30 Beav. 75; *Fryer v. Morland* (1876), 3 Ch. D. 675.

**644.** — — —.]—Under a settlement made in 1812, W. C. became tenant for life of certain freehold estates; with remainder to his first & other sons in tail male, remainder to G. for life; remainder to her first & other sons in tail male; remainder to J. C. for life, remainder to his son F. C. in tail male. On Dec. 3, 1850, W. C. & F. C. executed a disentailing deed & resettled the estates. By another deed of the same date F. C., for valuable consideration charged the settled estates with a sum of £20,000 for the use of W. C. payable with interest at the expiration of twelve calendar months from the day on which the limitations to W. C. & G. for their lives & their sons in tail male, or the last of such limitations, should fail. On Dec. 31, W. C., by a deed of settlement, assigned the £20,000 to trustees in trust as to £14,000 for his adopted son, & as to £6,000 for his adopted daughter. W. C. died in Feb. 1857, without legitimate issue; & G. died in Nov. 1857, without issue, whereupon the adopted children of W. C. became beneficially entitled to the £14,000 & £6,000:—*Held*: (1) the disposition of the £20,000 by the deed of settlement created a "succession" within 1853 Act, s. 2; (2) duty was payable at the rate of £10 per cent.—*A.-G. v. YELVERTON* (1861), 7 H. & N. 306; 30 L. J. Ex. 333; 5 L. T. 451; 7 Jur. N. S. 1250; 158 E. R. 490.

*Annotations*:—*As to* (1) *Consd. A.-G. v. Floyer, A.-G. v. Smythe* (1861), 31 L. J. Ex. 404. *Refd. A.-G. v. Abdy* (1862), 1 H. & C. 266; *A.-G. v. Gardner* (1863), 1 H. & C. 639; *A.-G. v. Gell* (1865), 3 H. & C. 615; *Wolverton v. A.-G.*, [1898] A. C. 535.

**645.** — — —.]—Settlor was appointed under a power of his own creation to such uses as he should appoint, & in default to himself in fee. Before the passing of 1853 Act, he appointed by will, so as to rest in expectancy the estate in the appointee:—*Held*: (1) the settlor by such will, created a new succession, which did not fall within the exceptive clauses of sects. 12 & 15 of the Act; (2) the appointee was liable, as a stranger in blood, to pay a succession duty of 10 per cent. upon the vesting of the estate in possession after the passing of the Act.

The first parts of sects. 12 & 15 [of the Act] apply only to cases where the disponent or alienor would himself be chargeable to duty & do not apply to a case like the present where he would not (*MARTIN, B.*).—*A.-G. v. GARDNER* (1863), 1 H. & C. 639; 1 New Rep. 364; 32 L. J. Ex. 84; 7 L. T. 682; 9 Jur. N. S. 281; 11 W. R. 378; 158 E. R. 1040.

*Annotations*:—*As to* (1) *Refd. A.-G. v. Gell* (1865), 3 H. & C. 615. *As to* (2) *Refd. A.-G. v. Rushton* (1864), 2 H. & C. 812.

**646. New trustee entitled to remuneration—On death of former trustee—Not taken as a succession.**—*A.-G. v. EYRES*, No. 297, *ante*.

**Successions after 1853 Act—Disposition made prior to Act.**—*See* Nos. 625, 640, *ante*.

**The successor.**—*See* Sub-sect. 4, *post*.



## SUB-SECT. 3.—SUCCESSIONS THROUGH DEVOLUTION BY LAW.

See 1853 Act, s. 2; DESCENT, Vol. XVIII., pp. 4 *et seq.*

**647. Devolution — Interpretation.**—A testator directed his property to be settled upon his daughter H. in such manner that in case of her death it should devolve upon her children, if she had any; & if she should not have any, then that she should bequeath it to any person she might think fit:—*Held*: (1) the word “devolve” imports transmission to children living at the death of the mother; (2) upon the death of the mother, her husband, as representative of a deceased child, took no interest under the will.

To devolve means to pass from a person dying to a person living (LEACH, M.R.).—PARR v. PARR (1833), 1 My. & K. 617; 2 L. J. Ch. 167; 39 E. R. 826.

*Annotation*:—As to (1) *Consd. Re Fowler, Fowler v. Fowler*, [1917] 1 Ch. 307.

**648.** ———.]—ZETLAND (EARL) v. LORD ADVOCATE, No. 702, *post*.

**649.** ———.]—SALTOUN (LORD) v. ADVOCATE-GENERAL, No. 591, *ante*.

**650.** ——— Distinguished from succession—1853 Act, s. 2.]—ZETLAND (EARL) v. LORD ADVOCATE, No. 702, *post*.

**651. To assignee in bankruptcy—Distinguished from succession—1853 Act, s. 2.]—WOLVERTON v. A.-G., No. 660, *post*.**

**The predecessor.**—See Sub-sect. 5, *post*.

## SUB-SECT. 4.—THE SUCCESSOR.

See 1853 Act, ss. 1, 2, 15.

**652. Who is a “successor”**—Person entitled to estate—At expiration of particular estate.]—That person is the “successor” within 1853 Act, ss. 2 & 17, in whom existed a title to property before the Act came into operation, but who, by an event occurring after the Act, became entitled thereto in possession. The true “successor,” in the sense of the individual liable to pay duty, is the person coming into the possession of the property upon the expiration, after the Act, by death or otherwise, of a particular intervening estate. The Act applies only to persons who, before the time of its passing, were, in law, entitled to a vested interest in the property, but could not enjoy it in possession until after the passing of the Act. 1853 Act, s. 15, does not impose any new duty upon the person taking by alienation, but, where reversionary property passes through a succession of persons, secures payment of the duty imposed by the previous sects., applicable to such a case. Personal property was, in July, 1829, settled on the proposed marriage of J. D., for herself & her intended husband, C., for their joint lives, & the life of the survivor, then to their children, with a power of appointment in J. D., the appointment to take effect after the death of J. D. & of her husband. In default of appointment, the property was, subject to the husband, C.’s, life estate, to be held on trust for such of J. D.’s next of kin as would be entitled if she had died unmarried & intestate. J. D. married C., but died childless, & without having exercised the power of appointment. About two months before

Mrs. C.’s death, her mother, Mrs. D., made a will giving all her property to Mrs. C. & her husband for their lives & the life of the survivor, then to their children, & in default, to her own brothers & sisters, & a nephew. This will was never altered; Mrs. C. died in Aug. 1831, & her mother, Mrs. D., then became, under the settlement of 1829, entitled to the reversionary interest in the settled property subject to C.’s life estate. Mrs. D. died in July, 1832. The Act came into operation in 1853. C. lived till 1868. The brothers & sisters & the nephew of Mrs. D. then became entitled in possession to the reversionary property bequeathed by her will:—*Held*: (1) there was no succession duty payable under sect. 2 in respect of the interest which vested in Mrs. D. on the death of her daughter; (2) her legatees were not liable to pay such duty; (3) under her will, they were liable for legacy duty under the Legacy Duty Acts; (4) being so liable, they were, under the concluding part of sect. 18 of the Act, relieved from any further payment under that Act.

The individual who, according to the terms of the disposition, would have taken upon the death of that tenant for life or tenant of a particular interest, that individual, although dying long before the time appointed for the commencement of the Act, is, in a certain limited sense, called a “successor,” because you may have to refer to that individual in the course of subsequently ascertaining the amount of succession duty. But the true successor, in the sense of the individual liable to pay the duty, is the person entitled upon the expiration, by death or otherwise, of the particular estate (LORD WESTBURY).—A.-G. v. LITTLEDALE (1871), L. R. 5 H. L. 290; 40 L. J. Ex. 241; 24 L. T. 921; 20 W. R. 473, H. L.

**653.** ——— Person entitled after tenant for life—Death before tenant for life.]—A.-G. v. LITTLEDALE, No. 652, *ante*.

**654.** ——— Purchasers from successor—Realty subject to subsisting lease.]—A.-G. v. MANDER, No. 810, *post*.

**655.** ——— Assignee in bankruptcy.]—WOLVERTON v. A.-G., No. 660, *post*.

**656. 1853 Act, s. 15—Interpretation.**—A.-G. v. LITTLEDALE, No. 652, *ante*.

**657.** ———.]—In 1831, under the will & upon the death of testator, his nephew A. became tenant for life, & A.’s eldest son, B., tenant in tail of a freehold estate, subject to an outstanding legal mtge. in fee. In 1849 A. mortgaged his equitable life interest to certain persons, & in 1852, B., having previously barred his equitable estate tail, mortgaged his equitable remainder in fee to the same persons, each mtge. being for a distinct sum, & containing the usual power of sale. Various transfers of the mtges. from father & son took place, in the course of which, subsequently to the passing of 1853 Act, the outstanding legal estate was got in. In 1863 the then mtgees., in exercise of their powers of sale, sold the entire estate by auction to C. in fee for a lump sum, but in conveyance to C. it was recited, as the fact was, that the purchase money had been duly apportioned between the life estate & remainder. C. then died, having by his will devised his estate to his nephew D. for life with remainders over, whereupon D. entered into possession & paid duty on his succession to his uncle at 3 per cent. to the full

## PART V.—SECT. 2, SUB-SECT. 4.

**652 i. Who is a “successor”**—Person entitled to estate—At expiration of particular estate.]—LORD ADVOCATE v. CONSTABLE’S TRUSTEES (1880), 17

Sc. L. R. 611.—SCOT.

**h.** ——— Offspring of polygamous marriages—Valid by native law.]—C., the son of an Englishman who settled in Pondoland, & married according to

the native custom, married two wives before the annexation of Pondoland, & resided in Pondoland, after the annexation until his death in 1905. By his will he left his property to his



**Sect. 2.—The succession: Sub-sects. 4 & 5, A.]**

amount as on the fee simple. The trustees of C.'s will then sold the estate to a purchaser, who raised the objection that although the sale to C. was made under powers contained in mtges. existing before the passing of the Act, succession duty had nevertheless attached, & would become payable in respect of B.'s succession upon the death of A. who was then living. Upon a summons taken out by the vendors under Vendor & Purchaser Act, 1874 (c. 78), s. 9:—*Held*: (1) the mtges. of the life estate & remainder, though made to the same persons, were in all respects independent mtges., & at the passing of 1853 Act were not merged either at law or in equity; that the sale by the mtgees., under the powers in 1863 was to be regarded as a joint sale by the two interests, & could be supported only upon the principles applicable to joint sales of two trust properties by two sets of trustees; & accordingly, inasmuch as a higher price was clearly obtainable by selling the fee simple in possession rather than the life estate & remainder separately, & as the purchase-money had been duly apportioned between the two interests, the sale was a proper exercise of the powers; (2) at the date of the 1853 Act, A. & B. were respectively entitled in equity as tenant for life & remainderman in fee, subject only to money charges on their respective estates, & therefore, B. was then entitled to a "succession" within sect. 2 of the Act, & since the mtgees. sold, in effect, as the agents of A. & B., C., as purchaser from them, took B.'s succession by "alienation not conferring a new succession" within sect. 15, & became liable to duty accordingly; (3) as a "new succession" had been created by C., duty then became payable on that succession only, & therefore, the full amount having been paid by D. on his taking under such new succession, the estate was discharged from all further duty on A.'s death.

(4) "By alienation or by any title not conferring a new succession," in sect. 15 of 1853 Act, means, "either by alienation or by any title other than alienation, in both cases not conferring a new succession."

(5) Settlement after 1853 Act: A. tenant for life; B. remainderman in fee. A. & B. conveyed their estates for money to C. in fee. C. died, having devised to D. in fee. D. paid duty on his succession from C., & then sold:—*Held*: on A.'s death no more succession duty would be payable than had already been paid by D.

(6) [Sect. 15] obviously means relinquishing a benefit, not meaning the life interest which has just expired & therefore cannot be dealt with, but some existing thing which otherwise the successor would be entitled to (JESSEL, M.R.).

(7) All new successions take place either by death, devolution, or alienation (JESSEL, M.R.).

(8) In the case of succession to real estate the object of the Act is to let the last succession prevail; but as regards personal estate, it is enacted that the highest duty shall be paid; & therefore, the section [s. 14] was put in for the purpose of fixing the last succession with the highest duty which would have been payable by any of the previous successors (JESSEL, M.R.).

(9) The moment there is a new succession created, & that succession comes first, that new succession appears to me itself to fix the time, &

that the time for the payment of the duty shall be the time of the opening or coming into effect of the new succession (JESSEL, M.R.).

(10) The purchaser will still have a remedy, which I have not forgotten, against the vendor at a future time, in case he is called upon to pay the duty (JESSEL, M.R.).—*Re COOPER & ALLEN'S CONTRACT FOR SALE TO HARLECH* (1876), 4 Ch. D. 802; 35 L. T. 890; 25 W. R. 301; *sub nom. Re COOPER & HARLECH*, 46 L. J. Ch. 133.

*Annotations*:—*As to* (2) *Refd.* A.-G. v. Assheton-Smith, [1924] 2 K. B. 25. *As to* (4) *Dbtd.* Wolverton v. A.-G., [1898] A. C. 535. *Overd.* Northumberland v. A.-G., [1905] A. C. 406. *Consd.* A.-G. v. Assheton-Smith, [1924] 2 K. B. 25. *As to* (8) *Consd.* Wolverton v. A.-G., [1898] A. C. 535.

**658. Alienation of expectant succession—Alienee at death of tenant for life.]—SOLICITOR-GENERAL v. LAW REVERSIONARY INTEREST SOCIETY, No. 797, *post*.**

**659. — Although not direct alienee.]—***Re COOPER & ALLEN'S CONTRACT FOR SALE TO HARLECH*, No. 657, *ante*.

**660. — — —.]—**A peer bequeathed his residuary personal estate in trust for his wife for life & after her death in trust for the person who should then be his right heir absolutely. After his death five nieces became his co-heiresses, & applt., a nephew, succeeded to the title. In order to make provision for the title a deed of family arrangement was executed whereby testator's widow assigned her interest in bank shares, part of testator's residuary estate, & the co-heiresses & applt. respectively assigned their contingent reversionary interests in the residue, to trustees in trust by clause 1 during the widow's life to pay out of the income of the bank shares an annuity of £15,000 to applt. & other annuities to the co-heiresses; & by clause 2 after the widow's death to pay out of the income of the whole residue an annuity of £15,000 to the person for the time being holding the title, with other payments to the co-heiresses & provisions for keeping up the title. The widow died & the co-heiresses paid legacy duty at 3 per cent. on the whole residue. The Crown having claimed succession duty at 6½ per cent. from applt. in respect of his annuity under clause 2 of the deed:—*Held*: (1) the Ct. of Appeal was right in holding that the annuity was not payable under "a contract made for valuable consideration in money or money's worth" within 1853 Act, s. 17; & (2) wrong in holding that the deed created a new succession; the case fell under sect. 15 & was one of "alienation" of part of the succession created by testator's will, whereby the duty payable in respect of the annuity was at the same rate & time as would have been payable if the annuity had not been created; but as legacy duty had been paid upon the whole residue out of which the annuity was carved, sect. 18 applied & no succession duty would have been payable by the co-heiresses if the annuity had not been created, & therefore the effect of sects. 15 & 18 together was that no succession duty was payable by applt. in respect of the annuity.

(3) The succession once created the duty must be paid for it; but I can find no warrant in the statute for a new succession duty being leviable upon the same property or money where no new death has created the right to such succession (LORD HALSBURY, C.).

(4) I take it to be equally clear that the suc-

wives & their children:—*Held*: as the marriages were valid according to the Pondo law & were contracted prior to the annexation of Pondoland, &

as the beneficiaries were resident in Pondoland, for the purposes of payment of succession duty C.'s marriages should be treated as lawful & valid &

the children thereof legitimate.—*CANHAM'S ESTATE v. THE MASTER* (1909), 26 S. C. 166; 19 C. T. R. 383.—**S. AF.**

cession came into existence as soon as testator died, & that its creation was not postponed until the death of the tenant for life (LORD HERSCHELL).

(5) I am unable to find in the Act, any warrant for the view that a succession once created can, by the act of the successor, cease to exist, & another succession be substituted for it (LORD HERSCHELL).

(6) A succession might by operation of law become vested in some other person, as, for example, an assignee in bkpcy., which would be a title not creating a new succession. But I can see nothing either in the terms of the sect. or in the reason of the thing to suggest that an alienation by instrument *inter vivos*, which merely transferred the interest of the successor or some part of it to some other person, would create a new succession (LORD HERSCHELL).—WOLVERTON v. A.-G., [1898] A. C. 535; 67 L. J. Q. B. 829; 79 L. T. 58; 62 J. P. 708; 47 W. R. 97; 14 T. L. R. 519, H. L.; *reusg.* S. C. *sub nom.* A.-G. v. WOLVERTON, [1897] 1 Q. B. 231.

*Annotations* :—As to (2) *Refd.* Northumberland v. A.-G., [1905] A. C. 406; A.-G. v. Assheton-Smith, [1924] 2 K. B. 25; Lord Advocate v. Macalister, [1924] A. C. 586. As to (3) *Refd.* Lord Advocate v. Macalister, [1924] A. C. 586. As to (5) *Distd.* A.-G. v. Selborne, [1902] 1 K. B.

661. ———.]—NORTHUMBERLAND (DUKE) v. A.-G., No. 602, *ante*.

662. When “new succession” arises—Transferor & remainderman—Dying in lifetime of tenant for life.]—On Feb. 2, 1821, by a marriage settlement, certain family estates were settled on the late Marquis of S. as tenant for life, with remainder to his first & other sons in tail. On Mar. 10, 1855, by a disentailing deed, the marquis & his eldest son, Lord C., barred the entail & resettled the property to the joint appointment of themselves &, subject thereto, to the uses of the settlement of 1821. On Mar. 27, 1857 the marquis & Lord C. appointed, by deed, certain of the settled estates to a trustee for 1,000 years after the death of the marquis, upon trust to raise thereout £20,000 for Lord E. (deft.) the third son of the marquis, in case he survived his father; &, by a subsequent deed of further appointment, dated Aug. 20, 1860 the £20,000 was directed to be raised, & paid to deft., whether he survived his father the marquis, or not. In 1866 Lord C. died, on Apr. 12, 1868, the marquis died, & deft. became entitled in possession to the £20,000 which he received.

The Crown, therefore, claimed succession duty from deft. on the £20,000 at 3 per cent., as upon a succession derived from his brother Lord C.; deft., on the other hand, contending that a duty of 1 per cent. only was payable thereon, inasmuch as it formed part of Lord C.’s old succession, & became vested in deft. “by a title not conferring a new succession” within the second branch of sect. 15 of 1853 Act, & that so only the duty to which the original successor would have been liable was chargeable upon deft.:—*Held*: by the operation of the deeds of 1855 & 1857 a “new succession” in which Lord C. was the “predecessor” & his brother, deft., was the “successor” was created, &, as deft., therefore took

by a title conferring a new succession the case was not within the exception in the second branch of sect. 15 & duty at 3 per cent. was accordingly payable by deft., under sect. 2 upon a succession derived from Lord C. his brother.—A.-G. v. CECIL (1870), L. R. 5 Exch. 263; 39 L. J. Ex. 201; 23 L. T. 20; 18 W. R. 949.

*Annotations* :—*Folld.* Charlton v. A.-G. (1879), 4 App. Cas. 427. *Consd.* Wolverton v. A.-G., [1898] A. C. 535; A.-G. v. Northumberland, [1904] 1 K. B. 762. *Apld.* A.-G. v. Assheton-Smith, [1924] 2 K. B. 25.

663. ———.]—*Re* COOPER & ALLEN’S CONTRACT FOR SALE TO HARLECH, No. 657, *ante*.

664. ——— Not on transfer *inter vivos*.]—WOLVERTON v. A.-G., No. 660, *ante*.

665. ———.]—NORTHUMBERLAND (DUKE) v. A.-G., No. 602, *ante*.

666. ——— Jointure rentcharge under new settlement.]—Real estate stood limited to a tenant for life with remainder in tail to his son under the of a stranger in blood. The tenant for life & tenant in tail executed a disentailing deed & resettled the estate, the settlement providing for the payment of a jointure rentcharge to the widow of the tenant for life. The tenant for life died in Sept., 1914, whereupon his son became entitled in possession but he died in Oct., 1914, before the first instalment of succession duty became payable. The Crown now claimed succession duty at the rate of 10 per cent. on the value of the jointure rentcharge, being the rate at which duty would have been payable by the son if the rentcharges had not been vested in the jointress:—*Held*: the jointress took, not by way of alienation within 1853 Act, s. 15, but under a new succession, the son being the predecessor, & the rate of duty was to be determined upon that footing.—A.-G. v. ASSHETON-SMITH, [1924] 2 K. B. 25; 93 L. J. K. B. 474; 40 T. L. R. 436.

#### SUB-SECT. 5.—THE PREDECESSOR.

##### A. In General.

*See* 1853 Act, ss. 2 & 13.

667. Necessity for a predecessor.]—A.-G. v. ABDY, No. 608, *ante*.

668. Who is a “predecessor.”]—ZETLAND (EARL) v. LORD ADVOCATE, No. 702, *post*.

669. ——— Succession by disposition or devolution.]—SALTOUN (LORD) v. ADVOCATE-GENERAL, No. 591, *ante*.

*See, further*, Sub-sect. 5, B. & C., *post*.

670. ——— Settlor—General rule.]—Upon a second marriage of a lady [in 1819] her second husband settled his property on the children of her former marriage:—*Held*: the husband & not the wife was the predecessor, & £10 per cent. succession duty was payable.

If a sum of money or charge on an estate or the estate itself be settled, whatever be the trusts on which it is settled, & in favour of whomsoever it may be ultimately limited, the predecessor is the person to whom the property settled belongs, & who makes the settlement, & this without taking

#### PART V. SECT. 2, SUB-SECT. 5.—A.

669 i. Who is a “predecessor.”—

*Succession by disposition or devolution.*]

—An entailed estate, after the failure of other heirs, passed to M. G. & the heirs-male of her body, one of whom having died without issue was succeeded by his paternal uncle, to the exclusion of his sisters, who but for the entail would have succeeded as heirs-portioners:—*Held*: the uncle did not succeed by “disposition” to the entailer as his

predecessor, but his predecessor was his nephew, the last possessor of the estate from whom he took “by devolution of law.”—LORD ADVOCATE v. GORDON (1872), 10 Macph. (Cl. of Sess.) 1015.—SCOT.

670 i. ——— Person who makes the settlement.]—By settlement, made on the marriage of A. & B., a sum of £5,000 the fortune of A. (the wife) was assigned to trustees, upon trust, to pay the interest thereof to her during

the joint lives of herself & B., & upon trust, after the decease of the survivor, & in the events which happened, to apply same in payment & discharge (so far as same would extend) of incumbrances affecting lands brought into settlement by B. & his father C., & over which a jointuring power was reserved to them in favour of A., which they exercised to its full extent; & by the said settlement A. was given a life interest, after B.’s death, in a



*Sect. 2.—The succession: Sub-sect. 5, A. & B. (a) & (b).]*

into account the motives or valuable considerations which may have induced him to make the settlement; with this qualification however, that if the settlor, in making this settlement, gives to a person, other than himself, a power of disposing of the property settled or of any part of it, which power is exercised, then that is substantially a transfer of the settled property to the donee of the power, & then the successors take their interest under the exercise of the power, & not under the trusts of the settlement in default of the exercise of that power. Then it is that the donee of the power, or, in other words, the person exercising the power, is the disposer from whom the interest of the succession is derived, & that he is consequently the predecessor whose relationship to the successor will settle the amount of succession duty

M.R.).—*Re RAMSAY'S SETTLEMENT* (1861), 30 Beav. 75; 30 L. J. Ch. 849; 5 L. T. 166; 7 Jur. N. S. 1225; 9 W. R. 910; 54 E. R. 817.

*Annotation:—Consd. A.-G. for Ireland v. Rathdonnell*, [1896] W. N. 141.

**671. — From whose estate succession is derived.]—A.-G. v. FLOYER**, No. 622, *ante*.

**672. — Purchaser making settlement.]—FRYER v. MORLAND**, No. 755, *post*.

**673. — Ancestor—Not confined to lineal ancestor.]—ZETLAND (EARL) v. LORD ADVOCATE**, No. 702, *post*.

**674. — Person preceding in the estate.]—ZETLAND (EARL) v. LORD ADVOCATE**, No. 702, *post*.

**675. — Gift by father to son & his wife in succession—Death of son—Father as predecessor.]—An indenture of marriage settlement recited that the father of the intended husband agreed to advance & give to his son the sum of £6,000, which was to be repaid in the event of the marriage not taking place. It was further recited that it was agreed between all the parties to the deed that certain persons, as trustees, should stand possessed of the sum upon trust for the father until the intended marriage should be solemnised; & if not solemnised before a certain day therein named to transfer the same to the father, & from & after the solemnisation of the marriage upon trust to pay the income to the husband for life, & from & after his decease to pay the income to the wife, should she survive the husband, with the usual trust over for the children. The husband having died & the widow having become entitled to the income of the said sum, the comrs. claimed payment of succession duty under 1853 Act, as a succession derived from the father-in-law as the**

sum of £4,000 brought into settlement by C. In the event (which happened) of there being no issue of the marriage, D., who was a grandson of C., but a stranger in blood to A., became tenant in tail of the settled lands; & barred the entail & resettled them.

A. survived B., & on her death the £5,000 was applied towards discharging incumbrances upon the settled lands:—*Held*: A. was predecessor of D. within Succession Duty Act, 1853, & that duty at 10 per cent. was payable by D. in respect of his succession to this sum.—*A.-G. FOR IRELAND v. RATHDONNELL*, [1896] W. N. 141.—*IR*.

**670 ii. —**—*A. insured his life for £4,000 in 1853 in view of his second marriage. C., the mother of his first wife who had a life interest in certain securities prior to the life*

interest of A., joined in a marriage settlement in assigning their life interest in these securities during the life of A. to trustees, upon trust, to pay out of the annual proceeds thereof the premiums on the life policy which A. had also assigned to the trustees. A. died in 1876 leaving a widow & children of the second marriage; C. died in 1880, a stranger in blood to the said children:—*Held*: C. was not a "predecessor."—*A.-G. v. RIALI*, [1906] 1 I. R. 122.—*IR*.

**670 iii. —**—*BREADALBANE (EARL) v. LORD ADVOCATE* (1870), 8 Macph. (Ct. of Sess.) 835.—*SCOT*.

**k. — Person who provides the property—& is the instrument of settling it.]—A stepdaughter who contemplated marriage owned 45 shares in the N. Bank, which had been given her**

predecessor:—*Held*: the father-in-law, & not the husband, was the "predecessor" or settlor, & succession duty was therefore payable.—*A.-G. v. MAULE* (1886), 56 L. T. 611; 3 T. L. R. 236, D. C.

**676. — Creditor.]—Re JENKINSON**, No. 643, *ante*.

**677. —**—*A.-G. v. YELVERTON*, No. 644, *ante*.

**678. Joint predecessors—Persons releasing claims to estate.]—Upon an information by the A.-G. to recover succession duty, payable in respect of the succession of one E. to a sum of £2,000 derived from W. P. as predecessor, a special verdict was found, which stated that J. P. died intestate leaving W. P., his brother; & A. S. the wife of J. H. S., claimed to be a daughter of a sister of J. P. That by indenture, reciting that letters of administration had been granted to W. P. & in order to obviate any doubts or differences which might arise touching any share which J. H. S. or A. S. might be entitled to in the personal effects of J. P., W. P. had proposed & agreed on having a general release from J. H. S. & A. S. to transfer £30,000 to be settled upon trusts for J. H. S. & A. S. & the children of their marriage, to which proposal J. H. S. & A. S. had consented & agreed; that the sum of £30,000 had been directed to be transferred to trustees by W. P., & that J. H. S. & A. S. had that day executed a general release to W. P. of all claims against him as administrator of J. P. or otherwise; it was declared that B. & O. should stand possessed of the £30,000 in trust to pay the interest to J. H. S. for life, & after his death to A. S. for her life & after the death of the survivor, if there should be an only child in trust for such child, & if there should be two or more children in trust for such children in such shares as J. H. S. & A. S., or the survivor, should appoint; & in case no child should live to attain a vested interest in trust for the survivor of J. H. S. & A. S. absolutely. Contemporaneously with the indenture a release was executed by J. H. S. & A. S. to W. P. There were ten children of the marriage, & J. H. S. & A. S. having appointed a sum of £2,000 to E. one of such children, J. H. S. & A. S. died in or before Mar. 1854:—*Held*: deft. was entitled to judgment, because it could not be inferred that W. P. was either the sole predecessor of E. within 1853 Act, s. 2, or a joint predecessor within 1853 Act, s. 13.—*A.-G. v. BAKER* (1859), 4 H. & N. 19; 32 L. T. O. S. 280; 157 E. R. 742.**

*Annotations:—Refd. A.-G. v. Deane* (1861), 5 L. T. 122; *Fryer v. Morland* (1876), 3 Ch. D. 675; *A.-G. for Ireland v. Rathdonnell*, [1896] W. N. 141.

**Under power of appointment.]—See Part V., Sect. 2, sub-sect. 5, B. (b), *post*.**

**Remainderman as predecessor.]—See Part V., Sect. 2, sub-sect. 5, B. (c), *post*.**

by her stepfather. These shares, at the stepfather's request, she handed over to her brother, & the stepfather gave her a marriage portion of £5,000, which was put in settlement. The stepfather, by his will, left his stepdaughter a legacy of £5,000. Upon her husband's death, the Inland Revenue claimed from the eldest son, who was the successor, succession duty in respect of the £5,000 put in settlement, on the footing that the predecessor was the stepfather. The eldest son contended that his mother settled the £5,000 & that she was the predecessor:—*Held*: before & at the time of the settlement, the £5,000 put in settlement belonged to the stepfather & not to the stepdaughter & that he was the predecessor.—*A.-G. v. BIGGS*, [1907] 2 I. R. 400.—*IR*.



*B. Under Dispositions.**(a) In General.*

See 1853 Act, ss. 2, 13.

**679. Motives of or consideration to settlor immaterial.]—***Re RAMSAY'S SETTLEMENT*, No. 670, *ante*.

**680. Creditor is predecessor—Charge levied on estate.]—***Re JENKINSON*, No. 643, *ante*.

**681. ———.]—***A.-G. v. YELVERTON*, No. 644, *ante*.

**682. Release of claim to estate—Provided by settlement.]—***A.-G. v. BAKER*, No. 678, *ante*.

**683. Settlement by family arrangement—Overriding previous settlement.]—**A lunatic was tenant in tail in possession of land with remainder to his younger brother R. & his sister D. successively in tail. R. converted his estate tail into a base fee in remainder, & mortgaged his interest to secure a debt of £124,000 which was more than the fee simple value of the land, so that he had no beneficial interest in the equity of redemption. His sister D. married, & by her marriage settlement made before such marriage her estate in remainder was settled to the use of herself for life, with remainder to the use of the first & other sons of such marriage. Deft. was the only son of that marriage. For the benefit of all parties a family arrangement was made with the consent of the Lord Chancellor, as protector & in lieu of the lunatic under Fines & Recoveries Act, 1833 (c. 74), s. 33, in pursuance of which R. & his sister D. & the mtgees. all joined in deeds of settlement, whereby the land was conveyed to trustees in fee simple, subject to the estate tail of the lunatic, but discharged from the mtge. & from the equity of redemption of R. upon trust after the determination of the lunatic's estate to raise £37,000 by sale or mtge., & to pay that sum to the mtgees., & subject thereto to hold the land to the use of D. for life with remainder to her sons successively in tail. This arrangement was carried out, & upon the death of the lunatic D. became tenant for life in possession, & upon her death deft., as her son, became tenant in tail in possession:—*Held*: deft. derived his interest as successor from his mother D. & not from his uncle R. as predecessor, under 1853 Act, s. 2, & was therefore liable to duty at 1 per cent., & not at 3 per cent.—*A.-G. v. DOWLING* (1880), 6 Q. B. D. 177; 50 L. J. Q. B. 192; 44 L. T. 234; 45 J. P. 422; 29 W. R. 327, C. A.

*(b) Powers of Appointment.*

**684. 1853 Act, s. 4—Effect on others created before the Act—Whether by deed or will.]—***Re LOVELACE*, No. 733, *post*.

**685. ——— Meaning of "taking effect"—Refers to power not to disposition.]—***Re LOVELACE*, No. 733, *post*.

**686. ——— Power in settlement of entailed property—Section not applicable.]—***CHARLTON v. A.-G.*, No. 699, *post*.

**687. General power of appointment—Donor as predecessor—Donor dying before commencement**

**of Act.]—**L., tenant for life & subject to such life estate, having a general power of appointment by deed or will, by will executed after 1853 Act came into operation, exercised the power in favour of B. B. was a stranger in blood to L., but was the niece of her husband, the donor of the power, who had created it & died before the Act came into operation:—*Held*: B. was only liable to a duty of 3 per cent., as on a succession derived from the donor of the power.—*Re BARKER* (1861), 7 H. & N. 109; 30 L. J. Ex. 404; 5 L. T. 206; 7 Jur. N. S. 1061; 158 E. R. 413.

*Annotations*:—*Distd. A.-G. v. Upton* (1866), L. R. 1 Exch. 224. *Apld. A.-G. v. Mitchell* (1881), 6 Q. B. D. 548. *Refd. A.-G. v. Gardner* (1863), 1 H. & C. 639.

**688. ———.]—**In cases of appointments by donees of general powers which fall within sect. 2 & do not fall within sect. 4 of 1853 Act, the canon of construction adopted in *In re Barker*, No. 687, *ante*; & *Charlton v. Attorney-General*, No. 699, *post*, is to be applied whether the power be joint or sole, & the appointees must be held to derive their interest from the donor of the power as "predecessor," & not from the donee. Testator, in 1826, bequeathed personalty in trust for his daughter for life, & afterwards in the event which happened for such persons as she should by deed appoint, & in default of appointment for her next of kin. Testator died before the coming into operation of 1853 Act, & legacy duty at 1 per cent. was paid upon the whole absolute interest of the trust fund. After that Act came into operation the daughter, by deed, appointed the trust fund to her sister's daughters:—*Held*: (1) as owing to the date of the testator's death sect. 4 did not apply, the appointees derived their interest from their grandfather, testator, as predecessor, within sect. 2, & not from their aunt, the appointor, & succession duty was therefore payable on their succession at the death of the appointor at 1 & not at 3 per cent.; (2) the payment of legacy duty under 1786 Act, did not exempt the appointees from succession duty, since their succession did not come within the exemption granted by 1853 Act, s. 18, to persons already charged with legacy duty "in respect of the same acquisition of the same property."

1853 Act, s. 18, exempts a person who has already paid legacy duty from paying succession duty in respect of "the same acquisition of the same property." If then nieces had paid legacy duty in respect of their interest, the Crown would not be entitled to succession duty because the same person is not to pay twice but the legacy duty was paid in respect of different persons, therefore the Crown is entitled to succession duty (*GROVE, J.*).—*A.-G. v. MITCHELL* (1881), 6 Q. B. D. 548; 50 L. J. Q. B. 406; 44 L. T. 580; 45 J. P. 618; 29 W. R. 683, D. C.

**689. ——— Donee as predecessor.]—***Re RAMSAY'S SETTLEMENT*, No. 670, *ante*.

**690. ———.]—***Re CHAPMAN'S TRUSTS*, No. 767, *post*.

**691. ——— Donor dying after commence-**

PART V. SECT. 2, SUB-SECT. 5.—*B. (a).*

**1. Creditor is predecessor — Charge levied on estate—No consideration paid to owner of estate.]—**In 1810, testatrix devised fee simple estates in K. & W. to trustees, in trust for G. D. for life, with remainder to his first & other sons in tail male, etc., & in default of issue, to S. D. for life, with remainder to her first & other sons in tail male. G. D., the first tenant for life, never married & S. D. married, & had several children. In Apr. 1844, a deed of

settlement was executed limiting the K. lands, immediately after the death of G. D., to J. D. D., eldest son of S. D., for life with remainder to his first & other sons in tail male, & the W. lands to S. D. for life, with remainder to her husband for life, & after the death of the survivor, to J. D. D. for life, with remainder to his first & other sons in tail male. By this deed, a term of 400 years was limited to trustees, in trust, after the death of G. D. to raise out of the K. lands interest on £4,000 for the younger children of S. D. subject to appointment by S. D. & her husband

or the survivor of them; & after the death of the survivor of S. D. & her husband to raise the £4,000 out of the K. & W. lands, subject to a like appointment. G. D. died without issue, in 1852, before the time appointed for the commencement of the Succession Duty Act, viz. May 19, 1853, & S. D. who survived her husband died in 1854. Upon the death of S. D., the charge of £4,000 became payable to the younger children of S. D.:—*Held*: S. D. was to be considered the sole "predecessor."—*A.-G. v. DEANE* (1861), 5 L. T. 122.—*IR.*

*Sect. 2.—The succession: Sub-sect. 5, B. (b) & (c)*

**ment of Act.]**—For the purpose of taxation under 1853 Act, the appointee under a general power of appointment, which has taken effect on a death happening since the commencement of the Act, takes a succession from the donee of the power. Under the will of her husband, who died in 1856, a widow had a life estate in real property, with a general power of appointment by deed or will. She by deed appointed to the use that trustees should, after her death, receive an annuity during the lives of the wife of testator's nephew, & of the children of the nephew by her, on trust for the separate use of the wife. Both testator's nephew & his wife were strangers in blood to the testator's widow:—*Held*: under 1853 Act, s. 4, the nephew's wife took the annuity as a succession from testator's widow, & not from the testator himself, & therefore a duty of 10 per cent. was payable:—*Seemle*: the result would have been the same under sect. 2.—*A.-G. v. UPTON* (1866), L. R. 1 Exch. 224; 4 H. & C. 336; 35 L. J. Ex. 138; 14 L. T. 334; 12 Jur. N. S. 489; 14 W. R. 732.

*Annotations*:—*Distd.* *A.-G. v. Charlton* (1877), 2 Ex. D. 398. *Refd.* *A.-G. v. Mitchell* (1881), 6 Q. B. D. 548. *Mentd.* *Grenfell v. I. R. Comrs.* (1876), 1 Ex. D. 242.

**692. Limited power of appointment—Donor as predecessor.]**—*ZETLAND (EARL) v. LORD ADVOCATE*, No. 702, *post*.

(c) *Resettlement of Entailed Property.*

**693. Resettlement by life tenant & remainderman—Remainderman the predecessor—As to own succession.]**—Testator devised his estates in L. to his brother, C. for life, with remainder in tail to his first & other sons. On Mar. 22, 1848, C. & deft., his eldest son, executed a disentailing deed whereby they limited the estate to such uses as they should jointly appoint, & in default of such appointment to the uses declared by the will of testator. On the same day C. & deft. executed another disentailing deed of estates devised to them by another testator & also limited them to such uses as they should jointly appoint. On Mar. 23, 1848, C. & deft. executed a joint appointment, whereby, after reciting the two disentailing deeds, & certain arrangements made in respect of incumbrances with other stipulations, they appointed the estates in L. to the use that deft. might receive thereout the yearly sum of £1,000 during the joint lives of himself & C., & subject thereto to the use of C. for life in restoration, corroboration, & confirmation of his previous life estate, & after his decease to the use of deft. for life, & after his decease to the use of his eldest son for life, with remainder in tail male. In the year 1855 C. died:—*Held*: (1) deft. took a succession under a disposition made by himself, within 1853 Act, s. 12, & was therefore chargeable with duty at the rate of 3 per cent.; (2) deft. was not entitled under s. 38 to any allowance in respect of the £1,000 a year, which ceased on the death of C.—*A.-G. v. SIBTHORP* (1858), 3 H. & N. 424; 28 L. J. Ex. 9; 31 L. T. O. S. 218; 6 W. R. 774; 157 E. R. 536.

*Annotations*:—*As to* (1) *Consd.* *A.-G. v. Floyer* (1861), 7 H. & N. 238; *Braybrooke v. A.-G.* (1861), 9 H. L. Cas. 150; *Re Peyton* (1861), 31 L. J. Ex. 50. *Refd.* *A.-G. v. Deane* (1861), 5 L. T. 122. *As to* (2) *Refd.* *Braybrooke v. I. L.*

4 Ap

**694. ———.]**—(1) A tenant in tail in remainder cannot vary the amount of his liability to succession duty by barring the entail, & resettling the estate in his own favour. The person from whom he derives the estate is his "predecessor."

Devise in 1796 of certain freehold estates to A. for life, remainder to his eldest son B. for life, remainder to the first & other sons of B. in tail male. In 1841, A. being then tenant for life in possession, A. & B. executed a disentailing deed, to which two other persons were parties as trustees, & granted to the trustees, to hold, subject to the life estate of A., to such uses as A. & B. should appoint, & in default, if B. should survive, to such uses as he should appoint, & in default to B. for life, & to his first & other sons in tail male. In 1850, by another deed which recited the former, & by which A. brought new estates into settlement, & discharged all the estates from a charge of £10,000, & B. gave up advantages to which he was entitled, an annuity to B. during the life of A. was charged upon all the premises, & subject thereto, they were appointed to A. for life, remainder to B. for life, remainder to the use of his first & other sons in tail male:—*Held*: (2) these deeds must be taken as having been executed on the same day; (3) they constituted within sect. 12 of 1853 Act (c. 51), a disposition made by B. in favour of himself, & made out of the estate to which he was entitled under the will of 1796; (4) his "succession" must be treated as happening under that will, & he was liable thereupon to the amount of duty chargeable in respect of his succession to testator, on a disposition made under it by himself; (5) the nature of the consideration upon which the disposition was made did not affect the question.

(6) The annuity, according to the terms of its creation, ceased on the death of A., at which time B. entered into possession of the estates:—*Held*: (7) he was entitled under sect. 38 of the above Act to an allowance as on account of property of which he had been deprived.

(8) The above Act is not to be construed according to the technicalities of the law of England or Scotland, but according to the popular use of the language employed.

I must further remark, that although the Act only came into operation on May 19, 1853, the liability to duty on subsequent successions depends upon the operation of wills & deeds made & executed previously, as if they had been made & executed subsequently (*LORD CAMPBELL, C.*).

In the present case we must consider under what disposition the succession did take place. A new disposition having been made, creating quite different interests in the estates from those created by the will, testator can no longer be considered the predecessor (*LORD CAMPBELL, C.*).—*BRAYBROOKE (LORD) v. A.-G.* (1861), 9 H. L. Cas. 150; 31 L. J. Ex. 177; 4 L. T. 218; 25 J. P. 531; 7 Jur. N. S. 741; 9 W. R. 601; 11 E. R. 685, H. L.; *varying S. C. sub nom. A.-G. v. BRAYBROOKE (LORD)* (1860), 5 H. & N. 488.

*Annotations*:—*As to* (1) *Appld.* *A.-G. v. Floyer* (1862), 9 H. L. Cas. 477; *Charlton v. A.-G.* (1879), 4 App. Cas. 427. *Consd.* *A.-G. v. Dowling* (1880), 6 Q. B. D. 177. *Refd.* *A.-G. v. Doane* (1861), 5 L. T. 122; *Re Barker* (1861), 7 H. & N. 109; *A.-G. v. Mitchell* (1881), 44 L. T. 580; *A.-G. v. Selborne*, [1902] 1 K. B. 388; *A.-G. v. Northumberland*, [1904] 1 K. B. 762; *As to* (3) *Consd.* *Re Peyton* (1861), 7 H. & N. 265. *Appld.* *A.-G. v. Floyer* (1862), 9 H. L. Cas. 477. *Consd.* *A.-G. v. Gardner* (1863), 1 H. & C. 639. *Appld.* *Charlton v. A.-G.* (1879), 4 App. Cas. 427. *Refd.* *Re Barker* (1861), 7 H. & N. 109; *A.-G. v. Mitchell* (1881), 44 L. T. 580; *A.-G. v. Dodington*, [1897] 1 Q. B. 722. *As to* (4) *Consd.* *Re Barker* (1861), 7 H. & N.

(1870), L. R. 5 Exch. 263; *I. R. Comrs. v. Harrison* L. R. 7 H. L. 1. *Appld*

*A.-G. v. Gardner* (1863), 1 H. & C. 639; *A.-G. v. Lilford* (1864), 3 H. & C. 239; *Wolverton v. A.-G.*, [1898] A. C. 535; *A.-G. v. Northumberland*, [1904] 1 K. B. 762,



*As to (6) Rejd. Re Peyton (1861), 7 H. & N. 265. As to (7) Consd. Re Peyton (1861), 7 H. & N. 265. Apld. I. R. Comrs. v. Harrison (1874), L. R. 7 H. L. 1; Le Marchant v. I. R. Comrs. (1875), L. R. 10 Exch. 292. Rejd. Cowley v. I. R. Comrs., [1899] A. C. 198. As to (8) Consd. A.-G. v. Abdy (1862), 1 H. & C. 266. Rejd. A.-G. v. Oxford, Worcester, etc. Ry. (1862), 7 H. & N. 840; A.-G. v. Upton (1866), L. R. 1 Exch. 224; A.-G. v. Chapman, [1891] 2 Q. B. 526; A.-G. v. Selborne, [1902] 1 K. B. 388; Lord Advocate v. Moray, [1905] A. C. 531. Generally, Mentd. Re Cowley (1866), 12 Jur. N. S. 607.*

695. ————.]—A.-G. v. FLOYER, No. 622, ante.

696. ———— As to succession of persons after him.]—A.-G. v. FLOYER, No. 622, ante.

697. ———— Remainderman predeceasing tenant for life.]—A., being seised of certain estates in fee simple by a marriage settlement executed in 1812, conveyed them to the use of himself for life, remainder to the use of his sons in tail male successively. A. had three sons, E., P., & F. In 1840 A. & his eldest son, E., executed a disentailing deed, & conveyed the estates to such uses as they should appoint, & in default, to the uses of the settlement of 1812. In the same year A. & E., on the intended marriage of E., appointed to the use of A. for life, remainder to E. for life, remainder, subject to certain provisions for the intended wife & the younger children, to the first & other sons of the marriage successively in tail male, remainder to P., & F. successively in tail male. E. died in his father's lifetime, without issue. A. & P. then conveyed the estates to such uses as they should appoint, & in default to the existing uses. They afterwards appointed to A. for life, remainder to P. for life, remainder to his first & other sons in tail male, with an ultimate remainder to A. & his heirs. P. died without issue. A. then died, & F. succeeded to the estate:—*Held*: F. was liable to a duty of £3 per cent., as on a succession derived from his elder brother.—A.-G. v. SMYTHE (1862), 9 H. L. Cas. 497; 31 L. J. Ex. 404; 7 L. T. 47; 26 J. P. 708; 11 E. R. 823, H. L.

*Annotations*:—Consd. Charlton v. A.-G. (1879), 4 App. Cas. 427. *Expld. & Apld.* A.-G. v. Parr, [1924] 1 K. B. 916. *Rejd.* A.-G. v. Cecil (1870), 18 W. R. 949; A.-G. v. Mitchell (1881), 6 Q. B. D. 548; A.-G. v. Chapman, [1891] 2 Q. B. 526.

698. ———— As to succession to portions—Charged by resettlement on estate.]—A.-G. v. FLOYER, No. 622, ante.

699. ———— General power of appointment—Exercised by tenant for life & third person.]—(1) Where a power is created, to be exercised over an estate, the donor of the power, the person out of whose estate a benefit or "succession" is to be derived, is, within 1853 Act, s. 2, the "predecessor" of the person taking such benefit or "succession." J., a father, tenant for life of an estate, & his eldest son, W., tenant in tail, resettled the estate, the son becoming tenant for life, remainder in tail, reserving to themselves a power of appointment, & in default, giving the power to appoint to the father & T., the second son, who was thereby made tenant for life, remainder in tail. W. died unmarried, & without having appointed, & the father and T. appointed. The persons taking the succession under such appointment, take it as a succession from W., the eldest son, the donor of the power, from whose estate the benefit is derived, & not from the father & T., the second son, who exercised the power.

(2) The case does not fall within the first portion of 1853 Act, s. 4.

The words of sect. 4 apply to the case of one

person possessing a general power to dispose of property as an absolute owner, & not to a power given in a family settlement to a father & son, where one is intended to be a check upon the other in the exercise of the power (LORD CAIRNS, C.).

The first branch of sect. 4 points to an absolute power, practically equivalent to property (LORD SELBORNE).

(3) A general power in a family settlement, which cannot be exercised without the concurrence of two minds, is not equivalent to a joint property in the two donees. (4) The case is not to be treated as an alienation within 1853 Act, s. 15.—CHARLTON v. A.-G. (1879), 4 App. Cas. 427; 49 L. J. Q. B. 86; 40 L. T. 760; 27 W. R. 921, H. L.; *affg.* S. C. *sub nom.* A.-G. v. CHARLTON (1877), 2 Ex. D. 398, C. A.

*Annotations*:—*As to (1) Apld.* A.-G. v. Mitchell (1881), 6 Q. B. D. 548. *As to (2) Rejd.* A.-G. v. Chapman, [1891] 2 Q. B. 526. *As to (4) Rejd.* Wolverson v. A.-G., [1898] A. C. 535; A.-G. v. Selborne, [1902] 1 K. B. 388.

### C. Under Devolution by Law.

700. Estate in fee simple—Last owner the predecessor—Irrrespective of how such ownership acquired.]—By a will, dated in Nov., 1799, L. gave to trustees £10,000, Consols, & certain other sums, upon trust that they should lay out both principal & interest in the purchase of land, to be conveyed to the use of C., his eldest son, for life; remainder to trustees, to preserve, etc.; remainder to the first & other sons of C. & the heirs male of their bodies successively in tail male, & in default of such issue to the use of J., another son of testator, for life, with similar remainders; remainder to testator's own right heirs.

Testator died on Apr. 8, 1800, leaving his two sons, C. & J., & one daughter, S., him surviving. The moneys directed to be laid out in land were never so laid out, & C. during his life received the dividends upon the whole "real estate fund." In 1840 he died a bachelor & intestate, whereupon the dividends were paid to J. up to May, 1857, when he also died a bachelor & intestate. S. then became the only lineal descendant & heir-at-law of testator. She died in Apr., 1866, unmarried & intestate, having refused during her lifetime to receive either dividends or principal of the money left under her father's will. Shortly afterwards, the "real estate fund" was paid into the Ct. of Ch. in an administration suit, & eventually was directed to be paid out to petitioner, who was a grandson of a brother of testator, & heir-at-law of S.

The Comrs. of Inland Revenue required petitioner to pay succession duty on the "real estate fund" at the rate of 5 per cent. under 1853 Act, s. 10, on the ground of the same being a succession to him derived from S., as the "predecessor." On appeal against this assessment:—*Held*: duty was not payable under 1853 Act, but under Legacy Duty Act (c. 52).

*Semble*: under whichever Act duty was payable, the amount charged by the Comrs. was correct, C., J., & S. having all died after 1815 Act came into force.

If this fund had been really land, then, as S. was absolutely entitled or seised in fee, it would not matter how she became so, & the succession to petitioner would be by devolution, & not by disposition (CLEASBY, B.).—*Re DE LANCEY* (1869), L. R. 4 Exch. 345; 21 L. T. 58; *sub nom.* DE

### PART V. SECT. 2, SUB-SECT. 5.—C.

m. Estate tail—Last possessor the predecessor.]—LORD ADVOCATE v. GRAHAM (1884), 22 Sc. L. R. 209.—SCOT.



*Sect. 2.—The succession: Sub-sect. 5, C.; sub-sects. 6 & 7, A.]*

LANCEY v. INLAND REVENUE COMRS., 38 L. J. Ex. 193; *on appeal* (1870), L. R. 5 Exch. 102, Ex. Ch.

*Annotations:—*Dbtd. A.-G. v. Dodd, [1894] 1 Q. B. 150. *Reid. Re Badart's Trusts* (1870), L. R. 10 Eq. 288; Macfarlane v. Lord Advocate, [1894] A. C. 291.

**701. Estate tail—Maker of disposition the predecessor—If successor be named in the entail.]—**SALTOUN (LORD) v. ADVOCATE-GENERAL, No. 591, *ante*.

**702. ————.]—**(1) Sect. 2 of 1853 Act distinguishes succession by disposition from succession by devolution of law; & the rate of duty is to be regulated by the propinquity of the successor to the predecessor. The predecessor may be determined by considering whether the succession is by disposition or by devolution of law. Substitute heirs of entail not called *nominatim*, nor coming under a descriptive designation as the head of a new stirps, will be held to take by devolution of law, & not by disposition, & the predecessor in the sense of the above Act will be the last possessor. Under two entails executed by his lineal ancestors, the Earl of Z. succeeded his uncle as heir substitute to estates in Scotland:—*Held*: the uncle was the “predecessor” of the Earl within the above Act, & as taking by devolution of law he was liable to duty at the rate of 3 per cent.

(2) The Act was so framed as to embrace estates both in Scotland & in England, notwithstanding the great differences between the tenure of property in the two countries, & therefore a construction must be found which would sustain the Act as applying either to an English or a Scottish estate (LORD HATHERLEY).

(3) Although all the persons specifically named in the deed would take the property in the first instance by virtue of the gift, & by virtue of that gift alone, those who derived any title by operation of law upon the death of a predecessor, would be held to be persons who would have, whatever might be the consequence of it, to pay, not as claiming a succession under the authority of the deed, but as claiming by operation of law an interest in the property conveyed by the deed, which interest would be pointed out by the law & by the law alone (LORD HATHERLEY).

(4) In the case of an appointment by selection, the legislature has very properly considered that the real author from whom the beneficiary takes his succession is the person who has given such limited power of selection to another (LORD HATHERLEY).

(5) Devolution by law takes place whenever the title is such that an heir takes under it by descent from an ancestor, according to the rules of law applicable to the descent of heritable estates; & in all cases of descent the estate of the successor is immediately derived from the ancestor from whom the estate descends (LORD SELBORNE).

(6) The estate comes to the next taker as much by descent (or devolution by law) from an heir in tail who cannot alienate, as from one who could do so by the use of means, which he has not, in fact, used (LORD SELBORNE).

(7) The “predecessor” in cases of “disposition” or purchase, is the “settlor, disposer, testator, or obligor,” from whom the interest of the successor is derived; in cases of “devolution by law” or descent, he is the “ancestor” from whom the interest of the successor is derived (LORD SELBORNE).

(8) The word “ancestor” is properly assignable to the person who really preceded in the estate,

although that person may not be the progenitor of the successor (LORD HATHERLEY).—ZETLAND (EARL) v. LORD ADVOCATE (1878), 3 App. Cas. 505; 38 L. T. 297; 26 W. R. 725, H. L.

*Annotations:—*As to (1) *Reid. Charlton v. A.-G.* (1879), 4 App. Cas. 427; A.-G. v. Mitchell (1881), 44 L. T. 580. As to (5) *Reid. Buchan v. Lord Advocate*, [1909] A. C. 166. As to (6) *Reid. Re Abergavenny*, Nevill v. I. R. Comrs., [1923] 1 K. B. 18. As to (7) *Consd. Hamilton v. Lord Advocate*, [1920] A. C. 50. As to (8) *Reid. Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289.

**703. ———— Successor designated in the entail.]—**By a Scottish deed of entail of 1823 land was disposed to the settlor & the heirs of his body, whom failing to his cousin A., & the heirs male of his body, whom failing to the heirs female of his body.

A. succeeded, on the death of the settlor without issue, in 1829 & died in 1838, leaving a son, B., who succeeded him as heir male of his body. B. died in 1910 without heirs male, but leaving a daughter, applt., who succeeded him in the estate:—*Held*: (1) on the exhaustion of the heirs male of the body, the destination of the property was to a new class of heirs to be ascertained by reference to the deed of entail; & applt. took the succession, not by devolution by law from her father, but by reason of the disposition of the original settlor, & was liable to succession duty on that footing; (2) the term “succession” in 1909–10 Act, s. 58, bore the same meaning as in 1853 Act, namely, a succession in respect of which duty was chargeable; & applt.’s succession was the first succession under the disposition within s. 58; & applt. was liable to succession duty at the rate of 10 per cent.—HAMILTON v. LORD ADVOCATE, [1920] A. C. 50; 88 L. J. P. C. 150; 122 L. T. 193, H. L.

*Annotation:—*As to (2) *Reid. Lord Advocate v. Macalister*, [1924] A. C. 586.

**704. ———— Last possessor the predecessor—Successor neither nominated nor designated in entail.]—**ZETLAND (EARL) v. LORD ADVOCATE, No. 702, *ante*.

#### SUB-SECT. 6.—SPECIAL MODES OF CONFERRING SUCCESSIONS.

*See* 1853 Act, ss. 1, 2, 3, 5, 6, 7, 8, 15, 17.

**705. Gift inter vivos of life insurance policy—When death of assured a succession—Premiums partly paid by donee.]—**LORD ADVOCATE v. FLEMING, No. 632, *ante*.

**706. ———— Premiums paid by other than donee.]—**In contemplation of a marriage it was agreed by the prospective parties & an uncle of the intended wife that the intended husband should effect a policy of insurance on his life in his own name & settle it as hereinafter mentioned, & that the uncle should pay the premiums during the joint lives of the husband & wife. The intended husband accordingly effected the policy, & the uncle paid the first annual premium. By the marriage settlement, which was made in 1853, the husband assigned the policy & the moneys payable thereunder to trustees upon trust for himself until the marriage, & thereafter upon trust for the intended wife for life for her separate use, & after her death for the husband for life, & after the death of the survivor of them upon certain trusts for the children absolutely; & the uncle thereby covenanted that if the marriage should take place he & his legal representatives would during the joint lives of the husband & wife pay the annual premiums; & the husband covenanted that, after the death of the wife if she died before him, as long as any child of the marriage or any person

claiming under such child should be living, he would pay the premiums. The marriage took place shortly after the execution of the settlement. The husband died in 1917, survived by his wife & by issue of the marriage. All the premiums on the policy were paid by the uncle or his exors. down to the death of the husband, when the policy moneys were paid to deft. as trustee of the settlement on behalf of the beneficiaries. The Crown claimed that on the death of the husband succession duty became payable by deft. in respect of the policy moneys as on a succession from the uncle, by virtue of the disposition made by the settlement:—*Held*: the interest in the policy moneys of the persons entitled under the settlement was derived from the uncle as "predecessor" within sect. 2 of 1853 Act, & deft. as trustee was liable to the Crown for the duty claimed.—A.-G. v. PUBLIC TRUSTEE, [1920] 3 K. B. 675; 90 L. J. K. B. 251; 124 L. T. 249; 36 T. L. R. 877.

**707. Extinction of determinable charge—Increase of benefit on succession—Dower.]—HARDING v. HARDING, No. 360, ante.**

**708. ——— Annuity.]—Conveyance, by two separate deeds, of certain Govt. annuities, & also a sum of £16,000 consols, to trustees, on trust to pay the annuities & the current income arising from the consols to B. for the period of four years from the date of the respective deeds, if he should so long live, & then immediately from & after the expiration of such period, or the death of B., whichever event should first happen, on trust to pay the same as directed to certain of his nieces. B. died before the expiration of the period of four years:—*Held*: succession duty at 3 per cent. was payable under 1853 Act, s. 2, not on the amount of income accruing between the death of B. & the expiration of the period of four years, but in respect of the entire annuities & the whole amount of £16,000 consols.**

The principle underlying the whole statute appears to be that, when a person comes into possession of property on a death, the beneficial interest in it which then accrues to him, or the increase of benefit which then accrues to him, is the whole property which he so comes into possession of, & not the difference in value between that property & the value of any estate or interest he may have had in it before he came into possession of it (LINDLEY, J.).

The words [of sect. 5] I take to mean, that when a person is in possession of property, if any other estate or charge upon the property comes to an end by reason of death, the increase of income is to be charged (JESSEL, M.R.).—A.-G. v. NOYES (1881), 8 Q. B. D. 125; 51 L. J. Q. B. 135; 45 L. T. 520; 30 W. R. 434, C. A.

*Annotation*:—*Mentd.* Birmingham Corpn. v. Birmingham Canal Navigation Co. (1905), 49 Sol. Jo. 536.

**709. Enlargement of interest in property—Life tenant becoming entitled to absolute interest—On failure of intermediate interest—Increase of benefit a succession.]—A.-G. v. ROBERTSON, No. 710, post.**

**710. ——— Not acceleration within 1853 Act, s. 15.]—(1) Under a marriage settlement a fund was vested in trustees in trust for the wife for life, with remainder to the husband for life, with remainder, in default of issue, to the wife absolutely, if she survived the intended coverture. There was no issue of the marriage, & the wife survived the husband:—*Held*: upon the death of the husband a succession was taken by the wife, in respect of which succession duty was then payable on the amount of the fund, less the value of her life interest therein.**

(2) The wife's title to the succession was not accelerated by the death of the husband though the possession was (LINDLEY, L.J.).

(3) Considering the fact that the wife really only got on the husband's death the difference between the value of the fund & the life interest she previously had, sect. 38 [of above Act] applies to the case, not by way of indulgence, as suggested, but in terms (LORD ESHER, M.R.).

(4) We must consider whether, upon his death, she got under the settlement something which she previously had not got, & if so, what it was. She then lost her life interest, & she got what she had not before, viz. the whole property in the fund, & power to dispose of it as she liked then & there. That appears to me to be a succession within the Act (LINDLEY, L.J.).

(5) Upon a careful consideration of the words of the sect. [15], on the true reading of it, there is no acceleration of a succession, within its meaning, where the succession comes to the successor at the moment at which it was intended by the settlement to come to him. The words of the sect. refer to something outside the settlement, which has caused the acceleration of the succession by causing it to take effect before the time intended by the parties by whom the settlement was made (LOPES, L.J.).—A.-G. v. ROBERTSON, [1893] 1 Q. B. 293; 62 L. J. K. B. 282; 68 L. T. 371; 57 J. P. 421; 41 W. R. 241; 9 T. L. R. 204; 37 Sol. Jo. 211; 4 R. 260, C. A.

*Annotation*:—*Generally*, *Mentd.* A.-G. v. Wood, [1897] 2 K. B. 102.

**711. Reservation of benefit to donor—Cessation of benefit a succession.]—FRYER v. MORLAND, No. 755, post.**

**712. ——— Reservation of annuity.]—A.-G. v. JOHNSON, No. 718, post.**

**Exercise of power of appointment.]—See Subsect. 5, B. (b), ante.**

#### SUB-SECT. 7.—DOMICIL AND SITUS.

##### A. Liability to Duty.

Foreign domicile generally, see CONFLICT OF LAWS, Vol. XI.

**713. Jurisdiction of English court—Legacy by person of foreign domicile.]—WALLACE v. A.-G., JEVES v. SHADWELL, No. 413, ante.**

**714. ——— Disposition by foreigner domiciled**

**712 i. Reservation of benefit to donor—Cessation of benefit a succession—Reservation of annuity.]—LORD ADVOCATE v. M'KERSIES (1881), 19 Sc. L. R. 438.—SCOT.**

#### PART V. SECT. 2, SUB-SECT. 7.—A.

**n. Property within & without the province—Owner domiciled within province.]—Testator lived in O. for seven years prior to his death. He left an estate consisting largely of mtges. on land within the State of M.:—*Held*: the entire estate, both within & without the province, was liable for payment of succession duties.—ONTARIO**

#### PART V. SECT. 2, SUB-SECT. 6.

**708 i. Extinction of determinable charges—Increase of benefit in succession—Annuity.]—By trust disposition & settlement trustees were directed to invest the whole estate in purchase of lands, which they were to hold in their own hands until the whole trust debts were paid off, & were then to entail & convey to a series of heirs. They were also to pay an annuity to the trustor's widow during her life. Before the debt was paid off the trustees & the heir entitled to possession of the lands, entered into an arrangement,**

by which a portion of the purchased lands was to be conveyed to the latter, he undertaking to pay the annuity to the trustor's widow. By subsequent agreement between the trustees & the heir, the whole of the purchased lands were conveyed to him, he paying the remainder of the trust debt out of his private funds. The annuity having lapsed by the death of the widow:—*Held*: by the annuitant's death an increase of benefit accrued to the heir of entail in possession; this constituted a succession.—LORD ADVOCATE v. MACDONALD (1862), 24 Dunl. (Ct. of Sess.) 1175.—SCOT.



*Sect. 2.—The succession: Sub-sect. 7, A., B. & C.]*

**abroad—To trustees in England—Property in England & abroad.]**—In 1892 a foreigner domiciled in Austria gave by a deed in the English language & form to an English co., constituted under Cos. Acts, & having its registered office in London, certain stocks, shares, & securities to a large amount upon the terms & conditions that the co. would permit the donor to receive the income thereof during his life, & after his death, would apply the same, & any investments substituted for them under the powers of the deed, for the benefit of Russian Jews generally, & principally for the promotion of the emigration of Russian Jews from Europe, & of their settlement in various countries outside Europe. The co. had been formed to carry out the same objects, & at the time of the execution of the deed the various securities comprised therein were transferred to the co. by the donor. The whole of the co.'s business was, under the arts. of assocn., transacted by a council which sat at the principal office of the co. in Paris. The ordinary & extraordinary general meetings of the co. were held at their registered office in London, but formal business only was transacted there. In 1896 the donor, who was still domiciled in Austria, died. At that time the principal part of the securities subject to the deed were foreign securities situate abroad, & the documents of title thereto were abroad, a small proportion only of the property subject to the deed being in England:—*Held*: there was on the death of the donor a succession by the co. within 1853 Act, s. 2, & therefore succession duty under that Act, & consequently, estate duty under 1894 Act, were payable upon the principal value of all the property which was subject to the trusts of the deed of 1892 at the donor's death.

We begin the discussion then with the property in the hands of an English trustee, & it seems to me that the presumption is that it is English, & the burden lies on those who say it is not (COLLINS, L.J.).

Whether, therefore, the test be that applts. become entitled to the succession by virtue of English law, as stated by Lord Cranworth in *Wallace v. Attorney-General*, No. 413, *ante*, or that the intention that the property is to be brought under the protection of the English law must be gathered from all the circumstances, or, what is probably only another way of arriving at the same result, that the property in question must have an English character stamped upon it, I think the succession here falls within the Act, as interpreted & limited by the decisions referred to in the argument. I think the principle at the bottom of these tests is really the same, & whether we arrive at the conclusion that it has become English property because an indelible incident of English property is stamped upon it, namely, that the

rights thereto shall be ascertained by English law, or conclude that, being English, it is therefore subject to our law, the result is the same, & in either view it is quite immaterial where the property is physically situated, & such I think is the effect of the authorities (COLLINS, L.J.).—A.-G. v. JEWISH COLONIZATION ASSOCN., [1901] 1 K. B. 123; 70 L. J. Q. B. 101; 83 L. T. 561; 65 J. P. 21; 49 W. R. 230; 17 T. L. R. 106, C. A.

*Annotations*:—*Reid*. A.-G. v. Johnson, [1907] 2 K. B. 885; A.-G. v. Burns, [1922] 1 K. B. 491; Swedish Central Ry. v. Thompson, [1924] 2 K. B. 255.

**715. — Physical situation of property immaterial.]**—A.-G. v. JEWISH COLONIZATION ASSOCN., No. 714, *ante*.

**716. Presumption when property in hands of English trustee—Burden of proof.]**—A.-G. v. JEWISH COLONIZATION ASSOCN., No. 714, *ante*.

*B. Real Property.*

*See* 1853 Act, s. 1.

**717. Realty in Great Britain—Devised by owner domiciled abroad.]**—*Re* WALLOP'S TRUST, No. 734, *post*.

**718. Foreign realty—Devised under trust for sale—Testator & trustees domiciled in England—Property deemed converted to English personality.]**—Testator, domiciled in England, by his will left the residue of his real & personal estate, including a tea estate situate in Assam, to trustees in trust to convert it into money & invest the proceeds, & out of the income thereof to pay certain life annuities, & subject thereto & until the death of the last surviving annuitant to pay the surplus income to certain persons in equal shares & to the survivors or survivor of them. The will contained no gift over either of the income or of the *corpus* upon the death either of the last surviving annuitant or of the last surviving person entitled to the surplus income. The trustees were authorised by the will to work the tea estate until it was sold, & also to postpone the sale & conversion of any part of the estate as long as they might think it desirable, & it was thereby provided that in the meantime the annual produce of the unconverted part should be applied in the same manner as if it were income arising from the proceeds of conversion. The trustees were resident in England, & the will was proved in England. The trustees, in the exercise of their discretion, postponed the sale of the tea estate, & while it remained unsold two of the persons entitled to shares of the surplus income died:—*Held*: the amount by which the survivors' shares of the surplus income was increased upon the deaths of the said two persons was not, even so far as that increase was attributable to the profits of the tea estate, property situate out of the United Kingdom, & succession duty, estate duty, & settlement estate duty were payable in respect of the increase so attributable.

*TREASURER v. PATTIN* (1910), 17 O. W. R. 154; 2 O. W. N. 141.—CAN.

**o. — .]**—The effect of the definition of "net value" in Succession Duty Act of British Columbia, 1911, s. 2, is not that that expression wherever used in the Act means the value of all the property of the deceased wherever situate, less his debts & incumbrances, but that it means the particular property with reference to which the expression is used in the sect. to be construed, less the deductions mentioned. Where, therefore, a person domiciled in the Province dies leaving property situate within & property situate outside the Province, the

succession duty payable under sect. 7 of the Act is to be computed with reference only to the property within the Province.—*ROYAL TRUST CO. v. BRITISH COLUMBIA, FINANCE MINISTER*, [1922] 1 A. C. 87.—CAN.

**p. — Owner domiciled outside the province.]**—Where deceased, domiciled without the province, leaves property both inside & outside the province, the taxation under Succession Duty Act, 1911, c. 217, is only on the actual value of the inside property; although for bringing inside property otherwise exempt within the ambit of taxation the outside property may be considered.—*Re* VAN HORNE

ESTATE, [1919] 3 W. W. R. 76; 47 D. L. R. 529.—CAN.

**PART V. SECT. 2, SUB-SECT. 7.—B.**

**q. Real property within province—Testator domiciled outside province.]**—M. B. & his brother were partners doing business in Ontario & owning timber limits in British Columbia. The firm had no place of business nor man of business in that province, & never worked the limits:—*Held*: under the terms of the articles of partnership, M. B. at the time of his death had an interest in the timber limits in British Columbia which passed by his will, & such interest was subject to



By reason of the trust for sale in the will, there was a conversion of the real estate in Assam, & though physically situate out of the United Kingdom it was to be deemed to be converted & brought within the jurisdiction for fiscal purposes.—*A.-G. v. JOHNSON*, [1907] 2 K. B. 885; 76 L. J. K. B. 1150; 97 L. T. 720.

*Annotation*:—*Refd. A.-G. v. Burns*, [1922] 1 K. B. 491.

### C. Personal Property.

See 1853 Act, s. 1.

**719. Funds brought into England—Invested in British securities—Quasi local settlement—Fund subject to duty.**—Where personal property is bequeathed by a person not domiciled in this country, it is not, in the first instance, liable to legacy or succession duty on being paid to the legatee. But where the exor. directed to collect foreign property & invest it here, has discharged the duty imposed on him, & has placed the fund, in the way required, in this country, any subsequent devolution of it becomes liable to duty, though the party on whom it may devolve may, like the testator, be domiciled abroad. *A.* was domiciled in Portugal, but on a visit to this country made his will in the English form, & appointed exors., some of whom resided in England. He desired his exors. to collect his property, which was in Portugal, to convert it into cash, pay certain legacies, & invest the residue in the English 3 per cents., to appropriate what they should think necessary to pay a life annuity of £50 to his sister, on the termination of which the appropriated fund was to revert to & form part of his residuary estate, & be divided, like the rest, among his three children. The exors. exactly performed the directions of the trust; when the sister died the part appropriated to satisfy her annuity became divisible among the children:—*Held*: this constituted a succession within 1853 Act, s. 2, & was liable to the payment of succession duty.

When there is any fund standing in this country in the names of trustees in consols or other property which has a *quasi* local settlement, which stock in the funds has, all the dividends having to be received in this country, & the persons who have to be dealt with in respect of it being persons residing in this country, that fund is subject to succession duty (*LORD HATHERLEY, C.*).—*A.-G. v. CAMPBELL* (1872), L. R. 5 H. L. 524; 41 L. J. Ch.

duty under B. C. Succession Duty Act, s. 5.—*BOYD v. A.-G. FOR BRITISH COLUMBIA & A.-G. FOR ONTARIO* (1916), 54 S. C. R. 532, [1917] 2 W. W. R. 242; 36 D. L. R. 266.—*CAN.*

### PART V. SECT. 2, SUB-SECT. 7.—C.

**r. Owner domiciled abroad—Property within the province.**—Succession duty is payable upon deposit receipts issued by banks in this province, payable here to a person whose domicile was in a foreign country at the time of his death.—*A.-G. FOR ONTARIO v. NEWMAN* (1899), 31 O. R. 340; *affd.* O. L. R. 511.—*CAN.*

.]—Succession duty is payable upon money, on deposit in a bank in this province, belonging to a person domiciled in a foreign country at the time of his death.—*Re McDONALD* (1902), 9 B. C. R. 174.—*CAN.*

t. ———.]—Mtges. on land in Alberta made by persons resident there & payable there & executed in form prescribed by the Land Titles Act of Alberta, although under seal which is not required, & registered under said Act, are "situate within the province" of Alberta & subject

611, H. L.; *reversg. S. C. sub nom. CALLANANE v. CAMPBELL* (1871), L. R. 11 Eq. 378.

*Annotations*:—*Folld. Lyall v. Lyall* (1872), L. R. 15 Eq. 1. *Consd. Re Cigala's Settlement. Trusts* (1878), 7 Ch. D. 351. *Apld. A.-G. v. Felce* (1894), 10 T. L. R. 337. *Folld. A.-G. v. Jewish Colonization Assn.*, [1901] 1 K. B. 123. *Refd. Blackwood v. R.* (1882), 8 App. Cas. 82; *Winans v. A.-G.*, [1910] A. C. 27. *Mentd. Colquhoun v. Brooks* (1888), 21 Q. B. D. 52.

**720. Owner domiciled abroad—Property situate in Britain.**—*Re CAPDEVIELLE*, No. 412, *ante*.

**721. ———.]—WALLACE v. A.-G., JEVES v. SHADWELL, No. 413, *ante*.**

**722. ——— Wife of husband domiciled abroad.**—*LORD ADVOCATE v. JAFFREY*, No. 414, *ante*.

Domicil of married woman, see *CONFLICT OF LAWS*, Vol. II., p. 332, Nos. 211 *et seq.*

**723. ——— Property situate abroad—Brought into England.**—*A.-G. v. CAMPBELL*, No. 719, *ante*.

**724. Settlement by will in English form—Owner domiciled abroad—Fund in England—Duty payable on death of tenant for life.**—Where a testator, a British subject domiciled abroad made his will abroad & died abroad leaving a fund to a tenant for life, with remainder over, before the passing of 1853 Act; upon the death of the tenant for life after the passing of the Act & consequent change of trustees, who thereupon paid the money into court:—*Held*: the persons entitled to the fund in remainder were liable to pay duty in respect of their succession.—*Re SMITH'S TRUSTS* (1864), 10 L. T. 598; 12 W. R. 933.

*Annotations*:—*Folld. Re Badart's Trusts* (1870), L. R. 10 Eq. 288. *Consd. Lyall v. Lyall* (1872), L. R. 15 Eq. 1.

**725. ———.]—A testator who was domiciled in Belgium, but for the last ten years of his life resided & carried on business in England, by his will directed a sum of £12,000 to be invested in consols & held in trust for A. for life, with remainder for his nephews & nieces, most of whom were Belgians:—Held: upon the death of A., succession duty was payable on the £12,000.—*Re BADART'S TRUSTS* (1870), L. R. 10 Eq. 288; 39 L. J. Ch. 645; 24 L. T. 13; 18 W. R. 885.**

*Annotations*:—*Consd. Lyall v. Lyall* (1872), L. R. 15 Eq. 1. *Refd. A.-G. v. Jewish Colonization Assn.*, [1900] 2 Q. B. 556.

**726. ———.]—Testator S. was born in Scotland in 1797. In 1822 he emigrated to New Brunswick. In 1823 testator became a student, & afterwards professor in Nova Scotia.**

to succession duty there notwithstanding that they were held by one who was domiciled & died in Ontario where he kept a duplicate executed copy of each mtge.—*R. v. TORONTO GENERAL TRUSTS CORPN.*, [1919] 2 W. W. R. 354; 46 D. L. R. 318; [1919] A. C. 679.—*CAN.*

a. ———.]—Succession Act, does not apply in respect of the movable property of persons not having an Indian domicile.—*MILLER v. ADMINISTRATOR-GENERAL OF BENGAL* (1876), 1 L. R. 1 Calc. 412.—*IND.*

b. ———.]—*F.* died in 1883, being at the time domiciled in England, & leaving movable property in Cape Colony, which he bequeathed to his wife for her life & after her death to his four children. One of these children, A., was at the time of the death of the widow a minor domiciled in Cape Colony, & succession duty was paid on his behalf to the Colonial Government:—*Held*: as Colonial Succession Duty depends upon the law of *situs* (Act 5 of 1864, s. 1, Cape), the Colonial duty was properly paid.—*FLETCHER'S ESTATE v. FLETCHER'S ESTATE* (1909), 26 S. C. 303; 19 C. T. R. 621.—*S. AF.*

c. *Settlement by will in English*

*form—Owner domiciled abroad—Fund in England.*—A person domiciled in U.S.A. executed a bond of provision in the scottish form by which he bound himself to pay to four trustees, three in Scotland, & one in Canada, for behoof of his children, reserving his own liferent, the sum of £3,000, & he assigned in security his rights & interests in certain funds, which formed part of a British succession which had accrued to him. At his death all his children were domiciled in America, or elsewhere abroad, but the fund stood invested by the trustees in Scottish heritable security:—*Held*: the children were liable in payment of succession duty upon their respective shares, the fund being in the United Kingdom.—*LITLEDALE'S TRUSTEES v. LORD ADVOCATE* (1882), 10 R. (Ct. of Sess.) 224; 20 Sc. L. R. 161.—*SCOT.*

d. ———.]—*DUNCAN'S TRUSTEE v. M'CRACKEN* (1888), 25 Sc. L. R. 551.—*SCOT.*

e. *Settlement by deed in English form—Foreign settlor domiciled in England—Fund invested in England.*—*LORD ADVOCATE v. GIBSON* (1882), 20 Sc. L. R. 161.—*SCOT.*

f. *Property outside the province*—

*Sect. 2.—The succession: Sub-sect. 7.*

In 1846 he came to England & was admitted at Caius College, Cambridge, & graduated in 1850. In the interval he visited Scotland for a few weeks. He was ordained & held a cure in England for a short time. He then went to the United States & was a professor in Virginia, & afterwards in Kentucky. In the meantime he re-visited New Brunswick. In 1854 he became a professor in Ohio. He remained away from England about 6 years. In 1856 he resided a short time at Cambridge. In 1863 he ceased to be a member of the college. From 1856 until 1864, with the exception of a few months' visit to Rouen, he resided at various places in England, where he undertook temporary duty as a clergyman on several occasions, but had no other occupation. In 1864 he again went to the United States, but in consequence of the continuance of the civil war, he returned to England the following year. In 1865 he had a paralytic stroke, & subsequently travelled to various places in England for the sake of his health. In the summer of 1869, his health having become worse, he went to reside at Ventnor, where he died in the following December. The testator made his will shortly before his death, & after giving a few pecuniary legacies to persons resident in America, he bequeathed the residue of his property, which consisted solely of personal estate, to English trustees upon trust to invest the same, & apply the income in payment of an annuity to his housekeeper for her life, & the balance for the maintenance of her daughter, *pltf.* in the suit, with an ultimate trust of the entire capital in favour of *pltf.* During the period from testator's return to England until his death he wrote various letters expressing his preference for the American climate & people, & his intention of returning to America to spend the remainder of his life:—*Held*: the testator was domiciled in New Brunswick, & therefore the legacy duty was not payable, but succession duty would become payable in respect of the trust fund to the extent of the increase of benefit which would accrue to *pltf.* on the death of the annuitant.—*THOMPSON v. BIRCH* (1876), 42 J. P. 331; *on appeal*, [1876] W. N. 278, C. A.

**727. ——— Fund abroad — Transmitted to English trustee.]—***A.-G. v. CAMPBELL*, No. 719, *ante*.

**728. ——— Death before fund transmitted to English trustees.]—**(1) By a marriage settlement executed in England the husband

*Testator domiciled within province.]—*It is *ultra vires* the Legislature of Ontario to tax property not within the province: Succession Duty Act, 1897, does not include within its scope movable properties locally situated outside the province of Ontario which testator, a domiciled inhabitant of the province, had transferred in his lifetime with intent that the transfers should only take effect after his death.—*WOODRUFF v. A.-G. FOR ONTARIO*, [1908] A. C. 508.—**CAN.**

**g. ———.]—**Neither Quebec Succession Duties Act, 1906, nor Succession Duties Act, 1892, of that Province imposes any duty upon the transmission of movable property outside the Province.—*COTTON v. R.*, [1914] A. C. 176.—**CAN.**

**h. ———.]—**Succession duties are payable under Succession Duty Act, 1911, by virtue of the maxim *mobilia sequuntur personam*, in respect of agreements for the sale of land & promissory notes, the owner of which died domiciled in the province but which were made, & were payable,

without the province & which had never been brought within the province.—*Re SUCCESSION DUTY ACT & WALKER*, [1922] 1 W. W. R. 803; 63 D. L. R. 397.—**CAN.**

**k. ———.]—**Under Succession Duty Act, 1893, the Province cannot collect a tax or duty upon shares of stock in corps. whose head offices are not in the Province or upon money on deposit outside of the Province as such property cannot be said to be "situate in the Province," although the deceased was a resident & died there.—*Re CAMPBELL'S ESTATE*, 14 C. L. T. Occ. N. 433.—**CAN.**

**l. ——— Proceeds of life policy—Beneficiary domiciled within the province.]—**The proceeds of a life policy payable at death without the province are not liable, in the hands of a beneficiary domiciled in the province, to succession duty under R. S. B. C., c. 175.—*Re TEMPLETON* (1898), 6 B. C. R. 100.

**. Property within the province—Domicil of owner immaterial.]—**Testator, resident & domiciled in the

assigned to trustees (all domiciled & resident in England) an English policy of assurance, effected on his own life for £2,000, payable at the expiration of six months after his death, & a sum of £1,047 3s. 8d. Consols, & covenanted to pay to the trustees within three years the sum of £1,000; & it was declared that the policy monies & the £1,000 should be held upon trust for investment & payment of the income to the wife for life, & then to the husband for life, & then for division among the children of the marriage. The husband died within three years, having been at the time of his marriage, & thenceforth, up to the time of his death, domiciled in New South Wales. The wife survived only three months, & left one child, *pltf.*, who was also domiciled abroad. At the time of the wife's death neither the policy moneys nor the £1,000 covenanted to be paid to the trustees of the settlement had been paid to them:—*Held*: succession duty was payable by *pltf.*, on the funds to which he became entitled under the settlement.

(2) By his will the husband appointed trustees & exors. in New South Wales to collect his residuary estate (which was all locally situate in that country), & transmit the same to trustees & exors. in England, who were to invest the funds so transmitted in Government funds or real securities, & pay the income to his wife for her life, & after her death to divide the same among the children. At the time of the wife's death no part of the residuary estate had reached the hands of the English trustees, but large remittances were afterwards made to them:—*Held*: no succession duty was payable by the *pltf.* on the funds to which he became entitled under the will.

(3) *Semble*: when a person, whether an alien or a British subject, succeeds to property under a British settlement, vested in British trustees, he is liable to pay succession duty, whether the settlement be made by an alien or a British subject, & whether the settlement be made by deed or will, wherever the property may be locally situated.—*LYALL v. LYALL* (1872), L. R. 15 Eq. 1; 42 L. J. Ch. 195; 27 L. T. 530; 21 W. R. 34.

*Annotations:—As to (1) Consd. A.-G. v. Jewish Colonization Assoc.*, [1900] 2 Q. B. 556. *As to (3) Refd. Re Cigala's Settlement. Trusts* (1878), 7 Ch. D. 351.

**729. Settlement by deed in English form—Property situate abroad—Settlor domiciled abroad.]—***LYALL v. LYALL*, No. 728, *ante*.

**730. ———.]—***A.-G. v. FELCE* (1894), 10 T. L. R. 337; 38 Sol. Jo. 310, D. C.

*Annotation:—Refd. A.-G. v. Jewish Colonization Assoc.*, [1901] 1 K. B. 123.

Province of Nova Scotia, at the date of his death was possessed of \$90,351 deposited in the New Brunswick branch of the Bank of British North America, the head office of which is in London; & the amount was paid to his executors after they had obtained ancillary probate in New Brunswick:—*Held*: the executors were liable to pay succession duty.—*R. v. LOVITT*, [1912] A. C. 212.—**CAN.**

**n. ——— Simple contract debt—Specialty debt.]—**M. had his domicil in Man. & had erected elevators for L., also domiciled in Man., on lands belonging to C. P. R. Co., in Sask. Until fully paid for the buildings were to remain the property of M., who was to retain possession & operate the elevators & all net revenues were to be applied in reduction of the price. M. also owned lands in Sask. known as the "K. Lands," which he had agreed to sell to purchasers under agreements under seal, in his possession in Man. at the time of his death, by which he remained owner until they had been fully paid for & then the lands were to



**731.** ————.]—A.-G. v. JEWISH COLONIZATION ASSOCN., No. 714, *ante*.

**732.** ———— **Settlor domiciled in England.**]—The word "property" in 1853 Act, s. 2, includes foreign movable property—as, for instance, funds or shares of a foreign government or trading corp'n.—comprised in a British settlement, vested in trustees subject to British jurisdiction, & recoverable by action in a British Ct. The mere fact of a person beneficially entitled under a settlement being a foreigner is not sufficient to exempt him from payment of succession duty.

By an English settlement executed in England on the marriage, in 1838, of an English lady with a domiciled Italian, the lady assigned certain property belonging to her consisting of French Rentes, shares in the Bank of France, & English govt. securities, to four trustees, of whom one was an Italian & the other three were English, upon trusts, after the death of the survivor of the husband & wife, for the children of the marriage. The settlement contained provisions usually inserted in English settlements, including a power for the trustees to reinvest in British or French securities. From the date of the marriage until their deaths the husband & wife resided in Italy. The Italian trustee having died, an English trustee was appointed in his place. The husband survived the wife & died in 1877, leaving two children, the only issue of the marriage, the several trust funds being then in the names of four English trustees. Both the children being domiciled Italians, the question arose whether, under 1853 Act, duty was payable on their succession to their father in respect of the French Rentes & bank shares:—*Held*: succession duty was payable, inasmuch as the settlement was a British settlement, the trustees or persons having the legal ownership were subject to British jurisdiction, & the forum for deciding any claim by the children in respect of the trust funds was a British Ct.—*Re CIGALA'S SETTLEMENT TRUSTS* (1878), 7 Ch. D. 351; 47 L. J. Ch. 166; 38 L. T. 439; 26 W. R. 257.

*Annotations*:—*Folld.* A.-G. v. Felce (1894), 10 T. L. R. 337. *Consd.* A.-G. v. Jewish Colonization Assocn., [1901] 1 K. B. 123. *Refd.* *Re Smyth, Leach v. Leach*, [1898] 1 Ch. 89; A.-G. v. Johnson, [1907] 2 K. B. 885. *entd.* Colquhoun v. Brooks (1887), 19 Q. B. D. 400.

**733. Exercise of general power of appointment—Appointor domiciled abroad—Appointees liable to duty.**]—(1) 1853 Act, s. 4, does not restrict the operation of the duty as regards appointments to cases where the powers are created by wills taking effect, or by settlements made after the commencement of the Act.

(2) Personal property appointed under a general power & not coming within sect. 4 ought not to be treated as the property of the donee, so as to be, in the case of the donee being domiciled abroad, exempt from succession duty.

be conveyed to the purchasers. The agreements contained no specific covenant to pay the price of the lands:—*Held*: (1) the debt due under the contract with L. constituted property within Man. &, as such, was liable for succession duty; (2) under the agreements for sale of the "K. Lands" they were specialty debts which, as such, constituted property within Man. & were liable for succession duty there.—*Re MUIR ESTATE* (1915), 28 W. L. R. 358; 6 W. W. R. 995; 18 D. L. R. 144; 24 Man. L. R. 310; 51 S. C. R. 428.—CAN.

*Shares of stock—Registered within province.*]—To determine the

*situs* of personal property liable to succession duties on the death of the owner the rule to be applied is that expressed in the maxim *mobilia sequuntur personam*. The head office of the Royal Bank is in Montreal, but under sect. 43 of "Bank Act" a share registry office has been established in Halifax, where all shares owned by persons residing in Nova Scotia must be registered & all transfers made:—*Held*: if the maxim *mobilia sequuntur personam* cannot be applied, the *situs* of shares of the stock of the bank transmitted by death of the owner, a resident of Halifax, is in the place of registration, rather than in the place

(3) The Act applies to a succession under a British settlement to British property vested in British trustees, & falling under the jurisdiction of a British Ct., although the persons entitled are aliens domiciled abroad.

(4) It seems to me therefore that the true construction of this section [sect. 4] is to refer the words "taking effect" to the power & not to the disposition of the property (TURNER, L.J.).—*Re LOVELACE* (1859), 4 De G. & J. 340; 28 L. J. Ch. 489; 33 L. T. O. S. 230; 5 Jur. N. S. 694; 7 W. R. 575; 45 E. R. 131, L. J.J.

*Annotations*:—*As to* (1) *Refd.* A.-G. v. Upton (1866), L. R. 1 Exch. 224. *As to* (2) *Refd.* *Re Chapman's Trusts* (1865), 2 Hem. & M. 447. *As to* (3) *Consd.* *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656; Lyall v. Lyall (1872), L. R. 15 Eq. 1; A.-G. v. Jewish Colonization Assocn., [1901] 1 K. B. 123. *Refd.* *Wallace v. A.-G., Jeyes v. Shadwell* (1865), 1 Ch. App. 1; *Re Badart's Trusts* (1870), 39 L. J. Ch. 645; *Re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351. *As to* (4) *Consd.* *Charlton v. A.-G.* (1879), 4 App. Cas. 427; A.-G. v. Mitchell (1881), 6 Q. B. D. 548.

**734.** ————.]—A married woman, domiciled abroad, exercised by her will a general absolute power of appointment, given to her by the will of her father, over property situate in England:—*Held*: legacy duty was not, but succession duty was, payable by the appointees.—*Re WALLOP'S TRUST* (1864), 1 De G. J. & Sm. 656; 3 New Rep. 679; 33 L. J. Ch. 351; 10 L. T. 174; 10 Jur. N. S. 328; 12 W. R. 587; 46 E. R. 259, L. J.J.

*Annotations*:—*Appld.* A.-G. v. Blucher de Wahlstatt (1864), 3 H. & C. 374. *Folld.* *Re Capdevielle* (1864), 5 New Rep. 15. *Consd.* *Re Chapman's Trusts* (1865), 2 Hem. & M. 447; A.-G. v. Jewish Colonization Assocn., [1901] 1 K. B. 123. *Refd.* *Wallace v. A.-G., Jeyes v. Shadwell* (1865), 1 Ch. App. 1; *Re Badart's Trusts* (1870), L. R. 10 Eq. 288; Lyall v. Lyall (1872), L. R. 15 Eq. 1.

*Compare* Part VI., Sect. 2, sub-sect. 3, *post*.

#### D. Domicil of S

*See, generally*, CONFLICT OF LAWS, Vol. XI.

**735. May be abroad.**]—*Re LOVELACE*, No. 733, *ante*.

**736.** ————.]—*Re BADART'S TRUSTS*, No. 725, *ante*.

**737.** ————.]—A.-G. v. CAMPBELL, No. 719, *ante*.

**738.** ———— **British settlement—Property vested in British trustees.**]—LYALL v. LYALL, No. 728, *ante*.

**739.** ————.]—*Re CIGALA'S SETTLEMENT TRUSTS*, No. 732, *ante*.

**740.** ————.]—A.-G. v. FELCE (1894), 10 T. L. R. 337; 38 Sol. Jo. 310, D. C.

*Annotation*:—*Refd.* A.-G. v. Jewish Colonization Assocn., [1901] 1 K. B. 123.

**741. Company registered in England—Principal business carried on abroad.**]—A.-G. v. JEWISH COLONIZATION ASSOCN., No. 714, *ante*.

**Nationality of settlor or person entitled.**]—*See* Sub-sect. 8, *post*.

where the head office is located.—SMITH v. PROVINCIAL TREASURER FOR PROVINCE OF NOVA SCOTIA (1919), 58 S. C. R. 570; 47 D. L. R. 108.—CAN.

*Owner domiciled within province.*]—A domiciled Chinaman died in British Columbia leaving legacies to each of his wives, to whom he was lawfully married in China while domiciled there:—*Held*: succession duty was payable without recognition of either of said legacies as lawful wife of deceased.—*Re SUCCESSION DUTY ACT, Re LEE CHEONG*, [1923] 1 W. W. R. 867; 2 D. L. R. 52; 31 B. C. R. 437.—CAN.



*Sect. 2.—The succession: Sub-sect. 8. Sect. 3: Sub-sects. 1, 2 & 3.]*

**SUB-SECT. 8.—NATIONALITY OF SETTLOR OR SUCCESSOR.**

**742. Successor—May be alien—British settlement—Controlled by British trustees.]—*Re LOVE-LACE*, No. 733, *ante*.**

**743. ————.]—*LYALL v. LYALL*, No. 728, *ante*.**

**744.**

SETTLEMENT TRUSTS, No. 732, *ante*.

**745. ————.]—*A.-G. v. FELCE* (1894), 10 T. L. R. 337; 38 Sol. Jo. 310, D. C.**

*Annotation:—Refd. A.-G. v. Jewish Colonization Assocn., [1901] 1 K. B. 123.*

**746. Settlor—May be alien.]—*Re BADART'S TRUSTS*, No. 725, *ante*.**

**747. ————.]—*LYALL v. LYALL*, No. 728, *ante*.**

**748. ————.]—*A.-G. v. FELCE* (1894), 10 T. L. R. 337; 38 Sol. Jo. 310, D. C.**

*Annotation:—Refd. A.-G. v. Jewish Colonization Assocn., [1901] 1 K. B. 123.*

**749. ————.]—*A.-G. v. JEWISH COLONIZATION ASSOCN.*, No. 714, *ante*.**

**SECT. 3.—EXCEPTIONS FROM CHARGE OF DUTY.**

**SUB-SECT. 1.—INTERESTS SURRENDERED, DESTROYED OR TRANSMITTED.**

*See 1853 Act, ss. 14, 18.*

**750. Transmission of interest—By death before possession acquired.]—*SOLICITOR-GENERAL v. LAW REVERSIONARY INTEREST SOCIETY*, No. 797, *post*.**

**751. ———— Whether one duty only payable.]—*A.-G. v. CLEAVE*, No. 380, *ante*.**

**752. Succession destroyed—By destruction of settlement—Sale by court of settled estates.]—*Re WARNER'S SETTLED ESTATES, WARNER TO STEEL*, No. 860, *post*.**

**753. ———— By exercise of power of appointment—Creating new title.]—(1) By a settlement made by a father on the marriage of his son, who was a party to the deed, an estate was conveyed by the father to trustees to such uses as the father & son should by deed jointly appoint, & in default of & until such appointment to the use of the father for life, & after his decease to the son in fee simple in case he should survive his father; but if he died in the lifetime of his father leaving a son who should attain the age of 21 years, then to the use of that son, & if there was no such son who attained the age of 21 years, then to the settlor in fee simple. By a subsequent deed the settlor & his son, in exercise of the power of appointment in the settlement jointly appointed the estate to the son in fee. On an information claiming succession duty:—*Held*: the son took the estate by a new title under the deed of appointment, & not by a succession the title to which had been accelerated by the surrender or extinction of any prior interest within 1853 Act, s. 15, & succession duty was not payable.**

**PART V. SECT. 2, SUB-SECT. 8.**

**q. Settlor—May be alien—Property which can be administered only in the province.]—Payment of duty under Succession Duty Act is based upon administration, & duty is payable upon any property which can properly be administered only in Ontario. Payment of non-negotiable deposit receipts, payable after notice at branches in Ontario of Canadian banks, held by a foreigner at the time**

**of his death in the foreign country, cannot be enforced except by his personal representative in Ontario, & succession duty is payable there in respect of the amount covered by them. —*A.-G. FOR ONTARIO v. NEWMAN* (1901), 21 C. L. T. 225; 1 O. L. R. 511.—*CAN.***

**PART V. SECT. 3, SUB-SECT. 3.**

**754. General rule.]—*LORD ADVOCATE v. FIFE (EARL)* (1883), 21 Sc. L. R.**

(2) It was urged that the power of appointment ought to be regarded as a superadded work of disposition of the property which is subject to the power. There may be cases in which such a view may properly be taken, & I have no wish to pre-judge them; but the power in this case appears to me to be of a wholly different kind, & to have been intended to enable the donees to create estates which could not possibly be derived from those vested in them in default of appointment (*STIRLING, L.J.*).

(3) The execution of the power could not have the effect of accelerating the succession created by the settlement, since its effect was to annul & defeat that succession altogether & substitute for it the estate created by the execution of the power. . . . For the same reason there was no acceleration by virtue of the surrender or extinction of any prior interest. The execution of the power no doubt extinguished the life interest of [the father] under the settlement. But it equally extinguished the succession under that disposition; & the estate given to [the son] by the execution of the power was not only an estate given by a different title . . . but was in itself a different interest (*COLLINS, M.R.*).—*A.-G. v. SELBORNE (EARL)*, [1902] 1 K. B. 388; 71 L. J. K. B. 289; 85 L. T. 714; 66 J. P. 132; 50 W. R. 210; 18 T. L. R. 111; 46 Sol. Jo. 103, C. A.

*Annotations:—As to (3) Refd. Re Bath's Settlement, Thynne v. Stewart (1914), 111 L. T. 153. Generally, Mentd. Re Walpole's Marriage Settlement, Thomson v. Walpole, [1903] 1 Ch. 928; Tremayne v. Rashleigh, [1908] 1 Ch. 681; Northumberland v. I. R. Comrs., [1911] 2 K. B. 343; A.-G. v. Milne, [1914] A. C. 765; Re Rushe, Warre v. Rush, [1922] 1 Ch. 302.*

**Exercise of power of appointment as acceleration.]—*See Sect. 6, sub-sect. 2, post.***

**SUB-SECT. 2.—WHEN SUCCESSOR ALSO PREDECESSOR.**

*See 1853 Act, s. 12.*

**Resettlement of entailed property—Remainderman the predecessor—As to own succession.]—*See Sect. 2, sub-sect. 5, B. (c), ante.***

**SUB-SECT. 3.—CONTRACT MADE FOR VALUABLE CONSIDERATION.**

*See 1853 Act, ss. 7, 17, 20.*

Consideration generally, *see CONTRACT*, Vol. XII., pp. 172–234, Nos. 1270–1936.

**754. General rule.]—The consideration of marriage is not a valuable consideration in money or money's worth within 1853 Act, s. 17, & a jointure rentcharge settled in consideration of marriage is therefore not exempt from duty. Nor is the release by the lady of a bare possibility of future dower or freebench a sufficient consideration to exempt the jointure from duty.**

On the marriage of B. with N. real estates were limited by the father & elder brother of B. to the use that N. might, in case she survived B., receive during her life for her jointure, in lieu

151.—*SCOT.*

**r. Succession Duty Act, 1853, s. 17—Scope of the section—Settlement in consideration of marriage.]—A settlement in consideration of marriage & money or money's worth is not within the exemption in Succession Duty Act, 1853, s. 17.—*A.-G. FOR IRELAND v. RATHDONNELL*, [1896] W. N. 141.—*IR.***

**s. ————.]—A lady on her husband's death became entitled**

& satisfaction of dower & thirds, a yearly rent-charge of £800, to be issuing thereout, without any deduction or abatement whatsoever on account of or in respect of any taxes, charges, impositions or assessments already taxed, charged, assessed or imposed, or thereafter to be taxed, charged, assessed or imposed on the hereditaments, or on the annual rentcharge or on N., or her assigns, in respect thereof, by authority of Parliament, or otherwise howsoever. The marriage took effect, & B. died after the passing of the Act, in the lifetime of N.:—*Held*: (1) the jointure was a "succession" within sect. 2 of the Act, & (2) it was not exempted from duty by sect. 17 of the Act; as between N. & the estates charged with the jointure, she was entitled to receive it free from succession duty.

(3) In framing the Act the word "succession" was adopted for the purpose of denoting any property passing, upon death, from one person to another, by virtue of any gift or descent, or of any contract, not being a *bond fide* contract of purchase or loan. Money or property, the right to receive or possess which might arise upon death, under a contract made *bond fide* in return for other money or property, was not, as between the contracting parties, to be treated as a succession. But it was not intended to exempt property arising upon death under contracts for valuable consideration generally (LORD WESTBURY, C.).

(4) A contract to be excepted must be *bond fide* made in consideration of money or money's worth, words which appear to have been selected for the purpose of excluding the consideration of marriage (LORD WESTBURY, C.).

(5) The essential requisites of a contract which is not to create a succession, are clearly defined by sect. 17. First, it must be a contract by one person to pay money or money's worth to another; secondly, it must be made *bond fide* for a valuable consideration existing in money or money's worth, the contract creating personal liability between the contracting parties; &, thirdly, such a contract is prevented from creating a succession only as between the contracting parties, for all that sect. 17 does, is to declare that there shall be no relation of predecessor & successor between the person bound to pay, & the person entitled to receive.—*FLOYER v. BANKES* (1863), 3 De G. J. & Sm. 306; 3 New Rep. 16; 33 L. J. Ch. 1; 9 L. T. 353; 27 J. P. 743; 9 Jur. N. S. 1255; 12 W. R. 28; 46 E. R. 654, L. C.

*Annotations*:—*As to* (2) *Refd. Re Egmont's Settled Estates, Lefroy v. Egmont*, [1912] 1 Ch. 251. *As to* (3) *Folld. A.-G. v. Wolverton*, [1896] 2 Q. B. 389. *Refd. Fryer v. Morland* (1876), 3 Ch. D. 675. *As to* (4) *Folld. A.-G. v. Wolverton* (1896), 2 Q. B. 389. *Refd. A.-G. v. Sandwich*, [1922] 2 K. B. 500. *Generally, Mentd. Gleadow v. Leatham* (1882), 52 L. J. Ch. 102.

—.]—A conveyance or assignment by way of *bond fide* sale does not create a succession within 1853 Act. Where the purchaser of a reversionary life interest in settled property had contracted to sell it to D., the tenant for life in possession, in consideration of a sum of money paid down & a further sum payable on the death of D., secured by a charge on the reversion:—*Held*: (1) there was no "succession" created within the meaning of sect. 2 of the Act, & no duty would be payable on the death of D. in respect of the said charge.

(2) If we look at the whole scope of the Act

to payment of an annuity of £3,000 provided to her by her husband's father in her ante-nuptial contract of marriage. She claimed exemption on the ground that the annuity had been granted for a valuable considera-

tion set forth in the marriage contract, viz. (1) the settlement by her father of £10,000 upon the spouses & children of the marriage, & (2) her renunciation of *jus relictas* & *terce*:—*Held*: (1) the provision by the lady's father was not

& its meaning generally, it does appear to me, unless I find very distinct words in the Act to say it applied to an ordinary case of purchase out & out, that is not a transfer of existing successions, when of course there are provisions that the purchaser shall be in the same position as the vendor, that I should be going against what I conceive to be the purview of the whole of the Act, to say that a conveyance or assignment on *bond fide* sale was within it at all. Therefore I approach the Act with the impression that it is not intended to impose a new tax on alienations (JESSEL, M.R.).

(3) It is a very odd thing that those words [of sect. 2, 1853 Act] do not say "in possession." That is what the Act means, "By reason whereof any person has, or shall become beneficially entitled to any property in possession," but it does not say so. A man becomes beneficially entitled to property in one sense undoubtedly before he gets into possession. But the Act obviously means possession; & it says "the term 'succession' shall denote the person so entitled, & the term 'predecessor' shall denote a settlor, disposer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be devised" (JESSEL, M.R.).

(4) There is a series of decisions which seems to confirm the view I take of the Act, that is to say, cases where a disposition was made by the purchaser on a purchase. The question arose who was the predecessor? & it was held that if a man bought for valuable consideration, either money or money's worth, &, instead of taking a conveyance to himself direct, took a conveyance by way of settlement on himself & others in succession that he was a settlor, that is, that the title was derived from the purchaser & not from the vendor (JESSEL, M.R.).

(5) I must read the words "policy of insurance" there [sect. 17 of 1853 Act], to mean a policy of insurance effected in the ordinary way in consideration of a premium or premiums. If that is so, that is a contract no doubt for money. It is a purchase of a reversionary sum in consideration of a present payment of money, or as is generally the case, on the payment of an annuity during the life of the person insuring. It is clearly a contract which could not fairly be described, as I read it, as a disposition of property at all, because a mere covenant to pay money is not a disposition of property in the ordinary sense (JESSEL, M.R.).

(6) The object of sect. 7 is plain enough. It is to prevent a man conveying the fee, reserving himself a life interest. It excepts a *bond fide* sale, & of course the argument was, if all *bond fide* sales are excepted, why were the words "not being a *bond fide* sale" put in? I am unable to say why. I cannot read those words to mean anything more than that any attempt gratuitously to reserve a life interest to the original owner shall be deemed to create a succession (JESSEL, M.R.).—*FRYER v. MORLAND* (1876), 3 Ch. D. 675; 45 L. J. Ch. 817; 35 L. T. 458; 41 J. P. 86; 25 W. R. 21.

*Annotations*:—*As to* (1) *Refd. A.-G. v. Hawkins*, [1901] 1 K. B. 285. *As to* (2) *Appl. A.-G. v. Dowling* (1880), 5 Ex. D. 139. *As to* (3) *Refd. A.-G. v. Charlton* (1877), 2 Ex. D. 398. *As to* (4) *Refd. A.-G. v. Montefiore* (1888), 21 Q. B. D. 461; *A.-G. v. Wolverton*, [1896] 2 Q. B. 389. *As to* (6) *Distd. A.-G. v. Brown* (1897), 77 L. T. 591. *Refd. Crossman v. R.* (1886), 18 Q. B. D. 256.

a consideration for the granting of the annuity in the sense of the Act, & (2) the renunciation of *jus relictas* & *terce* was not a valuable consideration, the husband at the date of the marriage contract having neither heritable or



**Sect. 3.—Exceptions from charge of duty: Sub-sects. 3, 4, 5, 6, 7 & 8.]**

**756. 1853 Act, s. 17—Scope of the section—Not confined to relation between debtor & creditor.]—**

(1) The words of the above sect. apply to all contracts, & exempt them from duty; & the funds of a tontine becoming divisible are within that sect., so that the Crown is not entitled to duty; such division, however, would not affect any devolution or disposition after the commencement of the Act.

(2) In the case of a father who had subscribed for one share in the tontine in the names of his three infant children, two of whom died before the Act came into operation, the ct. decided that there was no succession at all in the surviving child, who took in his own right only that which had been given to him before the Act came into operation.

(3) The above sect. is not confined to cases where the relation of debtor & creditor exists between the parties, but extends to every case of a contract *bond fide* for valuable consideration in money or money's worth for the payment of money or money's worth after the death of another person.

(4) No duty can attach in respect of what arises simply & merely from the contract; & that this was what was intended by the legislature is more plain when it is observed that express provision is made for the duty attaching upon any disposition or devolution of the moneys payable under the contract, thus pointedly marking the distinction between the disposition created by the contract & the disposition of moneys payable under the contract (TURNER, L.J.).—**OLDFIELD v. PRESTON** (1861), 3 De G. F. & J. 398; 31 L. J. Ch. 256; 5 L. T. 650; 8 Jur. N. S. 107; 10 W. R. 257; 45 E. R. 932, L. J.

**757. — Disposition created by contract—Disposition of moneys payable under contract—Distinguished.]—OLDFIELD v. PRESTON, No. 756, ante.**

**758. — Must be no relation of predecessor & successor.]—FLOYER v. BANKES, No. 754, ante.**

**759. Contract not creating succession—Requisites of.]—FLOYER v. BANKES, No. 754, ante.**

**760. — Benefit payable under a tontine.]—OLDFIELD v. PRESTON, No. 756, ante.**

**761. — Marriage.]—FLOYER v. BANKES, No. 754, ante.**

**762. — Jointure rentcharge in lieu of dower.]—FLOYER v. BANKES, No. 754, ante.**

**763. — Sale by purchaser of reversionary life interest—In settled property—To tenant for life in possession.]—FRYER v. MORLAND, No. 755, ante.**

**764. — Purchase of reversionary property—By trustees of will.]—By the will of X. ecclesiastical leaseholds for lives of which Y.'s was the last, were settled upon trusts for Y. for life & over. A. having acquired the life interest of Y., bought the reversion in the leaseholds from the Ecclesiastical Comrs., & had been held to have purchased as trustee for the persons entitled under the will of X. Part of the land was represented by a sum paid into ct. as compensation by a public body which had taken it under statutory powers. After the death of Y. the equitable interest under the will of X. had become vested absolutely in B., who, after satisfying A.'s lien for purchase**

money, was entitled to the fund in ct.:—**Held**: B.'s title was, for purposes of duty, a title acquired under the will & not by purchase, & succession duty was payable as on the death of Y. as predecessor.—**DE RECHBERG v. BEETON** (1888), 38 Ch. D. 192; 57 L. J. Ch. 1090; 59 L. T. 56; 36 W. R. 682.

**765. — Partnership agreement between father & son—Whereby son acquired share of business.]—**The father of applt., who had carried on a business for a long time, entered into partnership with his son, applt., for a term of years. The son brought no capital into the business, but, by the deed of partnership, it was agreed that one-third of the capital was to be deemed to be the son's, & that the profits were to be divided accordingly. It was also agreed that, if the partnership continued for the stipulated term, or was terminated by any other cause, than the death of one partner, the son's share of the capital was to be one half; &, if the father died during the term, the son was to have the whole business & pay £10,000 to the father's exors.; &, if the son died during the term, the father was to have back the whole business & pay £15,000 to the son's exors. The father died during the term, & the Crown claimed succession duty from the son:—**Held**: the partnership deed was of the nature of a family arrangement, & not a sale of the business to the son upon the footing of a commercial transaction, & the duty was payable.—**BROWN v. A.-G.** (1898), 79 L. T. 572; 15 T. L. R. 109, H. L.

**Annotations:—****Reid. A.-G. v. Hawkins**, [1901] 1 K. B. 285; **Lethbridge v. A.-G.**, [1907] A. C. 19; **A.-G. v. Boden**, [1912] 1 K. B. 539.

#### SUB-SECT. 4.—WHERE OTHER DEATH DUTY CHARGEABLE AND EXEMPTED.

*See* 1853 Act, s. 18; Finance Act, 1911 (c. 10), s. 13.

**766. Payment of probate duty—Under 1881 Act—Upon estate of deceased reversioner—No succession duty payable on death of life tenant.]—A. died intestate & without having been married. He was entitled to an interest in reversion expectant on his father's death, in a settled fund. The father, to whom letters of administration of A.'s estate were granted, paid 3 per cent. administration duty under above Act, s. 27, upon the estimated value of A.'s estate, including the above reversionary interest:—**Held**: the father was exempted by above Act, s. 41, from paying duty at £1 per cent. in respect of A.'s succession to his father, under 1853 Act, s. 10.—**Re HAYGARTH'S TRUSTS** (1883), 22 Ch. D. 545; 52 L. J. Ch. 416; 48 L. T. 24; 31 W. R. 316.**

**Annotation:—****Distd. Kenlis v. Hodgson**, [1895] 2 Ch. 458.

**767. Legacy duty payable—Same acquisition of same property—Legatee & successor.]—A., having a general power of appointment subject to a life interest in his sister B., appointed by will to C. for life with remainder to such persons as B. should appoint. A. died & then B. died in C.'s lifetime, having appointed to strangers. Then C. died:—**Held**: B.'s appointees were liable to £10 per cent. legacy duty, but the fund was not liable to succession duty in respect of the succession of B.**

Sect. 18 [of 1853 Act] enacts that succession

movable estate.—**LORD ADVOCATE v. SIDGWICK** (1877), 4 R. (Ct. of Sess.) 815; 14 Sc. L. R. 522.—**SCOT.**

**t. Leases at rack rent.]—A.-G. v. LONGFORD**, [1909] 1 I. R. 436.—**IR.**

#### PART V. SECT. 3, SUB-SECT. 4.

**a. Exemption of legacies from legacy duty—Succession duty payable on devise of realty.]—After giving pecuniary legacies, testator devised a**

freehold farm to F. & directed "all said legacies to be paid free of legacy duty":—**Held**: not to apply to the devise of the farm so as to cover succession duty.—**ELLARD v. PHELAN**, [1914] 1 I. R. 76.—**IR.**



duty & legacy duty shall not both be payable in respect of the same acquisition of the same property: & therefore though a person may be a successor, yet if he takes the property also as legatee he is not liable to both duties (PAGE-WOOD, V.-C.).—*Re* CHAPMAN'S TRUSTS (1865), 2 Hem. & M. 447; 13 L. T. 144; 11 Jur. N. S. 708; 71 E. R. 537.

*Annotations*:—*Folld. A.-G. v. Littledale* (1870), L. R. 5 Exch. 275. *Refd. A.-G. v. Cleave* (1873), 31 L. T. 86.

768. ——— Claim for legacy duty under will—Defeats claim for succession duty under settlement.]—*A.-G. v. LITTLEDALE*, No. 652, *ante*.

769. ——— ——— ———.]—*WOLVERTON v. A.-G.*, No. 660, *ante*.

770. ——— Legacy duty in respect of different persons—Donor of power dying before commencement of 1853 Act.]—*A.-G. v. MITCHELL*, No. 688, *ante*.

771. Succession equivalent to legacy—Exemption of legacy from legacy duty—Whether succession only payable.]—*A.-G. v. FITZJOHN*, No. 613, *ante*.

#### SUB-SECT. 5.—SMALL SUCCESSIONS.

See 1853 Act, s. 18; 1889 Act, s. 10 (2).

#### SUB-SECT. 6.—PROPERTY NOT YIELDING INCOME.

See Legacy Duty Act, 1796 (c. 52), s. 14; 1853 Act, ss. 23, 24, 32; 1896 Act, s. 20; 1909–1910 Act, ss. 61 (5), 63; Benefices Act, 1898 (c. 48), s. 1 (1) (b); Finance Act, 1912 (c. 8), s. 9.

#### SUB-SECT. 7.—MONEY APPLIED TO PAYMENT OF DUTY.

See 1853 Act, s. 18.

772. Bequest free from duty—Legacy duty—Succession duty on leaseholds not covered.]—*Re* JOHNSTON, COCKERELL *v.* ESSEX (EARL), No. 535, *ante*.

773. ——— From all deductions—Jointure—Payable free of succession duty.]—*FLOYER v. BANKES*, No. 754, *ante*.

774. ——— ——— ———.]—In 1889 estates were settled in strict settlement & heirlooms were settled upon trusts to correspond as nearly as might be to the uses of the freeholds. Under that settlement the seventh Earl of E. became tenant for life, & the eighth became tenant for life in remainder. The seventh earl died in 1897. Under a power contained in the settlement the eighth earl granted to his wife a jointure “free from all deductions.” He died in 1910. Estate duty & succession duty on the heirlooms were not paid in 1897, & the Crown now claimed the duties & interest thereon. The trustees had in their hands investments representing capital moneys

& rents accrued during the lives of the eighth & the present earl:—*Held*: according to the true construction of the settlement & grant the succession duty on the jointure must be paid out of the capital moneys.—*Re* EGMONT'S (EARL) SETTLED ESTATES, LEFROY *v.* EGMONT, [1912] 1 Ch. 251; 81 L. J. Ch. 250; 106 L. T. 292.

775. ——— Direction to raise “net sum”—Appointed fund.]—The donee of a special power of appointment contained in a settlement appointed that so much of the stocks & securities held by the trustees “as shall be sufficient to raise the net sum of £2,000” should, subject to the life interest therein of the appointor, “henceforth belong & be vested in” E., an object of the power, “& be held in trust for him”:—*Held*: the appointee took the fund free from succession duty.—*Re* SAUNDERS, SAUNDERS *v.* GORE, [1898] 1 Ch. 17; 67 L. J. Ch. 55; 77 L. T. 450; 46 W. R. 180; 42 Sol. Jo. 65, C. A.

*Annotations*:—*Apld. Re* Coxwell's Trusts, Kinloch-Cooke *v.* Public Trustee, [1910] 1 Ch. 63. *Refd. Re* Chisholm, Goddard *v.* Brodie, [1902] 1 Ch. 457; *Re* Grant, Novinson *v.* United Kingdom Temperance & General Provident Institution (1915), 85 L. J. Ch. 31.

776. ——— Free from any deduction except legacy duty & income tax—Particular legacy duty abolished at time of will—Replaced by succession duty.]—*Re* RAYER, RAYER *v.* RAYER, No. 264, *ante*.

777. ——— Legacy & succession duty payable on testator's death—Includes succession duty payable under prior settlement.]—A tenant for life directed his exors. to pay, out of a particular fund, his pecuniary legacies & annuities “& the legacy & succession duty payable for the same or in consequence of his death”:—*Held*: the succession duty payable by the next remainderman under a prior settlement & in respect of family estates not devised, was charged on the fund.—*POULETT (EARL) v. HOOD* (1866), 35 Beav. 234; 13 L. T. 783; 12 Jur. N. S. 85; 14 W. R. 298; 55 E. R. 885.

778. ——— Free from any incumbrances—Devise of freehold—Title deeds mortgaged to secure overdraft.]—*Re* NESFIELD, BARBER *v.* COOPER, No. 243, *ante*.

#### SUB-SECT. 8.—EARLY CESSER OF LIMITED INTEREST.

See 1853 Act, ss. 21, 32; 1888 Act, s. 22 (3) (a).

779. Successor dying before all duty paid—Cessation of instalments—Successor competent to dispose by will of continuing interest.]—By 1853 Act, s. 21, the duty chargeable on the succession to real property shall be paid by eight half-yearly instalments; “Provided that if the successor shall die before all such instalments shall have become due, then any instalment not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such

#### PART V. SECT. 3, SUB-SECT. 7.

b. Bequest free from duty—Additional bequests by codicil without direction by testator.]—Testator by his will gave to a niece \$20,000 & to another niece \$10,000 & directed his trustees “to pay all succession duty out of my said estate, my intention being that the legacies hereunder bequeathed are to be free from all succession or other duties.” By codicil he ratified & confirmed the will “in every respect save in so far as any part is inconsistent with this codicil,”

& bequeathed to each of his said nieces the sum of \$25,000:—*Held*: the legacies under the codicil were not to be paid free of succession duty.—*HENDERSON v. MONTREAL TRUST CO.*, [1923] 4 D. L. R. 745; 3 W. W. R. 808.—CAN.

c. ——— Legacy & succession duty on legacies & annuities—Succession duty on life interest in real property not covered.]—Testatrix devised a house, in trust for E. for life with remainders to E.'s children & devised all the residue of her property, upon

trust to convert the same into money & to pay all legacy & succession duty upon the legacies & annuities given by her will & then to invest the surplus in the purchase of land, such residue, when invested, to be impressed with the character of real estate & to be held by the trustees upon the same trusts for E. & his children as those declared concerning the house:—*Held*: succession duty in respect of the life interest of E. was not payable out of the residuary estate.—*Re* KING'S TRUSTS (1892), L. R. 29 Ir. 401.—IR.

3.—*Exceptions from charge of duty: Sub-sect. 8. Sects. 4 & 5: Sub-sect. 1.]*

property, in which case the instalments unpaid at his death shall be a continuing charge on such interest":—*Held*: the words "competent to dispose by will" had reference to the interest in the property & not to the personal capacity; & the duty was chargeable notwithstanding the successor was incompetent to make a will by reason of lunacy or coverture.—*A.-G. v. HALLETT* (1857), 2 H. & N. 368; 27 L. J. Ex. 89; 29 L. T. O. S. 214; 157 E. R. 152.

780. ————.]—Where a tenant in tail executed a disentailing deed, & died before any instalment of duty under 1853 Act became due, & his son & devisee, who but for the deed would have been the next tenant in tail, succeeded to the property:—*Held*: (1) he was liable to satisfy the duty which his father ought to have paid; (2) the interest of the father became, under such circumstances, according to the proviso in sect. 2 of the Act, a "continuing interest" of which the father was "competent to dispose by will" & the duty was a "continuing charge on such interest."—*LILFORD (LORD) v. A.-G.* (1867), L. R. 2 H. L. 63; 36 L. J. Ex. 116; 16 L. T. 184; 15 W. R. 595, H. L.; *affg. S. C. sub nom. A.-G. v. LILFORD (LORD)* (1864), 3 H. & C. 239.

*Annotations*:—*As to* (1) *Consd. A.-G. v. Northumberland*, [1904] 1 K. B. 762. *Refd. Northumberland v. A.-G.*, [1905] A. C. 406. *As to* (2) *Refd. Re Scott* (1900), 70 L. J. Q. B. 66. *Generally, Mentd. Re Gaskell & Walters' Contract*, [1906] 2 Ch. 1; *Re Trevanion, Trevanion v. Lennox*, [1910] 2 Ch. 538; *Re E. D. S.*, [1914] 1 Ch. 618; *Re Fowler, Fowler v. Fowler*, [1917] 1 Ch. 307; *Re Meeking, Meeking v. Meeking*, [1922] 2 Ch. 523.

781. "Competent to dispose by will"—Applies to interest in the property—Not to personal capacity.]—*A.-G. v. HALLETT*, No. 779, *ante*.

782. Who is competent to dispose by will—Tenant in tail disentailing.]—*LILFORD (LORD) v. A.-G.*, No. 780, *ante*.

#### SECT. 4.—RATES OF DUTY.

See 1853 Act, ss. 10, 11, 12, 14, 15, 16; 1888 Act, s. 21 (1); 1889 Act, ss. 6 (1), (2), (3), (4), (7); 1891 Act, s. 1, Sched. I. (3), (5); 1909–1910 Act, ss. 58 (1), (2), (3), (4), 64.

#### PART V. SECT. 4.

d. *Double duty—Payable on attempt to evade duty.*]—By a deed poll a man covenanted to pay among his children £200,000, & to pay interest thereon at the rate paid by the Associated Banks in Adelaide, provided such interest should not be less than £1 10s. per cent. Interest at 1½ per cent. was regularly paid until the testator's death:—*Held*: there was no intention to evade payment of duty, & no duty was chargeable under Succession Duties Act, 1898, s. 27.—*SIMMS v. REGISTRAR OF PROBATES* (1900), 69 L. J. P. C. 51.—*AUS.*

e. ———— *Land devolving under two wills.*]—Testator died in England on Feb. 25, 1901, possessed of & entitled to lands in Ontario. He left a will by which his sister was bequeathed the income of his whole estate for life & given a general power of appointment. The sister died on Mar. 2, 1901, without having proved the will & codicils & without having taken upon herself any of the burdens thereof. By her will, made in 1873, she gave all her estate to deft:—*Held*: that, having regard to the provisions of Succession Duty Act, R. S. O. 1897, c. 24, s. 4 (g), the lands in Ontario were subject to two duties, as having

devolved under two wills.—*A.-G. FOR ONTARIO v. STUART* (1901), 21 C. L. T. 527; 2 O. L. R. 403.—*CAN.*

f. *Payable by beneficiary entitled in remainder—Ascertainable when interest accrued in possession.*]—Under a will & codicil a widow became entitled to a life interest in her husband's property & upon her death the property was devisable amongst his lineal descendants & the wives of lineal descendants:—*Held*: the result of the amendment by the introduction of the proviso in Succession & Probate Duties Acts, Amendment Act, 1918, s. 7, was that the rate at which succession duty was payable by any of the beneficiaries entitled in remainder could not be ascertained until the interest of the beneficiary accrued in possession, that therefore it could not be predicted of the beneficiaries that they were "chargeable with the duties . . . at one & the same rate" & consequently Succession & Probate Duties Acts, 1892–1915, s. 31 (Qd.), had no application to the above successions & the duties to be paid by the different beneficiaries must be charged separately & not "as in the case of a legacy to one person."—*STAMP DUTIES COMR. v. LIGHTOLLER* (1922), 31 C. L. R. 382.—*AUS.*

783. *Duty on real & personal estate distinguished.*]—*Re COOPER & ALLEN'S CONTRACT FOR SALE TO HARLECH*, No. 657, *ante*.

784. *Succession of illegitimate children—Englishman domiciled abroad—Rate payable as for strangers.*]—*J. A.*, a native of Cumberland, went abroad about forty years before his death in 1877 to reside in Rome, & there acquired a Roman or Italian domicile. He cohabited with an Italian woman, by whom he had four children, sons, all born in Rome prior to 1862. The parents were never married. *J. A.* inherited real estate in England. By his will made in English form, he gave all his real estate whether in Italy or England to his four children, *nominatim*. The will was not valid in regard to his personal estate in Rome, but as he had acknowledged his natural children in his lifetime they were allowed to succeed to that estate as *heredes ab intestato*. The real estate in England was sold & the proceeds paid into ct.:—*Held*: their status was that of strangers in blood to testator, & the Crown was entitled to be paid 10 per cent. duty under 1853 Act.—*ATKINSON v. ANDERSON* (1882), 21 Ch. D. 100; *sub nom. Re ATKINSON, ANDERSON v. ATKINSON*, 51 L. J. Ch. 452; 46 L. T. 850; 30 W. R. 562.

785. *Successor taking under disposition by himself—Resettlement of disentailed estate—Succession of remainderman.*]—*A.-G. v. SIBTHORP*, No. 693, *ante*.

786. ————.]—*BRAYBROOKE (LORD) v. A.-G.*, No. 694, *ante*.

787. ————.]—*A.-G. v. FLOYER*, No. 622, *ante*.

788. *On alienation of estate—Death of alienor prior to possession by alienee.*]—*SOLICITOR-GENERAL v. LAW REVERSIONARY INTEREST SOCIETY*, No. 797, *post*.

789. ———— *Time of alienation fixes rate.*]—*SOLICITOR-GENERAL v. LAW REVERSIONARY INTEREST SOCIETY*, No. 797, *post*.

790. *Succession by person not entitled under settlement—After commencement of 1853 Act—Heir-at-law to deceased remainderman.*]—A title by descent is a "derivative title" within sect. 15 of the above Act.

Testator, who died in 1832, devised real estate to his wife for life, & the reversion to R., who

g. *Value of property above \$200,000—Duty on excess.*]—Under Succession Duty Act, s. 4, where the aggregate value of the property exceeds \$200,000, only the excess over that amount is subject to a duty of \$5 for every \$100 of the value.—*Re TODD, TODD v. TODD* (1900), 20 C. L. T. 143; 7 B. C. R. 115.—*CAN.*

h. *Person dying before 5 Edw. VII.* c. 6.]—L. died on June 24, 1904, his gross estate being \$239,858.74, its net value being \$96,188:—*Held*: the succession duty is 5 per cent. on the net value, & that 5 Edw. VII., c. 6, is not retrospective.—*Re LEE* (1909), 14 O. W. R. 180; 18 O. L. R. 550.—*CAN.*

k. *Compromise of conflicting claims—Liability to duty does not follow compromise.*]—The question as to the validity of a residuary devise in a will coming on before the ct., all parties were ordered to be represented by counsel except the Crown. The point was not determined, a settlement approved by the ct. being entered into. Subsequently the Crown claimed succession duty at 10 per cent. on the whole estate under R. S. M. (1913), c. 187, s. 6, column 6:—*Held*: the approval of the settlement was not in any sense or to any extent a judicial



died in 1844. Testator's wife died in 1859, & R.'s son, in whom the reversionary interest of his father was vested, as his heir, became entitled in possession. R. & his son were strangers in blood to testator:—*Held*: the son was liable, on the death of the wife, to a duty of 10 per cent. upon a succession derived from testator, & not to a duty of 1 per cent., as on a devolution from his father.—*A.-G. v. RUSHTON* (1864), 2 H. & C. 812; 3 New Rep. 439; 33 L. J. Ex. 184; 9 L. T. 832; 159 E. R. 337.

*Annotation*:—*Reid. A.-G. v. Littledale* (1870), L. R. 5 Exch. 275.

**791. Consideration for making disposition.]—***Re JENKINSON*, No. 643, *ante*.

**792. Disposition made before 1853 Act—Charge on realty—Defeasible on certain events.]—***Re JENKINSON*, No. 643, *ante*.

**793. ———.]—***A.-G. v. YELVERTON*, No. 644, *ante*.

**794. ——— Appointment under power—Vesting estate in expectancy.]—***A.-G. v. GARDNER*, No. 645, *ante*.

**795. Interpretation of succession—1909-10 Act, s. 58.]—***HAMILTON v. LORD ADVOCATE*, No. 703, *ante*.

**796. ———.]—**By sect. 10 of 1853 Act, the rate of succession duty was fixed at 5 per cent. on the value of the succession where the successor is a first cousin of the predecessor. By sect. 58 (1) of 1909-10 Act, the 5 per cent. was raised to 10 per cent., but by sect. 58 (4) of the latter Act, "This sect. shall take effect . . . in the case of a succession arising under a disposition only if the first succession under the disposition arises on or after" April 30, 1909.

Testator, who was beneficially entitled to certain lands in fee, subject to the life interest of his mother, gave them by his will to his mother for life & to his first cousin in fee. The gift of a life interest to testator's mother was admittedly ineffective as to the property, since she already held it for her life. Testator died in 1900, & his mother died in 1910:—*Held*: succession duty on the succession of resp. was payable only at the rate of 5 per cent., since the resp.'s succession

"arose" on the death of testator, when resp. acquired a title to the property, & not on the death of the life tenant, when resp. became entitled in possession to his succession.—*LORD ADVOCATE v. MACALISTER*, [1924] A. C. 586; 93 L. J. P. C. 220; 131 L. T. 545; 40 T. L. R. 564; 68 Sol. Jo. 575, H. L.

## SECT. 5.—VALUE CHARGEABLE.

### SUB-SECT. 1.—GROSS VALUE.

*See* 1853 Act, ss. 7, 16, 21, 23-27, 29-31, 32, Sched.; 1894 Act, s. 18 (1 & 2), s. 21 (3); 1909-10 Act, s. 61 (5); Legacy Duty Act, 1796 (c. 52), ss. 8, 10-12, 14, 23.

**797. General rule—Value of enjoyment succeeded to—Duration of life.]—**Testatrix, having by her will in 1839 devised real estates to T. for life, & after his death to W. in fee, died in 1841, leaving both W. & T. her surviving. Defts., in 1861, & during the lifetime of T., the tenant for life, purchased his reversion in fee from W., the remainderman. In 1870 W. died, & afterwards, in 1872, T., the tenant for life, died, whereupon defts. became seised in fee in possession. W. was a first cousin of testatrix, & had he succeeded to the enjoyment of the property, would have been liable under 1853 Act to succession duty at the rate of £5 per cent., calculated in the usual way, under sect. 21, on "the annual value of the property." The Crown claimed duty from defts. at the same rate, £5 per cent., under sect. 15, as W. would have paid had he been living & had not alienated, but calculated, under sect. 27, as defts. were a corporate body, "upon the principal value" of the property. Defts. contended that, as W., the remainderman, alienated the reversion & died before the tenant for life, either no succession duty was payable at all, or only such a sum as W.'s heir, if he had succeeded, would have been liable to pay:—*Held*: (1) defts. were liable as "successors," under sect. 2, to succession duty charged under sect. 27, defts. being a corporate body, "upon the principal value of

determination of the question originally submitted to the ct., & the Crown was not bound by it in any event & the duty was payable at the rate of 10 per cent.—*Re SMITH* (1916), 34 W. L. R. 834; 10 W. W. R. 1090.—**CAN**

**l. ———.]—***LORD ADVOCATE v. CHRISTIE'S TRUSTEES* (1905), 12 S. L. T. 690.—**SCOT**.

**m. Charitable bequest — Not restricted to purposes to be carried out in the province—Liability to double duty.]—**A bequest to trustees to be used & employed "for the benefit, advantage, assistance or the founding of such charitable, religious, educational or sanitary institutions" as they may "from time to time see fit & deem desirable" is not exempt from succession duty under Succession Duty Act, 1915, s. 6 (2), inasmuch as the bequest is not restricted to "purposes to be carried out in New Brunswick." This duty is calculated at the rate of ten per cent. under sect. 10 (d) & such portion as is applied by the trustees outside the province is liable to double duty under sect. 10 (e).—*PROVINCIAL SECRETARY TREASURER OF PROVINCE OF NEW BRUNSWICK v. ROBINSON* (1919), 47 N. B. R. 55; 49 D. L. R. 361.—**CAN**.

**n. ——— Not subject to additional duty.]—***LORD ADVOCATE v. MARSHALL (FRASER'S TRUSTEE)* (1893), 30 Sc. L. R. 599.—**SCOT**.

**o. Tenant in tail a stranger.]—**

By settlement, made on the marriage of A. & B., a sum of £5,000 the fortune of A. (the wife) was assigned to trustees, upon trust, after the decease of the survivor, to apply same in payment & discharge of incumbrances affecting lands brought into settlement by B. & his father C., & by the settlement A. was given a life interest, after B.'s death, in a sum of £4,000, brought into settlement by C. In the event (which happened) of there being no issue of the marriage, D. who was a grandson of C., but a stranger in blood to A., became a tenant in tail of the settled lands; & barred the entail & resettled them.

A. survived B., & on her death the £5,000 was applied towards discharging incumbrances upon the settled lands:—*Held*: duty at 10 per cent. was payable by D. in respect of his succession to this sum.—*A.-G. FOR IRELAND v. RATHDONNELL*, [1896] W. N. 141.—**IR**.

**p. ———.]—**A. insured his life for £4,000 in 1853 in view of his second marriage. C., the mother of his first wife who had a life interest in certain securities prior to the life interest of A., joined in a marriage settlement in assigning their life interest in these securities during the life of A. to trustees, upon trust, to pay out of the annual proceeds thereof the premiums on the life policy which A. had also assigned to the trustees. A. died in 1876 leaving a widow & children of the second marriage; C. died in 1880,

a stranger in blood to the said children.

In a claim for succession duty:—*Held*: succession duty at the rate of £10 per cent. in respect of a moiety of the proceeds of the said policy of insurance, as upon a succession from C., was not payable under Succession Duty Act, 1853, ss. 2 & 13.—*A.-G. v. RIALI*, [1906] 2 I. R. 122.—**IR**.

**q. ———.]—***LORD ADVOCATE v. GORDON* (1895), 32 Sc. L. R. 532.—**SCOT**.

**r. Succession by disposition.]—***LORD ADVOCATE v. M'CULLOCH* (1895), 32 Sc. L. R. 266.—**SCOT**.

## PART V. SECT. 5, SUB-SECT. 1.

**s. Property assessed on aggregate value of several successions.]—**Where property is disposed of by a testator so as to confer several interests therein on several persons, the stamp duty payable on each succession under Succession & Probate Duties Act, 1892, s. 12, is to be assessed on the aggregate value of the several successions, & not independently on the value of each particular succession.—*Re BLISSETT*, [1903] S. R. Q. 320.—**AUS**.

**t. Increase of value — After testator's death—"Increment accrued."]—**The value of the sheep on a partnership property increased between the date of the testator's death & the date on which probate was granted to A. & B. by reason of the growth of wool. The comr. for probate & administration



Sect. 5.—Value chargeable: Sub-sects. 1 & 2.]

the property," at the same rate, namely, £5 per cent., under sect. 15, as W. would have been liable to pay had he survived the tenant for life without alienating the estate; (2) the words in sect. 15, "as if no such alienation had been made," might be read as equivalent to "as if the alienee had succeeded & paid the duty"; (3) by sect. 2, every person becoming, by reason of any disposition of property, entitled to any beneficial interest after the death of another, had conferred upon him a "succession," that is, property liable to succession duty; (4) though the title to the succession dated from the disposition, & there was never any title to the property free from the duty, yet the duty was not payable until the taker under the disposition came to the actual enjoyment of the property; (5) if the interest taken under the disposition came to an end before the enjoyment commenced, the liability to duty would cease, & the duty never become payable; (6) the amount of the duty must be calculated upon the enjoyment of the property which the person actually taking is expected to have, *e.g.* in the case of a person taking in fee, the calculation is made upon the probable duration of his life, & is payable by eight instalments. But in the case of a corpn. taking in fee, though the duty is still payable by instalments, yet, as there can be no further succession, the amount is calculated upon the principal value of the property; (7) a person who had had a "succession" conferred upon him could not by parting with it prevent it from being a "succession," that is, prevent it from being property liable to the duty. It would continue a "succession," & would be, when the proper time came, a "succession," enjoyed in possession, into whatever hands it should have come.

(8) It is not an unreasonable construction that the time of the alienation should fix the rate, because from that time the alienor has no connection with the property & his history is unimportant (CLEASBY, B.).

(9) The Crown, at all events, have made out a *prima facie* case to be paid the duty which would be paid by the alienor, & if events have happened by which the duty would be less, defts. must prove them (CLEASBY, B.).—SOLICITOR-GENERAL *v.* LAW REVERSIONARY INTEREST SOCIETY (1873), L. R. 8 Exch. 233; 42 L. J. Ex. 146; 28 L. T. 769; 21 W. R. 854.

*Annotations:—As to (1) Refd. A.-G. v. Northumberland, [1903] 2 K. B. 71. As to (3) Refd. Northumberland v. A.-G., [1905] A. C. 406. As to (4) Consd. Northumberland v. A.-G., [1905] A. C. 406. Refd. Wolverton v. A.-G., [1898] A. C. 535. As to (6) Follid. A.-G. v. Northumber-*

*land, [1904] 1 K. B. 762. As to (7) Refd. Wolverton v. A.-G., [1905] A. C. 535; A.-G. v. Northumberland, [1904] 1 K. B. 762. Generally, Refd. A.-G. v. Mander (1896), 65 L. J. Q. B. 246.*

**798. — Value of whole property succeeded to Increase of benefit.]—A.-G. v. NOYES, No. 708, ante.**

**799. When value ascertainable—When interest of successor accrues.]—(1)** The value of property for the purposes of the succession duty, under 1853 Act, is to be ascertained at the time when the interest of the successor accrues. If the property has then no saleable value, nor any actual or potential annual value, it is not capable of being assessed. Neither possible increase or diminution in the value of the property after the succession accrued was dealt with by the Legislature.

(2) No system of assessment or charge can be adopted which draws into the calculation of value a prospective or future benefit. When therefore A. succeeded to land which, as alleged by the successor, & admitted in the information, had not for some years before the predecessor's death produced any annual income, & did not produce any, annual or otherwise, to the successor, but of which he afterwards sold part:—*Held*: he was not liable to duty under the provisions of the statute in respect of the part sold.

(3) There may be successions which at the time of accruer neither yield, nor are capable of yielding in their existing state any annual income, but yet are saleable & would fetch in the market considerable sums; & in such cases I incline to think that the property which forms the succession, not being excepted from the operation of the Act, which is the case with unopened mines, timber & advowsons, has an annual value within the meaning of the Act, namely a value equal to interest at three per cent. on the sum that might have been realised if the property had been sold at the time of the accruing of the succession; & that the successor cannot baffle the statute by postponing a sale until a future period (LORD WESTBURY, C.).

(4) The calculation of the succession duty is to be on successions according to their value by sect. 10, & is to be calculated, by sect. 21, at the value of an annuity equal to the annual value of the property, & is to be payable from the date of the successor becoming entitled thereto in possession in eight equal half-yearly instalments, the first to be paid twelve months next after the successor has become entitled to the beneficial enjoyment of the real property. (5) The beneficial enjoyment means no more than in his own right, & for his own benefit, not as trustee for another (LORD WENSLEYDALE).

purposes, in estimating the net value of testator's property, added a sum per head on this net increase of value:—*Held*: the increase in value was an "increment accrued" within the meaning of the sched. to Succession & Probate Duties Act, 1892.—*Re O'BRIEN*, [1920] St. R. Qd. 124.—AUS.

**a. Real property—Subject to mortgage—How assessed.]—**In estimating the "aggregate value" of the property of a deceased person under Succession Duty Act, 1897, as amended, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be regarded, & not merely the value of the deceased's equity of redemption therein.—A.-G. FOR ONTARIO *v.* LEE (1904), 25 C. L. T. 39; 4 O. W. R. 516; 6 O. W. R. 245; 9 O. L. R. 9; 10 O. L. R. 79.—CAN.

**b. Real Property—Growing timber—Profit from sale of wood the only**

*income.]—LORD ADVOCATE v. AILSA (MARQUIS) (1881), 19 Sc. L. R. 28.—SCOT.*

**c. — Annual value — Unlet shootings.]—LORD ADVOCATE v. BUCLEUCH (DUKE) (1888), 25 Sc. L. R. 249.—SCOT.**

**d. Fair market value — At date of testator's death.]—**In determining the value of land comprised in a testator's estate, the value of the land should be fixed at its fair market value at the date of testator's death.—*Re MARSHALL ESTATE & SUCCESSION DUTY ACT (1909)*, 14 O. W. R. 1199; 1 O. W. N. 256; 20 O. L. R. 116.—CAN.

**e. — Vacant property — Value given by executors should be accepted.]—**For the purpose of fixing the "fair market value," within Succession Duties Act, c. 187, 1913, of vacant

& unimproved property, part of which was subdivided, & for all of which there was no market:—*Held*: the values given by the exors. in the inventory filed by them should be accepted.—*Re NAIRN ESTATE*, [1918] 2 W. W. R. 278; 28 Man. L. R. 546.—CAN.

**f. Shares of stock.]—**In fixing the value of shares of stock of a co. forming part of the estate of a deceased person so as to fix the amount to be paid under Succession Duties Ordinance the value must be considered from the standpoint of dividend-earning power, together with the value of the real estate owned by the co., & the better method of ascertaining the value of such real estate is on the supposition that the co. had gone into liquidation & was realising on its entire assets.—*Re CLARK'S ESTATE* (1916), 34 W. L. R. 404; 10 W. W. R. 509.—CAN.

**g. Executor's affidavit of value—**

(6) The interpretation clause, sect. 1, states that in the construction & for the purposes of the Act, the term "succession" shall denote any property chargeable with duty under this Act. These words seem to be intended to embrace every description of property which in its own nature would be chargeable with duty, although from some accidental circumstance connected with it at the time when the succession falls, it might happen not to be capable of or liable to assessment (LORD CHELMSFORD).—A.-G. v. SEFTON (EARL) (1865), 11 H. L. Cas. 257; 5 New Rep. 436; 34 L. J. Ex. 98; 12 L. T. 242; 29 J. P. 468; 11 E. R. 1331, H. L.

*Annotations:—Generally, Mentd.* Staley v. Castleton Overseers (1864), 5 B. & S. 505; Arden v. Wilson (1872), L. R. 7 C. P. 535; R. v. Abney Park Cemetery Co. (1873), L. R. 8 Q. B. 515.

**800. Property capable of being assessed — Property having no saleable value.]—A.-G. v. SEFTON (EARL), No. 799, ante.**

**801. — Property having saleable value.]—A.-G. v. SEFTON (EARL), No. 799, ante.**

**802. — Not prospective or future benefit.]—A.-G. v. SEFTON (EARL), No. 799, ante.**

**803. — Property having no actual or potential annual value.]—A.-G. v. SEFTON (EARL), No. 799, ante.**

**804. Property excepted from 1853 Act—Timber, advowsons or unopened mines.]—A.-G. v. SEFTON (EARL), No. 799, ante.**

**805. Increase or diminution in value—After succession—Not included.]—A.-G. v. SEFTON (EARL), No. 799, ante.**

**806. Real property—Full value chargeable—Successor a body corporate.]—SOLICITOR-GENERAL v. LAW REVERSIONARY INTEREST SOCIETY, No. 797, ante.**

**807. — — — Death occurring after 1894 Act —1894 Act, s. 18.]—**By his will & a codicil thereto testator who died in 1860, settled one undivided third part of his real estate upon his eldest son W. for life, with remainder to his first & other sons in tail male. W.'s eldest son C. was born in 1860 & attained the age of 21 in 1881. A resettlement made in 1882 contained a provision that if C. should survive W. & have a son who should attain the age of ten years (both of which events happened) C. might appoint the settled share to himself absolutely. W. died in 1904:—*Held*: on the death of W., succession duty became payable under 1894 Act, s. 18, upon the principal value of the real estate comprised in W.'s share, & not under 1853 Act, s. 21, upon the value of C.'s interest as an annuity, inasmuch as C.'s succession arose within 1894 Act, s. 18, on W.'s death, & not when it was originally created under the will & codicil of testator.—A.-G. v. ANDERTON, [1921] 1 K. B. 159; 90 L. J. K. B. 435; 125 L. T. 95.

*Annotation:—Consd.* Lord Advocate v. Macalister, [1924] A. C. 586.

*How far conclusive.]—*The executor of an estate filed an affidavit of value with inventory pursuant to Succession Duty Ordinance, 1903, s. 6 (2nd Session), then in force. The Provincial Treasurer sent him a revised valuation of increased amount & fixing the succession duty. No objection was made & a bond was furnished as required. In an action by the Provincial Treasurer, upon the bond:—*Held*: in cases other than under sects. 7, 8, 9 & 10, providing for valuation by an appraiser & appeal to a judge from his decision, finality, other than by agreement, could only be arrived at by an action under sects. 11 & 12.—R. v. ROACH & LONDON GUARANTEE & ACCIDENT CO., LTD., [1919] 3 W. W. R. 56.—CAN.

**h. — — —.]—**The Auditor-General having determined, under Succession Duty Act, 1911, s. 22, the amount of duty payable, accepting a valuation of the property contained in the affidavit made by the exor. under sect. 21, & the procedure under sect. 43 for a determination by a judge not having been invoked, the amount payable cannot be questioned.—UNITED STATES FIDELITY & GUARANTEE CO. v. R., [1923] A. C. 808; [1923] 3 D. L. R. 701; *affu.*, 64 S. C. R. 48.—CAN.

**k. Advowsons — Extinguished by legislature—Whether duty payable on compensation received.]—**At the passing of Irish Church Act, 1869, several advowsons were vested in deff. who applied for & obtained compensa-

**808. — Based on annuity for term of enjoyment—Although entitled in fee simple.]—**NORTHUMBERLAND (DUKE) v. A.-G., No. 602, *ante*.

**809. — — — Estimated on expectancy of life.]—**NORTHUMBERLAND (DUKE) v. A.-G., No. 602, *ante*.

**810. — Subject to subsisting lease—Increase of value on determination of lease—Purchase of fee from successor.]—**Testator devised real property let on lease, not purporting to be at a rack rent, to a devisee in fee simple. The devisee paid succession duty assessed on the rent reserved by the lease, & before the determination of the lease sold the property to deffs. subject to the lease. The annual value of the property at the determination of the lease was greater than the rent reserved by the lease. Upon an information on behalf of the Crown claiming succession duty from deffs. in respect of the increased value accruing to them on the determination of the lease as upon the value of an annuity equal to the amount of the increase of the annual value during the residue of their lives:—*Held*: (1) the succession to the property, within 1853 Act, became fully vested in the devisee upon the death of testator, the effect of sect. 20 of the Act being merely to postpone the payment of the duty upon the increased value until the determination of the

Act, were only liable, under sect. 42 of the Act, as persons claiming in right of the successor, for duty as upon the value of an annuity equal to the amount of the increase of annual value for the residue of the life of the devisee.—A.-G. v. MANDER (1896), 65 L. J. Q. B. 246; 74 L. T. 103; 44 W. R. 413; 40 Sol. Jo. 213, D. C.

**811. Cut timber—Chargeable upon death at succession—Not upon event of a sale.]—**Re LECONFIELD, WYNDHAM v. LECONFIELD, No. 122, *ante*.

**812. Personal property — Comprised in succession—Scope of 1853 Act, s. 32.]—**CUDDON v. CUDDON, No. 846, *post*.

**813. — Succession on alternate contingencies.]—**A.-G. v. NOYES, No. 708, *ante*.

**814. — Subject to life interest.]—**A.-G. v. ROBERTSON, No. 710, *ante*.

**815. — Disposition with benefit reserved to settlor—Value full principal value.]—**A.-G. v. JOHNSON, No. 718, *ante*.

#### SUB-SECT. 2.—DEDUCTIONS.

*See* 1853 Act, ss. 22, 28, 33-36, 38, Sched. Table III.; 1889 Act, s. 10 (1); 1894 Act, s. 7 (5), s. 18 (2).

**816. Necessary outgoings.]—**In estimating the value of a succession to land, under 1853 Act, the successor is not entitled to a deduction for

tion in respect of them:—*Held*: the advowsons had not been disposed of by deff., but had been taken from him & extinguished by the Act, & succession duty was not chargeable on the amount of compensation received in respect of them.—A.-G. v. LECONFIELD (LORD) (1878), L. R. 2 Ir. 290.—IR.

#### PART V. SECT. 5, SUB-SECT. 2.

**1. Incumbrances — Not created by remainderman.]—**A. devised land to trustees to B. for life, remainder to C. for life, remainder to D. in tail, subject to certain incumbrances, & provided for the establishment of a sinking fund for the discharge of the principal moneys due in respect of debts, charges, etc.

The fund was duly accumulated



*Sect. 5.—Value chargeable: Sub-sect. 2. Sect. 6: Sub-sects. 1 & 2.]*

(1) income tax or (2) the agent's charges for collecting rents.

(3) The term "annual value of land" is not a term of art, but means in common parlance the rack rent or the value of the gross produce of the land, minus all payments, expenses, interest, labour & charges on the land, or on the tenant. This has been the mode in which it has been treated in legislation, & in the construction of Acts of Parliament (WATSON, B.).

(4) "Necessary outgoings" would appear to be permanent charges made on the occupiers of the land or falling entirely on the land, such as repairs, poor rates, highway, sewer, & county rates, town rates, drainage rates & the like (WATSON, B.).—*Re ELWES* (1858), 3 H. & N. 719; 28 L. J. Ex. 46; 32 L. T. O. S. 179; 4 Jur. N. S. 1153; 157 E. R. 657.

*Annotation:—As to (4) Folld. Re Cowley* (1866), L. R. 1 Exch. 288.

**817. — Intrinsicly necessary.]**—In estimating the value of a succession to lands the legal estate in which is vested by will in trustees, the *cestui que trust* is not entitled to deduct as "necessary outgoings" reasonable expenses of management incurred, independently of his control, by the trustees acting under an authority given to them by the will.

Testator devised real estate to trustees upon trust out of the rents to pay the interest on certain mortgage debts, & also certain annuities, & to pay the surplus to a *cestui que trust* for life, with remainder over. Power was given by the will to the trustees to pay certain sums to agents or receivers for collecting the rents:—*Held*: in estimating the value of the succession of the *cestui que trust* no allowance was to be made for these payments for collection.

It ["all necessary outgoings"] means, not all such outgoings as the predecessor may have thought fit to expend, & which, therefore, in that sense are "necessary," but all such as are intrinsicly necessary—such outgoings as it was not in the option of the predecessor to expend or not as he pleased (BRAMWELL, B.).—*Re COWLEY (EARL)* (1866), L. R. 1 Exch. 288; 4 H. & C. 476; 35 L. J. Ex. 177; 14 L. T. 663; 30 J. P. 600; 12 Jur. N. S. 607; 14 W. R. 836.

**818. — Not income tax.]**—*Re ELWES*, No. 816, *ante*.

**819. — Not agents charges for collecting rents.]**—*Re ELWES*, No. 816, *ante*.

**820. — Incurred by trustees.]**—*Re COWLEY (EARL)*, No. 817, *ante*.

**821. Incumbrances—Rentcharge in favour of widow of tenant for life—Succession of remainderman.]**—*Re PEYTON*, No. 626, *ante*.

until 1863 when C., the then life-tenant, & D., the remainderman, barred the entail & limited the land to such uses as they should appoint.

From 1863 until 1878 C. failed to provide for the sinking fund, but from 1878 it was continued regularly to be kept up till his death in 1883 when D. became entitled to the estates.

In assessing the succession duty payable by D. the Comrs. of Inland Revenue disallowed from the list of incumbrances, which D. claimed to deduct, £45,000 on the ground that incumbrances to this extent would have been paid off but for the suspension of the sinking fund from 1863 to 1878:—*Held*: The incumbrances represented by this sum were not created or incurred by D., & he was entitled to the deduction claimed.—

*Re O'NEILL, LTD.* (1886), L. R. 20 Ir. 73.—IR.

**m. — .]**—LORD ADVOCATE *v. GLASGOW (EARL)* (1875), 12 Sc. L. R. 215.—SCOT.

**n. — Mortgage by tenant for life & remainderman.]**—Where the lands sold were at the date of the death of the vendor's predecessor in title subject to a charge of £4,000, secured by mortgage, which the vendor had joined in executing:—*Held*: succession duty was payable in respect of the £4,000.—*Re HAMILTON'S ESTATE* (1905), 39 I. L. T. 272.—IR.

**o. "Relinquished" or "deprived of" property—Cesser of annuity.]**—LORD ADVOCATE *v. GLASGOW (EARL)* (1875), 12 Sc. L. R. 215.—SCOT.

**p. Debt due by deceased.]**—For the

**822. — Created by remainderman—Mortgages executed under power of appointment.]**—*Re PEYTON*, No. 626, *ante*.

**823. — Annuity in favour of son of remainderman.]**—*Re PEYTON*, No. 626, *ante*.

**824. Relinquished or "deprived of" property—Cesser of annuity—Succession to other property.]**—A., by settlement on the marriage of his daughter with B., covenanted to pay them £500 a year during their lives, provided that if B., by reason of the death of his brother without issue, should come into possession of certain estates, the covenant should cease, determine & be void. In 1853, B.'s brother died without issue, & B. came into possession of the estates:—*Held*: in assessing the duty chargeable under 1853 Act, B. was entitled under sect. 38 of that Act, to an allowance in respect of the loss of the annuity.—*Re MICKLETHWAIT* (1855), 11 Exch. 452; 25 L. J. Ex. 19; 156 E. R. 908.

*Annotations:—Distd. A.-G. v. Sibthorp* (1858), 3 H. & N. 424. *Apprvd. Braybrooke v. A.-G.* (1861), 8 H. L. Cas. 150. *Refd. Le Marchant v. I. R. Comrs.* (1875), 33 L. T. 50; *Re Higgins, Day v. Turnell* (1885), 31 Ch. D. 142; *A.-G. v. Montefiore* (1888), 21 Q. B. D. 461. *Mentd. Foley v. Fletcher* (1858), 3 H. & N. 769; *Re De Lancey's Succession* (1869), 21 L. T. 58; *Tennant v. Smith*, [1892] A. C. 150; *A.-G. v. Beech*, [1898] 2 Q. B. 147; *A.-G. v. Selborne*, [1902] 1 K. B. 388; *Drummond v. Collins* (1915), 11 Tax Cas. 525.

**825. — Secured to tenant in tail on resettlement—Under disentailing assurance.]**—*A.-G. v. SIBTHORP*, No. 693, *ante*.

**826. — .]**—BRAYBROOKE (LORD) *v. A.-G.*, No. 694, *ante*.

**827. — .]**—*A.-G. v. FLOYER*, No. 622, *ante*.

**828. — .]**—If a tenant for life, & his son, the first tenant in tail under a will or a previous settlement, resettle the estate, & by such resettlement an annuity, charged upon the estate, is given to the son during his father's life, & the father dies & the son succeeds to the estate on which the annuity is charged, there must be, in calculating the succession duty under 1853 Act, s. 38, an allowance made to the son in respect of the amount of the annuity. Whether the resettlement was made before or after the Act came into operation makes no difference.—INLAND REVENUE COMRS. *v. HARRISON* (1874), L. R. 7 H. L. 1; 43 L. J. Ex. 138; 30 L. T. 274; 22 W. R. 559, H. L.; *affg. S. C. sub nom. Re HARRISON'S SUCCESSION DUTY* (1872), 26 L. T. 73.

*Annotations:—Apld. Le Marchant v. I. R. Comrs.* (1876), 1 Ex. D. 185. *Refd. Cowley v. I. R. Comrs.*, [1899] A. C. 198. *Mentd. Bourne v. Keane*, [1919] A. C. 815.

**829. — .]**—The tenant for life in possession, & his son the tenant in tail in remainder of real estates, by a disentailing deed in 1869, conveyed the estates to such uses as they should jointly appoint; & by a deed of even date, in consideration of the son's intended

purpose of arriving at the aggregate value of the property of a deceased person under Succession Duty Act, c. 24, s. 3 (3), debts are to be deducted. The duty to be paid by the person who takes is on the value of the estate which he takes at the time of taking; & the estate on which the duty is to be paid is the surplus estate after payment of debts. A sum *bond fide* paid by exors. for the purpose of settling a claim against them as such, must be considered a debt for the purpose of ascertaining the amount of succession duty.—*Ross v. R.* (1900), 20 C. L. T. 332; 32 O. R. 143; 21 C. L. T. 227; 1 O. L. R. 487.—CAN.

**q. — .]**—In order to arrive at the aggregate value of the property of a deceased person under Succession



marriage, appointed the estates to the use of trustees in fee from & after the marriage by way of mtge. to secure £20,000, subject to a proviso that if the father or son, or any person interested in the equity of redemption, should on a day named in 1870, pay to the trustees £20,000, with interest at £3 per cent., the trustees should at any time on request reconvey the estates to the uses to which the equity of redemption should then stand settled; & the father covenanted that if the marriage was solemnised he would, so long during his life as the £20,000 or any part should remain due to the trustees on the security of the deed, pay the trustees interest thereon at £3 per cent.; provided that if he should pay the interest half yearly the trustees should not during his life call in the £20,000 or any part; & the deed witnessed that the trustees should stand possessed of the £20,000 upon the trusts declared by the marriage settlement of even date, viz. upon trust to pay the annual income thereof to the son for life, & after his decease to his wife for life, with the usual trusts over for children. The marriage was solemnised, & the son received under the deeds £600 a year, being the interest on £20,000 at £3 per cent., until his father's death in 1874, when he became entitled in possession to the estates, & the £600 a year ceased:—*Held*: the case was covered by the principle of *Commissioners of Inland Revenue v. Harrison*, No. 828, *ante*, & on taking his succession to the estates the son was "bound to relinquish" or was "deprived of" the £600 a year within 1853 Act, s. 38, & was entitled to an allowance accordingly, upon the computation of the assessable value of his succession.—*LE MARCHANT v. INLAND REVENUE COMRS.* (1876), 1 Ex. D. 185; 45 L. J. Q. B. 247; 24 W. R. 858; *sub nom.* *INLAND REVENUE COMRS. v. LE MARCHANT*, 34 L. T. 152, C. A.

**830. — Cesser of life interest—On enlargement into absolute interest.]—***A.-G. v. ROBERTSON*, No. 710, *ante*.

**831. — 1853 Act, ss. 15, 38.]—***Re COOPER & ALLEN'S CONTRACT FOR SALE TO HARLECH*, No. 657, *ante*.

**832. Onus of proof.]—***SOLICITOR-GENERAL v. LAW REVERSIONARY INTEREST SOCIETY*, No. 797, *ante*.

## SECT. 6.—COLLECTION OF THE DUTY.

### SUB-SECT. 1.—THE DUTY.

*See* 1853 Act, ss. 9, 51; 1909–1910 Act, s. 56 (1).

**833. Certificate of payment—Prescribed form.]—**I think that debt. is not entitled to compel the Inland Revenue Office to give a certificate in any particular form (*ROMILLY, M.R.*).—*HOWE (EARL) v. LICHFIELD (EARL)* (1866), L. R. 1 Eq. 641; 35 Beav. 370; 14 L. T. 122; 14 W. R. 468; 55 E. R. 939; *affd.* (1867), 2 Ch. App. 155, L. C.

### SUB-SECT. 2.—WHEN PAYABLE.

*See* 1853 Act, ss. 15, 16, 20, 21, 23, 24, 32, 37, 39, 40; 1888 Act, s. 21 (2), s. 22 (1 & 2); 1894

Act, s. 6 (8), s. 18 (1); 1896 Act, s. 18 (2); 1909–1910 Act, s. 61 (5).

**834. Successor entitled in possession.]—***SOLICITOR-GENERAL v. LAW REVERSIONARY INTEREST SOCIETY*, No. 797, *ante*.

**835. — Beneficial enjoyment—Half-yearly instalments—When first instalment payable.]—***A.-G. v. SEFTON (EARL)*, No. 799, *ante*.

**836. — Meaning of "beneficial enjoyment." ]—***A.-G. v. SEFTON (EARL)*, No. 799, *ante*.

**837. — Life interest enlarged to absolute interest.]—***A.-G. v. ROBERTSON*, No. 710, *ante*.

**838. Succession accelerated.]—***Re COOPER & ALLEN'S CONTRACT FOR SALE TO HARLECH*, No. 657, *ante*.

**839. — What amounts to acceleration—Advance to expectant successor—During lifetime of life tenant.]—**By a marriage settlement the trust funds were settled upon trust to pay the income to the husband for life, & upon his death to the wife for life if she should survive, with remainder to the children of the marriage as the husband & wife jointly, or the survivor of them, should appoint, & in default of such appointment for the children who should attain the age of 21, or die leaving issue, or marry, in equal portions. It was also provided that it should be lawful for the trustees during the joint lives of the husband & wife, or the life of the survivor, with their, his, or her consent in writing, & after the decease of both, at the discretion of the trustees, to raise & apply, or dispose of, all or any part of the then expectant part or share of any such child or issue whose share should not then be payable, for or towards the preferment, advancement, or benefit of such child or issue. During the lives of the tenants for life portions of the trust funds were appointed & paid over to the children by the trustees under the power in the settlement:—*Held*: on the death of the surviving tenant for life, that as to the appointed part of the trust fund, there had been an acceleration of the title to the succession "by the extinction of prior interests" within 1853 Act, s. 15, & such part was, equally with the unappointed part, subject to succession duty.—*Re DRURY LOWE'S MARRIAGE SETTLEMENT*, *Ex p.* *SITWELL* (1888), 21 Q. B. D. 466; 59 L. T. 539; 37 W. R. 238; 4 T. L. R. 652, D. C.

*Annotation*:—*Distd.* *A.-G. v. Selborne* (1901), 65 J. P. 342.

**Settlement taking effect sooner than intended.]—***A.-G. v. ROBERTSON*, No. 710, *ante*.

**841. — Possession distinguished.]—***A.-G. v. ROBERTSON*, No. 710, *ante*.

**842. — Exercise of power of appointment—Substituting particular estate for prior succession.]—***A.-G. v. SELBORNE (EARL)*, No. 753, *ante*.

**843. — Surrender of life interest.]—**The late Earl of Buchan being in 1872 heir of entail in possession of certain entailed estates in Scotland under an entail prior to 1848, applt., who was his eldest son & heir apparent, agreed with his father to propel the entailed estates so that applt. should enjoy them as from Sept. 13,

Duty Act of New Brunswick, 1896, s. 4, the debts due by the estate should be deducted.—*RECEIVER-GENERAL OF NEW BRUNSWICK v. HAYWARD* (1901), 35 N. B. R. 453.—*CAN.*

*r.* —.]—The aggregate value of the estate of an intestate was \$12,877, & of this \$7,540 passed to the hands of his niece by virtue of an agreement between them, given effect

to by a *donatio mortis causa*:—*Held*: the \$7,540 was not dutiable under Succession Duty Act, 1897, c. 24, & amendments, the transfer from the intestate to his niece not being a voluntary one, but one made in pursuance of a contractual obligation for value.—*A.-G. FOR ONTARIO v. BROWN* (1903), 23 C. L. T. 90; 5 O. L. R. 167; 2 O. W. R. 30.—*CAN.*

## PART V. SECT. 6, SUB-SECT. 2.

*s. Succession Duty Act, 1911, s. 20—"Unless otherwise provided for"—Deals with time of payment.]—*The phrase "unless otherwise provided for," in Succession Duty Act, c. 217, s. 20, R. S. B. C., 1911, refers to the succeeding phrase "shall be due & payable at the death of the deceased"; it, therefore, deals with

*Sect. 6.—Collection of the duty: Sub-sects. 2 & 3, A. & B.; sub-sects. 4 & 5. Sect. 7: Sub-sect. 1.]*

1871. The father & son thereupon executed a disposition of the entailed estates, & the father's interest therein ceased. But inasmuch as the estate could not be disentailed until applt. attained the age of twenty-five years, it was further agreed that when applt. attained that age the estates should be disentailed. This was done in 1875. Applt. also undertook to raise a large sum of money on the estates to pay off the debts of the Earl of Buchan. In 1898 the late Earl of Buchan died, some years after he had ceased to be owner of the entailed estates. The Crown claimed succession duty under 1853 Act, ss. 2, 15, founding their claim on the ground that under the original deed of entail of 1864 applt. had an expectant right of succession, & this right would open to him by devolution on the death of the late Earl of Buchan, his father, & the transaction above referred to, by which there was a propulsiion of the estates to the next heir, namely, applt., was an acceleration of the succession:—*Held*: succession duty was payable by applt. under 1853 Act, s. 15, on the ground that he had a title to the succession capable of being "accelerated," & that title had been accelerated by the surrender or extinction of the father's prior interest.—*BUCHAN (EARL) v. LORD ADVOCATE*, [1909] A. C. 166; 78 L. J. P. C. 70; 100 L. T. 5; 25 T. L. R. 134; 53 Sol. Jo. 116, H. L.

**844. — Duty payable in "same time & in same manner"—Interpretation.]—***NORTHUMBERLAND (DUKE) v. A.-G.*, No. 602, *ante*.

#### SUB-SECT. 3.—BY WHOM PAYABLE.

##### *A. The Accountable Persons.*

See 1853 Act, ss. 1–10, 14–20, 42–45, 49, 52; 1889 Act, s. 10 (3), s. 12 (3); Legacy Duty Act, 1805 (c. 28), ss. 5, 7.

**845. Executor of settlor.]—**The father of a married woman covenanted with trustees for payment to them at such time or times during his life as he should think fit, or within twelve months after his death, of £10,000 "free from all deductions whatsoever," & for payment to them in the meantime of an annuity of £200, the principal sum & the annuity to be held upon trust for the daughter & her family. The covenantor did not pay any part of the £10,000 in his lifetime, but after his death his exor. paid to the trustees the full sum of £10,000. The Crown claimed succession duty from the trustees, who paid it, & claimed repayment from the exor. on the ground that the £10,000 was to be paid free from all deductions. Both parties agreed that the fund was liable to succession duty, & argued the case on that footing:—*Held*: (1) if the duty was payable it must be borne by the fund, for the relation between the trustees & the exor. was simply that of creditors

& debtor; (2) the exor. was not liable to be called on by the Crown for the duty; (3) when he had paid the £10,000 in full to the trustees, he had discharged his testator's obligation, & was not concerned with the question whether succession duty was payable.

(4) *Qu.*: whether any succession duty was payable on the death of the covenantor.—*Re HIGGINS, DAY v. TURNELL* (1885), 31 Ch. D. 142; 55 L. J. Ch. 235; 54 L. T. 199; 34 W. R. 81, C. A. *Annotations*:—*As to* (3) *Distd.* *Re Currie, Bjorkman v. Kimberley* (1888), 57 L. J. Ch. 743. *As to* (4) *Expld.* *A.-G. v. Montefiore* (1888), 21 Q. B. D. 461.

**846. Trustees of settlement.]—**(1) Where a person absolutely entitled to a reversionary interest in personalty settled the same on the usual trusts of a marriage settlement, & on the reversion falling in, paid the whole of the succession duty, which had become payable thereon, out of his own moneys:—*Held*: having regard to 1853 Act, s. 32, he was entitled to be recouped out of the corpus of the settled fund.

(2) By sect. 32 of 1853 Act personal property settled upon different persons in succession is to be treated for the purposes of the Act as if it were bequeathed by the predecessor to the successor. I think the legislature meant to impose the liability to pay the duty on personal property in settlement, not only on the different persons beneficially interested in succession, but also on the trustees of the settlement in the same manner as on the trustees of a will. In other words, the duty was to be a charge on the capital (*JESSEL, M.R.*).—*CUDDON v. CUDDON* (1876), 4 Ch. D. 583; 46 L. J. Ch. 257; 25 W. R. 341.

*Annotation*:—*As to* (2) *Consd.* *A.-G. v. Aberdare*, [1892] 2 Q. B. 684.

**847. —.]—***Re HIGGINS, DAY v. TURNELL*, No. 845, *ante*.

**848. — Duty paid by successor—Reimbursement by trustee—Liability for interest.]—**Real & personal estate was given by will to A. & B. to permit X. to receive the income during his life, remainder to the use of Y., an infant. On the death of X. leaving his widow & Y. otherwise unprovided for, the ct. made an order for the payment of the whole income of Y.'s property for her maintenance, to X.'s widow, by A. & B. Shortly afterwards the circumstances of X.'s widow improved, but A. & B., till the death of B., in 1861, & after that event A. alone, still paid the gross income, without ever paying succession duty, to X.'s widow during Y.'s minority. Y. attained 21 in 1873, married, & sought to charge A. & the estate of B. with the amount paid for succession duty, with interest:—*Held*: (1) they were liable for succession duty, but not for the interest.

X.'s widow, in 1863, married J., who died in 1872. On May 7, 1874, she married R. Y. sought to charge J.'s estate, Y.'s separate estate, if any, & R. in the same way:—*Held*: (2) J.'s liability in respect, as well of his wife's receipt of income, from 1861 to 1863, as of her accountability for succession duty, terminated with the coverture;

the time of payment, not with the method thereof.—*Re CRAWFORD*, [1918] 1 W. R. 267; 25 B. C. R. 178.—

**t. Residuary estate—Subject to life interest.]—**By the will of M. C. his children became entitled to the residuary estate in expectancy on the decease of his widow, who took a life interest in the property. The testator died in 1862. The widow died in 1885:—*Held*: the estate was liable to succession duty, payable on the children becoming entitled.—*Re CAMPBELL* (1890), 8 N. Z. L. R.

#### PART V. SECT. 6, SUB-SECT. 3.—A.

**a. Successor.]—**By an indenture made in 1904, W. conveyed L. station in Q. to his wife & his son in certain proportions. The indenture purported to be made between W., his wife, & son, but it was executed by W. only. W. died in 1905:—*Held*: (1) the son was liable on account only as to the interest which he himself had in the real estate in respect of which he took an interest under the settlement; (2) the wife was liable to account in respect of the interest she took in the real estate under the

settlement.—*Re WHITE*, [1920] St. R. Qd. 55.—**AUS.**

**b. Executor as devisee.]—**Q., who was exor. & sole devisee under the will of a testator domiciled in British Columbia, & applt. executed a bond for the payment of succession duty under Succession Duty Act (R. S. B. C., 1911, c. 127). The bond, which was in the form provided in the sched. to the Act, described Q. as exor., & was defeasible upon his paying all duty to which the property, estate, & effects of the testator "coming to the hands of the said" Q. might be found liable



(3) R. was similarly protected by Married Women's Property Act, 1870 (c. 93), s. 12 ; (4) J.'s estate was liable for the receipts of income from 1863 to 1872.—*BROWN v. SMITH* (1875), 46 L. J. Ch. 866.

**849. — Funds paid under order of court.]—**By his will & codicil thereto testator who died in 1860, settled one undivided third part of his real estate upon his eldest son W. for life, with remainder to his first & other sons in tail male. W.'s eldest son C. was born in 1860 & attained the age of 21 in 1881. In 1882 a disentailing assurance was executed by which one undivided third part of the freehold lands of which C. was the first equitable tenant in tail was disentailed & conveyed to such uses as W. & C. should jointly appoint, & by a deed of resettlement made on the following day the lands were under the joint power contained in the disentailing assurance conveyed to such uses as they should jointly appoint. In 1883 & 1884, £35,425 was, in pursuance of an order made in a suit for the administration of testator's estate, paid by the then trustees of the will & codicil to W., the proportion attributable to proceeds of sales of real estate subject to the will & codicil being £7,081. Between 1898 & the death of W., which took place in 1904, W. & C., in exercise of the joint power of appointment vested in them by the resettlement, appointed to themselves investments & cash attributable to the proceeds of real estate amounting in the aggregate to £26,718. Succession duty in respect of C.'s succession had not been paid on either the £7,081 or the £26,718:—*Held*: (1) the order of the ct. under which the trustees paid the £7,081 did not protect them from liability for succession duty in respect of that sum ; (2) upon the death of W., succession duty became payable in respect of C.'s succession on £33,799 (the aggregate of the sums of £7,081 & £26,718), & the trustees or their personal representatives were liable for the duty in respect of so much of those sums as was paid by the trustees respectively or to the payment of which they were parties.—*A.-G. v. CHAMBRES*, [1921] 1 K. B. 173 ; 90 L. J. K. B. 441 ; 125 L. T. 189.

**850. Liability of husband during coverture.]—***BROWN v. SMITH*, No. 848, *ante*.

*B. Limitation of Personal Liability.*

*See* 1889 Act, ss. 12, 13 (1), (2), (3), (4), (14), (15).

**SUB-SECT. 4.—REMISSION OF DUTY AND INTEREST.**

*See* Part I., Sect. 4, *ante*.

**SUB-SECT. 5.—COMMUTATION OF DUTY AND COMPOSITION OF CLAIMS.**

*See* 1853 Act, ss. 23, 39, 41 ; 1880 Act, s. 11 ; Part I., Sect. 3, *ante*.

under the provisions of the Act:—*Held*: Q. & the applts. were liable under the bond for duty in respect of real property which passed to Q. as devisee, although it had not vested in him as exor.—*UNITED STATES FIDELITY & GUARANTEE CO. v. R.*, [1923] A. C. 808.—*CAN.*

**PART V. SECT. 7, SUB-SECT. 1.**

*a. Legacy.]—*Unless otherwise stated by the terms of the will the succession tax is payable out of the specific legacy & not out of the residuary estate.—*Re BOTSFORD'S WILL*

J.—VOL. XXI.

(1895), 33 N. B. R. 55.—*CAN.*

*d. —.]—*The direction in a will to exors. to pay debts & funeral & testamentary expenses does not operate so as to make the payment of the succession duty, payable under R. S. O. 1897, c. 24, a charge on the residue & to exonerate the legacies from payment thereof.—*Re HOLLAND* (1902), 22 C. L. T. 164 ; 3 O. L. R. 406 ; 1 O. W. R. 73.—*CAN.*

*e. —.]—*Testator by codicil devised to each of two devisees one \$1,000 debenture bearing interest at 4 per cent. per annum. He had in

**851. Duty payable on fund in court—Commutation.]—**Where an application is made for payment out of ct. of a sum of money on which duty will afterwards become payable for succession duty, the ct. will recommend petitioner to commute the duty.—*BAILEY v. TINDALL* (1853), 2 Eq. Rep. 538 ; 22 L. T. O. S. 166 ; 18 Jur. 668 ; *sub nom.* *BAYLEY v. TINDAL*, 2 W. R. 129.

**SECT. 7.—OUT OF WHAT PROPERTY PAYABLE.**

**SUB-SECT. 1.—THE PROPERTY.**

*See* 1853 Act, ss. 42, 43 ; 1888 Act, s. 22 (3) (b) ; 1889 Act, s. 12 (2), (3) ; 1894 Act, s. 18 (1) ; Land Transfer Act, 1897 (c. 65), s. 5.

**852. Purchase of reversion—Purchaser liable for duty.]—**As between the vendor & purchaser of a reversion:—*Held*: the purchaser was liable to bear the succession duty payable in respect of it.—*COOPER v. TREWBY* (1860), 28 Beav. 194 ; 54 E. R. 340 ; *sub nom.* *COOPER v. TRUBY*, 8 W. R. 299.

*Annotation*:—*Folld. Re Langham & Langham Hotel Co.* (1890), 60 L. J. Ch. 110.

**853. ——— Purchase of spes successionis.]—**The heir-presumptive of an estate in fee agreed to sell his interest free from incumbrances:—*Held*: as between him & the purchaser the succession duty ought to be borne by the purchaser.—*Re LANGHAM & LANGHAM HOTEL CO., LTD.* (1890), 60 L. J. Ch. 110 ; 39 W. R. 156, C. A.

**854. ——— Subject to existing lease—Duty payable on expiry of lease.]—**(1) By a contract for sale the vendors agreed to sell, & the purchaser to buy, for £41,000, certain freehold property, "subject to the leases affecting the same, but free from incumbrances." The property was expressly sold, subject to all quit, chief, & other rents, rights of way, light, & other easements, but there was no mention of any liability in respect of succession duty. The vendors became entitled to the property on the death of a predecessor, who died before the date of the contract. The property was then subject to the leases which would expire in the year 1897, & on the death of their predecessor the vendors had only paid succession duty on the value of the ground rents, the duty which would become payable in respect of the increased value upon the determination of the leases in 1897 having been postponed, according to 1853 Act, s. 20:—*Held*: as between the vendors & purchaser, the duty which would become payable on the determination of the leases was a liability which must be discharged by the vendors.

(2) It is well settled that where a purchaser buys an estate in possession, notwithstanding that he buys it in part from owners in remainder, he is entitled to have the estate in fee in possession cleared from the burden of the succession duty, which will become payable on the determination of the prior estates (*KEKEWICH, J.*).—*Re KIDD &*

previous clauses bequeathed to each of five named persons one debenture for the sum of \$1,000 bearing interest at 4 per cent.:—*Held*: the legacies to the two legatees were not specific legacies: & even if they had been, the legatees were not entitled to receive them free of succession duty.—*Re MACKEY* (1903), 2 O. W. R. 230, 690 ; 6 O. L. R. 292.—*CAN.*

*f. —.]—*Specific legacies not specially exonerated by the will, are not to be exonerated from their proportion of the succession duties payable upon the whole of the estate, at



**Sect. 7.—Out of what property payable: Sub-sects. 1, 2, 3 & 4. Sect. 8: Sub-sects. 1, 2 & 3. Sect. 9.]**

**GIBBON'S CONTRACT**, [1893] 1 Ch. 695; 62 L. J. Ch. 436; 68 L. T. 647; 41 W. R. 507; 3 R. 268.

**Annotation:—As to (1) Folld. Re Weston & Thomas' Contract** (1907), 96 L. T. 324.

**855. ——— Indemnity by vendor.]—**  
A contract was entered into for the purchase of freehold ground rents secured on house property by a lease for 61 years expiring in 1938 subject to a condition entitling the vendors to rescind if the purchaser should insist on any requisition which the vendors should be unable or, on the ground of difficulty, delay, or expense, or any other reasonable ground, unwilling to comply with. The title to the property, which was of small value, disclosed that a claim for succession duty thereon would arise on the determination of the lease if the vendors, whose ages would then be 98, 97, & 92 years respectively, were then living. The purchaser required the vendors to discharge that claim, which the latter declined to do on the ground that the contingency was too remote for calculation & that the amount must be very small, but offered an indemnity, &, failing acceptance of that offer, gave notice to rescind without prejudice. The purchaser took out a summons for a declaration that the vendors were liable to discharge the succession duty. There was no evidence showing either any inability of the vendors to discharge the claim for the duty, or the existence of any ground of difficulty, delay, or expense, or other reasonable ground for their refusal to do so:—**Held**: the vendors were bound to discharge the claim for the duty.—**Re WESTON & THOMAS'S CONTRACT**, [1907] 1 Ch. 244; 76 L. J. Ch. 179; 96 L. T. 324.

**856. ——— Increase of value on expiry of lease—Liability of purchaser.]—A.-G. v. MANDER**, No. 810, *ante*.

**857. Purchase of estate in possession—From life tenant & remainderman—Purchaser not liable—Remedy against vendor.]—Re COOPER & ALLEN'S CONTRACT FOR SALE TO HARLECH**, No. 657, *ante*.

**858. ———.]—Re KIDD & GIBBON'S CONTRACT**, No. 854, *ante*.

the expense of the residuary legatees.—**Re BOLSTER** (1905), 25 C. L. T. 455; 6 O. W. R. 300; 10 O. L. R. 591.—**CAN.**

**g. Amount actually distributed—On final distribution.]—**The duty payable on the final distribution would be on the amount actually distributed, whether increased by accumulation or by the rise in value of lands or securities or decreased by loss.—**A.-G. v. CAMERON** (1897), 28 O. R. 571.—**CAN.**

**h. Income of property until division of corpus.]—**Testator by his will devised his estate to trustees upon trust to collect the income & apply it or such part as the trustees thought proper for the benefit of children & grandchildren for the period of 21 years after his death, & to pay over to the beneficiaries the whole income, without accumulations, for the period between the end of the 21 years & the death of the last surviving child:—**Held**: only the income was presently liable to the payment of succession duty.—**A.-G. v. TORONTO GENERAL TRUSTS CORPN.** (1902), 23 C. L. T. 89; 5 O. L. R. 216; 1 O. W. R. 807.—**CAN.**

**k. Proceeds of sale of debentures when passing to legatees—Debentures not liable.]—**Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local, or municipal purposes" in the

province:—**Held**: although the debentures themselves were not liable to the duty either in the hands of the exors. or of the purchasers, the proceeds of their sale, when passing to legatees, were.—**LOVITT v. A.-G. FOR NOVA SCOTIA** (1903), 23 C. L. T. 212; 33 S. C. R. 350.—**CAN.**

**l. Property devised.]—**The succession duty payable under Succession Duty Act, 1897, in respect of the real estate of a deceased person, does not form part of the testamentary expenses of the deceased, but is chargeable against the different properties devised under the will.—**Re WATKINS** (1906), 12 B. C. R. 97.—**CAN.**

**m. Contingent interest—Value of intervening life interest.]—**Where a will gave to D. "when he becomes the age of 21 years" certain land "together with all the crop, stock & implements which may be thereon at the time of decease":—**Held**: Under R. S. S. 1909, c. 38, s. 16, in force at time of deceased's death, the tenants for years entitled under Devolution of Estates Act should pay the succession duty upon the appraised value of the term & D. upon the appraised value of the contingent fee simple going to him.—**Re GALBRAITH ESTATE**, [1919] 2 W. W. R. 930; 48 D. L. R. 42; 5 D. L. R. 174.—**CAN.**

#### PART V. SECT. 7, SUB-SECT. 2.

**n. Executors—Mortgage of testator's**

**859. Sale of settled estates—Duty on purchase money—Exoneration of estates—Duty on extinction of rentcharge.]—**Estates subject to a jointure rentcharge were settled subject to a power of sale, with trusts for reinvestment of the purchase-money in lands to be settled to the like uses, & were sold under the power of sale:—**Held**: the charge of succession duty that would become payable on the extinction of the jointure was shifted by 1853 Act, s. 42, from the lands sold to the purchase-money, & the lands on which it might be re-invested, & therefore the purchaser was not entitled to require it to be paid or provided for.—**DUGDALE v. MEADOWS** (1870), 6 Ch. App. 501; 40 L. J. Ch. 140; 24 L. T. 113; 18 W. R. 310, L. C.  
**Annotation:—Consd. Re Warner's S. E., Warner to Steel** (1881), 50 L. J. Ch. 542.

**860. ———.]—**The effect of a sale by the ct. under the powers conferred by Settled Estates Act, 1877 (c. 18), of any settled estates, is, by the operation of sect. 22 of that Act, to revoke the uses of the settlement; & by the operation of 1853 Act, s. 42, the duty is shifted from the land sold to the purchase-money or its investments, & the land in the hands of the purchaser is freed from the succession duty.

With the destruction of the settlement the right to duty in respect of the land originally comprised in it goes (**JESSEL, M.R.**).—**Re WARNER'S SETTLED ESTATES, WARNER TO STEEL** (1881), 17 Ch. D. 711; 50 L. J. Ch. 542; 45 L. T. 37; 29 W. R. 726.  
**Annotation:—Reid. A.-G. v. Selborne**, [1902] 1 K. B. 388.

**861. Succession to lunatic—Dying Intestate—Himself successor to realty & personalty.]—Re HOLE, DAVIES v. DAVIES** (1905), 119 L. T. Jo. 222.

**Where money applied to payment of duty.]—See Sect. 3, sub-sect. 7, *ante*.**

**On early cesser of limited interest.]—See Sect. 3, sub-sect. 8, *ante*.**

#### SUB-SECT. 2.—POWER TO RAISE THE DUTY.

**See 1853 Act, ss. 18, 27, 44, 53; Supreme Court Fund Rules, 1905, rr. 20, 52 (b), 66; C. C. R. 1903, Ord. 2, r. 14.**

**property.]—**By his will testator appointed exors. & directed that the income of his estate, until the period of distribution, after paying all necessary expenses, should be used & expended by his wife in maintaining a home for herself & their children, & that when the period of distribution arrived, the corpus of the estate should be divided between his wife & three children:—**Held**: an order was properly made by a judge of the Supreme Court, upon the application of the exors., authorising them to borrow, on the security of a mortgage of testator's property, a sum which was required to pay succession duties.—**Re ELLIOT** (1917), 41 O. L. R. 276; 13 O. W. N. 266; 40 D. L. R. 649.—**CAN.**

**o. Trustees—Duty & expenses—Not costs of application to court.]—**Trustees, acting under a will, having paid succession duties due on the death of testator, applied to the ct. for authority under Finance Act, 1894, s. 9 (5), & Succession Duty Act, 1853, s. 44, to grant a bond & disposition in security over the property for the amount of the duty so paid & the expenses of settling the same & of the appln.:—**Held**: the trustees were entitled to authority to charge the property for the duty paid & also for the expenses incurred in settling the duty, but not for the costs of the application.—**HARRIS' TRUSTEES v.**

## SUB-SECT. 3.—LIMITATION OF THE CHARGE OF DUTY.

See 1853 Act, ss. 42, 52 ; 1889 Act, s. 12 (1), (3).

**862. Plene administravit by executor—Without notice of claim for duty—Right of retainer for personal debt.]—**A debt in respect of which an exor. has exercised his right of retainer must be treated as a debt paid by him, & not as money remaining in his hands. Where an exor. has, without notice of any claim for succession duty, fully administered his testator's estate, retaining a portion of the assets in payment of a debt to himself, a subsequent claim for succession duty cannot be enforced against the portion of the assets so retained by the exor.—*Re FLUDYER, WINGFIELD v. ERSKINE*, [1898] 2 Ch. 562 ; 67 L. J. Ch. 620 ; 79 L. T. 298 ; 47 W. R. 5.

## SUB-SECT. 4.—BEQUEST FREE OF DUTY

See Sect. 3, sub-sect. 7, *ante*.

## SECT. 8.—INTEREST, PENALTIES AND PROCEEDINGS.

## SUB-SECT. 1.—INTEREST.

See 1896 Act, s. 18 (2).

**863. Failure of trustee to pay duty—Reimburse-**

*HARRIS* (1904), 6 F. (Ct. of Sess.) 470.—SCOT.

*p. Provision by court for payment of duty.]—*EWING'S TRUSTEES *v. MATHIESON* (1906), 44 Sc. L. R. 12.—SCOT.

## PART V. SECT. 8, SUB-SECT. 3.

*q. Petition of appeal against assessment—Right of provincial treasurer to appeal.]—*Appeal by the Treasurer of the Province of O. from a judgment or decision of the judge of the Surrogate Court of W., under Succession Duties Act, R. S. O. 1897, c. 24, s. 9, & cross-appeal by the executors of the will of G. R. from the same decision. The surrogate judge assessed the value of the estate of G. R. at \$197,152.27, upon an appeal from the appraisement & assessment by the sheriff under sect. 7 of the Act:—*Held*: sect. 9 of the Act included the Provincial Treasurer so as to give him the right to appeal; & such appeal was not limited to the grounds expressly stated, the whole appraisement being open to appeal; & the appeal being for an amount in excess of \$10,000 there was a further appeal to a Judge of the High Court.—*Re ROACH* (1904), 6 O. W. R. 189 ; 10 O. L. R. 208.—CAN.

*r. Payment of costs by the Crown.]—*Under the power contained in Succession Duties Act, 1893, s. 41, "to make such order . . . as shall seem just," the ct. on appeal may order the Registrar of Probates, representing the Crown, to pay the costs of a successful applt. Regulation 22, made under Succession Duties Act, waives the prerogative whereby costs may not be given against the Crown.—*Re SUTHERLAND* (1914), S. A. L. R. 374.—AUS.

*s. —.]—*In litigation under

ment of successor—Liability of trustees.]—*BROWN v. SMITH*, No. 848, *ante*.

**864. ——— Liability of husband of guardian of successor.]—*BROWN v. SMITH*, No. 848, *ante*.**

## SUB-SECT. 2.—PENALTIES.

See 1853 Act, s. 46 ; Inland Revenue Act, 1868 (c. 124), s. 9.

## SUB-SECT. 3.—PROCEEDINGS.

See 1853 Act, ss. 45, 50 ; 1865 Act, ss. 55, 56, 58, 63, 64.

**865. Petition of appeal against assessment—Dispute as to amount due—Right of petitioner to begin.]—*Re DE LANCEY* (1869), L. R. 4 Exch. 327 ; 21 L. T. 58 ; *sub nom. DE LANCEY v. INLAND REVENUE COMRS.*, 38 L. J. Ex. 193, n. ; 17 W. R. 861.**

**866. ——— Right of Crown to begin.]—*Re GREENWOOD*, No. 459, *ante*.**

## SECT. 9.—REPAYMENT OF OVERPAID DUTY.

See 1853 Act, ss. 37, 40.

Succession Duty Act express power is given to the High ct. to deal with the costs ; where the trustees of an estate had paid, or were ready to pay, all the duty which could properly be claimed against it, they were held entitled against the Crown to the costs of a special case & an action by the A.-G. to recover higher duties ; but only one set of costs was allowed to the trustees & beneficiaries.—*A.-G. v. TORONTO GENERAL TRUSTS CORPN.* (1903), 23 C. L. T. 194 ; 5 O. L. R. 607 ; 1 O. W. R. 807 ; 2 O. W. R. 271.—CAN.

*t. —.]—*In an appeal from a judge's decision on an application under Succession Duty Act, s. 43, to fix the succession duty taxable on an estate, the ct. has no power to order costs against the Crown, as the Crown applies.—*Re VAN HORNE ESTATE* (No. 2), [1919] 3 W. W. R. 598 ; 47 D. L. R. 529.—CAN.

*a. Jurisdiction of surrogate registrar.]—*When the provincial treasurer & the parties interested do not agree as to the succession duty payable, the question must be settled by the tribunal appointed by the Act, namely, the surrogate registrar, with the right of appeal given by the Act. The high ct. has no jurisdiction to decide the question in a stated case.—*A.-G. v. CAMERON* (1899), 26 A. R. 103.—CAN.

*b. Fund in court—Succession duty—Priority of claim for.]—*An extrix named in the will of deceased who died domiciled in Saskatchewan brought action on demand notes given to deceased by deft., a co. incorporated in Alberta, & carrying on business there only. The action was brought in Alberta, & before probate was obtained either in Saskatchewan or Alberta. Deft. did not deny the debt, but questioned pltf.'s right to receive

money which it paid into ct. Probate was issued in Saskatchewan after defence was filed, but there was never any ancillary probate in Alberta. An order of the Master giving pltf. leave to enter judgment & costs of suit, except of application for judgment, was varied as to costs & debt. given costs of appeal ; the judgment to stand in favour of pltf. for the moneys in ct. without costs, but no payment out to be made until a judge is satisfied that the Treasury Department has no claim for succession duties.—*TORGUSON v. WAYNE SUPPLY CO., LTD.*, [1916] 2 W. W. R. 875.—CAN.

## PART V. SECT. 9.

*c. By executors—Duty paid in ignorance of claims against estate.]—*Where exors., erroneously & in ignorance of the existence of claims, overvalued the estate & paid succession duty for which the estate would not have been liable had the amount of such claims been deducted therefrom, they were held entitled to recover back from the Crown the amount of the duty wrongly paid.—*Ross v. R.* (1900), 32 O. R. 143 ; *affd.* 1 O. L. R. 487.—CAN.

*d. ——— Annuity—Duty payable in instalments.]—*Testator gave an annuity to Mrs. A. The exors. paid the whole of the succession duty at once & obtained a release thereof. Mrs. A. died before receiving 4 annual instalments, & the exors. brought an action against the provincial treasurer to recover under Succession Duty Act, s. 11, the amount of succession duty paid in excess to what would have been required had they paid according to annual payments:—*Held*: petitioners could not recover.—*BETHUNE v. R.* (1912), 21 O. W. R. 559 ; 3 O. W. N. 941 ; 26 O. L. R. 117 ; 4 D. L. R. 229.—CAN.



## Part VI.—Probate Duty.

NOTE.—In this Part Probate Duty Act, 1801 (c. 86), Probate and Legacy Duties Act, 1808 (c. 149), Stamp Act, 1815 (c. 184), Court of Probate Act, 1857 (c. 77), Probate Duty Act, 1859 (c. 36), Probate Duty Act, 1860 (c. 15), Probate Duty Act, 1861 (c. 92), Revenue Act, 1862 (c. 22), Revenue (No. 2) Act, 1864 (c. 56), Crown Suits, etc. Act, 1865 (c. 104), Inland Revenue Act, 1868 (c. 124), Customs and Inland Revenue Act, 1880 (c. 14), Customs and Inland Revenue Act, 1881 (c. 12), Revenue Act, 1884 (c. 62), Revenue Act, 1889 (c. 42), Finance Act, 1894 (c. 30), Finance Act, 1896 (c. 28), referred to as 1801 Act, 1808 Act, 1815 Act, 1857 Act, 1860 Act, 1861 Act, 1862 Act, 1864 Act, 1865 Act, 1868 Act, 1880 Act, 1881 Act, 1884 Act, 1889 Act, 1894 Act, 1896 Act respectively.

### SECT. 1.—IN GENERAL.

See, now, 1894 Act, ss. 1, 21 (2).

**867. Whether duty merged in estate duty—Effect of 1894 Act.]**—WINANS v. A.-G., No. 1, ante.

**868. Definition.]**—Probate duty in England is a stamp duty payable upon the value of the property the subject of the probate at the time it is granted.—BELL v. MASTER IN EQUITY OF THE SUPREME COURT OF VICTORIA (1877), 2 App. Cas. 560; 36 L. T. 936, P. C.

Annotation:—Mentd. Armytage v. Wilkinson (1878), 3 App. Cas. 355.

**869. Where title of personal representative in issue—Duty must be paid to cover sum to be recovered.]**—If an administrator shows that he sues for a greater value than is covered by the *ad valorem* stamp of his letters of administration, he shows his administration to be void, & cannot recover, although he sues for a doubtful claim; he must prove his administration, for that constitutes his title to recover, & it will not suffice to sue out new letters of administration on a larger stamp after he has obtained judgment.—HUNT v. STEVENS (1810), 3 Taunt. 113; 128 E. R. 46.

Annotations:—Folld. Carr v. Roberts (1831), 2 B. & Ad. 905. Consd. A.-G. v. Hope (1834), 1 Cr. M. & R. 530; A.-G. v. Bouvons (1838), 4 M. & W. 171. Refd. A.-G. v. Brunning (1860), 8 H. L. Cas. 243; Re Rowe, Jacobs v. Hind (1889), 60 L. T. 596.

**870. ——— Effect of subsequent payment of duty.]**—A. sued out a commission of bkpt. against B. upon a debt due to him as exor., but the probate of the will had an insufficient stamp. Afterwards, however, a sufficient stamp being affixed:—Held: it was sufficient to support the petitioning creditor's debt, in an action by the assignees.

Numberless instances have occurred in which a party has been nonsuited, because the deed, under which he claimed a right of action, has had an insufficient stamp; but it has never been contended that, after a valid stamp has been put upon it, he has not had, by retrospection, a good right of

action (GIBBS, L.C.J.).—ROGERS v. JAMES (1816), 7 Taunt. 147; 2 Marsh. 425; 129 E. R. 59.

Annotations:—Refd. Burton v. Kirkby (1816), 7 Taunt. 174; Re Drakeley, Ex p. Paddy (1818), 3 Madd. 241; Rose v. Tomblinson (1834), 3 Dowl. 49.

**871. ———.]**—A pltf. sued to recover a large unliquidated sum due to her testatrix, but the stamp on the probate did not cover the amount claimed:—Held: pltf. could not obtain a decree even for accounts & inquiries, until the probate had been properly stamped. The cause stood over, & the comrs. stamped the probate & gave credit for the duty.—HOWARD v. PRINCE (1847), 10 Beav. 312; 9 L. T. O. S. 350; 50 E. R. 602.

**872. ———.]**—Semble: a party suing as exor. or administrator cannot sustain proceedings to recover a larger sum than that upon which the probate duty is calculated.—JONES v. HOWELLS (1843), 2 Hare, 342; 12 L. J. Ch. 365; 67 E. R. 141; affd. (1845), 15 L. J. Ch. 115, L. C.

Annotations:—Consd. Lord v. Colvin (1867), L. R. 3 Eq. 737. Mentd. Parker v. Carter (1845), 4 Hare, 400; Wilkinson v. Fowkes (1851), 9 Haro, 193.

**873. ———.]**—A.-G. v. BRUNNING, No. 876, post.

**874. Property of uncertain value—Depending on result of action—Probate to two executors in different amounts.]**—One of two exors. proved the will, swearing the property, the amount of which depended on the result of a pending suit in Chancery, under a certain amount, & paid the duty thereon. The other exor. was allowed to take probate, swearing the property under a smaller amount.—In the Goods of BELL (1871), L. R. 2 P. & D. 247; 40 L. J. P. & M. 67; 25 L. T. 163; 36 J. P. 376.

**875. Insufficiency of stamp—Effect on validity of probate.]**—Probate having been granted it justified the exors. in administering the whole estate & the insufficiency of the stamp, if proved, would not affect its validity, though, whilst insufficiently stamped, its admissibility in evidence might be affected (HAWKINS, J.).—A.-G. v. SMITH, [1892] 2 Q. B. 289; 66 L. T. 857; 56 J. P. 758; 40 W. R. 671; 8 T. L. R. 626; 36 Sol. Jo. 557; affd., [1893] 1 Q. B. 239, C. A.

Annotation:—Mentd. Wallen v. Lister, [1894] 1 Q. B. 312.

### SECT. 2.—SUBJECT MATTER OF CHARGE.

#### SUB-SECT. 1.—“ESTATE OR EFFECTS.”

##### A. Personal Estate.

**876. All personalty recovered by virtue of probate—Whether legal or equitable.]**—All moneys recoverable by the exor. by virtue of the probate, in whatever form recovered, whether through the agency of a ct. of equity or a ct. of law, are part

### PART VI. SECT. 1.

**e. Property of uncertain value—Interim assessment—Agreement for final adjustment.]**—J. T. died intestate, & pltf. were appointed administrators. The deceased's estate consisted largely of station properties & it was found impossible to value it satisfactorily in accordance with Succession & Probate Duties Act, 1892. An interim assessment was then made, & duty was paid on that basis, it being agreed that a final adjustment should be made after the whole estate in Queensland had

been realised. The estate having realised less than the estimated value, pltf. sued for a refund:—Held: the making of this agreement was within the express powers of the Commissioners under Succession & Probate Duties Act, 1892, s. 39; & within the general powers of the govt.—QUEENSLAND TRUSTEES, LTD. v. FOWLES (1910), 12 C. L. R. 111.—AUS.

**f. ———.]**—A brother, in 1880, made a deed of gift of real & personal property to his two sisters, subject to a power reserved to him to revoke

the gift at any time, wholly or in part, by deed or will. In 1888, whilst the brother was still alive, one of the sisters made a deed of gift to the other of all her interest in the gift from the brother. The brother subsequently died without having revoked his gift:—Held: as the value of the interest made over by the one sister to the other in 1888 was incapable of estimation, the deed of gift from the one to the other was not liable to duty under Deceased Persons' Estates Duties Acts, 1881 & 1885.—Re DAVONPORT TO RANDALL (1898), 17 N. Z. L. R. 84.—N.Z.



of the estate & effects of testator & are liable to probate duty.

A., the owner of an estate, entered into a contract for the sale of it. Part of the purchase-money was paid as in his lifetime. The contract contained stipulations to the effect that certain alterations might be made in the formal agreement drawn up on the original contract, & as the purchaser was a ward of ct., that the contract should be void if not approved by the Lord Chancellor. There were also articles as to the contract being rescinded through the act of the parties on the non-payment of the purchase money, etc. Some alterations were made in the original contract; testator had a good title; he died; & after his death the formal approval of the contract was given by the Ct. of Ch.:—*Held*: the purchase-money was to be deemed part of the "estate & effects" of testator within 1815 Act, sched., part 3, & was liable to probate duty.

A stamped probate or letters of administration to cover the sum to be recovered, is always necessary where the title of the exor. or administrator is put in issue (LORD WENSLEYDALE).

The sum to be recovered in case of death by negligence [under Fatal Accidents Act, 1846 (c. 93)], certainly would not be subject to probate duty, for it is not made part of the estate of the deceased (LORD CAMPBELL, C.).

Mtge. money now recovered by an exor., by the aid of a ct. of equity, would certainly be assets & liable to probate duty (LORD CAMPBELL, C.).—A.-G. v. BRUNNING (1860), 8 H. L. Cas. 243; 30 L. J. Ex. 379; 3 L. T. 36; 6 Jur. N. S. 1083; 8 W. R. 362; 11 E. R. 421, H. L.

*Annotations*:—*Expld.* *Re De Lancey* (1870), L. R. 5 Exch. 102. *Consd.* *Forbes v. Steven*, *Mackenzie v. Forbes* (1870), L. R. 10 Eq. 178. *Refd.* *Lord v. Colvin* (1867), L. R. 3 Eq. 737; *Perry's Exors. v. R.* (1868), L. R. 4 Exch. 27; *A.-G. v. Lomas* (1873), L. R. 9 Exch. 29; *A.-G. v. Ailesbury* (1887), 12 App. Cas. 672; *O'Grady v. Wilmot*, [1916] 2 A. C. 231; *Re Scott*, *Scott v. Scott*, [1916] 2 Ch. 268. *Mentd.* *A.-G. v. Partington* (1864), 3 H. & C. 193; *Re Capdevielle* (1864), 11 L. T. 89; *A.-G. v. Hubbuck* (1884), 13 Q. B. D. 275; *New York Breweries Co. v. A.-G.* (1898), 79 L. T. 568; *Re Power*, *Re Stone*, *Acworth v. Stone*, [1901] 2 Ch. 659; *Re Dixon*, *Penfold v. Dixon*, [1902] 1 Ch. 248; *Re Lyne's Settlement*, *Trusts*, *Re Gibbs*, *Lyne v. Gibbs*, [1919] 1 Ch. 80.

**877.** — At date of death or subsequently.]—LORD v. COLVIN, No. 927, *post*.

## PART VI. SECT. 2, SUB-SECT. 1.—A.

**878i.** *Fund appointed under general power.*]—Property over which a deceased person had at the time of his death a general power of appointment by will is liable to probate duty under Administration & Probate Act, 1903, s. 13.—WEBB v. MCCracken (1906), 3 C. L. R. 1018.—AUS.

**g.** *Fund appointed under special power.*]—New South Wales Stamp Duties Act, 1898, s. 49 (2) A (a), does not apply to property over which a deceased person has only a special as distinguished from a general power of appointment by will.—STAMP DUTIES COMR. v. STEPHEN, [1904] A. C. 137.—AUS.

**h.** *Mortgage debt—Mortgaged lands outside the colony.*]—Testator, resident & domiciled in Victoria, agreed to lend £25,000 to a person then & at the time of testator's death domiciled & resident in N.S.W. The debt was secured by two mtges. over land in N.S.W. which were subject to the provisions of 26 Vict. No. 9 of that Colony. At the death of testator, the principal sum together with certain accrued interest was due & payable to testator in Victoria:—*Held*: the principal sum secured by the mtges., together with the accrued interest thereon, were not subject to the payment of probate duty in Victoria.—

*Re CURRIE'S WILL* (1899), 25 V. L. R. 224.—AUS.

**k.** —.]—Testator, by his will, directed that certain charges vested in him should merge in his real estate:—*Held*: probate duty was payable on the charges.—*Re NUNN'S ESTATE*, [1891] 1 L. R. 252.—IR.

**l.** *Personalty in the colony—Testator domiciled in England.*]—Testator died domiciled in Scotland possessed of bills of exchange secured by mortgage of station property in this colony. Probate of the will was granted by the Supreme Ct. to the executors:—*Held*: the prothonotary was right in refusing to issue the probate unless probate duty were paid on the personalty in the colony.—*Re RUTHERFORD* (1882), 3 N. S. W. L. R. 176.—AUS.

**m.** — *Shares on local register.*]—Shares upon the local register of the Union Bank of Australia, Ltd., are liable to probate duty in Victoria. The test of liability of any property to probate duty in Victoria is whether title is or has to be made there.—*POWER v. R.* (1886), 12 V. L. R. 50.—AUS.

**n.** — *Promissory notes payable in the colony.*]—Testator, who died domiciled in Victoria, was at the time of his death the holder of promissory notes

**878.** *Fund appointed under general power.*]—Where testator having a general power of appointment over a fund exercises it by will, probate duty must be paid in respect of the fund.—PALMER v. WHITMORE (1832), 5 Sim. 178; 58 E. R. 304.

*Annotations*:—*Folld.* *A.-G. v. Staff* (1833), 2 Cr. & M. 124. *Distd.* *Vandiest v. Fynmore* (1834), 6 Sim. 570. *N.F.* *Platt v. Routh* (1840), 6 M. & W. 756.

**879.** —.]—A married woman having a testamentary power to appoint a fund exercised it in favour of her husband, & appointed him her exor.:—*Held*: if the husband claimed the fund as his wife's exor., he must pay probate duty on the fund.—NAIL v. PUNTER (1832), 5 Sim. 555; 58 E. R. 447.

*Annotations*:—*Mentd.* *Davies v. Hodgson* (1858), 25 Beav. 177; *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494; *London Chartered Bank of Australia v. Lemprière* (1873), L. R. 4 P. C. 572; *Re Armstrong*, *Ex p. Gilchrist* (1886), 17 Q. B. D. 521; *Crichton v. Crichton*, [1896] 1 Ch. 870.

**880.** —.]—Testator bequeathed certain stock to trustees upon such trusts & subject to such powers, etc., as A. should by deed or will direct or appoint; & in default of appointment, upon trust to pay the dividends to A. during her life, & after her decease to pay the principal amongst her children. After testator's death A. executed a deed according to the mode described by the will; by which, after reciting that she was desirous of executing the power, she directed the trustees to transfer the fund to herself & a new trustee, upon such trusts & subject to such powers, etc., as A. should by any deed, with or without power of revocation & new appointment, or by her last will, direct & appoint, with certain limitations over in default of appointment, similar to those contained in the will; in pursuance of which deed the fund was transferred into the names of A. & the new trustee. A. afterwards, by will by virtue & in execution of that power, appointed the fund to be transferred to certain persons, in trust that the same might be consolidated with & become part of her residuary estate, & follow the dispositions thereof thereafter mentioned:—*Held*: the deed executed by A. being an exercise of the power under the original will, the property thereby became liable to her debts, & became her personal estate, in which she had a beneficial interest, & consequently was liable to the payment

payable in Victoria; such promissory notes had been given for partnership purposes to testator by a partnership carrying on business solely in New South Wales, of which partnership the testator was a member.—*Held*: the promissory notes were assets, & liable to probate duty.—SHAW & MACKINNON v. R. (1895), 21 V. L. R. 338.—AUS.

**o.** *Shares in company incorporated outside the colony.*]—Probate duty is not payable in respect of shares in a mine, such mine being situated in N.S.W., but incorporated & registered in Victoria.—*Re DALGLISH* (1889), 10 N. S. W. L. R. 256; 6 N. S. W. W. N. 100.—AUS.

**p.** *Settlement on trusts taking effect after testator's death—Trusts taking effect during testator's lifetime.*]—A settlement containing trusts to take effect during the lifetime of the testator as well as trusts to take effect after his death is within Act No. 1060, s. 112, & is liable to duty.—WHITING v. THOMPSON (1903), 29 V. L. R. 89.—AUS.

**q.** —.]—ROSENTHAL v. ROSENTHAL (1910), 11 C. L. R. 87.—AUS.

**r.** —.]—NEW SOUTH WALES STAMP DUTIES COMRS. v. PERPETUAL TRUSTEE CO., LTD. (1915), 21 C. L. R. 69.—AUS.

**s.** —.]—*Re FAIRFAX'S SETTLE-*

**Sect. 2.—Subject matter of charge: Sub-sect. 1, A. & B.; sub-sects. 2 & 3.]**

of probate duty.—A.-G. v. STAFF (1833), 2 Cr. & M. 124; 4 Tyr. 14; 3 L. J. Ex. 6; 149 E. R. 700.

**Annotations:—Distd.** Vandiest v. Fynmore (1834), 6 Sim. 570. **Dbtd.** Platt v. Routh (1840), 6 M. & W. 756. **Refd.** Ewart v. Ewart (1853), 1 Eq. Rep. 536.

**881. —.]—**Testator gave to A. a power to dispose, by her will, of £5,000, part of his estate, on which probate duty was paid. A. exercised the power by her will:—**Held:** probate duty was not again payable in respect of the £5,000.—VANDIEST v. FYNMORE (1834), 6 Sim. 570; 58 E. R. 707.

**Annotation:—Consd.** Platt v. Routh (1840), 6 M. & W. 756.

**882. —.]—**DRAKE v. A.-G., No. 337, ante.

*See, now,* 1860 Act, s. 4.

**883. Mortgage debt recovered.]—**A.-G. v. BRUNNING, No. 876, ante.

**884. Purchase-money—Contract completed after death of testator.]—**A.-G. v. BRUNNING, No. 876, ante.

**885. Not money received under Fatal Accidents Act, 1846 (c. 93).]**—A.-G. v. BRUNNING, No. 876, ante.

#### B. Real Estate—Conversion.

**886. Not liable to duty—Profits of duties from lighthouse.]—**A.-G. v. JONES, No. 373, ante.

**887. Effect of notional conversion.]—**As to the right of the Crown to probate duty on realty of a deceased party impressed, in equity, with the character of personalty.

S. conveyed fee-simple estate, upon trust by sale, etc., to pay certain debts, & the residue to himself, his exors., administrators, & assigns, without any equity thereon in favour of his heirs or real representatives, notwithstanding the estate might remain unconverted at the time of his death. The estate was sold after his death:—**Held:** no part of the produce was liable to probate duty.—MATSON v. SWIFT (1845), 8 Beav. 368; 14 L. J. Ch. 354; 5 L. T. O. S. 405; 9 Jur. 521; 50 E. R. 144.

**Annotations:—Folld.** Custance v. Bradshaw (1845), 4 Hare, 315. **Distd.** A.-G. v. Brunning (1860), 8 H. L. Cas. 243. **Consd.** Re De Lancey (1870), L. R. 5 Exch. 102. **Distd.** A.-G. v. Lomas (1873), L. R. 9 Exch. 29. **Dbtd.** A.-G. v. Allesbury (1887), 12 App. Cas. 672. **Refd.** Forbes v. Steven, Mackenzie v. Forbes (1870), L. R. 10 Eq. 178; A.-G. v. Hubbuck (1884), 13 Q. B. D. 275. **Mentd.** Myers v. Perigal (1852), 2 De G. M. & G. 599; A.-G. v. Partington (1862), 1 H. & C. 457; Lord v. Colvin (1867), L. R. 3 Eq. 737.

**888. — Partnership realty.]—**The share of a deceased partner in the freehold & copyhold estates of the partnership is not personal estate for the purpose of being included in the value or

amount in respect of which probate duty is payable.—CUSTANCE v. BRADSHAW (1845), 4 Hare, 315; 14 L. J. Ch. 358; 9 Jur. 480; 67 E. R. 669.

**Annotations:—Distd.** A.-G. v. Brunning (1860), 8 H. L. Cas. 243; A.-G. v. Lomas (1873), L. R. 9 Exch. 29. **Overd.** A.-G. v. Hubbuck (1884), 13 Q. B. D. 275. **Refd.** Re De Lancey (1870), L. R. 5 Exch. 102; Forbes v. Steven, Mackenzie v. Forbes (1870), L. R. 10 Eq. 178. **Mentd.** Myers v. Perigal (1852), 2 De G. M. & G. 599.

**889. —.]—**The shares of partners in realty forming part of the partnership must be regarded as personal estate in the absence of any binding agreement between the partners to the contrary; & probate duty is payable on a deceased partner's share in such realty, irrespective of the question whether or not there is in the event any actual conversion into personalty.—A.-G. v. HUBBUCK (1884), 13 Q. B. D. 275; 53 L. J. Q. B. 146; 50 L. T. 374, C. A.

**Annotations:—Apld.** A.-G. v. Allesbury (1887), 12 App. Cas. 672. **Distd.** Re Grimthorpe, Beckett v. Grimthorpe, [1908] 2 Ch. 675. **Mentd.** Re Glassington, Glassington v. Follett, [1906] 2 Ch. 305; Talbot v. Jevers, [1917] 2 Ch. 363.

**890. — Exercise of option to purchase.]—**LORD v. COLVIN, No. 927, post.

**891. —.]—**Under partnership arts. an option was given to purchase real estate, upon which the partnership business was carried on, & which was the private property of A., one of the partners, within six months from his death. By the will of A. the period of option was extended to three years. The option was not exercised until after the six months had expired:—**Held:** as the option was not exercised within the period limited by the arts., there was no conversion at the time of A.'s death; & therefore, the purchase-money arising from the sale of the real estate was not liable to probate duty.—Re GOODALL, GOODALL v. GOODALL (1895), 65 L. J. Ch. 63; 73 L. T. 379; 44 W. R. 70; 40 Sol. Jo. 10; 19 R. 870.

**892. — Direction for sale—Failure of trusts & death of heir before sale.]—**A.-G. v. LOMAS, No. 361, ante.

**893. —.]—**In the Goods of GUNN, No. 362, ante.

**894. — Money of lunatic invested in realty by court—Direction that it should be treated as personalty.]—**Money of a lunatic was invested by his committees, by order of the lords justices having jurisdiction in lunacy, in purchases of lands, which under their lordships' direction were conveyed to the committees, "their heirs & assigns, upon trust for" the lunatic, "his exors., administrators, & assigns" with a declaration that the lands so conveyed, & all others to be purchased in lieu of them under any exercise of

MENT, *Ex p.* STAMPS COMRS. (1915), 16 S. R. N. S. W. 92.—AUS.

**t. —.]—**Duty is payable in respect of such property as is comprised in a settlement at the date of the settlor's death & would have been liable to probate duty in Victoria had it belonged to the settlor at that date.—VICTORIA TAXES COMR. v. CURRIE (1916), 21 C. L. R. 157.—AUS.

**a. Residuary estate — Bequeathed under covenant in marriage settlement.]—**A., by a codicil to his will, bequeathed to the trustees of his marriage settlement, the sum of £20,000, to be held by them upon the trusts of the settlement, & he left & bequeathed to them the residue of his real & personal property, upon the trusts in the settlement declared as to his residue:—**Held:** the amount of the residue of A.'s estate did not constitute a debt due by him at his death, under 44 Vict. c. 12, & the residue formed part of the estate & effects of the testator, A., & was, as such, subject to probate duty.

—A.-G. v. MURRAY (1887), L. R. 20 Ir. 124.—IR.

**b. Not compensation money — Presented by grand jury to widow of murdered peace officer.]—**Money presented by a grand jury to the widow & personal representative of a peace officer murdered in the discharge of his duty, as compensation for her loss is not assets of the deceased husbands.—Re MARTIN (1889), L. R. 23 Ir. 413.—IR.

#### PART VI. SECT. 2, SUB-SECT. 1.—B.

**c. Effect of notional conversion — Savings from real estate—Invested in real estate.]—**Savings from large entailed estates & other property, amounting to £65,000, which had been invested by tutors in heritage in name of the pupil, & which on his death descended to the next in kin as executry are liable to inventory duty, as part of the pupil's personal estate & effects.—ADVOCATE-GENERAL v. ANSTRUTHER (1850), 13 Dunl. (Ct. of

Sess.) 450.—SCOT.

**888 i. — Partnership realty.** LORD ADVOCATE v. MACFARLANE'S TRUSTEES (1893), 31 Sc. L. R. 357.—SCOT.

**d. Land transferred in lifetime of testator—To evade death duties.]—**Where testator, in his lifetime made voluntary transfer of land to his children in order to avoid the provisions of Land Tax Act, 1887:—**Held:** such transfers were evidence of a constructive intent to evade the payment of duty under "Duties on the Estates of Deceased Persons Statute, 1870"; such lands formed part of his estate at death & were liable to probate duty.—FINLAY v. R. (1889), 15 V. L. R. 212.—AUS.

**e. Testator's land outside the colony—Purchase money payable within the colony.]—**Where a testator who died domiciled out of V. had entered into a simple contract to sell his land situate out of V. to a purchaser resident within



certain powers of sale & re-investment which were contained in the deed, should "to all intents & purposes be considered as part of the personal estate of" the lunatic. Upon the death of the lunatic, who never recovered:—*Held*: the value of the lands was part of the personal estate of the lunatic at his death, & liable to probate duty.

Although the Probate Ct. never recognised the doctrine of equitable conversion, a different view is now taken in the Probate Division (LORD MACNAGHTEN).—*A.-G. v. AILESBUURY (MARQUIS)* (1887), 12 App. Cas. 672; 57 L. J. Q. B. 83; 58 L. T. 192; 36 W. R. 737; 3 T. L. R. 830, H. L.

*Annotations*:—*Reid. A.-G. v. Dodd*, [1894] 2 Q. B. 150. *Mentd. Re Cleveland's Settled Estates*, [1893] 3 Ch. 244; *Re Gist*, [1904] 1 Ch. 398; *Re Alston, Sinclair v. Willes*, [1917] 2 Ch. 226.

*See, generally, EQUITY, Vol. XX., pp. 335 et seq.*

#### SUB-SECT. 2.—GRANTS IN CHAIN OF TITLE— CUMULATIVE DUTIES.

**Exceptions from charge of duty.]—See Sect. 3, post.**

**895. Bequest to tenant for life—Or to personal representative—Default in appointment.]—**Personal estate was bequeathed to several persons successively for life, with remainder as one of them, who was a married woman, should appoint, & in default of appointment, "unto & for the benefit of her exors. or administrators." The lady having died without making any appointment:—*Held*: the trust fund formed part of her estate; & her husband having survived her, & become entitled to it, it was liable to probate duty & legacy duty, as forming part of his estate, as well as to probate duty, as forming part of the estate of the wife.—*A.-G. v. MALKIN* (1846), 2 Ph. 64; 1 Coop. temp. Cott. 237; 16 L. J. Ch. 99; 9 L. T. O. S. 69; 10 Jur. 955; 41 E. R. 866, L. C.

*Annotations*:—*Consd. A.-G. v. Partington* (1864), 3 H. & C. 193. *Reid. A.-G. v. Maxwell* (1860), 2 L. T. 334; *A.-G. v. Cleave* (1873), 31 L. T. 86. *Mentd. Morris v. Howes* (1846), 16 L. J. Ch. 121; *Mozley v. Alston* (1847), 4 Ry. & Can. Cas. 636; *Mackenzie v. Mackenzie* (1851), 3 Mac. & G. 559; *Long v. Watkinson* (1852), 17 Boav. 471; *Re Crawford's Trusts* (1854), 2 Drew. 230; *Re Morgan's Trusts* (1854), 2 W. R. 439; *Re Seymour's Trusts* (1859), 28 L. J. Ch. 765; *Re Clay, Clay v. Clay* (1885), 54 L. J. Ch. 648; *Re Ware, Cumberlege v. Cumberlege-Ware* (1890), 45 Ch. D. 269.

**896. Bequest to legatee dying in testator's lifetime—Liability of executors of legatee.]—***PERRY'S EXECUTORS v. R.*, No. 924, *post*.

**897. — Or to his personal representatives.]—***LORD ADVOCATE v. BOGIE*, No. 386, *ante*.

**898. — —.]—***A.-G. v. LOYD*, No. 387, *ante*.

**899. Devolution of same property from husband & wife.]—**(1) By the law of England if a married woman becomes entitled to the property of a deceased relative situated in England & her husband takes no step to reduce her rights into possession, & she dies, & her husband does not take out administration to her & he dies, the child

of these married persons must take out two administrations, one to his father, the other to his mother, on each of which, as on a distinct devolution of property, duty is payable to the Crown.

(2) If this child is domiciled in a foreign state where his parents were also domiciled, & empowers a person in England to take out administration for him, the same course must, under the same circumstances, be pursued, even though the property when obtained is to be distributed in the foreign state, where the law might not require this double authority of administration.

(3) Where such property, no next of kin appearing, had been taken possession of by the Solr. to the Treasury, who had paid off all the debts of intestate, & then paid over the balance to the Crown, & after some years, the claim of the next of kin was established, & the Solr. to the Treasury ordered to pay over the principal amount with interest to the next of kin, the interest as well as the principal is chargeable with duty; the rule being that whatever is recoverable by virtue of the letters of administration is so chargeable & the interest was so recoverable, being in fact part of the estate for which administration was granted.—*PARTINGTON v. A.-G.* (1869), L. R. 4 H. L. 100; 38 L. J. Ex. 205; 21 L. T. 370, H. L.; *affg. S. C. sub nom. A.-G. v. PARTINGTON* (1864), 3 H. & C. 193, Ex. Ch.

*Annotations*:—*As to* (1) *Reid. A.-G. v. Cleave* (1873), 31 L. T. 86. *Generally, Reid. Lord v. Colvin* (1867), L. R. 3 Eq. 737; *Bell v. Master in Equity of Supreme Court of Victoria* (1877), 2 App. Cas. 560. *Mentd. Fleet v. Perrins* (1869), 9 B. & S. 575; *In the Goods of Harding* (1872), L. R. 2 P. & D. 394; *Colquhoun v. Brooks* (1888), 21 Q. B. D. 52; *Smart v. Tranter* (1888), 40 Ch. D. 165; *Trevor v. Hutchins*, [1896] 1 Ch. 844; *A.-G. v. De Préville* [1900] 1 Q. B. 223; *A.-G. v. Selborne*, [1902] 1 K. B. 388; *Northumberland v. I. R. Comrs.*, [1911] 2 K. B. 343; *Dyson v. A.-G.*, [1912] 1 Ch. 158; *A.-G. v. Milne*, [1914] A. C. 765; *Drummond v. Collins* (1915), 84 L. J. K. B. 1690; *I. R. Comrs. v. Sheffield & South Yorkshire Navigation Co.*, [1916] 1 K. B. 882; *Re Abergavenny, Nevill v. I. R. Comrs.*, [1923] 2 K. B. 18.

#### SUB-SECT. 3.—DOMICIL AND SITUS.

**900. Property must be situate within jurisdiction of court.]—**Probate duty is not payable in respect of property in a foreign country belonging to testator dying in this country, although the property be brought into & administered in this country by the exor.

It is not the administration of assets that renders the probate duty payable but the local situation of the assets at testator's death (LORD LYNDHURST, C.B.).—*A.-G. v. DIMOND* (1831), 1 Cr. & J. 356; 1 Tyr. 243; 9 L. J. O. S. Ex. 90; 148 E. R. 1458.

*Annotations*:—*Consd. A.-G. v. Hope* (1834), 4 Tyr. 878. *Fold. A.-G. v. Bouwens* (1838), 4 M. & W. 171; *R. v. Stamps & Taxes Comrs.* (1849), 18 L. J. Q. B. 201. *Consd. A.-G. v. Sudeley*, [1896] 1 Q. B. 354. *Reid. Arnold v. Arnold* (1837), 2 My. & Cr. 256; *Custance v. Bradshaw* (1845), 4 Hare, 315; *A.-G. v. Brunning* (1860), 8 H. L. Cas. 243; *A.-G. v. Pratt* (1874), 43 L. J. Ex. 108; *A.-G. v. New York Breweries Co.*, [1898] 1 Q. B. 205; *Re Scott, Scott v. Scott*, [1916] 2 Ch. 268. *Mentd. Tyler v. Bell*

V., & under the contract the purchase money was payable within V., the purchase money is V. assets, & as such, is subject to the payment of duty in V. by the exors. under the V. probate.—*Re MILLER* (1897), 22 V. L. R. 542.—AUS.

#### PART VI. SECT. 2, SUB-SECT. 3.

**900 i. Property must be situate within jurisdiction of court.]—**According to the true construction & intention of V. Act No. 388 of 1870, a legal personal representative in V. should, as regards the "personal estate" of the deceased

mentioned in sect. 2 (7), state accounts only of so much thereof as comes under his control by virtue of his V. probate.—*BLACKWOOD v. R.* (1882), 8 App. Cas. 82.—AUS.

**900 ii. —.]—**Testator at the time of his death was one of two partners carrying on business as graziers. The property of the partnership consisted of two stations in New South Wales & two in Queensland. Testator managed the business, & both partners lived in Sydney. The general banking account & the general books were kept in Sydney, but each station had its

separate manager, staff, books, & records, & banking account. Purchases & sales relating to each station were kept separate. Profits were paid into & losses adjusted from the general account in Sydney, & balances made up half yearly:—*Held*: probate duty was not payable on testator's share in the partnership business so far as it included the Queensland properties.—*CHRISTIAN v. STAMPS COMRS* (1915), 15 S. R. N. S. W. 401.—AUS.

**900 iii. —.]—**A share in an Indian company is not liable for inventory duty in the United Kingdom.—



**Sect. 2.—Subject matter of charge: Sub-sect. 3.]**

(1837), 2 My. & Cr. 89; *Hervey v. Fitzpatrick* (1854), Kay, 421; *Smelting Co. of Australia v. I. R. Comrs.*, [1897] 2 Q. B. 179; *I. R. Comrs. v. Muller's Margarine*, [1901] A. C. 217; *Re Scull, Scott v. Morris* (1917), 87 L. J. Ch. 59.

**901.** —. —. —.]—Where testator dies in this country possessed of personal property here & also in foreign funds, & the exor. takes out probate here & pays probate duty on the amount of the property in this country, he is not chargeable with the probate duty in respect of the property in the foreign funds, although he afterwards obtain such property & administer it.—*A.-G. v. HOPE* (1834), 8 Bli. N. S. 44; 2 Cl. & Fin. 84; 1 Cr. M. & R. 530; 4 Tyr. 878; 5 E. R. 863, H. L.

*Annotations:—Folld. A.-G. v. Bouwens* (1838), 4 M. & W. 171; *Pearse v. Pearse* (1838), 9 Sim. 430. **Consd.** *Platt v. Routh* (1840), 6 M. & W. 756. **Folld.** *A.-G. v. Pratt* (1874), L. R. 9 Exch. 140. **Consd.** *A.-G. v. Sudeley*, [1896] 1 Q. B. 354. **Refd.** *Arnold v. Arnold* (1837), 2 My. & Cr. 256; *A.-G. v. Higgins* (1837), 2 H. & N. 339; *Custance v. Bradshaw* (1815), 4 Hare, 315; *A.-G. v. Brunning* (1860), 8 H. L. Cas. 243; *A.-G. v. New York Breweries Co.*, [1898] 1 Q. B. 205; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; *Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *Re Scott, Scott v. Scott*, [1916] 2 Ch. 268. **Mentd.** *R. v. Stamps & Taxes Comrs.* (1849), 18 L. J. Q. B. 201; *In the Goods of Murray*, [1896] P. 65; *Smelting Co. of Australia v. I. R. Comrs.* (1896), 75 L. T. 534.

**902.** —. —. —.]—(1) Probate duty is payable in respect of bonds of foreign govts. of which testator, dying in this country, was the holder at the time of his death, & which have come to the hands of his exor. in this country, such bonds being marketable securities within this kingdom, saleable & transferable by delivery only, & it not being necessary to do any act out of this kingdom in order to render the transfer of them valid.

(2) The duty is to be regulated, not by the value of all the assets which an exor. or administrator may ultimately administer by virtue of the will or letters of administration but by the value of such part as are at the death of deceased within the jurisdiction of the spiritual judge by whom the probate or letters of administration are granted (**LORD ABINGER, C.B.**).—*A.-G. v. BOUWENS* (1838), 4 M. & W. 171; 1 Horn & H. 319; 7 L. J. Ex. 297; 150 E. R. 1390.

*Annotations:—As to (1) Consd.* *Stern v. R.*, [1896] 1 Q. B. 211; *New York Life Insco. v. Public Trustee*, [1924] 2 Ch. 101. **Refd.** *A.-G. v. Pratt* (1874), L. R. 9 Exch. 140; *A.-G. v. Sudeley*, [1896] 1 Q. B. 354; *Winans v. A.-G.* (No. 2), [1910] A. C. 27. *As to (2) Refd.* *A.-G. v. New York Breweries Co.*, [1898] 1 Q. B. 205. **Generally, Mentd.** *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374; *Goodwin v. Roberts* (1875), L. R. 10 Exch. 337; *I. R. Comrs. v. Muller's Margarine* (1901), 84 L. T. 729; *Scottish Widows Fund Life Assce. Soc. v. Farmer, Farmer v. Scottish Widows Fund Life Assce. Soc.* (1909), 5 T. Cas. 502.

**903.** —. —. —.]—Testator, who was domiciled in England, had, in the hands of his agents in India, certain securities of the Indian Govt., the principal & interest of which was payable in India, either in cash or by bills on the India co. at the option of the creditor. Shortly before his death he accepted

an offer made by the co. to have his notes converted into stock, to be registered in England, & to be saleable & transferable there. The conversion was not completed at testator's death nor until after his will had been proved in England; but, ultimately, the stock was transferred to his exors. :—**Held**: no probate duty was payable in respect either of the notes or the stock.—**PEARSE v. PEARSE** (1838), 9 Sim. 430; 59 E. R. 423.

*Annotation:—Refd.* *A.-G. v. Sudeley*, [1896] 1 Q. B. 354.

**904.** —. —. —.]—**Domicil of deceased immaterial.**—**WEATHERBY v. ST. GEORGIO**, No. 411, ante.

**905.** —. —. —.]—**PARTINGTON v. A.-G.**, No. 899, ante.

**906.** —. —. —.]—Probate duty attaches on *bona notabilia* in the place where the goods happen to be situate wholly irrespective of the question of the domicil of testator (**GIFFARD, L.J.**).—**Re COMMERCIAL BANK CORPN. OF INDIA & THE EAST LTD., FERNANDES' CASE** (1870), 5 Ch. App. 314; 22 L. T. 219; 18 W. R. 411, L. J.

*Annotation:—Consd.* *A.-G. v. New York Breweries Co.*, [1898] 1 Q. B. 205.

**907.** —. —. —.]—(1) In an action for probate duty it appeared that deceased had been member of a partnership firm. By the articles of partnership it was provided that the business should be the carrying on & working of certain silks & indigo concerns, & zemindaries for the production or manufacture or working of indigo & silk & other produce, & for the sale in Calcutta or shipment for realisation in Europe of such produce. The articles further provided that the entire business of the firm in India should be carried on by certain managing agents who were required to be partners, who were alone entitled to use the name of the firm, to keep the books, & prepare the balance-sheets, & who were also empowered, but subject to the opinion of the committee hereinafter mentioned, to determine what branches of business should be undertaken. A committee of the partners in England was appointed to advise with the agents both in London & Calcutta on all matters affecting the interest of the partnership, & subject to the approval of a general meeting of the partners, to decide all matters affecting the partnership. It was further provided that on the death of any partner his representative should not become a partner in respect of his share, but that the interest of deceased partner should cease from Sept. 30 next after his decease, with power for the representatives to sell the share within a stipulated period or else to receive its fair value. A firm in London were declared to be the agents of the partnership in Europe, to whom the produce of the firm was to be consigned & the proceeds of the sales in India were to be remitted. The London agents were to make the advances necessary for carrying on the business, & held a mtge. over the assets, which were vested in trustees resident in the United Kingdom. The estates cultivated by the firm were situated in India, & the business

**LAYDLAY'S TRUSTEES v. LORD ADVOCATE** (1888), 13 App. Cas. 67; 27 Sc. L. R. 1035, H. L.—**SCOT.**

**g. Debts chargeable on foreign assets.**—*To the extent of the excess over the security.*—Where testator was domiciled in V., but had foreign assets, these latter, to which V. probate gives no title, need not be stated, nor any debts chargeable thereon except so far as they are in excess of the security, & to the extent of that excess are chargeable on the V. assets.—**HENTY v. R.**, [1896] A. C. 567.—**AUS.**

**h. Share in partnership business in the colony.**—Two partners domiciled in England carried on a partnership

business in Victoria, as well as in England & other places. One of the partners died, being at the time of his death interested as a partner in all the partnership business :—**Held**: the interest of the deceased partner in the partnership in Victoria was liable to probate duty in Victoria, & should be included in the statement of the deceased's estate filed by extrix. under Act No. 1060, s. 97.—**Re** (1892), 18 V. L. R. 589.—**AUS.**

**k.** —. —. —.]—Where a firm carried on business in M. & elsewhere, which were severally treated as distinct in the partnership agreement, & also in the accounts & conduct of the same :—

**Held**: the interest of a deceased partner in the business carried on at M. was locally situate in V. so as to be liable to probate duty under 54 Vict. No. 1060 in respect of his will.—**BEAVER v. MASTER IN EQUITY OF THE SUPREME COURT OF VICTORIA**, [1895] A. C. 251.—**AUS.**

**l.** —. —. —.]—The share of a deceased partner is situate where the business was carried on at the time of his death.—**STAMP DUTIES COMR. v. SALTING**, [1907] A. C. 449.—**AUS.**

**m. Locality of simple contract debt.**—In order that an asset may be liable to probate duty under Stamp Duties Acts (44 Vict. No. 3, 50 Vict.

properly so called was entirely carried on there. There were sixteen partners, all but two of whom resided in the United Kingdom:—*Held*: the share or interest of the deceased in the partnership was not property situated in the United Kingdom, & was therefore not liable to probate duty.

(2) Probate duty attaches to *bona notabilia* in the place where the goods are situate wholly irrespective of the question of the domicile of testator (LORD HERSCHELL).—LAIDLAY v. LORD ADVOCATE (1890), 15 App. Cas. 468, H. L.

*Annotations*:—As to (1) *Refd.* Beaver v. Masters in Equity of Supreme Court (1895), 72 L. T. 127; A.-G. v. Johnson, [1907] 2 K. B. 885. As to (2) *Consd.* A.-G. v. Sudeley, [1896] 1 Q. B. 354. *Apld.* Stamp Duties Comr. v. Salting, [1907] A. C. 449.

908. ———.]—Upon the death of a testator, a foreign subject domiciled in America, shares & debentures in an English co. of which he was the registered holder in the books of the co. in London, passed by his will to his exors. in America, according to the law of his domicile. At their request the co. paid to them the dividends & interest payable upon testator's shares & debentures & transferred into their names in the co.'s books in London two shares & a debenture. The exors. to the knowledge of the co. had not obtained & did not intend to obtain probate in England:—*Held*: (1) the co. had made themselves exors. *de son tort*; (2) they had "taken possession of & administered" part of testator's estate, & were liable to penalties, & to deliver an account & pay such duty as would have been payable if probate had been obtained in England.

(3) *Semble*: the co. were persons who "ought to obtain probate or letters of administration" in England within 1881 Act, s. 40, although they were not entitled to do so, because under 1857 Act, s. 73, the ct. had power in its discretion to appoint them administrators.—NEW YORK BREWERIES CO. v. A.-G., [1899] A. C. 62; 68 L. J. Q. B. 135; 79 L. T. 568; 63 J. P. 179; 48 W. R. 32; 15 T. L. R. 93; 43 Sol. Jo. 111, H. L.; *affg.* S. C. *sub nom.* A.-G. v. NEW YORK BREWERIES CO., [1898] 1 Q. B. 205, C. A.

*Annotation*:—As to (2) *Refd.* Winans v. A.-G. (No. 2), [1910] A. C. 27.

909. ———.]—WINANS v. A.-G., No. 1, *ante*.

910. ———.]—(1) P., resident in India, directed his bankers there to realise certain securities, & transmit the proceeds to his bankers in England. The securities were realised, & the proceeds transmitted in bills of exchange payable six months after sight, & drawn by a bank in India upon a bank in London in favour of testator's English bankers. Whilst the bills were on their way to England, P. died in India. The bills were received by his bankers in England & were accepted, & the proceeds were in due course collected by the bankers & were received by debt., whom testator had appointed his exor. in England, & who had taken out probate here:—*Held*: probate duty must be paid on the amount of the bills.

(2) The result of all the authorities is, that where

assets are beyond the jurisdiction at the time when the right to the duties attaches, duty is not payable on them; when they are in England at the time when the duty attaches, duty is payable (KELLY, C.B.).

(3) When property belonging to a British subject is on the high seas a probate is taken out in this country that property forms part of the estate & effects of deceased subject to probate duty (KELLY, C.B.).—A.-G. v. PRATT (1874), L. R. 9 Exch. 140; 43 L. J. Ex. 108; 30 L. T. 531; 22 W. R. 615.

911. *Specialty debt from person outside jurisdiction.*—Covenant on a policy of insurance under seal, whereby three of the directors of the insurance co. did order, direct, & appoint, that, if T., the insured, should die, etc., the capital, stock & funds of the co. should stand charged & be liable to pay to the exors., administrators, & assigns of T., within three calendar months after his decease should be certified, £500. The insured died in the diocese of Exeter, & the policy was in that diocese at the time of his death:—*Held*: a probate from the diocesan ct. of Exeter was sufficient to enable the exors. to recover on the policy, though debts. resided, & all the stock & funds of the co. were situate, in the diocese of London.—GURNEY v. RAWLINS (1836), 2 M. & W. 87; 2 Gale, 235; 6 L. J. Ex. 7.

*Annotations*:—*Refd.* Stamps Comr. v. Hope, [1891] A. C. 476; Toronto General Trusts Corp. v. R., [1919] A. C. 679; New York Life Insce. v. Public Trustee, [1924] 1 Ch. 15. *Mentd.* Sunderland Marine Insce. v. Kearney (1851), 15 Jur. 1006; Hallett v. Dowdall (1852), 18 Q. B. 2; Churchward v. R. (1865), L. R. 1 Q. B. 173.

912. *Foreign bonds & shares transferable by delivery in jurisdiction.*—A.-G. v. BOUWENS, No. 902, *ante*.

913. ———.]—Certificates of shares in a foreign co. on which a form of transfer & power of attorney has been indorsed & executed in blank may be liable to probate duty, if they are marketable in this country & are operative by delivery.—STERN v. R., [1896] 1 Q. B. 211; 65 L. J. Q. B. 240; 73 L. T. 752; 44 W. R. 302; 12 T. L. R. 134; 40 Sol. Jo. 194, D. C.

*Annotations*:—*Refd.* Winans v. A.-G. (No. 2), [1910] A. C. 27. *Mentd.* Scottish Widows Fund Life Assce. Soc. v. Farmer, Farmer v. Scottish Widows Fund Life Assce. Soc. (1909), 5 Tax Cas. 502.

914. *Registered shares.*—Testator, domiciled in England, having died in the province of York, his property within that province was sworn under £100,000, & the will having been proved, probate duty was paid on that amount. Testator's personal property actually in that province amounted to £93,221, in addition to which he was possessed of shares in railway cos. in Scotland, such cos. being constituted under Companies Clauses Consolidation (Scotland) Act, 1845 (c. 17), to the value of £5,715. In pursuance of sects. 19 & 20 of that Act the exors. produced the probate with the proper declaration to the secretaries of the several railway cos., & caused

No. 10) it must be one which exists within the local area of the colonial jurisdiction.

A simple contract debt is within the area of the local jurisdiction within which the debtor for the time being resides.—STAMPS COMR. v. HOPE, [1891] A. C. 476.—AUS.

n. ———.]—A debt which though a specialty debt in N.S.W. is a simple contract debt in V., where both testator & debtor resided & were domiciled, is an asset in V., recoverable under a V. probate, & liable to duty in V.—PAYNE v. R., [1902] A. C. 552.—AUS.

o. *Locality of specialty debt.*—In order that an asset may be liable to probate duty under Stamp Duties Acts (44 Vict. No. 3, 50 Vict. No. 10) it must be one which exists within the local area of the colonial jurisdiction.

The locality of a specialty debt is where the specialty is found at the time of the creditor's death.—STAMPS COMR. v. HOPE, [1891] A. C. 476.—AUS.

p. ———.]—Among the assets of testator who died domiciled & resident in V. were certain debts secured by mortgages under seal over property

situated in other Australian Colonies. The mortgages & the securities connected therewith were found in V. at the date of testator's death:—*Held*: the locality of the debts was V.: that they were assets which passed to the V. executor, & as such were liable for probate duty.—Re CLARKE (1902), 28 V. L. R. 447.—AUS.

q. ———.]—Where the proper meaning of a covenant was that the mortgagors should pay in Melbourne, out of the moneys available from the property mortgaged, but not otherwise, both the principal & the interest, & the deed containing the covenant



**Sect. 2.—Subject matter of charge : Sub-sect. 3. Sects. 3 & 4.]**

their own names to be inserted in the register of shareholders at the chief offices of the cos. in Scotland; but, although more than six months had elapsed, did not exhibit an inventory properly stamped in the Commissary Ct. in Scotland, as required by 1808 Act, s. 38. In an information for penalties for not exhibiting, such inventory:—*Held*: the duty imposed on exors. by 1808 Act, sect. 38, to exhibit in the Ct. of Scotland an inventory properly stamped, is not affected by Cos. Clauses Consolidation (Scotland) Act, 1845 (c. 17), s. 20, & therefore the duty on such inventory was payable in Scotland in respect of the shares.—*A.-G. v. HIGGINS* (1857), 2 H. & N. 339; 26 L. J. Ex. 403; 29 L. T. O. S. 184; 137 E. R. 140.

*Annotations*:—*In the Goods of Ewing* (1881), 11 P. D. 19; *A.-G. v. Sudeley*, [1896] 1 Q. B. 354; *A.-G. v. New York Breweries Co.*, [1898] 1 Q. B. 205.

**915. Property of British subject on high seas.]—***A.-G. v. PRATT*, No. 910, *ante*.

**916. Share in foreign partnership business.]—***LAIDLAY v. LORD ADVOCATE*, No. 907, *ante*.

**917. Share in unascertained residue of another estate.]—**(1) Testator, who died domiciled in England, by his will after bequeathing legacies gave the residue of his real & personal estate to his exors. in trust for his wife for life, & by a codicil gave one-fourth of his "said residuary real & personal estate" to his wife absolutely. His will was proved in England by his exors. domiciled in England. His estate included mtges. on real property in New Zealand. His wife afterwards died & her will was proved in England. At her death her husband's estate had not been fully administered, the clear residue had not been ascertained, & no appropriation had been made of the New Zealand mtges. or of any securities to particular shares of the ultimate residue:—*Held*: the right of the wife's exors. was, not to one-fourth or any part of the mtges. in specie, but to require her husband's exors. to administer his personal estate & to receive from them one-fourth part of the clear residue, & this was an English asset of the wife's estate, & probate duty was therefore payable under her will upon one-fourth part of the value of the New Zealand mtges.

(2) It is unnecessary to say what would have been the case if the estate had been administered; but I certainly am very far from thinking, as at present advised, that it would have made any difference, & that even in that case it could have been said that this was a foreign asset as regards

the estate of testatrix whose estate is in question (*LORD HERSCHELL*).—*SUDELEY (LORD) v. A.-G.*, [1897] A. C. 11; 66 L. J. Q. B. 21; 75 L. T. 398; 61 J. P. 420; 45 W. R. 305; 13 T. L. R. 38, H. L.; *affg. S. C. sub nom. A.-G. v. SUDELEY (LORD)*, [1896] 1 Q. B. 354, C. A.

*Annotations*:—*As to* (1) *Folld. Re Smyth, Leach v. Leach*, [1898] 1 Ch. 89. *Appld. A.-G. v. Johnson*, [1907] 2 K. B. 885. *Consd. Vanneck v. Benham*, [1917] 1 Ch. 60. *Appld. Barnardo's Homes v. Income Tax Special Comrs.*, [1921] 2 A. C. 1. *Refd. New York Life Insco. v. Public Trustee*, [1924] 2 Ch. 101.

**918. —.]—**Testator, who at the date of his will & death was living & domiciled in England, made an English will whereby in effect he devised & bequeathed a plantation in Jamaica to trustees upon trusts for the benefit of certain persons for life & their issue, & upon the deaths of those persons & failure of issue upon trust to sell the plantation & divide the proceeds amongst several persons therein named. The trustees were at the above dates all domiciled in the United Kingdom; & one of them after testator's death proved the will in England & acted as trustee, & held as trustee in this country the plantation upon the trusts of the will. The trust for sale ultimately took effect, & the proceeds of sale of the plantation became divisible amongst the several persons named in that behalf in the will, or their legal personal representatives. One of those persons, who was at the time of his death living & domiciled in England, died while the persons entitled for life were in existence, & the question was whether probate duty was or was not payable here on his death in respect of his interest under the will:—*Held*: the interest of the legatee under the will was an English equitable chose in action, recoverable in England, & an English & not a foreign asset, & as such was subject to probate duty here.—*Re SMYTH, LEACH v. LEACH*, [1898] 1 Ch. 89; 67 L. J. Ch. 10; 77 L. T. 514; 46 W. R. 104; 14 T. L. R. 77; 42 Sol. Jo. 81.

*Annotations*:—*Appld. A.-G. v. Johnson*, [1907] 2 K. B. 885. *Refd. Stamp Duties Comr. v. Salting*, [1907] A. C. 449; *Re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192.

**SECT. 3.—EXCEPTIONS FROM CHARGE OF DUTY.**

**919. Trust property—Covenant to indemnify estate against failure to pay annuity.]—**1815 Act, sched., part 3, imposes an *ad valorem* duty on letters of administration, where the estate is above £20 in value, exclusive of what deceased shall have been possessed of or entitled to as a

was, at the appointer's death, held in Melbourne by the trustee, the right to call upon the trustee to account for the money was then *bona notabilia* within Victoria & therefore the fund was chargeable with duty under Administration & Probate Act, 1915, s. 145.—*Re GRAHAM*, [1918] V. L. R.

**r. Deceased domiciled in the colony—Movable property.]—**Where testator was domiciled in N.Z. at the date of his death, & at that date had in his possession in N.S.W. property to the value of £10,832 0s. 6d., consisting of cash, jewellery, N.Z. postage stamp, & shares in companies incorporated out of N.Z., the whole of the said property is deemed to be situated in N.Z. by Death Duties Act, 1909, s. 7.—*BRASCH v. STAMP DUTIES COMR.*, [1921] N. Z. L. R. 1038.—N.Z.

**PART VI. SECT. 3.**

**a. Legacy—General legacy—Necessary payable out of property in**

*the colony.]—*Where a legacy is not specific, & there is property outside V. from which such legacy might be paid, it lies upon the execution or person claiming the exemption under Act No. 1060, s. 116, to prove that the whole or any part of the legacy must be paid out of the property of the testator in V.—*R. v. BUTLER* (1892), 18 V. L. R. 239.—AUS.

**t. — Effect of direction in will —Legacy under codicil.]—**Where the provisions of a will as to the exemption of legacies from probate duty in effect refer to particular persons & do not constitute a general direction, then they should not be held to include the legacies under a codicil to the will; but, on the other hand, where they do not in effect refer to particular persons, they should be held to include legacies under the codicil.—*Re STROUD'S WILL, BELL v. STROUD*, [1908] V. L. R. 33.—AUS.

**a. Settlement — Taking effect independently of death of settlor.]—**A

settlor conveyed certain real estate to trustees upon trust for his wife, she continuing his widow, & from & after her decease or second marriage, upon trust for his children:—*Held*: inasmuch as the settlement took effect immediately upon the execution of the deed, & in no way depended upon the death of the settlor, this property did not come within Stamp Duties Act, s. 58, & was not liable to probate duty on the death of the settlor.—*PERPETUAL TRUSTEE Co. v. STAMPS COMR.*, [1910] 10 S. R. N. S. W. 550.—AUS.

**b. Gift inter vivos.]—**In 1904–5–6 testator brought proper ties in the names of his two sons by way of advancement & subsequently received the rents & paid for rates & repairs. He died in 1909. On a claim made by the Commissioner of Stamps against the exors. in respect of the said properties. On the evidence:—*Held*: the transactions were gifts out & out passing the properties to the sons to the exclusion of all interest in the



trustee, & not beneficially. Intestate had granted an annuity to A., & afterwards by deed conveyed his property to B., who covenanted to indemnify him against the payment of the annuity. Default having been subsequently made in the payment during the intestate's lifetime, the annuitant sued his administratrix, & recovered judgment for debt & costs exceeding £20. The administratrix paid this, & then sued B. on his covenant for the amount :—*Held* : (1) the right to recover this sum was a part of the intestate's estate, & rendered the letters of administration liable to stamp duty ; (2) the intestate, if he had lived, could not have been considered, in respect of this sum, as a mere trustee for the annuitant, & having no beneficial interest.—*CARR v. ROBERTS* (1831), 2 B. & Ad. 905 ; 1 L. J. K. B. 33 ; 109 E. R. 1379 ; *previous proceedings*, 1 Mood. & R. 45, N. P.

*Annotations* :—As to (1) *Reid. A.-G. v. Hope* (1834), 4 Tyr. 878. Generally, *Mentd. Lord v. Colvin* (1867), L. R. 3 Eq. 737.

**920. — Shares purchased in name of tenant for life.**—(1) Shares in a banking co. purchased by exors. with the assets of their testator in the name

of a party who was entitled to the dividends for life, are included in the probate stamp & do not require to be covered by the stamp upon the letters of administration granted to the estate & effects of the party in whose name the purchase was made.

(2) If the bankers refuse to transfer the shares after an affidavit made by the exor. of testator, in conformity with 1808 Act, they do so at the peril of costs.—*HENNEL v. STRONG* (1856), 25 L. J. Ch. 407.

—*See* 1881 Act, s. 27.

**Subsequent grants.**—*See* 1801 Act, s. 3.

**Where estate duty chargeable.**—*See* 1894 Act, s. 1, Sched. I. (1), Part II., *ante*.

**Effects of common seamen, etc.**—*See* 1815 Act, Sched., Part III.

**Small estates.**—*See* 1864 Act, s. 5.

**Policy of assurance effected by person domiciled abroad.**—*See* 1889 Act, s. 19.

#### SECT. 4.—RATES OF DUTY.

*See* 1881 Act, ss. 27, 33 (1), (5).

father & the duty was not payable.—*STAMP DUTIES COMR. v. BYRNES*, [1911] A. C. 386.—AUS.

**c. — Property susceptible of actual delivery.**—*Necessity for taking possession.*—In order that property which is in its nature susceptible of actual delivery, that is, of visible change of possession, & which is the subject of a gift, shall not be liable for payment of duty under Administration & Probate Act, 1903, s. 11, possession must be taken by such delivery.—*LANG v. WEBB* (1912), 13 C. L. R. 503.—AUS.

**d. —**—*G. married in 1901. Shortly after he promised to give his wife a house, & it was arranged that she should choose one & that the husband would purchase it. In 1911 it was arranged between them, that she should sign a contract of purchase for a certain house, the husband finding the money. This was done & the house transferred to the wife. They, with their family, went to reside there, & lived there until the husband's death in 1914 :—Held* : (1) there was an entire exclusion of the donor from possession & enjoyment of the property or of any benefit by contract or otherwise within the meaning of Administration & Probate Act, 1903, s. 11, & therefore neither the house nor the purchase money was chargeable with duty as part of the donor's estate ; (2) the words "benefit to him by contract or otherwise" in Administration & Probate Act, 1903, s. 11, do not include any benefit which the donor may have in the subject matter of the gift by virtue of the fact that the relationship of husband & wife exists between donor & donee.—*Re GIBB*, [1915] V. L. R. 279.—AUS.

**e. Contingent settlement.**—A settlement which contains trusts or dispositions which may take effect upon the death of the settlor is not chargeable with duty under Administration & Probate Act, 1890, s. 112, as amended by Act of 1903, s. 8, if at the death of the settlor the contingency upon which the trusts or dispositions were to arise has not & never can happen.—*Re DICK'S SETTLEMENT*, [1914] V. L. R. 540.—AUS.

**f. Charitable bequest — Must be of property in the colony.**—The exemption conferred by Administration & Probate Act, 1915 (Viot.), s. 130, does not extend to a bequest to a public institution in V. which is not specifically of V. property of the testator & to pay which it is not necessary to resort to such property.—*DALY v. STATE OF VICTORIA* (1921), 29 C. L. R. 491.—

**g. — Assignment of life policy.**—The assignment of a life policy of insurance to trustees, upon trust to dispose of money payable under the policy for purposes of charity, is not a charitable bequest within Charitable Gifts Duties Exemption Act, 1883, s. 2.—*Re LYNCH (DECEASED)* (1895), 13 N. Z. L. R. 301.—N.Z.

**h. —**—*Testator left his property in trust for the religious order of the Little Sisters of the Poor, an order composed of ladies who devoted their time gratuitously to the carrying-on of a home for the destitute, aged, & infirm of both sexes, irrespective of creed :—Held* : the gift was a "charitable bequest" within Charitable Gifts Duties Exemption Act, 1883, & was therefore exempt from the payment of duty chargeable under Deceased Persons' Estate Duties Act, 1881.—*Re QUINN (DECEASED)* (1899), 18 N. Z. L. R. 50.—N.Z.

**j. Residuary estate — Widow given life interest with power of appointment.**—*Appointment in her own favour.*—Duty under Deceased Persons' Estates Duties Act, 1881, & its amendments is to be assessed on the property existing at the time of the death of the deceased person, & as on the state of facts then existing. Where, therefore, a will gave the widow of testator a life interest in the residue of his estate, & from & after her decease gave, devised, & bequeathed the said residue to such person or persons as she should by deed or will appoint, & in default of appointment, to certain persons & institutions named in the will, & the widow, shortly after testator's death & before any assessment of duty, executed a deed of appointment of the whole residue in her own favour :—*Held* : the widow could not claim exemption of the residue from duty, under amending Act of 1885, s. 18, on the ground that she had become absolutely entitled to it under the will.

In such a case the persons entitled to the property after the determination of the life interest, within Act of 1885, s. 19 (1), are the persons contingently so entitled—that is to say, in default of appointment & the duty must be assessed & paid accordingly.—*Re JACKSON*, [1903] A. C. 350 ; (1901), 19 N. Z. L. R. 566.—N.Z.

#### PART VI. SECT. 4.

**k. Testator's interest vested in widow & children.**—*Gift over on happening of contingency.*—Where the whole beneficial interest in testator's estate was under his will vested in his widow & children, with a limitation in favour

of his grandchildren, the defeasible character of each child's interest, only affecting the shares of the children or grandchildren *inter se*, with a gift over on the happening of a contingency, probate must be delivered on payment of duty at the rate of 5 per cent. notwithstanding that additional duty is payable on the gift over taking effect.—*ARMYTAGH v. WILKINSON* (1878), 3 App. Cas. 355.—AUS.

**l. Intestacy — Widow & child en ventre sa mère.**—When an intestate dies leaving a widow & child *en ventre sa mère*, letters of administration may be granted to the widow, upon an affidavit verifying her pregnancy, & stating that the unborn child is the only next of kin of the intestate ; thus entitling the administratrix to the issue of the letters upon payment of duty at the rate of one-half only of the full percentage.—*Re KERSHAW* (1878), 4 V. L. R. 62.—AUS.

**m. — As to residue of estate.**—*Lost will — Administration to widow subject to codicils.*—A testator in 1864 executed a codicil to his last will, by which he devised & bequeathed all his property to his wife for life, & subject thereto directed that it should devolve according to the terms of his will made ten years before, save that any provisions by such will made in favour of his wife should lapse, & appointed his wife sole executrix. By a further codicil in 1878, he referred to the previous codicil, & confirmed it, & made provision for his sister-in-law. Upon his deathbed, he directed where his will could be found, except the two codicils. The Court granted probate of the two codicils to the widow as sole executrix, & administration to her of the estate subject to the two codicils & to any previous will which might be found, or the contents of which evidence might be discovered. Further ineffectual searches for the will having been made, & testator, having, therefore, presumably died intestate as to the residue of his estate, & leaving only a widow & collateral relations :—*Held* : duty was payable at one-half the full percentage upon the widow's life estate, & upon her moiety of the residue, at the full percentage upon the other moiety.—*In the Estate of HENTY* (1878), 4 V. L. R. 54.—AUS.

**n. Gifts made within twelve months of death.**—The duty in respect of property given within twelve months immediately preceding the donor's death, is to be calculated at the rate applicable to an estate valued at the sum of the values of such property & of

## SECT 5.—VALUE CHARGEABLE.

## SUB-SECT. 1.—GROSS VALUE.

**921. Duty payable on principal value at date of grant.]—**(1) Where land has been improved in value by building between the owner's death & the grant of administration to his estate, stamp duty on the letters of administration is payable for the improved value.

(2) Letters of administration taken out to the leasehold estate of an intestate, which at the time of his death was under the value of £100, but between that time & the grant of administration had increased to a greater value than £100, in consequence of the erection of buildings on the property:—*Held*: not sufficiently stamped with an *ad valorem* stamp as for under £100 value.—*DOE d. RICHARDS v. EVANS* (1847), 10 Q. B. 476; 16 L. J. Q. B. 305; 11 Jur. 609; 116 E. R. 181.

*Annotation*:—As to (2) *Reid. Partington v. A.-G.* (1869), L. R. 4 H. L. 100.

**922. —.]—***BELL v. MASTER IN EQUITY OF THE SUPREME COURT OF VICTORIA*, No. 868, *ante*.

**923. Doubtful debts—Discretion of executor to exclude from value of estate.]—**On proving a will, the exor. need not, in the amount for which probate duty is paid, include debts due to testator, which are either desperate or doubtful; & the exor. has a right to exercise his judgment fairly & *bonâ fide*, whether a debt is doubtful or bad.—*MOSES v. CRAFTER* (1831), 4 C. & P. 524, N. P.

*Annotations*:—*Reid. A.-G. v. Brunning* (1860), 8 H. L. Cas. 243; *Robinson v. Vernon* (1860), 7 Jur. N. S. 146.

**924. ——— Effect of subsequent payment.]—**(1) Testator bequeathed his personal estate to his son, who died in his father's lifetime, leaving issue:—*Held*: the exors. of the son were charge-

able with probate duty on the amount of the bequest, in the same manner as they would have been had the son actually survived the father.

(2) Suppose a man dies with a debt that may be termed a desperate debt due to him. His exors. are not bound to include it in the accounts of the estate. But suppose that afterwards somebody leaves a sum of money to pay it off to the creditor & it is paid off, it would then become part of the estate of the deceased & an augmentation of the probate duty would be made (*BRAMWELL, B.*)—*PERRY'S EXECUTORS v. R.* (1868), L. R. 4 Exch. 27; 38 L. J. Ex. 5; 19 L. T. 520; 17 W. R. 382.

*Annotations*:—As to (1) *Expld. & Distd. A.-G. v. Loyd*, [1895] 1 Q. R. 496. *Consd. Re Scott*, [1901] 1 K. B. 228. Generally, *Mentd. In the Goods of Ewing* (1881), 6 P. D. 19.

**925. Share of partnership—Net balance of account included.]—**It is only the balance of a partnership account, after payment of debts, that can be treated as assets in examining the question of *bona notabilia*.—*EKINS v. BROWN* (1854), 1 Ecc. & Ad. 400; 24 L. T. O. S. 63; 1 Jur. N. S. 21; 164 E. R. 231.

**926. Leasehold property improved by building since death.]—***DOE d. RICHARDS v. EVANS*, No. 921, *ante*.

**927. Contingent interest—If duty not paid till interest falls into possession—Payable on present value.]—**Administration duty must be paid on the whole personal estate belonging to an intestate, including contingent interests; & where such duty was not paid on a contingent interest, which afterwards fell into possession:—*Held*: administration duty must be paid on the present value of the absolute interest, & not on the value

donor's estate, but the rate of duty in respect of the donor's estate is not increased.—*HEWARD v. R.* (1905), 3 C. L. R. 117.—AUS.

**o. —.]—**Nine months before his death A. made gifts of personal property to each of his seven children. All of these survived him. By his will, A. left his remaining property to the members of his family & others:—*Held*: in determining the rate of duty to be paid by each of the children under the Succession & Probate Duties Acts, 1892 & 1904, in respect of the successions conferred upon them respectively, the commissioners were entitled to aggregate the value of all the gifts *inter vivos*, with the value of testator's estate devolving by will.—*Re ARCHIBALD*, [1909] S. R. Q. 160.—AUS.

**p. —.]—**Where there are several gifts of property falling within Administration & Probate Act, 1915, s. 143, duty is to be assessed upon the value of the property contained in each gift, together with the value of the private estate of the donor at his death, & not upon the aggregate value of the property contained in all the gifts, together with the value of his private estate.—*FERGUSON v. R.*, [1920] V. L. R. 451.—AUS.

**q. —.]—***WELDON v.* [1922] V. L. R. 135.—AUS.

**r. Property settled on widow or child—Under £2,000 in value.]—**A settlor settled property worth over £10,000 upon trust for himself for life & after his death upon trust for his children.

The passing under the settlor's will was under £2,000 in value:—*Held*: the words of the proviso of Administration & Probate Act, 1915, Sched. 10, Part III., Clause 1, referred to the property of the settlor passing under his will, & the settled property was dutiable at half rates.—*CAMPBELL v. R.*, [1916] V. L. R. 673.—AUS.

**s. Joint family property—Request to son—Full duty payable.]—**In a case where there was admittedly a joint Hindu family consisting of a father & a minor son, the father made a will bequeathing the whole property to his minor son. The property covered by the will was joint family property:—*Held*: the parties claiming under the will could not go behind its terms, or claim any exemption whatsoever upon allegations utterly inconsistent not only with the fact of the will itself, but with the express statements made therein & the exors. must pay full probate upon the will.—*KASHINATH PARSHARAM v. GOURAVABAI* (1914), I. L. R. 39 Bom. 245.—IND.

**t. Depends on law in force at date of grant.]—**J. died Aug. 2, 1879, testate. Her exor. proceeded to prove her will & on Sept. 13 paid £450 the amount of duty then payable. A caveat was lodged by the next-of-kin & the will was not established till Apr. 15, 1880. By 43 Vict. c. 14 the duties payable upon probates were increased as from Apr. 1, 1880:—*Held*: probate was liable to the increased duty under sect. 9.—*Re JOY, LALOR v. JONES* (1880), L. R. 5 Ir. 282.—IR.

**u. Duty assessed in Scotland—No further payment in England.]—**The exor. of testator domiciled in Scotland having obtained confirmation of the will in Scotland, on payment of the duty assessed according to the scale adopted in Scotland, is entitled to have the confirmation sealed in England, so as to have the effect of probate under 21 & 22 Vict. c. 56, without any further payment of duty, although, according to the mode of assessing the duty in England, a higher amount would be payable.—*Re BOOTH'S TRUSTS* (1859), 1 Giff. 46; 65 E. R. 818.—SCOT.

## PART VI. SECT. 5, SUB-SECT. 1.

## b. Market value—Bank deposit

*receipts.]—*In a statement of a testator's estate under Administration & Probate Act, 1890, s. 97, bank deposit receipts should be valued at the price which they would fetch in the market & not according to the amounts appearing on the face of them to be payable.—*MASTER IN EQUITY OF SUPREME COURT OF VICTORIA v. PEARSON*, [1897] A. C. 214.—AUS.

**c. — Bank stock.]—***WISHART v. LORD ADVOCATE* (1880), 18 Sc. L. R. 62.—SCOT.

**d. — Shares in private company.]—**Testatrix left her shares in a limited co., the articles of which confined the control of the co., & the ownership of the shares to members of her family & contained conditions which would depreciate the value of the shares to the ordinary investor on the open market:—*Held*: the value of the shares was to be estimated at the price they would fetch if sold in the open market on the terms that the purchaser should take & hold them subject to the articles of assocn., including those containing the restrictive conditions.—*MACARTHUR ONSLOW v. STAMPS COMR.*, [1913] 13 S. R. N. S. W. 354.—AUS.

**e. Trust in favour of several beneficiaries—Amounting to single disposition of property.]—**A donor gave to three trustees two lump sums of £6,000 & £3,000 respectively, to be held upon the trusts stated in a deed of trust executed by the said donor & trustees. The deed recited that the donor had paid to the trustees eighteen separate sums of £500, which payment the trustees duly acknowledged. Each of such sums was to be held in trust for a named grandchild of the donor:—*Held*: although the deed recited that there were eighteen separate gifts, the gifts amounted to a single disposition of property within Death Duties Act, 1909, s. 45, & were liable to gift duty as on one gift of £9,000.—



of the contingent interest at the date of administration only; although if duty had then been paid on the value of the contingency, the Crown would not have been entitled to any further duty by reason of the contingency having subsequently fallen into possession.

It is clearly settled that probate or administration duty attaches upon all the estate of testator or intestate which is of a personal nature at the time of his death, on which, by subsequent events, becomes so (MALINS, V.-C.).

If testator granted a lease of his real estate, & gave the lessee the option of becoming the purchaser, & that option was not exercised for some years after his death, so that the property at his death devolved upon his heir as real estate; yet on the option being afterwards exercised, it would operate as a conversion of the property as from the date of the lease, & probate duty would become payable upon the amount of the purchase-money (MALINS, V.-C.).—LORD v. COLVIN (1867), L. R. 3 Eq. 737; 30 L. J. Ch. 354; 16 L. T. 53; 15 W. R. 485.

Annotation:—*Reid. Re Eyre*, [1907] 1 K. B. 331.

**928. Accretions of interest since death.]—**PARTINGTON v. A.-G., No. 899, *ante*.

#### SUB-SECT. 2.—DEDUCTIONS.

*See, now*, 1881 Act, s. 28.

**929. Debts—Debts payable out of personal estate—Direction of testator.]—**A testator gave all his real & personal estate to his exors. upon trust to sell & out of the proceeds to pay his debts, funeral expenses & legacies & invest the residue for his relations. The trustees had power to postpone the sale for such period as they should deem expedient. The exors. paid the simple

contract debts out of the personal estate only, without selling any realty, & claimed a return of duty upon the amount of such debts so paid. The comrs. refused to return the sum claimed on the ground that the will created a mixed & general fund to be applied in payment of debts & that the real & personal estate should contribute in proportion to their respective value:—*Held*: the exors. were entitled to deduct the simple contract debts from the value of the personalty only & were therefore entitled to a return of probate duty claimed by them pursuant to Railway Passenger Duty Act, 1842 (c. 79), s. 23.—PERCIVAL v. R. (1864), 3 H. & C. 217; 33 L. J. Ex. 289; 10 L. T. 622; 29 J. P. 23; 10 Jur. N. S. 1059; 12 W. R. 966; 159 E. R. 512.

Annotation:—*Reid. Re Nathan* (1884), 12 Q. B. D. 461.

**930. — Foreign personal property.]—**When a testator or intestate dies possessed of personal estate both in England & India, & indebted to English creditors in respect of debts contracted in England, the amount of assets in India cannot be taken into consideration in estimating the amount of duty to be returned to the exor. or administrator, under Railway Passenger Duty Act, 1842 (c. 79), s. 23, India being for this purpose to be considered as a foreign country.

A. died intestate in England possessed of personal estate in England to the amount of £5,858 16s. in respect of which a duty of £150 was paid on the letters of administration. His administratrix paid debts due to creditors resident in England & contracted in England to the amount of £4,890 0s. 10d., leaving a balance of £968 15s. 3d., on which the duty would only be £30. A., at the time of his death, was also possessed of personal property in the East Indies to the amount of £12,118 16s 4d., which had been received by his administratrix by means of letters of administration granted to an agent in India, & there were no

STAMPS COMR. v. PEAT (1912), 32 N. Z. L. R. 457.—N.Z.

**i. Contingent reversionary interest—Fair value of the expectancy.]—**An executor gave up an inventory of the personal estate of the deceased, in which the deceased's interest under a *pactum de hæreditate viventis* was valued at £20. The person whose succession formed the subject of the agreement survived the deceased & the deceased's interest under the agreement proved to be of great value. *Held*: the Crown was entitled to claim inventory duty on a fair valuation of the expectancy as at the date when the inventory was sworn to.—LORD ADVOCATE v. PRINGLE (1878), 5 R. (Ct. of Sess.) 912; 15 Sc. L. R. 624.—SCOT.

#### PART VI. SECT. 5, SUB-SECT. 2.

**g. Debts—Due by testator in the colony—Secured upon assets abroad.]—**In making the statement required by Duties on the Estates of Deceased Persons Statute, 1870 (No. 388), s. 7 (ii), exors. are not entitled to deduct from the value of the assets, debts due by testator in V., & fully secured upon assets in another country.—VIRGOE v. R. (1885), 11 V. L. R. 517.—AUS.

**h. — Deceased domiciled in another colony.]—**An intestate who died domiciled in N.S.W. had by contracts made by him in V. contracted debts in V. payable in V. to persons residing there. The intestate had assets in N.S.W., where administration was taken out; & he also had assets in V., in which colony letters of administration were sealed to the same administrators as in N.S.W. The administrators in V. in their statement of assets & liabilities claimed to

deduct from the V. assets the debts specified above:—*Held*: these debts were V. debts, which were properly deducted from the V. assets.—MCLAUGHLIN v. R. (1898), 23 V. L. R. 638.—AUS.

**k. — Specialty debt—Payable outside the colony.]—**A mortgage debt secured upon land of testator in N.S.W., but payable in V., may be deducted when assessing the value of the estate for probate duty in N.S.W.—*Re AIRD* (1893), 14 N. S. W. L. R. 317.—AUS.

**l. — Promissory notes held by deceased—Given by partnership of which deceased was a member.]—**Testator, who died domiciled in V., was at the time of his death the holder of promissory notes payable in V.; such promissory notes had been given for partnership purposes to testator by a partnership carrying on business solely in N.S.W., of which partnership the testator was a member:—*Held*: as the testator, as a member of the partnership, was liable as to one-third of such promissory notes, the executors were entitled to set down one-third thereof as a liability of the estate.—SHAW & MACKINNON v. R. (1895), 21 V. L. R. 338.—AUS.

**m. — Sums due for calls on shares.]—**Sums payable in respect of bank shares at the times mentioned in various schemes for the reconstruction of those banks are debts of the deceased, & may be deducted from the sum total of the assets in order to ascertain the balance liable to probate duty.—MASTER IN EQUITY OF SUPREME COURT OF VICTORIA v. PEARSON, [1897] A. C. 214.—AUS.

—WISHART v. LORD

ADVOCATE (1880), 18 Sc. L. R. 62.—SCOT.

**n. — Sums payable by testator under covenant—Annuity.]—**By a deed of settlement executed in consideration of marriage the settlor covenanted to pay to his wife, in the event of her surviving him, certain moneys by way of annuity, & also certain other moneys for mournings & for maintenance during the time between the day of his death, & the first payment of the annuity. By the same deed the settlor assigned to his wife the furniture that should be in the settlor's house at the time of his death. The settlor also bound himself to pay certain sums of money to the children of the marriage, upon a date subsequent to his own & his intended wife's decease. The settlor died leaving him, surviving his wife & children:—*Held*: these moneys were debts due by the deceased within the meaning of Administration & Probate Act, 1890, s. 97, & should in the ascertainment of the final balance upon which probate duty was payable, be deducted from the value of his estate.—*Re KININMONTH* (1897), 23 V. L. R. 131.—AUS.

**p. — — —.]—**The capitalised value of an annuity which testator had covenanted to pay to a person resident within the colony is not a debt "due & owing" within the meaning of 57 Vict. No. 20, s. 3, & cannot be deducted from his estate in estimating the amount due for probate duty.—*Re ROBERTSON* (1897), 18 N. S. W. L. R. 239.—AUS.

**q. — Voluntary debts.]—**Testator, in order to induce A. H. to marry, promised to enter into a bond in his favour for £50,000, to be paid within five years of testator's



**Sect. 5.—Value chargeable: Sub-sect. 2. Sect. 6: Sub-sects. 1, 2 & 3.]**

other debts due from the intestate:—*Held*: the administratrix was entitled to a return of £120 of the duty.—*R. v. STAMPS & TAXES COMRS.* (1849), 18 L. J. Q. B. 201; 13 Jur. 624.

*Annotation*:—*Mentd.* *A.-G. v. Brunning* (1859), 4 H. & N. 94.

**931. — Not if primarily payable out of realty.]**—T., being seised in fee of certain lands, by indenture mortgaged them as a security for money lent. The indenture contained a covenant by T. to pay the principal & interest on a certain day. By another indenture, T. covenanted to pay on a certain day a further sum of money lent, & that the same lands should be charged with that sum also. T., by will, devised his real estate to B. whom he appointed his exor. P. paid the interest on the mortgage debts, but died without having paid the principal. The personal estate of T. was only sufficient to discharge his funeral & testamentary expenses. B., by will bequeathed his real & personal estate to his two sons, whom he appointed his exors., & died without having paid the mortgage debts. The exors. of B., exhausted his personalty, by paying with it those debts, & on that ground claimed an exemption from legacy duty, & a return of probate duty:—*Held*: the exors. were bound to pay legacy duty, & were not entitled to a return of probate duty, since they were not justified in paying the mortgage debts with the personal estate of B., notwithstanding Debts Recovery Act, 1830 (c. 47), s. 3, rendered them & B. liable as devisees, to actions on the covenants in the deeds.—*Re TAYLOR'S ESTATE* (1853), 8 Exch. 384; 22 L. J. Ex. 211; 155 E. R. 1397.

## SECT. 6.—COLLECTION OF DUTY.

### SUB-SECT. 1.—WHEN DUTY PAYABLE.

*See* 1815 Act, s. 37; 1865 Act, s. 57; 1881 Act, ss. 32, 40.

**932. Power to issue probate on credit—Grant de bonis non.]**—By 1815 Act, s. 49, the comrs. of stamps are authorised to stamp letters of administration *de bonis non* on security given, & without payment of the duty, as well in cases where the duty has been paid on the original letters of administration, as when such letters of administration have been originally stamped on credit.—*DOE v. WOOD* (1819), 2 B. & Ald. 724; 106 E. R. 529.

*Annotations*:—*Mentd.* *R. v. Trent & Mersey Canal Co.* (1825), 3 L. J. O. S. K. B. 140; *Jones v. Reynolds* (1836), 4 Ad. & El. 805; *Muskett v. Hill* (1839), 5 Bing. N. C. 694; *Prendergast v. Turton* (1841), 11 L. J. Ch. 22; *Vico v. Thomas* (1842), 4 Y. & C. Ex. 538; *Rogers v.*

death, & interest thereon to be paid to A. H. in the meantime. Relying on this promise, A. H. married, & on the marriage testator executed a deed of settlement, vesting the sum of £16,666 13s. 4d. in trustees, for the benefit of the parties to the marriage, A. H. acknowledging such settlement as in satisfaction, *pro tanto*, so far as he was concerned of the £50,000:—*Held*: neither the £50,000 nor the £16,666 13s. 4d. was a voluntary debt within the meaning of 1898, No. 27, s. 53 (3), & the executors were entitled to deduct the £50,000 from the amount of the estate liable for duty.—*HAY v. STAMPS COMR.* (1911), 11 S. R. N. S. W. 304.—*AUS.*

**r. — Barred by Statute of Limitations—Acknowledged by executor.]**—A debt of a testator barred by the

Statute of Limitations, but acknowledged by the exor., is "a debt due by the deceased" within Administration & Probate Act, 1890, s. 97, & may be deducted from the assets of deceased in calculating the final balance upon which duty is payable.—*Re ELFORD'S WILL*, [1914] V. L. R. 609.—*AUS.*

**s. — Covenant debt in antenuptial contract.]**—By antenuptial contract a person bound himself to pay to his spouse, in case she should survive him, an annuity of £800, & to invest a capital sum sufficient for that purpose, & to the children of the marriage, whom failing, to himself, his heirs & assignees whomsoever, in fee, with power of apportionment among the children. This obligation was not implemented, but the husband, by his settlement,

*Brenton* (1847), 10 Q. B. 26; *Re Stroud* (1849), 8 C. B. 502; *Watson v. Spratley* (1854), 10 Exch. 222; *Holmes v. Powell* (1856), 8 De G. M. & G. 572; *Martyn v. Williams* (1857), 1 H. & N. 817; *Lee v. Stevenson* (1858), E. B. & E. 512; *Griffiths v. Jenkins* (1864), 3 New Rep. 489; *Roads v. Trumpington Overseers* (1870), L. R. 6 Q. B. 56; *Low Moor Co. v. Stanley Coal Co.* (1876), 34 L. T. 186; *Sutherland v. Heathcote*, [1892] 1 Ch. 475.

**933. —.]**—*HOWARD v. PRINCE*, No. 871, *ante*.

*See* 1815 Act, ss. 45–49.

### SUB-SECT. 2.—BY WHOM DUTY PAYABLE.

*See* 1880 Act, s. 10 (2); 1881 Act, ss. 27, 29, 30, 37, 40.

**934. Executor de son tort—Transfer of shares without production of grant.]**—*NEW YORK BREWERIES CO. v. A.-G.*, No. 908, *ante*.

**935. Affidavit of value—Need not be made by executor.]**—Deceased died domiciled in a foreign country, in which also the exor. resided. The usual affidavits were forwarded to & made by the exor. & returned to this country. Before the probate passed under seal, it was discovered that the value of the property in England had been understated in the affidavits. The ct. allowed probate to issue, with a stamp to cover the full value of the property of deceased, on an affidavit by the agent of the exor. in England being filed explanatory of the mistake, & of the real value of the personal estate liable to probate duty.—*In the Goods of URRUELA* (1869), L. R. 1 P. & D. 598; 38 L. J. P. & M. 21; 19 L. T. 704; 33 J. P. 167.

**936. —.]**—A., having taken out administration to the goods of the deceased went abroad. Subsequently under an order of the Ct. of Ch., a considerable sum became payable to the estate of deceased, & of his brother & sister, who were also deceased. The order could not be passed & entered until the additional duty on these estates had been paid. In the absence of the administrator, who was in Japan, the ct. allowed another person to file an affidavit as to the increase of property, & to execute the bond to cover the increased duty, in the place of the administrator, with two sureties, on the understanding that, as soon as possible, the administrator should execute a similar bond.—*In the Goods of Ross* (1877), 2 P. D. 274; 46 L. J. P. 57; 25 W. R. 808; 42 J. P. Jo. 8.

**937. Where insufficient duty paid—Liability of executor after close of administration.]**—After testator's estate has been fully administered & wound up & the administration closed, the exors. cannot be made liable to the Crown for increased probate duty on articles which subsequently prove to have been of greater value at the time

bequeathed to one of his sons £10,000, which, by a codicil, was expressly declared to be in lieu & in full of any share he might be entitled to claim of the capital sum aforesaid:—*Held*: in a question between the father's executors & the Crown, that the £10,000 was a debt "due & owing from the deceased" which therefore fell to be deducted from the gross amount of his personal estate.—*LORD ADVOCATE v. HAGART'S EXECUTORS* (1872), 10 Macph. (Ct. of Sess.) 62; 44 Sc. Jur. 381; L. R. 2 Sc. & Div. 217.—*SCOT.*

**t. —.]**—*MOIR'S TRUSTEES v. LORD ADVOCATE* (1873), 11 Sc. L. R. 157.—*SCOT.*

**u. —.]**—*MARSHALL v. LORD ADVOCATE* (1874), 11 Sc. L. R. 392.—*SCOT.*

of granting probate than the value then put upon them.—*A.-G. v. SMITH*, [1893] 1 Q. B. 239; 62 L. J. Q. B. 288; 68 L. T. 6; 57 J. P. 389; 41 W. R. 245; 9 T. L. R. 171; 37 Sol. Jo. 192, C. A. Annotation:—*Mentd. Wallen v. Lister*, [1894] 1 Q. B. 312.

**Cumulative duties.**—*Sec Sect. 2, sub-sect. 2, ante.*

#### SUB-SECT. 3.—OUT OF WHAT PROPERTY DUTY PAYABLE.

**938. Payable out of general residue.**—*Re BOURNE, MARTIN v. MARTIN*, No. 168, *ante*.

**939. — Duty a testamentary expense.**—A married woman who had a power of appointment over a fund invested in Govt. stock, by her will gave legacies of specified sums of the fund. The legacies so given did not exhaust the fund, & there was a residuary gift of the fund after payment thereout of testatrix's debts, funeral & testamentary expenses:—*Held*: (1) though the disposition of the residue of the fund was also specific, the words of the will threw the payment of the whole of the probate duty upon the residue.

(2) Testamentary expenses include probate duty (*MALINS, V.-C.*).—*DAVIES v. FOWLER* (1873), L. R. 16 Eq. 308; 43 L. J. Ch. 90; 29 L. T. 285.

Annotation:—*As to (2) Rejd. Re King, Travers v. Kelly*, [1904] 1 Ch. 363.

**940. — If general residue insufficient — Specific bequest to charity.**—A testatrix bequeathed to a hospital all her household furniture & other things in her dwelling-house, & also all her ready money, money at the bankers', & money in the public stocks or funds of Great Britain, & also all other of her personal estate & effects which she could by law bequeath to such an institution, & she appointed exors., but made no further disposition of her property, real or personal:—*Held*: the charitable bequest was a specific bequest, & the debts, funeral & testamentary expenses, & costs, must be paid first out of the undisposed of personal estate, next out of the real

estate, & lastly out of the specific bequest; but the specific bequest must exonerate the real estate from probate duty.—*SHEPHEARD v. BEETHAM* (1877), 6 Ch. D. 597; 46 L. J. Ch. 763; 25 W. R. 764.

Annotation:—*Consd. & Expld. Re Pullen, Parker v. Pullen*, [1910] 1 Ch. 564.

**941. Whether duty a disbursement within Solicitors Act, 1843 (c. 73), s. 37.**—*Re LAMB*, No. 11, *ante*.

**942. —**—*Re KINGDON & WILSON*, No. 12, *ante*.

**943. Personalty appointed under general power — Duty payable out of property appointed.**—A married woman who had a power of appointment over certain trust funds, & was also possessed of separate estate her title to which had accrued before Married Women's Property Act, 1882 (c. 75), died in 1887, having in the same year made a will, by which she exercised her power of appointment over the trust fund & appointed exors., but made no disposition of her separate property. Probate of the will was granted to the exors. according to the altered practice introduced by Probate Rules of 1887, *i.e.* in the ordinary form without any exception or limitation:—*Held*: the expenses of proving the will, including the probate duty, must be apportioned ratably between the appointed & undisposed of property in the same manner in which they would have been apportioned under a grant *cæterorum* before the change in the form of the grant: but the costs of the proceedings in which the questions were determined must fall upon the undisposed of property, as they were occasioned by a contest between the husband & the next of kin.—*Re LAMBERT'S ESTATE, STANTON v. LAMBERT* (1888), 39 Ch. D. 626; 57 L. J. Ch. 927; 59 L. T. 429.

Annotation:—*Mentd. Surman v. Wharton*, [1891] 1 Q. B. 491.

**944. — Appointment of part of "clear value" & of "all the residue" — Duty payable out of residue.**—Testatrix, in exercise of a general power of appointment, made several appointments

#### PART VI. SECT. 6, SUB-SECT. 3.

**9401. Payable out of general residue — If general residue insufficient.**—*E. H. V.* directed that all the specific & pecuniary legacies given by her will or any codicil thereto should be paid free from deduction for probate duty or otherwise. She devised all her residuary real & personal estate to her trustees upon trust to convert, at their discretion, & to pay all her just debts, & funeral & testamentary expenses & all the expenses incident to the execution of the trusts & together with the legacies thereinbefore given, & to stand possessed of the residue of the moneys for certain charitable objects. By codicils she devised three houses to M. B. & C. absolutely, & directed that the probate duty on this devise should be paid out of the residuary estate.

Certain specific personalty was directed to be sold & the proceeds paid to two charitable objects & M. C. B. in equal shares. The residuary estate was valued at £4,653, less expenses, & debts, costs of administration & probate duty amounting to £2,786: the amount required for pecuniary legacies was £3,080:—*Held*: as the residuary estate was insufficient to pay the State probate duty & the pecuniary legacies & the intention of the will was that all beneficiaries other than the ultimate residuary beneficiaries were to get their benefits in full, the direction to pay the probate duty was to be treated as a legacy to the several beneficiaries of the amount which would, but for such direction, have been

deducted from their respective devises or bequests under Stamp Duties Act.—*BROWN v. BUTCHER* (1921), 22 S. R. N. S. W. 176.—*AUS.*

**b. Annuity — Fund appropriated thereto.**—An annuity is a series of legacies payable at intervals during the life of the annuitant, & the duty under Duties on the Estates of Deceased Persons Statute, 1870 (No. 388), s. 11, should be deducted by the exors. from those payments, & from any funds appropriated to their security; & not from the residuary estate.—*In the Will of MOFFATT* (1872), 3 V. R. 166.—*AUS.*

**c. Property given during donor's life — In absence of directions for payment out of another fund.**—The duty payable under Administration & Probate Act, 1903, s. 11, in respect of property transferred colourably or by way of gift during the donor's life is to be borne by the property so transferred, unless the donor expressly provides for the payment of such duty out of some other fund.

A provision in a donor's will for "payment of testamentary & administration expenses & all probate legacy & other duty payable on my estate" out of a specified fund does not exonerate the transferred property.—*NATIONAL TRUSTEES, EXECUTORS & AGENCY CO. v. O'HEA* (1904), 29 V. L. R. 814.—*AUS.*

**d. Property transferred in consideration of marriage.**—On July 8, 1903, G. by indenture purported to grant & transfer to his son A. in consideration of his then intended

marriage with E. certain land to hold the same for G.'s benefit until the marriage, & afterwards for A.'s benefit absolutely. By the same indenture G. covenanted that immediately after the marriage he would execute all transfers for the better transferring of the said land. The marriage took place on July 14, & G., on the same day, executed a transfer of the land to A. G. died on Dec. 8, 1903:—*Held*: neither the indenture nor the transfer came within Administration & Probate Act, 1903 (No. 1813), s. 11, so as to make the property to which they related chargeable with the payment of duty.—*Re MEARES*, [1905] V. L. R. 4.—*AUS.*

**e. Moneys payable under protected life policies.**—As between legatees of protected policy moneys & other specific legatees the policy moneys are liable for their aliquot proportion of probate duty & administration expenses.—*Re MCCALLUM*, [1907] 7 S. R. N. S. W. 523.—*AUS.*

**f. Property of intestate — Over £1,000 in value.**—On the death of an intestate leaving an estate of the value of over £1,000 his widow is entitled to £1,000 clear of debts & expenses but subject to payment of a proportion of the State probate duty.—*Re WOODWORTH* (1915), 11 Tas. L. R. 161.—*AUS.*

**g. Specific devises & bequests "free of duty" — General personal estate insufficient — Duty payable out of bequests of same class.**—Testator gave specific bequests & specific de-



**Sect. 6.—Collection of duty: Sub-sect. 3. Sect. 7: Sub-sects. 1, 2 & 3. Sect. 8. Part VII.]**

of, in each case, "so much & such part of" the trust funds as should be of the "clear" value of a specified sum of money in each case, & lastly made an appointment of "all the residue" of the trust funds. The will disposed of no other property except that subject to the power, & contained no direction for payment of testamentary expenses, probate or legacy duty:—*Held*: the testamentary expenses & probate duty, & the legacy duty on the specified portions of the trust funds, must be paid out of that part of the trust funds which was lastly appointed as residue.—*Re CURRIE, BJORKMAN v. KIMBERLEY (LORD) (1888), 57 L. J. Ch. 743; 59 L. T. 200; 36 W. R. 752.*

*Annotations*:—*Apld. Re Coxwell's Trusts, Kinloch-Cooke v. Public Trustee, [1910] 1 Ch. 63. Re Saunders, Saunders v. Gore, [1898] 1 Ch. 17; Re Chisholm, Goddard v. Brodie, [1902] 1 Ch. 457.*

## SECT. 7.—INTEREST, PENALTIES AND PROCEEDINGS.

### SUB-SECT. 1.—INTEREST.

*See, now, 1896 Act, s. 18 (1), (2).*

### SUB-SECT. 2.—PENALTIES.

*See 1815 Act, ss. 37, 43; 1881 Act, s. 40; Stamp Act, 1891 (c. 39), s. 15.*

**945. Penalty under 1815 Act, s. 37—Representative may subsequently take out grant.]—**Sect. 37 [of the above Act] merely inflicts a penalty upon an exor. or administrator personally, for not proving the will or taking out letters of administration within a certain specified time. But it was not intended that the representatives of deceased should thereby be prevented from taking out probate or letters of administration after that time (PARKE, B.).—*BODGER v. ARCH (1854), 10 Exch. 333; 156 E. R. 472.*

*Annotations*:—*Mentd. Amos v. Smith (1862), 1 H. & C. 238; Maher v. Maher (1867), L. R. 2 Exch. 153; Baker v. Blaker (1886), 55 L. T. 723; Kregor v. Hollins (1913), 109 L. T. 225.*

**946. Executor de son tort—Omission to pay duty.]—**NEW YORK BREWERIES CO. v. A.-G., No. 908, *ante*.

vises to sons & daughters, & also disposed of his residuary estate. The devises to his daughters & certain bequests to them were stated to be free of probate & estate duty. The general personal estate was insufficient to pay the debts, funeral & testamentary expenses of testator:—*Held*: the State death duty on the specific devises & bequests given free of duty to the daughters was thrown on the other specific devises & bequests of the same class ratably according to their value.—*LEE v. JOSEPH (1922), 22 S. R. N. S. W. 239.—AUS.*

**h. Out of estate in first instance.]—**Probate duty is in the nature of a legacy duty, & is payable in the first instance out of the estate.—*Re PEARSE (1903), 10 B. C. R. 280.—CAN.*

### PART VI. SECT. 7, SUB-SECT. 3.

**k. Jurisdiction of Supreme Court—Mandatory order on Master in Equity.]—**The Supreme Ct. of V. has power to make an order of a mandatory character upon the Master in Equity in relation to duties claimed by him under Act No. 388 whether in his capacity of an officer of the ct. or of a

revenue officer responsible to the Crown.—*ARMYTAGH v. WILKINSON (1878), 3 App. Cas. 355.—AUS.*

**l. Effect of Master's certificate.]—**The certificate of the Master under Duties on the Estates of Deceased Persons Statute, 1870 (No. 388), s. 12, is not final either as to the amount of duty payable, or as to the balance of assets on which it is to be calculated, or as to the items of which such balance is made up. An action may be maintained, after such certificate, to recover duty on assets afterwards found to be not exempt, & to recover a higher rate of duty on the whole, by reason of the sliding-scale on the increased amount of assets under Act No. 523.—*R. v. SMITH (1883), 9 V. L. R. 404.—AUS.*

**m. Claim of further duty by Crown—Fresh statement by executor or administrator.]—**Where the Crown alleges that too little duty has been paid in respect of the estate of a deceased person & seeks to obtain further payment of duty under Administration & Probate Act, 1890 (Vict.), s. 105, it must ascertain how much duty ought to have been paid,

**SUB-SECT. 3.—PROCEDURE.**  
*See 1865 Act, s. 57.*

## SECT. 8.—REPAYMENT OF OVERPAID DUTY.

*See 1881 Act, s. 31.*

**947. Repayment of duty under false representations—Whether duty can be again demanded.]—**(1) Pending a suit for the administration of assets, & before the accounts had been taken, the A.-G. presented a petition for payment out of the assets, of a sum which, under false representations, had been returned to the administrator as overpaid in respect of probate duty, & for the legacy duty payable by the administrator on his share of the residue. The administrator had wasted the assets, & the widow, who was entitled to one-third, had not been paid:—*Held*: the application was premature, & the petition was dismissed.

(2) In an administration suit, the ct. provides for the payment of the legacy duty before payment to the legatee.—*HICKS v. KEAT (1840), 3 Beav. 141; 49 E. R. 55.*

**948. Where property in two jurisdictions—Calculation of refund.]—**Where a testator left personal property in each of the provinces of Canterbury & York, & probates were taken out for the property being in each province respectively, & separate duties paid on each probate, & the exors. afterwards paid debts indiscriminately out of the whole personalty:—*Held*: they were not entitled, for the purpose of demanding a return of duty under Railway Passenger Duty Act, 1842 (c. 79), s. 23, to add together the amounts in respect of which the two probate duties were paid, deduct from the gross sum the amount of the debts, & then estimate the duty payable on the remainder, & demand back the difference between such duty & the aggregate of the sums paid on the two probates. *Semble*: an equitable mode of calculating the sum to be returned was to apportion the sum paid for debts in the ratio of the estates in each province, & deduct the respective portions of the debts from the values of the respective estates.—*R. v. STAMPS & TAXES COMRS. (1846), 9 Q. B. 637; 16 L. J. Q. B. 75; 8 L. T. O. S. 155; 11 Jur. 365; 10 J. P. Jo. 756; 115 E. R. 1418.*

*Annotations*:—*Consd. R. v. Stamps & Taxes Comrs. (1849), 18 L. J. Q. B. 201. Mentd. Re Webster (1859), 1 L. T. 45; R. v. I. R. Comrs., Re Empire Theatre (1888), 57 L. J. M. C.*

& there must be a fresh statement made by the executor or administrator.—*AFFLECK v. R. (1906), 3 C. L. R. 608.—AUS.*

**n. Collection under Supreme Court Rules.]—**By r. 1065, the appendices to the Supreme Court Rules form part thereof, & by Supreme Court Act, R. S. B. C. 1897, c. 56, s. 94, the Rules are declared to be valid & binding therefore probate fees as set out in appendix M. of the Rules may be collected as being imposed by statutory enactment.—*Re PORTER'S ESTATE (1902), 10 B. C. R. 275.—CAN.*

**o. Appeal—Case stated for opinion of Supreme Court.]—**An appeal lies to the Ct. of Appeal from the decision of the Supreme Ct. on a case stated by the comr. for the opinion of the Supreme Ct. under Death Duties Act, 1909, s. 60.—*STAMPS COMR. v. PEAT (1912), 32 N. Z. L. R. 457.—N.Z.*

### PART VI. SECT. 8.

**p. Excess of valuation—No statutory provision in Scotland—Common law principle of conductio indebiti.]—***ALSTON'S TRUSTEES v. LORD ADVOCATE (1895), 33 Sc. L. R. 278.—SCOT.*



**949. Mandamus to recover excess of duty paid—Not remedy against commissioners.]—**Railway Passenger Duty Act, 1842 (c. 79), s. 23, provides for the return by the Comrs. of Stamps & Taxes of probate duty on proof by oath & proper vouchers to their satisfaction of the payment of debts of deceased, whereby the amount of probate duty payable on the estate is reduced below the amount which has been paid. By a subsequent Act the Comrs. of Inland Revenue are substituted for the Comrs. of Stamps & Taxes. On an application by an administrator for a *mandamus* to the Comrs. to pay to appct. the amount of duty overpaid by him, on the ground that he had supplied evidence of overpayment & had no other legal remedy:—*Held*: the *mandamus* ought not to issue, for the statute created no duty between the Comrs. & appct. whose remedy, if the decision of the Comrs. could be reviewed was by petition of right.—*R. v. INLAND REVENUE COMRS., Re NATHAN* (1884), 12 Q. B. D. 461; 53 L. J. Q. B. 229; 51 L. T. 46; 48 J. P. 452; 32 W. R. 543, C. A.

*Annotations*:—*Consd.* *R. v. Lambourn Valley Ry.* (1888), 22 Q. B. D. 463. *Reid.* *R. v. Income Tax Special Comrs., Re Cape Copper Mining Co.* (1888), 2 Tax Cas. 332; *Special Purposes Income Tax Comrs. v. Pemsel*, [1891] A. C. 531; *Lord Advocate v. Cuninghame Division of Ayrshire Income Tax General Comrs.* (1895), 3 Tax Cas.

395; *R. v. Incorporated Law Soc.*, [1895] 2 Q. B. 456. *Peebles v. Oswaldtwistle U. D. C.*, [1897] 1 Q. B. 381; *It. v. St. Giles, Camberwell, Vestry* (1897), 61 J. P. 217; *Smith v. Chorley District Council* (1897), 66 L. J. Q. B. 427. *Mentd.* *Leakey & Haig v. Duglinsor* (1891), 65 L. T. 152; *R. v. Leicester Union*, [1899] 2 Q. B. D. 632; *Hollinshead v. Hazleton*, [1916] 1 A. C. 428.

**950. — Effect of delay.]—**Where exors. paid probate duty partly under mistake of law & partly with a reservation of their right to have the excess refunded without regard to delay, & it was subsequently decided in another case that no duty at all was payable as claimed:—*Held*: an application made nine years later for a *mandamus* to state a case for the Full Ct. was not brought within a reasonable time, & must be refused.—*BROUGHTON v. STAMP DUTIES COMR.*, [1899] A. C. 251; 68 L. J. P. C. 36, P. C.

**951. — Consent of Crown—Railway Passenger Duty Act, 1842 (c. 79), s. 23.]—**The ct. cannot entertain an application for a rule calling on the Comrs. of Inland Revenue to show cause why they should not make a return of probate duty, under the above sect., unless by consent of the Crown.—*In the Goods of WEBSTER* (1859), 1 L. T. 45; 24 J. P. 24.

—*See, generally, CROWN PRACTICE, Vol. XVI., Part VI.*

## Part VII.—Account Duty.

*See, now, Finance Act, 1894 (c. 30), s. 2 (1) (c), & Finance (1909–1910) Act, 1910 (c. 8), ss. 54, 59–62.*

**952. Duty due on conversion—Realty into personalty.]—**In 1885, by a voluntary settlement, A. gave real estate to trustees upon trust, at the request of A. or his wife or the survivor of them, or after the death of the survivor, at their own discretion, to sell the same, and hold the proceeds on certain trusts. A. died in 1887:—*Held*: the realty must be treated as converted into personalty by the settlement of 1885, & must therefore be included in an account & charged with duty under Customs & Inland Revenue Act, 1881 (c. 12), s. 38.—*A.-G. v. DODD*, [1894] 2 Q. B. 150; 63 L. J. Q. B. 319; 70 L. T. 660; 58 J. P. 526; 42 W. R. 524; 10 T. L. R. 336; 38 Sol. Jo. 350; 10 R. 177, D. C.

*Annotations*:—*Reid.* *A.-G. v. Londesborough* (1904), 73 L. J. K. B. 503; *A.-G. v. Johnson*, [1907] 2 K. B. 885. *Mentd.* *Re Goswell's Trusts*, [1915] 2 Ch. 106; *Re Ffennell's Settlement, Re Ffennell's Estate, Wright v. Holton*, [1918] 1 Ch. 91.

**953. Appointment of trust funds—Appointees liable ratably.]—**C. being, under a voluntary settlement made by him, tenant for life of certain trust funds, with remainder to his children as he should by will appoint, died in 1891, having by his will appointed part of the trust funds in separate specific sums to four of his five children, & the residue to his fifth child. The will contained no direction that the specifically appointed sums should be paid free of duty:—*Held*: the account duty payable in respect of the trust funds on C.'s death, under the Customs & Inland Revenue Act, 1881 (c. 12), s. 38 (2) (c), & the Customs &

Inland Revenue Act, 1889 (c. 7), s. 11, must be borne by all the appointees ratably according to their respective shares & not by the residuary appointee exclusively.—*Re CROFT, DEANE v. CROFT*, [1892] 1 Ch. 652; 61 L. J. Ch. 190; 66 L. T. 157; 40 W. R. 425; 8 T. L. R. 309; 36 Sol. Jo. 255.

*Annotations*:—*Distd.* *Re Bourne, Martin v. Martin*, [1893] 1 Ch. 188; *Re Foster, Thomas v. Foster*, [1897] 1 Ch. 484. *Reid.* *Re Orford, Cartwright v. Balzo* (1896), 65 L. J. Ch. 253.

**954. Dispositions of personal property—Passing on death other than by will.]—**(1) By a deed between G. & his partners, G. was empowered to dispose of his share in the business to any one of a limited class, such person to be certified by the senior partners as qualified. G. left his shares to his son who was duly certified:—*Held*: the deed was a voluntary settlement whereby a life interest was reserved in G., within Customs & Inland Revenue Act, 1881 (c. 12), s. 38, & Customs & Inland Revenue Act, 1889 (c. 7), s. 11.

(2) The object of the Act [Customs & Inland Revenue Act, 1881 (c. 12)] was to strike with liability to such duty dispositions which, while preserving to a man the enjoyment of personal property to the day of his death, make the same property pass on his death to some one else & so become substitutes for wills (*per CUR.*).—*A.-G. v. GOSLING*, [1892] 1 Q. B. 545; 61 L. J. Q. B. 429; 66 L. T. 284; 56 J. P. 358; 40 W. R. 306; 8 T. L. R. 349; 36 Sol. Jo. 294, D. C.

*Annotations*:—*As to (1) Reid.* *A.-G. v. Boden*, [1912] 1 K. B. 539. *As to (2) Foll.* *A.-G. v. Ellis*, [1895] 2 Q. B. 466.

## Part VIII.—Foreign Duties.

955. Out of what property payable—General estate—Foreign property not specifically bequeathed or devised.]—*PETER v. STIRLING*, No. 419, *ante*.

956. ———.]—Testator domiciled in England, whose assets consisted of considerable personalty in England & also of realty leaseholds, & personalty in Australia, by his will, after bequeathing pecuniary legacies of considerable amount, gave his residuary real & personal estate upon trust for such of his five children as should be living at his death in equal shares, the share of each child being settled upon him or her for life with remainder to his or her children, with power for his trustees to manage & cultivate his real & leasehold estates until sold:—*Held*: the duties due to the Govt. of South Australia were not, like the duties due to the English Govt., payable out of the share of each child; but were part of the costs of realisation, & were therefore payable out of testator's general assets before distribution.—*Re MAURICE, BROWN v. MAURICE* (1896), 75 L. T. 415; 13 T. L. R. 36.

*Annotation*:—*Reid. Re Brewster, Butler v. Southam*, [1908] 2 Ch. 365.

957. ——— Foreign property—Where specifically bequeathed or devised.]—Testatrix domiciled in England made an English will appointing English exors. & trustees & Colonial exors. & trustees.

She devised certain land in Melbourne, Victoria, to her Colonial trustees, upon trust to sell the same & to pay or remit the proceeds of sale to her English trustees to be held upon certain specific trusts.

She devised & bequeathed the residue of her real & personal estate to her English trustees upon trust to sell & convert the same into money & thereout to pay (*inter alia*) her "debts" & to stand possessed of the residue thereof upon certain residuary trusts:—*Held*: (1) the direction to pay debts out of residue referred to actual debts & did not include local death duty on the Melbourne property, though "deemed to be a debt of the testatrix" by the local law; (2) the local death duty & other expenses of realising the Melbourne property fell on that property & not on residue.

*Re BREWSTER, BUTLER v. SOUTHAM*, [1908] 2 Ch. 365; 77 L. J. Ch. 605; 99 L. T. 517.

*Annotations*:—As to (2) *Reid. Re De Sommers, Coelenbier v. De Sommers*, [1912] 2 Ch. 622; *Re Grosvenor, venor v. Grosvenor* (1916), 85 L. J. Ch. 735.

958. ———.]—Where trustees of a will incurred costs & paid duties abroad in respect

of foreign property specially bequeathed, they having as exors. assented to the bequest:—*Held*: both the foreign costs & the foreign duty must be borne by the specifically bequeathed property & not by the residue.—*Re DE SOMMERS, COELENBIER v. DE SOMMERS*, [1912] 2 Ch. 622; 82 L. J. Ch. 17; 107 L. T. 253, 823; 57 Sol. Jo. 78.

*Annotations*:—*Consd. Re Grosvenor, Grosvenor v. Grosvenor*, [1916] 2 Ch. 375. *Reid. Re Scott, Scott v. Scott*, [1915] 1 Ch. 592; *Re Scott, Scott v. Scott*, [1916] 2 Ch. 268; *Re Hewett, Eldridge v. Hewett* (1920), 90 L. J. Ch. 126. *Mentd. Kennedy v. Kennedy*, [1914] A. C. 215; *Re Allott, Hanmer v. Allott*, [1924] 2 Ch. 498.

959. ——— Direction to pay "free of legacy duty."—Testator, a domiciled Englishman, by his will bequeathed to Lady S. "free of legacy duty" all his pictures, engravings, furniture, busts, silver plate, & "works of art" of every description wheresoever situate, except at his two London houses or except those bequeathed specifically by his will. At his death he was possessed of a number of valuable tapestries which were attached to the walls of his house in Paris, which the ct. held, upon the facts, passed to Lady S. under the specific bequest of "works of art." According to French law a mutation duty was payable by the legatee on these chattels; & if the duty was not paid within eight months of testator's death certain penalties were incurred. By reason of litigation which arose with reference to the proving of the will & the administration of the estate the French duty was not paid, & Lady S. was not put into possession of the tapestries until two years after testator's death, & heavy penalties for delay became payable to the French fiscal authorities:—*Held*: (1) on the construction of the will the expression "legacy duty" was used by testator in its strict legal sense as meaning the duty imposed by the Legacy Duty Act, 1796 (c. 52), & amending Acts, & not as meaning all duties in the nature of legacy duty, & it did not therefore include the French mutation duty; (2) there was no obligation on the exors. to pay the mutation duty in order to get possession of the tapestries & deliver them to the legatee, & consequently the mutation duty must be borne by the legatee; (3) the penalties were in substance an extra mutation duty & must also be paid by the legatee.—*Re SCOTT, SCOTT v. SCOTT*, [1915] 1 Ch. 592; 84 L. J. Ch. 366; 112 L. T. 1057; 31 T. L. R. 227, C. A.

*Annotation*:—As to (2) *Reid. Re Grosvenor, Grosvenor v. Grosvenor*, [1916] 2 Ch. 375.

## ESTATE BY THE CURTESY.

*See* COPYHOLDS ; HUSBAND AND WIFE ; REAL PROPERTY AND CHATTELS REAL.

## ESTATE FOR LIFE.

*See* REAL PROPERTY AND CHATTELS REAL ; SETTLEMENTS.

## ESTATE PUR AUTRE VIE.

*See* DESCENT AND DISTRIBUTION ; REAL PROPERTY AND CHATTELS REAL.

## ESTATE TAIL.

*See* DESCENT AND DISTRIBUTION ; REAL PROPERTY AND CHATTELS REAL ; SETTLEMENTS.

## ESTATES OF THE REALM

*See* CONSTITUTIONAL LAW ; PARLIAMENT.



# ESTOPPEL.

	PAGE
PART I. NATURE AND CLASSIFICATION . . . . .	136
SECT. 1. NATURE OF ESTOPPEL . . . . .	136
SECT. 2. CLASSIFICATION OF ESTOPPELS . . . . .	139
PART II. ESTOPPEL BY MATTER OF RECORD . . . . .	140
SECT. 1. IN GENERAL . . . . .	140
SECT. 2. WHAT ARE MATTERS OF RECORD . . . . .	142
SUB-SECT. 1. RECORDS OF COURTS OF LAW . . . . .	142
A. What are Courts of Record . . . . .	142
B. What Records . . . . .	143
(a) Judgments in personam . . . . .	143
i. On Discontinuance or Withdrawal of Proceedings . . . . .	143
ii. On Dismissal of Proceedings . . . . .	144
iii. Judgment by Default . . . . .	144
iv. Judgment by Consent . . . . .	146
v. On Compromise of Proceedings . . . . .	148
vi. Nonsuit . . . . .	150
vii. On Withdrawal of Juror . . . . .	150
viii. Effect of Appeal . . . . .	151
ix. Irregular Judgments . . . . .	151
x. Other Judgments. . . . .	151
(b) Judgments in rem . . . . .	153
i. Judgments Determining Status of Person . . . . .	153
ii. Judgments Determining Status of Thing . . . . .	153
(c) Orders in Civil Proceedings . . . . .	156
(d) Convictions and Orders in Criminal and Quasi-Criminal Proceedings . . . . .	158
SUB-SECT. 2. OTHER RECORDS . . . . .	158
SECT. 3. EFFECT OF RES JUDICATA . . . . .	159
SUB-SECT. 1. AS AN ESTOPPEL . . . . .	159
A. In General . . . . .	159
B. In respect of What Matters . . . . .	161
(a) Matters of Law . . . . .	161
(b) Matters of Fact . . . . .	163
(c) Cause of Action . . . . .	163
(d) Matters in Issue . . . . .	164
(e) Matters not in Issue . . . . .	169
(f) Matters only collaterally in Issue . . . . .	173
(g) Matters Available in Former Proceedings . . . . .	174
(h) Matters not Available in Former Proceedings . . . . .	178
(i) Statements in Pleadings . . . . .	179
(j) Continuing Causes of Action . . . . .	181
(k) Admissibility of Evidence to show What Matters in Issue. . . . .	181
(l) Election of Remedy . . . . .	183
(m) Where Money paid into Court . . . . .	183
C. On What Parties Binding . . . . .	183
(a) Parties . . . . .	183
i. In General . . . . .	183
ii. Parties Suing or Defending in Different Right . . . . .	186
(b) Privies . . . . .	187
(c) Persons having Similar Interest . . . . .	189

	PAGE
(d) Members of Class . . . . .	190
(e) Trustee and Cestui que trust . . . . .	190
(f) The Crown . . . . .	191
(g) Strangers . . . . .	191
D. In What Proceedings Available . . . . .	195
E. Convictions and Orders in Criminal and Quasi-Criminal Proceedings . . . . .	195
SUB-SECT. 2. AS BAR TO SUBSEQUENT PROCEEDINGS BY PLAINTIFF . . . . .	198
A. In General . . . . .	198
B. In respect of What Matters . . . . .	200
(a) Cause of Action . . . . .	200
i. In General . . . . .	200
ii. Arising out of Contract . . . . .	201
iii. Arising out of Tort . . . . .	205
(b) Matters in Issue . . . . .	209
(c) Matters not in Issue . . . . .	210
(d) Matters Available in Former Proceedings . . . . .	211
(e) Matters not Available in Former Proceedings . . . . .	213
(f) Continuing Causes of Action . . . . .	215
(g) Election of Remedy . . . . .	215
(h) Where Money paid into Court . . . . .	216
C. As regards What Parties . . . . .	217
(a) Parties suing in Different Right . . . . .	217
(b) Joint Parties . . . . .	218
i. Joint Contractors . . . . .	218
ii. Joint Tortfeasors . . . . .	221
(c) Joint and Several Parties . . . . .	223
(d) Alternative Parties . . . . .	223
i. Actions of Contract. . . . .	223
ii. Actions of Tort . . . . .	225
(e) Strangers . . . . .	225
D. To What Proceedings Applicable . . . . .	226
E. Convictions and Orders in Criminal and Quasi-Criminal Proceedings . . . . .	226
SECT. 4. MATTERS PRECLUDING ESTOPPEL . . . . .	229
SUB-SECT. 1. FRAUD OR COLLUSION . . . . .	229
SUB-SECT. 2. MISTAKE . . . . .	231
SUB-SECT. 3. LACK OF JURISDICTION . . . . .	231
SUB-SECT. 4. TRUTH APPEARING IN SAME RECORD . . . . .	233
SUB-SECT. 5. ALLEGATION NOT INCONSISTENT WITH RECORD . . . . .	233
SUB-SECT. 6. RECORD UNCERTAIN . . . . .	233
SUB-SECT. 7. MATTER NOT TRAVERSABLE OR MATERIAL . . . . .	233
SUB-SECT. 8. ESTOPPEL AGAINST ESTOPPEL . . . . .	233
SUB-SECT. 9. WANT OF MUTUALITY. . . . .	234
SECT. 5. PLEADING ESTOPPEL . . . . .	234
SUB-SECT. 1. NECESSITY FOR . . . . .	234
SUB-SECT. 2. MODE OF . . . . .	235
PART III. ESTOPPEL QUASI OF RECORD . . . . .	236
SECT. 1. JUDGMENTS OF COURTS NOT OF RECORD . . . . .	236
SUB-SECT. 1. ADMIRALTY COURT . . . . .	236
SUB-SECT. 2. ECCLESIASTICAL COURTS . . . . .	237
SUB-SECT. 3. FOREIGN COURTS . . . . .	238
SUB-SECT. 4. OTHER COURTS AND TRIBUNALS . . . . .	238
SECT. 2. MATTERS PRECLUDING ESTOPPEL . . . . .	241
PART IV. LIS ALIBI PENDENS . . . . .	242
PART V. ESTOPPEL BY DEED . . . . .	242
SECT. 1. IN GENERAL . . . . .	242

	PAGE
SECT. 2. TO WHAT DEEDS APPLICABLE . . . . .	243
SUB-SECT. 1. INDENTURES . . . . .	243
SUB-SECT. 2. DEEDS POLL . . . . .	243
SUB-SECT. 3. BONDS . . . . .	243
SUB-SECT. 4. VOID AND IMPERFECT DEEDS . . . . .	244
SUB-SECT. 5. UNEXECUTED DEEDS . . . . .	245
SUB-SECT. 6. DEED ACKNOWLEDGED . . . . .	247
SUB-SECT. 7. DEED ENROLLED . . . . .	247
SECT. 3. RULES OF GENERAL APPLICATION . . . . .	247
SUB-SECT. 1. MUST BE CERTAIN AND UNAMBIGUOUS. . . . .	247
SUB-SECT. 2. MUST BE RECIPROCAL . . . . .	248
SUB-SECT. 3. ONLY AS TO FACTS . . . . .	248
SUB-SECT. 4. NO ESTOPPEL BY IMPLICATION . . . . .	248
SUB-SECT. 5. WHETHER ESTOPPEL WHERE TRUTH APPEARS . . . . .	249
SECT. 4. DIFFERENT PARTS OF DEED . . . . .	250
SUB-SECT. 1. THE DATE. . . . .	250
SUB-SECT. 2. DESCRIPTION OF PARTIES . . . . .	252
SUB-SECT. 3. RECITALS . . . . .	252
A. In General . . . . .	252
B. Rules of General Application . . . . .	254
(a) General Recitals . . . . .	254
(b) Particular Recitals . . . . .	254
(c) Only when Clear and Positive . . . . .	255
C. Particular Instances . . . . .	256
SUB-SECT. 4. PARCELS—PROPERTY DEALT WITH . . . . .	262
SUB-SECT. 5. COVENANTS . . . . .	263
SUB-SECT. 6. RECEIPT CLAUSE AND INDORSEMENT . . . . .	265
SUB-SECT. 7. CONDITION IN BONDS . . . . .	266
SUB-SECT. 8. OTHER PARTS OF DEED . . . . .	267
SUB-SECT. 9. PARTICULAR WORDS . . . . .	267
SECT. 5. PARTICULAR DEEDS. . . . .	268
SECT. 6. ON WHOM BINDING AND WHO MAY TAKE ADVANTAGE OF ESTOPPEL . . . . .	268
SUB-SECT. 1. PARTIES . . . . .	268
SUB-SECT. 2. PRIVIES . . . . .	269
SUB-SECT. 3. INFANTS . . . . .	273
SUB-SECT. 4. FEME COVERT . . . . .	273
SUB-SECT. 5. LUNATICS <i>See</i> LUNATICS. . . . .	
SUB-SECT. 6. CORPORATIONS . . . . .	274
SUB-SECT. 7. VOLUNTEERS . . . . .	275
SUB-SECT. 8. STRANGERS . . . . .	275
SECT. 7. EXCEPTIONS . . . . .	276
SUB-SECT. 1. FRAUD . . . . .	276
SUB-SECT. 2. MISTAKE . . . . .	277
SUB-SECT. 3. ILLEGALITY . . . . .	279
SUB-SECT. 4. DURESS . . . . .	279
SECT. 8. OPERATION OF THE ESTOPPEL . . . . .	280
SUB-SECT. 1. AS TO MATTERS COLLATERAL . . . . .	280
SUB-SECT. 2. DURATION OF THE ESTOPPEL . . . . .	281
SUB-SECT. 3. ESTATES BY ESTOPPEL . . . . .	281
A. When Grantor has no Title . . . . .	281
B. When an Interest passes . . . . .	283
C. Interest when it accrues feeds the Estoppel . . . . .	283
SUB-SECT. 4. INTEREST BY ESTOPPEL . . . . .	286
SECT. 9. PLEADING ESTOPPEL . . . . .	287



	PAGE
PART VI. ESTOPPEL IN PAIS . . . . .	287
SECT. 1. NATURE OF . . . . .	287
SECT. 2. BY LIVERY, ENTRY OR ACCEPTANCE OF ESTATE . . . . .	289
SECT. 3. BY REPRESENTATION . . . . .	290
SUB-SECT. 1. RULES OF GENERAL APPLICATION . . . . .	290
A. In General.- . . . .	290
B. When Estoppel by Representation arises . . . . .	292
(a) Representations of Fact . . . . .	292
(b) Representations of Law . . . . .	294
(c) Ambiguous Representations . . . . .	295
(d) Representations in respect of ultra vires Acts . . . . .	296
(e) Representations Induced by Party Complaining . . . . .	297
(f) Representations Intended to be acted on. . . . .	298
(g) Representations acted on . . . . .	300
i. In General . . . . .	300
ii. To Prejudice of Representee . . . . .	302
C. Effect and Extent of Estoppel . . . . .	305
D. Who Bound by Estoppel . . . . .	306
E. Who may take Advantage of Estoppel . . . . .	308
F. Equitable Estoppel by Representation . . . . .	308
SUB-SECT. 2. BY STATEMENT . . . . .	310
A. Verbal Statements . . . . .	310
B. Statements in Writing . . . . .	315
(a) In General . . . . .	315
(b) In Accounts . . . . .	316
(c) In Pleadings . . . . .	316
(d) In Receipts . . . . .	318
(e) In Other Documents . . . . .	321
SUB-SECT. 3. BY CONDUCT . . . . .	328
A. In General . . . . .	328
B. Acceptance of Benefit . . . . .	328
C. Acquiescence . . . . .	333
(a) In General . . . . .	333
(b) Necessity for Knowledge . . . . .	335
(c) Particular Instances . . . . .	337
D. Concealment . . . . .	346
E. Laches or Delay . . . . .	347
(a) In General . . . . .	347
(b) Particular Instances . . . . .	349
i. Period of Delay . . . . .	349
ii. Other Cases . . . . .	354
F. Election . . . . .	355
(a) In General . . . . .	355
(b) Between Alternative Courses of Action . . . . .	357
(c) Between Alternative Remedies . . . . .	359
(d) Between Persons with Alternative Liability . . . . .	359
G. Holding out . . . . .	359
(a) In cases of Agency . . . . .	359
(b) As to Right, Title, Possession or Capacity of Party Holding out . . . . .	362
(c) As to Right, Title, Possession or Capacity of Third Party . . . . .	363
(d) Other Cases. . . . .	365
H. Silence or Standing by . . . . .	366
(a) In General . . . . .	366
(b) While Money Expended . . . . .	368
(c) While Property or Goods of Party Standing by Dealt with . . . . .	372
(d) While Property in which Party Standing by Interested Dealt with . . . . .	373
(e) Other Cases . . . . .	374
I. Waiver . . . . .	376
(a) In Legal Proceedings . . . . .	376
i. In General . . . . .	376
ii. By Positive Acts . . . . .	376
iii. By Omissions . . . . .	381

	PAGE
(b) Apart from Legal Proceedings . . . . .	384
i. In General . . . . .	384
ii. By Positive Acts . . . . .	385
iii. By Omissions . . . . .	391
J. Other Acts and Omissions . . . . .	395
SUB-SECT. 4. BY NEGLIGENCE. . . . .	399
A. When Estoppel by Negligence arises . . . . .	399
B. In Preparation and Custody of Documents . . . . .	402
SECT. 4. ARISING IN PARTICULAR RELATIONSHIPS AND TRANSACTIONS . . . . .	402
SECT. 5. PLEADING ESTOPPEL . . . . .	403
PART VII. PLEADING ESTOPPEL . . . . .	404

### Conclusiveness of Foreign

Judgments generally . . . See CONFLICT OF LAWS.

Documentary Evidence . . . EVIDENCE.

Judgments generally . . . JUDGMENTS.

Negotiable Instruments . . . See BILLS OF EXCHANGE.

Estoppel arising in particular relationships

and transactions . . . PARTICULAR TITLES  
passim.

## Part I.—Nature and Classification.

### SECT. 1.—NATURE OF ESTOPPEL.

**1. General rule.]**—An estoppel is an admission, or something which the law treats as equivalent to an admission, of an extremely high & conclusive nature, so high & so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it (LUSH, J.).—ORD v. ORD, No. 140, *post*.

**2. —.]**—In an action upon a covenant to pay £6,800 subject to deductions to the extent of £4,800 upon a certain event to be ascertained by an arbitrator, deft. pleaded in bar that the arbitrator had awarded that a deduction should be made of £4,800 :—*Held* : that award was properly pleaded in bar, & not by way of estoppel.

This is no estoppel. The deduction depends upon a fact to be ascertained by an arbitrator, & the arbitrator has ascertained it (PATTESON, J.).

A plea in bar must show that there was no cause of action, or accord & satisfaction. The principle of a plea in estoppel is, that whether pltf. has a cause of action or not, he is estopped from asserting it : but this plea shows that he has no cause of action (COLERIDGE, J.).—PARKES v. SMITH (1850), 15 Q. B. 297 ; 19 L. J. Q. B. 405 ; 15 L. T. O. S. 223 ; 14 Jur. 761 ; 117 E. R. 470.

*Annotations* :—**Folld.** Commings v. Heard (1869), L. R. 4 Q. B. 669. **Mentd.** Collins v. Collins (1858), 26 Beav. 306 ; & Secretary of State for War Department v. J. Q. B. 53 ; *Ex p.* Glaysher (1864), 3 H. & C. 442 ; Wishart v. Fowler (1864), 3 New Rep. 373 ; *Re* Newton & Hetherington (1865), 19 C. B. N. S. 341.

**3. —.]**—The general definition of estoppel is given in *Les Termes de la Ley*, title Estoppel : "Estoppel is, when one is concluded & forbidden in law to speak against his own act or deed, yea, though it be to say the truth." This is what deft. attempted to do. There is a distinction between estoppel by matter of record or deed & by matter *in pais* : in the latter case it arises on the evidence itself, & need not be pleaded ; in the others it must be pleaded, if there be an oppor-

tunity (WIGHTMAN, J.).—ASHPITEL v. BRYAN (1863), 3 B. & S. 474 ; 1 New Rep. 265 ; 32 L. J. Q. B. 91 ; 7 L. T. 706 ; 9 Jur. N. S. 791 ; 11 W. R. 279 ; 122 E. R. 179 ; *on appeal* (1864), 5 B. & S. 723, Ex. Ch.

*Annotations* :—**Refd.** M'Cance v. L. & N. W. Ry. (1861), 31 L. J. Ex. 39 ; Garland v. Jacomb (1873), L. R. 8 Exch. 216 ; Vagliano v. Bank of England (1889), 23 Q. B. D. 243. **Mentd.** Brook v. Hook (1871), L. R. 6 Exch. 89.

**4. —.]**—SIMM v. ANGLO-AMERICAN TELEGRAPH CO., ANGLO-AMERICAN TELEGRAPH CO. v. SPURLING, No. 1113, *post*.

**5. Rule of evidence.]**—(1) Although it is the duty of a trustee to give his *cestui que trust*, on demand, information with respect to the dealings with & position of the trust fund, it is no part of his duty to assist his *cestui que trust* in selling or incumbering his beneficial interest by telling him what incumbrances he, the *cestui que trust*, has created, nor which of his incumbrancers have given notice of their respective charges ; & it follows that the trustee is under no obligation to answer the inquiries of a stranger about to deal with the *cestui que trust*.

If the trustee takes upon himself to answer the inquiries of a stranger about to deal with the *cestui que trust*, he is not under any legal obligation to do more than to give honest answers to the best of his actual knowledge & belief ; he is not bound to make inquiries himself. Provided he answers honestly, he incurs no liability to the inquirer, unless he binds himself by a statement amounting to a warranty, or so expresses himself as to be estopped from afterwards denying the truth of what he has said.

(2) A statement to operate as an estoppel must be clear & unambiguous.

(3) Estoppel is not a cause of action, it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself (LANDIEY, L.J.).

### PART I. SECT. 1.

*of evidence.]*—The law of estoppel is contained in Evidence Act, s. 115.—ASMUTUNNESSA KHATUN SAHEBA v. HARENDRA LAL BISWAS (1908), 1 L. R. 35 Calc. 904 ; 12 C. W. N. 72.—IND.

Estoppel is only a rule of evidence ; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that deft. is estopped from denying the truth of something which he has said (BOWEN, L.J.).—*Low v. BOUVERIE*, [1891] 3 Ch. 82 ; 60 L. J. Ch. 594 ; 65 L. T. 533 ; 40 W. R. 50 ; 7 T. L. R. 582, C. A.

*Annotations* :—*As to* (1) **Refd.** *Fry v. Smellie*, [1912] 3 K. B. 282. *As to* (2) **Consd.** *Whitechurch v. Cavanagh*, [1902] A. C. 117 ; *Porter v. Moore*, [1904] 2 Ch. 367. **Refd.** *Pierson v. Altrincham* U. C. (1917), 86 L. J. K. B. 969. *As to* (3) **Refd.** *Exploring Land & Minerals Co. v. Kolkemann* (1905), 94 L. T. 234. *Generally*, **Refd.** *Balkis Consolidated Co. v. Tomkinson* (1893), 42 W. R. 201 ; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34 ; *Nocton v. Ashburton*, [1914] A. C. 932. **Mentd.** *Elkington v. Hürter*, [1892] 1 Ch. 452 ; *Re Tillott, Lee v. Wilson*, [1892] 1 Ch. 86 ; *Re Wyatt, White v. Ellis*, [1892] 1 Ch. 188 ; *Le Lievre v. Gould*, [1893] 1 Q. B. 491 ; *Ward v. Duncombe* (1893), 69 L. T. 121 ; *Whittington v. Seale-Hayne* (1900), 82 L. T. 49 ; *Oliver v. Bank of England*, [1902] 1 Ch. 610 ; *Banbury v. Bank of Montreal*, [1917] 1 K. B. 409 ; *Everett v. Griffiths*, [1920] 3 K. B. 163.

6. —.]—*WILLIAMS v. PINCKNEY*, No. 798, *post*.

7. —.]—Estoppel being a rule of evidence can only apply in a case where it is sought to make a man liable by preventing him proving the true facts, his conduct having been inconsistent with those facts, & having induced others to alter their position (VAUGHAN WILLIAMS, L.J.).—*OLIVER v. BANK OF ENGLAND*, [1902] 1 Ch. 610 ; 71 L. J. Ch. 388 ; 86 L. T. 248 ; 50 W. R. 340 ; 18 T. L. R. 341 ; 7 Com. Cas. 89, C. A. ; *on appeal, sub nom. STARKEY v. BANK OF ENGLAND*, [1903] A. C. 114, H. L.

*Annotations* :—**Mentd.** *Salvesen v. Rederi Akt. Nordstjernen*, [1905] A. C. 302 ; *Sheffield Corpn. v. Barclay*, [1905] A. C. 392 ; *A.-G. v. Odell*, [1906] 2 Ch. 47 ; *Bank of England v. Cutler*, [1908] 2 K. B. 208 ; *Yonge v. Toynbee*, [1910] 1 K. B. 215 ; *Edwards v. Porter, McNeill v. Hawes*, [1923] 2 K. B. 538.

8. —.]—The grounds . . . on which a decree for dissolution can be made are set forth in sect. 27 the Act of 1857. [Matrimonial Causes Act, (c. 85).] It is sufficient to say that a decree for judicial separation is not made available by the Act on one of such grounds. If such a decree is available at all, it is by virtue of the ordinary rules of evidence. I do not doubt that as between the parties the ordinary doctrine of estoppel applies . . . but estoppel is only a rule of evidence, & the duty imposed on the judge by sect. 29, which emphasises the necessity for the ct. being satisfied as required by sect. 31, is not restricted by any such rule (FARWELL, L.J.).—*HARRIMAN v. HARRIMAN*, [1909] P. 123 ; 78 L. J. P. 62 ; 100 L. T. 557 ; 73 J. P. 193, C. A.

*Annotations* :—**Mentd.** *Eastbourne Grdns. v. Croydon Grdns.*, [1910] 2 K. B. 16 ; *Stevenson v. Stevenson*, [1911] P. 191 ; *Churner v. Churner* (1912), 106 L. T. 769 ; *Robinson v. Robinson*, [1919] P. 352 ; *Timmins v. Timmins*, [1919] P. 75 ; *Rutherford v. Rutherford*, [1922] P. 144.

9. —.]—There is no such thing as quasi estoppel. Estoppel is not a cause of action, but a rule of evidence. If a man makes a statement he cannot afterwards be heard to say it is not true (FARWELL, L.J.).—*LIVERPOOL & NORTH WALES S.S. CO., LTD. v. MERSEY TRADING CO., LTD.*, [1909] as reported in 1 Ch. 209, C. A.

10. —.]—Estoppel is not a cause of action, but a rule of evidence by which A.'s statements or conduct to B. alleging one state of circumstances, if relied on & acted on by B. prevent A. from proving against B. the truth, namely, that the state of circumstances alleged does not exist. But if A.'s original allegation is caused by B.'s misrepresentation of the state of circumstances, B. cannot take advantage of an allegation based

on his own misrepresentation (SCRUTTON, L.J.).—*RUSSIAN COMMERCIAL & INDUSTRIAL BANK v. COMPTOIR D'ESCOMPTE DE MULHOUSE*, [1923] 2 K. B. 630 ; 92 L. J. K. B. 1053 ; 129 L. T. 706 ; 39 T. L. R. 561 ; 68 Sol. Jo. 12, C. A. ; *on appeal*, [1925] A. C. 112, H. L.

*Annotation* :—**Mentd.** *Banque Internationale de Commerce de Petrograd v. Goukassow* (1924), 93 L. J. K. B. 1084.

11. **Not cause of action.**—Goods were in 1875 stored by brokers with wharfingers, who issued a warrant for the same. In 1885 the servants of deft., who had taken over the wharf & business, delivered the goods by mistake to certain persons instead of goods to which they were entitled, & deft. was not made aware of the mistake. The warrant had been negotiated & was in Jan. 1886 in the possession of B. & E. In that month, no rent having been paid for the goods since 1880 deft. wrote two letters to pltf. who had previously taken over the business of the brokers, & carried it on under their name, informing him, as the supposed owner of the warrant, & as the person presumed interested in the goods, that the goods were in hand, that rent was due, & that, unless it was paid, the goods would be sold to cover the amount due. Pltf. made no reply, but afterwards, & in consequence of receiving these letters, he bought the warrant from B. & E., & applied to deft. for the goods, when deft. first discovered that they were no longer in his possession :—**Held** : deft. was liable, being estopped from denying that he had the goods specified in the warrant because he had by his negligent misrepresentation led pltf. to believe that the goods were in his possession, & such misrepresentation was the cause of pltf.'s loss.

An estoppel does not in itself give a cause of action ; it prevents a person from denying a certain state of facts (LORD ESHER, M.R.).—*SETON v. LAFONE* (1887), 19 Q. B. D. 68 ; 56 L. J. Q. B. 415 ; 57 L. T. 547 ; 35 W. R. 749 ; 3 T. L. R. 624, C. A.

*Annotations* :—**Apld.** *Platau v. Sawyer* (1892), 8 T. L. R. 656. **Consd.** *Sarat Chunder Dey v. Gopal Chunder Lala* (1892), 56 J. P. 741 ; *L. & Y. Ry., L. & N. W. Ry. & Graescr v. Mac Nicoll* (1918), 88 L. J. K. B. 601.

12. —.]—*Low v. BOUVERIE*, No. 5, *ante*.

13. —.]—No cause of action arises upon an estoppel itself (BOWEN, L.J.).—*Re OTTOS KOPJE DIAMOND MINES, LTD.*, [1893] 1 Ch. 618 ; 62 L. J. Ch. 166 ; 68 L. T. 138 ; 41 W. R. 258 ; 37 Sol. Jo. 115 ; 2 R. 257, C. A.

*Annotations* :—**Mentd.** *Longman v. Bath Electric Tramways*, [1905] 1 Ch. 646 ; *Platt v. Rowe* (Trading as Chapman & Rowe) & Mitchell (1909), 26 T. L. R. 49.

14. —.]—*LIVERPOOL & NORTH WALES S.S. CO., LTD. v. MERSEY TRADING CO., LTD.*, No. 9, *ante*.

15. —.]—Pltf., who was the trustee of a settlement made in contemplation of the marriage of the settlor's son, brought an action against the settlor's widow & in effect asked for a declaration that deft. was estopped from denying the validity of the settlement. The statement of claim alleged that deft. had represented to pltf. that her husband desired a settlement to be drawn up providing an annuity for his son's future wife ; that pltf. had prepared the settlement accordingly & it was executed by the settlor, whose hand was guided by deft. owing to his physical condition ; that the marriage took place on the faith of the settlement, & the settlor died three days later ; & that, in probate proceedings, deft. had since challenged the validity of the settlement on the ground that the settlor was incapable of approving

11 i. **Not cause of action.**—Estoppel does not of itself give rise to an action.—*MICHAU & DE VILLIERS v. ROUSSEAU ROUSSEAU* (1913), C. P. D. 146.—**S. AF.**



*Sect. 1.—Nature of estoppel. Sect. 2.]*

its contents :—*Held* : the statement of claim must be struck out as showing no cause of action, & the action must be dismissed.—*BRANDON v. MICHELHAM* (1919), 35 T. L. R. 617.

16. ———.]—*RUSSIAN COMMERCIAL & INDUSTRIAL BANK v. COMPTOIR D'ESCOMPTE DE MULHOUSE*, No. 10, *ante*.

17. *In equity.*]—Not every bar or estoppel in law ought also to bind in chancery.—*ANON.* (undated), Cary, 20 ; 21 E. R. 11.

18. ———.]—A judgment at law is no estoppel in equity.—*PIERCE v. JOHNS* (1717), Bunb. 11 ; 145 E. R. 577.

——— *Equitable estoppel.*]—*See* Part VI., Sect. 3, sub-sect. 1, F., *post*.

19. ——— *Cause of action.*]—*WILLIAMS v. PINCKNEY*, No. 798, *post*.

20. *Distinguished from admission.*]—In covenant on an indenture of lease which purported to be granted by J. S., in exercise of a power given by the will of P. S. :—*Held* : deft., by holding under the lease & executing a counterpart, admitted the due execution of the will of P. S.

In the lease under which deft. takes, there is a recital that the lessor demised in exercise of a power given him by the will of P. S. ; then, at the trial the will of a P. S. is put in, which corresponds with the recital in the lease. . . . I do not put the admission so high as an estoppel ; but it has its effect on the principle laid down in *Shelley v. Wright*, No. 784, *post*, where a party executing a deed was held to be estopped by the recital of a particular fact in that deed, to deny such fact (*TINDAL, C.J.*). —*BRINGLOE v. GOODSON* (1839), 5 Bing. N. C. 738 ; 8 Scott, 71 ; 8 L. J. C. P. 364 ; 132 E. R. 1284.

21. *Distinguished from conclusive evidence.*] — *NEWALL v. ELLIOT*, No. 265, *post*.

22. ———.]—(1) Although the decision of a foreign prize ct. must be received in evidence, still it may be examined to see whether the fact in proof of which it is adduced was clearly & certainly found by the ct. that gave it ; & it is for the ct. here to ascertain what facts were so found, without inquiring into the legal validity of the grounds of the judgment.

(2) Where a fact is found in the course of adjudication by a prize ct., & the judgment would be conclusive evidence of that fact, the finding of such fact cannot be pleaded by way of estoppel.—*HOBBS v. HENNING* (1865), 17 C. B. N. S. 791 ; 5 New Rep. 406 ; 34 L. J. C. P. 117 ; 12 L. T. 205 ; 11 Jur. N. S. 223 ; 13 W. R. 431 ; 2 Mar. L. C. 183 ; 144 E. R. 317.

*Annotations* :—As to (2) *Refd.* *De Mora v. Concha* (1885), 29 Ch. D. 268. *Generally, Mentd.* *Seymour v. London & Provincial Marine Insee.* (1872), 41 L. J. C. P. 193.

23. ———.]—*CONRADI v. CONRADI*, No. 56, *post*.

24. ———.]—A decision between parties in an action tried 150 years ago, followed by long enjoyment on the part of the winner, & long acquiescence on the part of the loser, is *prima facie* to be held binding on the latter. It is not an estoppel, indeed, but it is the strongest possible evidence against him (*WICKENS, V.-C.*).—*Re WALTON-CUM-TRIMLEY, MANOR, Ex p. TOMLINE* (1873), 28 L. T. 12 ; 21 W. R. 475.

25. “*Estoppels are odious*” — *Extent of maxim.*]—Trespass for imprisoning pltf. Plea : justification under *ca. sa.* at the suit of W., to the sheriff of Y., under which pltf. was arrested, & remained in the sheriff's custody, till he was brought up on *habeas corpus* & committed by order of a judge to deft. as keeper of the Queen's prison,

with the cause of his detention aforesaid. New assignment : That pltf., whilst in custody at Y., petitioned the ct. for the relief of insolvent debtors ; that his petition was transmitted to the judge of the county ct. of Y., who adjudicated that for fraud he should be remanded for one year from Apr. 12, 1851, & then discharged : that the judge of the county ct. made a warrant, directed to the gaoler of Y., ordering his discharge from the detainer of W. at that date ; & that the warrant, as well as the detainer, was delivered to deft. on pltf.'s committal : & pltf. new assigned imprisonment after Apr. 12, 1852. Plea : That deft. had not the warrant. Replication : That he had the warrant. Issue thereon. On the trial it appeared that deft. had only a copy of the warrant : but the jury found that he led pltf. to believe he had the original. It appeared that pltf. was placed in the remand ward, & also that he had applied without success to a judge, & to the ct. for the relief of insolvent debtors, for a warrant addressed to deft. to authorise his discharge pursuant to the adjudication, & that he was detained three days after Apr. 12, 1852 :—*Held* : there was nothing to preclude deft. from showing that his representation that he had the warrant was erroneous, as there was no evidence either that he intended pltf. to act upon the faith of the representation, or that pltf. did so act upon it to his prejudice ; & without both these ingredients there could be no conclusion by a representation.

If a party wilfully makes a representation to another, meaning it to be acted upon, & it is so acted upon, that gives rise to what is called an estoppel. It is not quite properly so called ; but it operates as a bar to receiving evidence contrary to that representation as between those parties. Like the ancient estoppel, this conclusion shuts out the truth, & is odious & must be strictly made out (*LORD CAMPBELL, C.J.*).

I do not think that an estoppel of this kind is always odious ; in many cases I think it extremely equitable to act upon that doctrine (*CROMPTON, J.*). —*HOWARD v. HUDSON* (1853), 2 E. & B. 1 ; 1 C. L. R. 267 ; 22 L. J. Q. B. 341 ; 21 L. T. O. S. 88 ; 17 J. P. 630 ; 17 Jur. 855 ; 1 W. R. 325 ; 118 E. R. 669.

*Annotation* :—*Refd.* *Foster v. Mentor Life Assce.* (1854), 3 E. & B. 48.

26. ———.]—*HOWLETT v. TARTE*, No. 96, *post*.

27. ———.]—*PALMER v. EKINS*, No. 710, *post*.

28. ———.]—Pltf. was surveyor to the trustees of certain turnpike roads. It was his duty to make all contracts, & pay the amounts due for labour & materials required for the repair of the roads, he being permitted to draw on the treasurer to a certain amount. His expenditure was not strictly limited to that amount, & in the yearly accounts, which it was his duty to present to the trustees, a balance was generally claimed as due to him & was carried to the next year's account. He rendered accounts for the years 1856, 1857 & 1858, showing certain balances due to himself. These accounts were audited, examined & allowed by the trustees at their general annual meeting & a statement, based on them, of the revenue & expenditure of the trust, was published as required by the 3 Geo. 4, c. 126, s. 78. The trustees, believing the accounts correct, paid off with moneys in hand a portion of their mtge. debt. Pltf. afterwards claimed a larger sum in respect of payments which had in fact been made by him, & which he ought to have brought into the accounts

of the above years, but knowingly omitted. Pltf. also rendered an account for the year 1859, which, on inquiry by the trustees, he stated did not include all the payments, & he subsequently rendered another account for that year in which he claimed a larger sum as due to him:—*Held*: pltf. was estopped from recovering the sums omitted in the accounts for the years 1856, 1857 & 1858, since the trustees had acted upon the faith that those accounts were true.

A man shall not be allowed to blow hot & cold, to affirm at one time & deny at another, making a claim on those whom he has deluded to their disadvantage, & founding that claim on the very matters of the delusion. Such a principle has its basis in common sense & common justice, & whether it is called "estoppel" or by any other name, it is one which cts. of law have in modern times most usefully adopted (*per* CUR.).—CAVE *v.* MILLS (1862), 7 H. & N. 913; 31 L. J. Ex. 265; 6 L. T. 650; 8 Jur. N. S. 363; 10 W. R. 471; 158 E. R. 740.

29. ———.]—BAXENDALE *v.* BENNETT, No. 1609, *post*.

30. Estoppels must be mutual—Persons affected.]—ANON. (prior to 1585), Cro. Eliz. 37, n.; 78 E. R. 302.

31. ———.]—A fine in fee will not extinguish a contingent remainder, when a contrary intention is apparent. A contrary opinion must proceed on the doctrine of estoppel. Every estoppel must be reciprocal, that is, to bind both parties, & that is the reason that, regularly, a stranger shall neither take advantage of nor be bound by the estoppel; but privies in blood, as the heir, & privies in estate as the feoffee, lessee, etc., privies in law, as the lord by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, & others that come under by act in law, or in the *post*, shall be bound by, & take advantage of estoppels (*per* CUR.).—DOE *d.* BRUNE *v.* MARTYN (1828), 8 B. & C. 497; 2 Man. & Ry. K. B. 485; 7 L. J. O. S. K. B. 60; 108 E. R. 1127.

Annotations:—*Expld.* Doe *d.* Christmas *v.* Oliver (1829), 10 B. & C. 181. *Mentd.* Doe *d.* Shelley *v.* Edlin (1836), 4 Ad. & El. 582.

32. ———.]—Declaration in covenant by A., the surviving lessor in a lease for years, granted by A., B. & C., to deft., on a covenant to repair & leave in repair, assigning breaches in not repairing, & in not leaving in repair at the end of the term. Plea, that A., B. & C., from the time of making the demise until the death of B., & A. & C. afterwards, had a reversion for a longer term of years, expectant on the lease, & that after B.'s death, &

before any breach of covenant, A. & C. assigned such reversion to D., & thenceforward ceased to have any reversion or interest in the demised premises. Replication, that A. B. & C. were not until the death of B., nor were A. & C. afterwards, possessed of the said reversion in the demised premises, in manner & form as alleged in the plea:—*Held*: bad, as being a departure from the declaration.

The declaration imports a giving up to the lessors at the end of the term which implies a reversion. [It is said] that we are to infer that this was a mere equitable estate. There is nothing from which we can infer that; & if there were, still the estoppel must be mutual (ALDERSON, B.).—GREEN *v.* JAMES (1840), 6 M. & W. 656; 10 L. J. Ex. 73; 151 E. R. 575.

Annotations:—*Dbtd* Poole *v.* Prew (1857), 29 L. T. O. S. 79. *Refd.* Pargeter *v.* Harris (1845), 7 Q. B. 708. *Mentd.* Stuart *v.* Joy & Nantes (1903), 90 L. T. 78.

33. ———.]—SHEDDEN *v.* A.-G., No. 398, *post*.

34. ———.]—A mtgor. before mtge. let a farm to P. as tenant from year to year. After the mtge., P. let deft. into possession in his stead, & informed the mtgor. of the fact, & the mtgor. subsequently received the rent from the hands of deft.:—*Held*: the tenant's term was still in P., there being no effectual surrender, & consequently that the mtgee. could not maintain ejectment against deft. without a notice to quit.

None but those who are parties to the estoppel can take advantage of it. It is a rule that it must be reciprocal (BRAMWELL, B.).—CADLE *v.* MOODY (1861), 30 L. J. Ex. 385; 7 Jur. N. S. 1249.

35. ———.]—CONCHA *v.* CONCHA, No. 258, *post*.

36. ———.]—CAINE *v.* PALACE STEAM SHIPPING Co., No. 692, *post*.

—— Application of maxim—Estoppel by record.]

—See Part II., *post*.

—— Estoppel by deed.]—See Part V., Sect. 3, sub-sect. 2, *post*.

—— Estoppel in pais.]—See Part VI., *post*.

37. Estoppel affecting interest of land—Runs with land.]—TREVIVIAN *v.* LAWRENCE, No. 332, *post*.

38. ———.]—PALMER *v.* EKINS, No. 740, *post*.

What parties estopped.]—See, generally, Part II., Sect. 3, sub-sect. 1, C.; sub-sect. 2, C., *post*; Part V., Sect. 6, *post*.

## SECT. 2.—CLASSIFICATION OF ESTOPPELS.

Estoppel by record.]—See Part II., *post*.

Estoppel by deed.]—See Part V., *post*.

Estoppel in pais.]—See Part VI., *post*.

31 i. Estoppels must be mutual.]—Every estoppel ought to be reciprocal, that is, to bind both parties, so that it cannot be taken advantage of by a stranger.—WOOD *v.* SMART (1914), 28 W. L. R. 817; 16 D. L. R. 97.—CAN.

a. Estoppel affecting companies & their members.]—The rules which apply to estoppel as between individuals are not applicable as between an incorporated co. & its members.—NOLAN *v.* ANNABELLA GOLD MINING Co. (1869), 6 W. W. & A'B. 38.—AUS.

b. Whether available against infant.]—No estoppel can be set up against an infant.—JEWELL *v.* BROAD (1909), 14 O. W. R. 269; 19 O. L. R. 1; 14 O. W. R. 1272.—CAN.

c. Whether available in public matters.]—In a public matter the doctrine of estoppel has no place.—*Re* ELLIS & RENFREW (1910), 15 O. W. R. 880; 21 O. L. R. 74.—CAN.

d. ———.]—Municipalities cannot transfer their rights or obligations in regard to public ways at their will,

& cannot get rid of them by estoppel as if they were private rights.—WENTWORTH *v.* HAMILTON RADIAL ELECTRIC RY. Co. & HAMILTON (1914), 31 O. L. R. 659; 54 S. C. R. 178.—CAN.

e. Whether available to defeat a statute.]—An estoppel will not be allowed so as to interfere with the proper carrying out of an Act of Parliament.—KLINCK *v.* GREER (1910), 14 W. L. R. 282; 3 Sask. L. R. 157.—CAN.

f. ———.]—The principle of estoppel cannot be invoked to defeat the plain provisions of a statute.—JAGADBANDHU SAHA *v.* RADHA KRISHNA PAL (1909), 1 L. R. 36 Calc. 920.—IND.

g. ———.]—A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute.—CHHAGANLAL *v.* BAI HARKHA (1909), 1 L. R. 33 Bom. 479.—IND.

h. ———.]—The plea of *res judicata* or estoppel is not applicable

to a transaction in plain defiance of a statutory prohibition.—BRADSHAW *v.* McMULLAN, [1920] 2 I. R. 412, 490; 54 I. L. T. 109.—IR.

k. Onus of proof.]—The party relying upon estoppel must carry the burden of proving it.—MCKINNON *v.* EWING & MCINTOSH, [1923] 1 W. W. R. 1268.—CAN.

l. Whether available against the Crown.]—Estoppel cannot be invoked against the Crown.—*R. v.* TESSIER (1921), 21 Exch. C. R. 150.—CAN.

m. ———.]—Trustees gave up an account of the residue of an estate, & made payment of the legacy-duty in 1827. In 1859 duty was claimed on a portion of the estate not included in the former account. It was pleaded, in answer to the claim, that, in respect of the previous settlement the claim could not be insisted in:—*Held*: that plea did not operate against the Crown.—LORD ADVOCATE *v.* MEIKLAM, ETC. (1860), 22 Dunl. (Ct. of Sess.) 1427.—SCOT.

## Part II.—Estoppel by Matter of Record.

### SECT. 1.—IN GENERAL.

**39. General rule—Conclusive.]—**Matter contrary to the record cannot be assigned for error.—*BOWSSE v. CANNINGTON* (1610), Cro. Jac. 244; 79 E. R. 209.

*Annotation:—*Refd. *R. v. Carlile* (1831), 2 B. & Ad. 362.

**40. ———.]—**Error contrary to the record not assignable.—*COLE v. GREEN* (1671), 1 Lev. 309; 83 E. R. 422, H. L.

*Annotations:—*Appld. *R. v. Carlile* (1831), 2 B. & Ad. 362. Refd. *London City v. Wood* (1701), 12 Mod. Rep. 669. Mentd. *R. v. Butler* (1685), 3 Lev. 220; *Crosse v. Bilson* (1704), 6 Mod. Rep. 102; *Huntley v. Russell* (1849), 13 Q. B. 572.

**41. ———.]—***R. v. CARLILE*, No. 51, *post*.

**42. ——— Judgment stands.]—**If the record of a judgment in an inferior ct. be, that it was held by custom before the mayor, it cannot be assigned for error that there is no such custom.—*WHISTLER v. LEE* (1614), Cro. Jac. 359; 2 Bulst. 213; 1 Roll. Rep. 53; 79 E. R. 307.

*Annotations:—*Refd. *R. v. Carlile* (1831), 2 B. & Ad. 362. Mentd. *Smith v. R.* (1849), 13 Jur. 850.

**43. ——— Until set aside.]—**Here goods are condemned as forfeited by judgment of the ct., & the party might have prevented that by coming in before judgment & claiming property; & if such an action [against the custom-house officer for seizing goods] should be allowed, the judgment would be blown off by a side-wind (*HALE, C.B.*).—*VANDERBERGH v. BLAKE* (1662), Hard. 191; 115 E. R. 447.

*Annotations:—*Refd. *Reynolds v. Kennedy* (1748), 1 Wils. 232; *Scott v. Shearman* (1774), 2 Wm. Bl. 977; *Basché v. Matthews* (1867), L. R. 2 C. P. 684; *Bynoe v. Bank of England*, [1902] 1 K. B. 467. Mentd. *Barber v. Lesiter* (1859), 7 C. B. N. S. 175.

**44. ———.]—**An order [of removal] unappealed from is conclusive.—*R. v. EALING (INHABITANTS)* (1781), 4 Doug. K. B. 12; Cald. Mag. Cas. 472; 99 E. R. 742.

Removal orders generally, *see* POOR LAW.

**45. ——— Irregular judgment.]—**Bill to be relieved against a judgment irregularly obtained; deft. pleaded the judgment & demurred, both which were allowed.—*HUDDLESTONE v. ASBUGG* (1675), Cas. temp. Finch, 204; 23 E. R. 112.

**46. ———.]—**A. having issued a writ of summons against B. specially indorsed for £28, B., without appearing to the writ, paid £10 to A., on account of the debt. A. afterwards, under C. L. P. Act, 1852, s. 27, signed judgment for default of appearance for the full amount & costs & issued a *ca. sa.* indorsed for that amount, under which B. was arrested, & paid the sum demanded. B. having brought an action against A. for maliciously & without probable cause signing judgment & issuing execution:—*Held*. whilst the judgment stood for the full amount, it estopped plff. from denying the correctness of the judgment or of the execution; *qu.*: whether if the judgment had been rectified by reducing it to the amount for which it ought to have been signed, the action would have been maintainable?

*HUTCHER v. ALLEN* (1866), L. R. 2 Exch. 15; 4 H. & C. 634; 36 L. J. Ex. 17; 15 L. T. 225; 12 Jur. N. S. 930; 15 W. R. 281.

*Annotation:—*Refd. *Turley v. Daw* (1906), 94 L. T. 216.

**47. ———.]—***PARKER v. STANLEY* (1726), 2 Eq. Cas. Abr. 280; 22 E. R. 236.

**48. ———.]—**In ejectment by an execution creditor under an *elegit*, it is no defence to say that the *elegit* was executed upon a judgment founded on a warrant of attorney given to secure upon land an usurious loan, because even though the warrant were voidable on the ground alleged, yet the proper mode of avoiding it would be by application to set it aside, it being too late to do so on such grounds at the trial of the ejectment, where the judgment appearing to be in existence must be taken to be valid.—*HUGHES v. LUMLEY* (1854), 4 E. & B. 274; 3 C. L. R. 242; 24 L. J. Q. B. 57; 24 L. T. O. S. 144; 1 Jur. N. S. 122; 3 W. R. 109; 119 E. R. 105.

*Annotations:—*Mentd. *Benham v. Keane* (1861), 1 John. & H. 685; *Neve v. Flood* (1864), 33 Beav. 666.

**49. ———.]—**Two pauper children were removed from L. to H. by an order of justices, which described them as the lawful children of W. G. & E. G. The order was not appealed against.

Afterwards, E. G. was received into an asylum, being sent thither from L., as a pauper lunatic; & subsequently two justices, on inquiry, adjudicated that the settlement of E. G. was in H., & made an order of maintenance accordingly. H. having appealed, the order was confirmed, subject to a case which stated the above facts:—*Held*: the first order, unappealed against, was conclusive proof that E. G. was settled in H.—*R. v. HARTINGTON MIDDLE QUARTER (INHABITANTS)* (1855), 4 E. & B. 780; 3 C. L. R. 551; 24 L. J. M. C. 98; 24 L. T. O. S. 327; 19 J. P. 150; 1 Jur. N. S. 586; 3 W. R. 285; 119 E. R. 288.

*Annotations:—*Refd. *R. v. Hutchings* (1881), 6 Q. B. D. 300; *De Mora v. Concha* (1885), 29 Ch. D. 268; *Irish Land Comrs. v. Ryan*, [1900] 2 L. R. 565; *Wakefield Corpn. v. Cooke*, [1903] 1 K. B. 417; *Poulton v. Adjustable Cover & Boiler Block Co.*, [1908] 2 Ch. 130. Mentd. *Hill v. Clifford*, *Clifford v. Timms*, *Clifford v. Phillips*, [1907] 2 Ch. 236.

**50. ———.]—**When an order making an arbitrator's award an order of ct. has passed without being appealed from, it is not open to a party to resist compliance with part of the award as being *ultra vires*.—*JONES v. JONES* (1880), 14 Ch. D. 593; 43 L. T. 76; 29 W. R. 65, C. A.

*Annotations:—*Mentd. *Re Clark & Bath Corpn.*, [1881] W. N. 127; *Re Gifford & Bury Town Council* (1888), 20 Q. B. D. 368.

**51. ———.]—**Resp. was tenant of a piece of land held upon a lease from the Crown for the term of thirty years, subject to a right reserved to the Crown to give him a three months' notice to quit as to any part of the land comprised in the lease. Appls., a ry. co., gave him notice to treat in respect of a strip of this land required by them for their railway. Afterwards the Crown gave him a three months' notice to quit this strip of land. The magistrate refused to assess, under sect. 121 of Lands Clauses Act, 1845 (c. 18), the compensation to be paid to resp. Upon a motion by appls. for a *mandamus* to the magistrate, the Div. Ct. held that resp. had no claim except for the loss of the strip of land & damage for its severance during the remainder of his three

### PART II. SECT. 1.

39 i. General rule—Conclusive.]—If

estoppel appears upon record, & issue is joined, if jury find fact against estoppel, yet judgment shall be

according to estoppel, & not according to verdict.—*HUME v. BURTON* (1785), 1 Ridg. Parl. Rep. 201.—IR.



months' interest in it, & granted a *mandamus* to the magistrate to assess, under sect. 121, the amount of compensation due. Upon a special case subsequently stated by the magistrate:—*Held*: the magistrate had no jurisdiction under sect. 121 to assess compensation for the injuriously affecting of the remainder of resp.'s land upon the basis of a thirty years' tenancy, & that the only compensation he had jurisdiction to assess was, for the loss of the strip of land & damage for its severance for three months.

In truth the proper course for resp., if he insisted on this larger claim, was to have appealed against the order for a *mandamus* in order to have had his claims assessed, not by a magistrate under sect. 121, but by arbitration or by a jury in the ordinary way under sect. 68 of the Act. On this appeal we are bound to treat the *mandamus* as rightly granted (KAY, L.J.).—BEXLEY HEATH RY. CO. v. NORTH, [1894] 2 Q. B. 579; 64 L. J. M. C. 17; 71 L. T. 533; 58 J. P. 832; 10 T. L. R. 528; 9 R. 751, C. A.; *previous proceedings, sub nom.* R. v. KENNEDY, [1893] 1 Q. B. 533, D. C.

52. ———.]—So long as a committal order stands, an action will not lie at the suit of a judgment debtor against the high bailiff of the county ct. for not having served him, the debtor, with the judgment summons upon which the order is made.—TURLEY v. DAW (1906), 94 L. T. 216; 22 T. L. R. 231.

——— Foreign judgments.]—See CONFLICT OF LAWS, Vol. XI., pp. 459, 463, 464, Nos. 1151, 1152, 1189–1201.

53. ———.]—WEBB v. PLUMMER (1729), 1 Barn. K. B. 216; 94 E. R. 148; *sub nom.* PLUMMER v. WEBB & CRIPP, 2 Ld. Raym. 1415.  
*Annotation*:—*Refd.* R. v. Carlile (1831), 9 L. J. O. S. K. B. 250.

54. ———.]—A return to a writ of error set out the record of an indictment found against deft., & stated that he was tried upon the said indictment by a jury of the country at the next session holden before the Lord Mayor, several of the judges, aldermen, recorder, & others, assigned by certain letters patent under the Great Seal directed to them, or any two or more of them, to inquire of certain offences; that he was, by the verdict of such jury, found guilty; & that thereupon judgment was given by the ct. against him. Upon this return deft. assigned as errors in law, that the judgment was insufficient, & that it should have been for deft.: & as errors in fact, first, that when the jury gave their verdict there was but one of the justices named in the commission present in ct.; & secondly, that the verdict was not, at the time it was so given, entered of record. The King's coroner & attorney answered "*in nullo est erratum*," & prayed that the judgment might be affirmed:—*Held*: (1) as it appeared by the record, that the verdict was given at a session holden before several of the comrs. & justices, pltf. in error could not be allowed to aver, in contradiction to the record, that only one of the justices was present when the jury gave their verdict; & the answer, *in nullo est erratum*, is no admission of the fact assigned for error, unless it could lawfully be assigned, & is well assigned in point of form; (2) the second error in fact assigned, was no error, inasmuch as it was impossible that a verdict should be recorded at the time when it was given, the recording of it being necessarily an act subsequent to the delivery of the verdict by a jury.

A party cannot be received to aver as error in fact, a matter contrary to the record (LORD TENTERDEN, C.J.).

A minute of the verdict should be entered forthwith by the officer of the ct., & entered of record at some subsequent time . . . & the minute so entered is considered by the ct. in which the proceeding takes place as evidence of the verdict (LORD TENTERDEN, C.J.).—R. v. CARLILE (1831), 2 B. & Ad. 362; 2 State Tr. N. S. 459; 9 L. J. O. S. K. B. 250; 109 E. R. 1177.

*Annotations*:—*As to* (1) *Refd.* *Re* Bowman, R. v. Middlesex JJ. (1834), 5 B. & Ad. 1113; *Re* Newton (1855), 16 C. B. 97; *Irwin v. Grey* (1865), 19 C. B. N. S. 584. *Generally, Mentd.* R. v. Suffolk JJ. (1835), 5 Nev. & M. K. B. 139.

55. ———.]—After a trial by special jury, the *postea* recited that a jury came & on their oath said deft. was not guilty. Pltf. thereafter brought error on the judgment, alleging as error that some of the jurors had not been summoned; that a *tales* has been prayed & added without default of the original jurors struck; that the names of the jurors had not been called over at the hour named in the summonses, etc.:—*Held*: (1) after verdict & judgment, pltf. was precluded from raising any question of fact which is inconsistent with the record; (2) the record impliedly stated the contrary of the errors alleged, & that his remedy, if any, was by applying to the ct. within four days to set aside the verdict.—IRWIN v. GREY (1867), L. R. 2 H. L. 20; 36 L. J. C. P. 148; 16 L. T. 74; 15 W. R. 593, H. L.

*Annotation*:—*Generally, Mentd.* Met. Ry. v. Wilson (1871), L. R. 6 C. P. 376.

56. ———.]—Petitioner established his wife's adultery in a suit for dissolution of marriage, but the co-respondent established petitioner's adultery, & on that ground his petition was dismissed. He afterwards presented a fresh petition, alleging subsequent adultery with other co-respondents. The Queen's Proctor intervened, & alleged the judgment against petitioner in the previous suit, & further alleged the fact of petitioner's adultery. The jury found that petitioner was not guilty of the adultery charged:—*Held*: the judgment in the former suit was conclusive evidence of the fact of such adultery having been committed.

There is a clear distinction between estoppel & conclusive evidence. An estoppel is set up by the pleadings, & where there is an estoppel the issue does not go to the jury. But if there is no estoppel, the issue goes to the jury . . . & they are bound to find the fact according to the evidence laid before them (LORD PENZANCE).—CONRADI v. CONRADI (1868), L. R. 1 P. & D. 514; 37 L. J. P. & M. 55; 18 L. T. 659; 16 W. R. 1023.

*Annotations*:—*Refd.* Butler v. Butler, [1894] P. 25; Yates v. Kyffin-Taylor & Wark, [1899] W. N. 141. *Mentd.* Gooch v. Gooch, [1893] P. 99.

*Effect of res judicata.*]—See Sect. 3, *post*.

57. *Necessity for enrolment of decree.*]—A decree of dismissal may be pleaded in bar to a new bill, though it is not signed & enrolled.

Either that suit was for the same matter as the present, or not; if not you ought to have moved to have had the plea referred; but if it is then that suit is either depending or determined, & either way is pleadable (*per* CUR.).—PRETTYMAN v. PRETTYMAN (1884), 1 Vern. 310; 23 E. R. 488; *sub nom.* PRITMAN v. PRITMAN, 1 Eq. Cas. Abr. 162, pl. 3.

58. ———.]—A decree cannot be pleaded (in bar of the suit) unless it has been signed & inrolled.—KINSEY v. KINSEY (1754), 2 Ves. Sen. 577; 28 E. R. 368; *sub nom.* ANON., 3 Atk. 809.

*Annotation*:—*Distd.* Pearse v. Dobinson (1865), L. R. 1 Eq. 241.

59. ———.]—Where a bill sets out a decree which, if unimpeached, would preclude pltf.'s

*Sect. 1.—In general. Sect. 2: Sub-sect. 1, A. &*

title to relief, & impeaches it on the ground of fraud used in obtaining it, the decree may be pleaded with averments negating the charges of fraud, though it has not been enrolled.—*PEARSE v. DOBINSON* (1865), L. R. 1 Eq. 241; 35 L. J. Ch. 110; 13 L. T. 519; 14 W. R. 121; *subsequent proceedings* (1867) Ch. App. 1, L. C.

—*See, now, R. S. C., Ord. 61, r. 8.*

**60. Must be judgment—Verdict not sufficient.]**

—(1) Where a ct. of equity directs that a new trial of an issue should be had, the verdict on the first trial need not be set aside, as it forms no ground for any subsequent proceeding of such ct.

Nor ought either party to be allowed to give such verdict in evidence on the second trial.

(2) A verdict without a judgment is no evidence at all; the reasons being that there is nothing to show that such verdict may not have been set aside, or may not have been acted on by the ct. (LORD COTTENHAM, C.).—*O'CONNOR v. MALONE* (1839), 6 Cl. & Fin. 572; Macl. & Rob. 468; 3 Jur. 522; 7 E. R. 814, H. L.

*Annotations:—As to (1) & (2) Refd. Butler v. Butler, [1894] P. 25.*

**61. ———.]**—The freehold of Chelsea hospital is in the Crown, & is managed by comrs., who derive their authority under sect. 35 of 7 Geo. 4, c. 16. & subsequent letters patent from the Crown. The hospital consists partly of the Governor's house, & other distinct houses or apartments, & partly of the pensioners' wards & the chapel of the hospital & the dining room of the pensioners; also courts & buildings used for common purposes within & by the said hospital. There had been assessments by the comrs. of sewers in respect of the former parts of the hospital, which had been paid by the Governor & other residents. In respect of the latter part, one of the clerks of the works was assessed "for buildings not hitherto rated, chapel & wards, & for land." Such assessment was made upon a presentment by the jury, which presentment was traversed, & a verdict found confirming the presentment. The clerks of the works are appointed by the comrs. of woods & forests, who superintend the repairs of the buildings of the hospital:—*Held*: the comrs. of the hospital, having traversed the presentment, were not estopped by a verdict confirming the presentment, but might bring trespass against the collector for taking goods on the premises in respect of which the assessment was made.—*NEAVE v. WEATHER (OR WRATHER)* (1842), 3 Q. B. 984; 3 Gal. & Dav. 221; 12 L. J. Q. B. 32; 7 Jur. 168; 114 E. R. 786.

*Annotations:—Refd. Biglin v. Wylie (1867), 36 L. J. Q. B. 307. Mentd. St. Katharine Dock Co. v. Higgs (1845), 10 Q. B. 641.*

**62. ———.]**—Where there were cross suits, & the wife in her suit (which was for a judicial separation on the ground of cruelty), was by the verdict of the jury acquitted of the charges of adultery alleged in the husband's answer, the ct. refused to allow this verdict to be pleaded in answer to the husband's petition for dissolution in which the same acts of adultery were charged.

In the cts. of common law a prior verdict cannot be set up in answer to an action founded on the same cause of action. It is only the judgment

**60 i. Must be judgment—Verdict not sufficient.]**—A verdict in a former action is not conclusive until judgment.—*GORDON v. ROBINSON* (1864), 14 C. P. 566.—*CAN.*

*n. — Final decree.]*—An order

of the ct. which is not a final decree does not create any estoppel by matter.—*BRUSHAW v. MCMULLEN*, 1920 2 I. R. 412, 490; 54 I. L. T. 109. —*IR.*

*o. Record assumed to be true.]*

founded upon such a verdict which would be a bar. In suits in this ct. the decree would take the place of the judgment of a ct. of common law (*per CUR.*).—*BANCROFT v. BANCROFT & RUMNEY* (1864), 3 Sw. & Tr. 597; 34 L. J. P. M. & A. 14; 164 E. R. 1407.

*Annotation:—Refd. Butler v. Butler, [1894] P. 25.*

**63. ———.]**—A married woman, living apart from her husband, incurred a debt for necessaries. The husband being sued, pleaded never indebted, &, in support of his plea, gave in evidence an account of proceedings instituted by himself against the wife for adultery, in which the jury found in the affirmative, judgment being entered accordingly. As it was proved that the husband had also committed adultery, the judge dismissed his petition:—*Held*: the judgment in the Divorce Ct. was merely the finding of the jury, & though it might bind the parties themselves, it did not affect strangers.—*NEEDHAM v. BREMNER* (1866), L. R. 1 C. P. 583; Har. & Ruth. 731; 35 L. J. C. P. 313; 14 L. T. 437; 12 Jur. N. S. 434; 14 W. R. 694.

*Annotation:—Mentd. R. v. Kenny (1877), 46 L. J. M. C. 156.*

**64. ——— Unless followed by decree nisi in divorce suit—Although decree nisi afterwards set aside.]**—The verdict of the jury at the trial of a petition for divorce by a wife against her husband finding that the husband has been guilty of adultery & cruelty, & a decree nisi in accordance with such verdict, are conclusive evidence of such adultery & cruelty in a subsequent suit between the same parties, in which the husband seeks similar relief against his wife; & the mere fact that such decree nisi has been set aside by the ct. upon the intervention of the Queen's Proctor, the grounds upon which it was set aside not affecting the propriety of the verdict, does not prevent the findings of the jury from being conclusive evidence in the second suit.—*BUTLER v. BUTLER*, [1894] P. 25; 63 L. J. P. 1; 69 L. T. 515; 42 W. R. 49; 10 T. L. R. 26; 38 Sol. Jo. 24; 1 R. 535, C. A.; *previous proceedings*, [1893] P. 185.

## SECT. 2.—WHAT ARE MATTERS OF RECORD.

### SUB-SECT. 1.—RECORDS OF COURTS OF LAW.

#### A. What are Courts of Record.

**English courts—Superior courts.]**—*See, generally, COURTS*, Vol. XVI., pp. 101 *et seq.*

—**Inferior courts.]**—*See, generally, COURTS*, Vol. XVI., pp. 104 *et seq.*, 131 *et seq.*, 197 *et seq.*

**Courts of Admiralty.]**—*See ADMIRALTY*, Vol. I., pp. 99 *et seq.*

**Courts of Bankruptcy.]**—*See BANKRUPTCY*, Vol. IV., pp. 35 *et seq.*

—**Chancery Division.]**—*See COURTS*, Vol. XVI., pp. 174–177, Nos. 800–802, 820–826.

—**County courts.]**—*See COUNTY COURTS*, Vol. XIII., pp. 505, 506, 511, Nos. 554 *et seq.*, 606.

—**Divorce Division.]**—*See COURTS*, Vol. XVI., p. 177; *HUSBAND & WIFE*.

—**Ecclesiastical courts.]**—*See ECCLESIASTICAL LAW*, Vol. XIX., pp. 308–361.

—**Prize court.]**—*See PRIZE LAW*.

The doctrine of estoppel by record is based upon the assumption that the record relied on is true.—*PLANT v. URQUHART*, [1922] 1 W. W. R. 632; 65 D. L. R. 242; 38 Can. Crim. Cas. 339; *affg.* 61 D. L. R. 211; 29 B. C. R. 488.—*CAN.*



— **Probate Division.**]—See COURTS, Vol. XVI., p. 177; EXECUTORS.

— **Courts exercising winding up jurisdiction.**]—See COMPANIES, Vol. X., pp. 815, 816.

**Courts held by magistrates.**]—See MAGISTRATES.

**Licensing justices.**]—See COURTS, Vol. XVI., p. 99, Nos. 6-14.

— **Courts-martial.**]—See ROYAL FORCES.

**Colonial & foreign courts.**]—See CONFLICT OF LAWS, Vol. XI., pp. 444 *et seq.*

**Consular courts.**]—See CONFLICT OF LAWS, Vol. XI., pp. 456, 465, 467, Nos. 1130, 1209, 1233; COURTS, Vol. XVI., p. 192, No. 970.

### B. What Records.

#### (a) Judgments in personam.

##### i. On Discontinuance or Withdrawal of Proceedings.

**65. General rule.**]—(1) Where defts. plead a former suit, they must show it was *res judicata*.

(2) A bill dropped for want of prosecution, is never to be pleaded as a decree of dismissal.—BRANDLYN v. ORD (1738), 1 Atk. 571; 26 E. R. 359, L. C.

*Annotations:*—As to (1) **Expld.** Moss v. Anglo-Egyptian Navigation Co. (1865), 1 Ch. App. 108. **Refd.** Osborne v. Eales (2) (1864), 2 Moo. P. C. C. N. S. 125; Tredegar v. Windus (1874), L. R. 19 Eq. 607. *Generally, Mentd.* Doe d. Blight v. Pett (1840), 11 Ad. & El. 812; Ellice v. Roupell (No. 2) (1863), 32 Beav. 308; Ross v. Tyser Line, The Celtic King (1894), 10 T. L. R. 222.

**66.** —.]—In an action on 2 & 3 Edw. 6, c. 13, by pltf., as owner of tithe-hay, against deft., as occupier of a close, for not setting out the tithe:—**Held:** copies of a bill & answer, in a suit by the vicar for tithe-hay, against S., then occupier of the close, & from whom deft. purchased, denying the vicar's right, & setting up a right in the ancestor of pltf., on which the vicar abandoned the suit, were evidence against deft.

Where the question in dispute is, whether the tithe belongs to the rector or the vicar, it is competent evidence for the rector to show that in a proceeding between the vicar & rector, the vicar set up a claim, & in the result abandoned that claim, & that tithe has ever since then been paid to the rector (LE BLANC, J.).—DARTMOUTH (LADY) v. ROBERTS (1812), 16 East, 334; 104 E. R. 1116.

*Annotations:*—**Refd.** Meade v. Norbury (1816), 2 Price, 338; Foster v. Plumbers Co. (1900), 44 Sol. Jo. 211. **Mentd.** Chatfield v. Fryer (1815), 1 Price, 253; Hennell v. Lyon (1817), 1 B. & Ald. 182.

**67.** —.]—A. & B. had charges on a plantation & the slaves. In 1834 an issue was tendered in a suit between them as to their priority on the slave compensation money. B. withdrew his claim, & the bill was, on motion, dismissed. Sixteen years afterwards, when the witnesses were dead, B.'s exors. raised the same question of priority, in regard to the plantation itself:—**Held:** they were concluded by the transactions of 1834.—BUSHBY v. ELLIS (1853), 17 Beav. 279; 51 E. R. 1041.

—.]—Compare No. 658, *post*.

**68. Withdrawal from suit by solicitor.**]—The attorneys of an extrix having withdrawn from a suit after propounding an alleged will & suffered a next of kin to take administration:—**Held:** not to bar the extrix. from calling upon the next of kin to bring in the administration & reproponounding the alleged will.—TROWER & SMEDLEY v. COX (1822), 1 Add. 219; 163 E. R. 76.

**69. Nolle prosequi as to part.**—After judgment for whole.]—A *nolle prosequi* as to part, entered up after judgment for the whole, is equivalent to a *retraxit*, & a bar to any future action for the same cause.—BOWDEN v. HORNE (1831), 7 Bing.

716; 5 Moo. & P. 756; 131 E. R. 277; *sub nom.* BOADEN v. HORNE, 9 L. J. O. S. C. P. 220.

*Annotations:*—**Consd.** Hadley v. Green (1832), 2 Tyr. 390. **Refd.** Holland v. Clark (1842), 1 Y. & C. Ch. Cas. 151; Jones v. Brassey & Ballard (1871), 24 L. T. 917.

**70. Confession of defence.**]—(1) In an action by the lord of a manor against a copyholder for trespassing on the free warren of pltf., a judgment on a *quo warranto*, brought against a former owner of the manor, in which deft. pleaded, & A.-G., confessed, a prescriptive title to the franchise of free warren, as appurtenant to the manor, is evidence for pltf. in support of the right of free warren by prescription; (2) such a record was held to be evidence of a prescriptive right over the lands of tenants, as well as demesne lands, where the information charged an usurpation of the franchise over both; & the ct. gave judgment for deft. as to both, although the plea, probably by an accidental omission on the record, set forth a title only over demesne lands, & A.-G. only confessed the title as pleaded.

(3) So a judgment for pltf. in a former action against another copyholder for a trespass on pltf.'s free warren, is also admissible.—CARNARVON (EARL) v. VILLEBOIS (1844), 13 M. & W. 313; 14 L. J. Ex. 233; 153 E. R. 130.

*Annotations:*—*Generally, Mentd.* Doe d. William IV. v. Roberts (1844), 13 M. & W. 520; R. v. Bedfordshire (1855), 4 E. & B. 535.

**71.** —.]—NEWINGTON v. LEVY, No. 291, *post*.

**72. By consent of parties.**]—An action having been brought by the owners of ship K. against ship A. for damages arising out of a collision, an agreement was drawn up between the parties that the action be "discontinued without costs on the ground of inevitable accident," & an order in those terms was drawn up in the Admlty. registry. The owners of the cargo of ship K. having afterwards brought an action against the owners of ship A. for damages arising out of the same collision, both ships were held to blame, & the cargo owners were held entitled to half their damages. The owners of ship A. having obtained a decree limiting their liability, & having paid a sum into ct., the cargo owners filed their claim in the limitation action. The owners of ship K. having afterwards, with the consent of the owners of ship A., obtained a rescission of the order for discontinuance, claimed against the fund in the limitation action:—**Held:** the agreement & order for discontinuance, upon their true construction, did not amount to a release of all claims, & the owners of ship K. were not precluded from claiming against the fund.—KRONPRINZ (CARGO OWNERS) v. KRONPRINZ (OWNERS), THE ARDANDHU (1887), 12 App. Cas. 256; 56 L. J. P. 49; 56 L. T. 345; 35 W. R. 783; 6 Asp. M. L. C. 124, H. L.

**73.** —.]—An order by consent, in the absence of an agreement to compromise the cause of action, to dismiss an action for want of prosecution is no bar to the institution of a fresh action. In this respect the practice of the old Ct. of Ch. remains unchanged.

Pltfs. in an action wherein the same parties were respectively pltfs. & defts., & the same relief was sought as in the present action, had paid defts.' costs & consented to an order, made on summons taken out by defts., dismissing the action for want of prosecution. Pltfs. subsequently brought the present action, whereupon defts. moved that the question of law might first be tried whether pltfs. were not estopped from bringing the present action by reason of the consent order made in the previous action:—**Held:** pltfs. were not estopped.—MAGNUS v.



**Sect. 2.—What are matters of record: Sub-sect. 1, B. (a) i., ii. & iii.]**

NATIONAL BANK OF SCOTLAND (1888), 57 L. J. Ch. 902; 58 L. T. 617; 36 W. R. 602.

**Annotations:—Mentd.** Fox v. Star Newspaper Co., [1898] 1 Q. B. 636; The Craighall, [1910] P. 207.

Consent judgments generally, see Sect. 2, sub-sect. 1, B. (a) iv., *post*.

**74. Withdrawal of summons before justices.]**

—The withdrawal of a summons under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), has the effect of putting an end to the complaint in respect of which it is issued, & after the withdrawal, no fresh summons can be issued upon the same cause of complaint.—PICKAVANCE v. PICKAVANCE, [1901] P. 60; 70 L. J. P. 14; 84 L. T. 62, D. C.

**Annotations:—Consd.** Stokes v. Stokes, [1911] P. 195. **Distd.** Davis v. Morton, [1913] 2 K. B. 479. **Foll.** Hopkins v. Hopkins, [1914] P. 282. **Distd.** R. v. Seddon, *Ex p.* Hall (1916), 85 L. J. K. B. 806. **Mentd.** Blackledge v. Blackledge (1912), 82 L. J. P. 13.

**75. — — Technical informality in proceedings.]**

—DAVIS v. MORTON, No. 634, *post*.

**76. — —.]**—The withdrawal by a wife of a summons under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), does not necessarily render the subject matter of complaint *res judicata* or dispose of her right to take further proceedings on similar facts. The withdrawal may be conditional, but if it is unconditional it is an estoppel, barring the same cause of complaint in subsequent proceedings before justices though the complaining wife may be able to raise the same subject matter, coupled with adultery, to obtain relief in the superior ct.—HOPKINS v. HOPKINS, [1914] P. 282; 84 L. J. P. 26; 112 L. T. 174; 78 J. P. Jo. 556, D. C.

**Annotation:—Distd.** R. v. Seddon, *Ex p.* Hall (1916), 85 L. J. K. B. 806.

—*See, further*, Part II., Sect. 3, sub-sect. 1 E., & Part II., Sect. 3, sub-sect. 2, E., *post*.

ii. *On Dismissal of Proceedings.*

**77. In equity.]—PRETTYMAN v. PRETTYMAN,** No. 57, *ante*.

**78. — —.]**—A bill dismissed may be pleaded in bar.—ANON. (1701), 12 Mod. Rep. 561; 88 E. R. 1520.

**79. — —.]**—A co-administrator, who was pltf. in a bill in 1723, brings in 1739 a bill, partly of revivor, & partly supplemental, to the same purpose pretty near with the original:—*Held*: plea of a former dismissal good.

It would be a very great inconvenience, where there are several pltf.s., & one of them dies, if after such a length of time, bills of revivor should be allowed; this is keeping up a right *in nubibus*, & *in custodia legis*, & parties would never know when to be at rest (LORD HARDWICKE, C.).—BOWDEN v. BEAUCHAMP (1740), 2 Atk. 82; 26 E. R. 450, L. C.

**80. — —.]—BAINBRIDGE v. BADDELEY,** No. 535, *post*.

**81. By consent of parties.]**—In an action for damages by collision between the owners of the A. & the B., the ct., by consent of the parties, made a decree dismissing the action. Subsequently another action was brought by the owners of the cargo on the A. against the B. in respect of the same collision, & the ct. found both vessels to blame. The owners of the B. then commenced an action against the owners of cargo on the A.

for the purpose of limiting their liability in respect of all claims arising out of this collision, & paid the amount of their statutory liability into ct. Subsequently, again by consent of the owners of the A. & the B., the assistant registrar rescinded the decree by consent in the first action, & the owners of the A. then brought in a claim in the limitation action against the fund in ct. The registrar held such claim to be inadmissible. On motion to confirm the report:—*Held*: (1) the report should be confirmed, as the owners of the A. & the B. could not by consent rescind the decree of the ct.; (2) the decree by consent was a bar to a claim against the fund in ct., as it estopped the owners of the A. from bringing any further action against the B.—THE BELLCALRN (1885), 10 P. D. 161; 55 L. J. P. 3; 53 L. T. 686; 34 W. R. 55; 5 Asp. M. L. C. 503, C. A.

**Annotations:—Distd.** Kronprinz (Cargo Owners) v. Kronprinz (Owners), The Ardandhu (1887), 12 App. Cas. 256. **Apld.** Hammond v. Schofield, [1891] 1 Q. B. 453. **Refd.** The Disposer, [1920] P. 228.

—**Dismissal for want of prosecution.]—See** No. 73, *ante*.

Consent judgments generally, see Sub-sect. 1, B. (a) iv., *post*.

**82. Grounds of decision not clear—Several issues raised—General dismissal.]**—An urban sanitary authority served deft. & other frontagers of a new street with notices requiring them to execute certain works, including a particular work which could not legally be included in such notices. The notices not being complied with, the urban authority did the works, & apportioned the expenses incurred by them in so doing on the frontagers. A summons to recover from deft. £650, the amount charged to him under the apportionment, having been dismissed by the magistrates, the urban authority made a second apportionment, deducting the expense of the work which had been wrongly included, the amount charged to deft. therein being £579. They then brought an action to establish a charge on deft.'s premises for £579, or, in the alternative, for £650:—*Held*: (1) the urban authority had power to make a second apportionment; (2) notwithstanding the dismissal of the summons, they were entitled to a charge on the premises for £579.—MANCHESTER CORPN. v. HAMPSON (1887), 35 W. R. 591; 3 T. L. R. 468, C. A.

**Annotation:—As to** (1) **Refd.** Derby Corpn. v. Grudgings, [1894] 2 Q. B. 496.

**Not on merits.]—See** Nos. 137, 139, *post*.

iii. *Judgment by Default.*

**83. Default generally — By infant.]**—A., an infant, sues out an assize of novel disseisin against B., returnable in the King's Bench; but between the *teste* & return of the writ, B. sues out an assize against A. in the Common Pleas, & obtaining judgment by default, pleads the recovery in bar of the first assize. A. replies that he was an infant at the time, that he was not the terre-tenant, & that the recovery was by default:—*Held*: A. being an infant, & the judgment against him by default, the recovery was no bar to the action.—HOLFORD v. PLATT (1618), Cro. Jac. 464; 79 E. R. 397.

**84. — — By representative.]**—Judgment against an administrator by confession or default *pendente lite*, is an admission of assets, & he is estopped to say the contrary on a *devastavit* returned.—ROCK v. LAYTON (1700), 1 Com. 87; 1 Ld. Raym. 589; 1 Salk. 310; 92 E. R. 973.

**Annotations:—Consd.** Ramsden v. Jackson (1737), 1 Atk.

PART II. SECT. 2, SUB-SECT. 1.—B. (a) iii.

—*By plaintiff—Subsequent suit for different mode of relief—Identity of causes not affected.]—*SHANKAR (1887), 1 L. R. 15 Cal. 422; L. R. 15 Ind. App. 66.—IND.

292. **Foll.** Erving v. Peters (1790), 3 Term Rep. 685. **Appl.** Leonard v. Simpson (1835), 2 Bing. N. C. 176. **Foll.** *Re Higgins's Trusts* (1861), 2 Giff. 562. **Refd.** Farr v. Newman (1792), 4 Term Rep. 621; Hooper v. Summersett (1810), Wight. 16.

85. ———.]—In debt upon a judgment be default, against deft. as exor., the production of the judgment & of a *testatum fi. fa.* upon which the sheriff had returned *nulla bona testatoris*, & a levy of costs *de bonis propriis*:—**Held**: unanswered, sufficient evidence of a *devastavit*.

The judgment by default in the former action is conclusive upon deft., that he has assets to satisfy the judgment (TINDAL, C.J.).—LEONARD v. SIMPSON (1835), 2 Bing. N. C. 176; 1 Hodg. 251; 2 Scott, 335; 4 L. J. C. P. 302; 132 E. R. 69. **Annotation**:—**Refd.** Lee v. Park (1836), 1 Keen, 714.

———.]—**Sec, generally**, EXECUTORS.

86. ——— **Subsequent action for mesne profits.** —An action for mesne profits will lie after a judgment by default.—ASLIN v. PARKIN (1758), 2 Burr. 665; 2 Keny. 376; 97 E. R. 501.

**Annotations**:—**Distd.** Denn v. White (1797), 7 Term Rep. 112. **Consd.** Doe d. Byne v. Brewer (1815), 4 M. & S. 300; Doe v. Harvey (1832), 8 Bing. 239; Doe v. Huddart (1835), 2 Cr. M. & R. 316; Litchfield v. Ready (1850), 20 L. J. Ex. 51. **Foll.** Doe v. Challis (1851), 17 Q. B. 166. **Appl.** Wilkinson v. Kirby (1854), 15 C. B. 430. **Consd.** Pearce v. Coaker (1869), L. R. 4 Exch. 92; Harris v. Mulkorn (1875), 1 Ex. D. 31. **Refd.** Goodtitle v. Tombs (1770), 3 Wils. 118; Goodright d. Hare v. Cator (1780), 2 Doug. K. B. 477; Doe d. James v. Stanton (1819), 2 B. & Ald. 371; Bottings v. Firby (1829), 4 Man. & Ry. K. B. 567; Doe v. Wellsman (1818), 2 Exch. 368; Elliott v. Boynton, [1924] 1 Ch. 236.

87. ———.]—In trespass for mesne profits, deft. pleaded, first, not possessed, secondly, that, before the several times when, etc. A. was seised in fee, & on Dec. 27, 1816, demised the premises to B. for 21 years; that B. entered by virtue of that demise, & on Jan. 28, 1817, demised to deft. for one year from Mar. 25, then next & so from year to year, etc. & that deft. entered by virtue of the last-mentioned demise. Replication, by way of estoppel, as to so much of the pleas as related to the trespasses complained of in the count since Oct. 26, 1853—that pltf. on that day sued out a writ of ejectment for the recovery of the premises in question; that E. K. in the writ mentioned was deft. in this action, & was at the time of the issuing of the writ the tenant in possession of the premises in question; that the premises in the writ & in this action were the same, & that pltf. in the writ named was now pltf.; that no appearance was entered or defence made to the writ; that, after the issuing of the writ, & whilst the ejectment was pending, & in pursuance of the Act of Parliament in that behalf pltf., by the consideration & judgment of the ct. obtained possession of the premises, etc. that the judgment was still in force; & that, afterwards & before the commencement of this suit, & by virtue of the judgment, pltf. entered into & upon the possession of the premises—wherefore pltf. prayed judgment if deft. ought to be admitted against the said recovery record & proceedings to plead the pleas, or either of them, as to the trespasses in the count complained of since Oct. 26, 1853:—**Held**: (1) a good replication by way of estoppel to both pleas; (2) it was not necessary to aver notice to deft. of the proceedings in the ejectment or the issuing

or execution of a writ of possession; (3) if it were necessary, the replication contained a sufficient averment of entry by the pltf.; (4) pltf.'s title by estoppel related back to the date of the writ of ejectment & would be presumed until shown by rejoinder to have been determined.—WILKINSON v. KIRBY (1854), 15 C. B. 430; 2 C. L. R. 1387; 23 L. J. C. P. 224; 23 L. T. O. S. 177; 1 Jur. N. S. 164; 2 W. R. 570; 139 E. R. 492.

**Annotations**:—**As to** (2) **Consd.** Scott v. Reynall (1855), 26 L. T. O. S. 256; Des Barres v. Shey (1873), 29 L. T. 592; Harris v. Mulkorn (1875), 1 Ex. D. 31. **As to** (4) **Refd.** Barnett v. Gullford, Rhodes & Farrer (1855), 3 C. L. R. 1440; Dunlop v. Macedo (1891), 8 T. L. R. 43. **Generally**, **Mentd.** Chappell v. Davidson (1856), 25 L. J. C. P. 225; Paterson v. Harris (1862), 2 B. & S. 814.

88. ———.]—In an action on a bill of exchange, the person whose name was used as pltf. lived in Somersetshire, deft., who suffered judgment to go by default, lived in London. Deft. to deprive pltf. of the costs of suit, endeavoured to show that the real pltf. & holder of the bill lived within twenty miles of deft.: that the bill was not indorsed to pltf. nor any consideration given by him for it, & that pltf.'s name in the action was merely used as a pretence in order to get the costs:—**Held**: as deft. had suffered judgment in the action to pass against him by default, he was estopped by that judgment, & pltf. was entitled to the costs of the action.—WEBBER v. SHAW (1862), 6 L. T. 291; 26 J. P. 583; 8 Jur. N. S. 701; 10 W. R. 526.

89. ———.]—**Re** SOUTH AMERICAN & MEXICAN CO., *Ex p.* BANK OF ENGLAND, No. 103, *post*.

90. **Default of appearance — By plaintiff—At trial.**—A non-suit before appearance would be no bar in another action.—CLOBERY v. EXON (Bp.) (1692), Carth. 173; 90 E. R. 705.

**Annotation**:—**Refd.** Twynning v. Lowndes (1833), 10 Bing. 65.

91. ———.]—If when a cause is called on deft. appears & pltf. does not appear, deft., if he has no counterclaim, is entitled to judgment dismissing the action, & the effect of such a judgment is equivalent to a judgment on the merits, & is a bar to another action on the same matter.—ARMOUR v. BATE, [1891] 2 Q. B. 233; 60 L. J. Q. B. 433; 65 L. T. 137; 39 W. R. 546; 7 T. L. R. 557, C. A.

**Annotation**:—**Mentd.** Gilbert v. Gosport & Alverstoke U. C. [1916] 2 Ch. 587.

92. ——— **By defendant.**—HUFFER v. ALLEN, No. 46, *ante*.

93. ———.] — CRIBB v. FREYBERGER, No. 311, *post*.

94. ——— **At trial.**—Pltf., a sheriff, levied upon certain goods in the possession of defts., who were agents for their sale, & who proceeded with the sale which had then been advertised. Defts. by inadvertence, failed to appear upon an interpleader summons taken out by pltf. in the action concerning which pltf. was obeying the writ of *fi. fa.*, & defts. were barred. They subsequently attempted to rescind the order, but failed, & their appeal was also dismissed. This action was brought to recover the proceeds of the sale:—**Held**: defts. could not set up as a defence to the action the facts by which they claimed to be entitled to the goods upon which pltf. had levied.—WILLIAMS v. RICHARDSON (1877), 36 L. T. 505.

92 i. ——— **By defendant.**—Since O. Jud. Act, a judgment recovered in an action of ejectment by default of appearance will sustain a defence of *res judicata* to an action subsequently brought by deft. to try the same question.—COCHRANE v. HAMILTON PROVIDENT LOAN SOCIETY (1888), 15 O. R. 128.—**CAN.**

92 ii. ———.]—BALL v. CATH-J.—VOL. XXI.

CART (1889), 16 O. R. 525.—**CAN.**

q. ——— **Subsequent action to recover part of amount of judgment.**—Fresh action to recover back part of amount of judgment by default on ground that judgment was for too much:—**Held**: the judgment constituted an estoppel, & was a bar to the present action.—GOON CAN v. MOORE (1892), 2 B. C. R. 154.—**CAN.**

r. ——— **Subsequent action to set aside judgment by default.**—Action to set aside a judgment by default of appearance obtained in an action by deft. against pltf.:—**Held**: (1) pltf. was not estopped by the default judgment; (2) the issues were not *res judicata* by a decision refusing to set aside the default judgment & admit pltf. to defend, & set up in that



*Sect. 2.—What are matters of record: Sub-sect. 1, B. (a) iii. & iv.]*

95. ———. ———.] —Extrix. held estopped from denying assets in her hands, & held to be personally liable

Deft., by failing to appear in the original action, must be taken to have admitted that she had in her hands sufficient property of the deceased to meet pltf.'s claim. She was now estopped from denying the truth of that admission. It must be taken that she had in her hands sufficient to satisfy pltf.'s claim, & had failed to satisfy it (BIGHAM, J.). —THOMPSON & SONS v. CLARKE (1901), 17 T. L. R. 455.

96. *Default of defence.*]—To an action for rent under a building agreement dated Sept. 29, 1853, deft. pleaded that, after the making of that agreement it was agreed between the parties that a tenancy from year to year should be created in substitution for the former tenancy under the agreement; that notice to quit was duly given, which notice expired at Michaelmas, 1858; that deft. quitted accordingly; & that no rent ever became due from deft. to pltf. in respect of the premises after the last-mentioned day. To this plea, pltf. replied, by way of estoppel, that he brought an action against deft. for the recovery of rent as having accrued due from deft. to pltf. under the agreement in the declaration in this cause mentioned after Sept. 29, 1858; that deft., being under terms to plead issuably, pleaded to that action pleas which were not issuable, but not the defence now set up; & that pltf. thereupon signed judgment, & thereby recovered the rent sued for in that action:—*Held*: the replication was bad, deft. not being estopped by his omission to set up on the former occasion, from availing himself of the defence alleged in his plea.

Without adopting the old maxim that estoppels are odious it is enough to say that the doctrine is not to be extended beyond what there is authority for (WILLIAMS, J.). —HOWLETT v. TARTE (1861), 10 C. B. N. S. 813; 31 L. J. C. P. 146; 9 W. R. 868; 142 E. R. 673.

*Annotations: Distd. Humphries v. Humphries, [1910] 2 K. B. 531. Consd. Cooke v. Rickman, [1911] 2 K. B. 1125. Refd. Re Hilton, Ex p. March (1892), 67 L. T. 594; Re South American & Mexican Co., Ex p. Bank of England, [1895] 1 Ch. 37.*

97. ———.]—Pltf. brought an action against defts. for an injunction to restrain them from passing off goods alleged to be a colourable imitation of those of pltf.'s manufacture. Defts. made default in pleading, & the injunction was granted in due course. Later it appeared that a similar article to that complained of was being put upon the market by N., for whom defts. were acting as agents for sale. On a motion for attachment of defts. for breach of the injunction no direct evidence was forthcoming, & the case was rested on admissions by defts., which the ct. held to be insufficient, & on the fact that defts., having allowed judgment to go against them by default, were estopped from saying that the goods com-

plained of were not an imitation of those of pltf.'s manufacture:—*Held*: in these circumstances an attachment could not issue.—RIPLEY v. ARTHUR (1902), 86 L. T. 735; 19 R. P. C. 443, C. A.

#### iv. *Judgment by Consent.*

98. *General rule.*]—It is a rule that whenever a decree is entered by consent the merits after shall never be inquired into, unless there be an objection that the word consent be struck out of the order.—NORCOTT v. NORCOTT (1702), 2 Eq. Cas. Abr. 279; 22 E. R. 236.

99. ———.]—Where an action was brought on bonds, & a *cognovit* was given in the action, & judgment entered up for the principal & interest then due:—*Held*: it was not competent to the representatives of the obligor, at the distance of ten years afterwards, in a suit for the administration of the obligor's assets, to question the validity of the bonds on the ground of usury.—BERRINGTON v. EVANS (1831), You. 276; 159 E. R. 996.

*Annotations:—Mentd. Whitaker v. Wright (1843), 2 Hare, 310; Taylor v. Taylor (1849), 8 Hare, 120.*

100. ———.]—After deft. had been arrested for £200 by an attorney, he applied to have pltf.'s bill taxed, which was ordered, upon the terms of pltf. being at liberty to sign judgment for the amount taxed, & deft. undertaking to pay that amount & the costs of the action; the master allowed upon taxation £149 only, but disallowed £60 actually expended by pltf. in preparing briefs, etc. in great haste by deft.'s direction:—*Held*: deft. was estopped by the terms of the order from complaining of the arrest.

The reference to the master was by consent, & it was upon condition that pltf. should sign judgment, & that deft. should pay the costs of the action. If deft. complained of the arrest, he ought before the order was made to have taken his stand, & required that provision should be made upon that subject (PARKE, B.).—WATKINS v. MAHON (1836), 1 M. & W. 722; 5 Dowl. 178; 2 Gale, 129; Tyr. & Gr. 1023; 5 L. J. Ex. 247; 150 E. R. 624.

101. ———.]—Defts. to a suit by a patentee for infringement are not estopped from denying the novelty of the patent by the fact that some of them, against whom the same pltf. had formerly brought an action for infringement of the same patent, had allowed him to sign judgment before any declaration was filed.—GOUCHER v. CLAYTON (1865), 5 New Rep. 360; 34 L. J. Ch. 239; 11 L. T. 732; 11 Jur. N. S. 107; 13 W. R. 336.

*Annotation:—Refd. Re May (1883), 25 Ch. D. 231.*

102. ———.]—(1) The dismissal of a bill by consent, as well as adversely, is a bar to a second suit for the same object, & deft. may avail himself of this defence by a motion to stay proceedings, or, *semble*, by a motion to take the bill off the file.

(2) If a pltf.'s consent to an order effecting a compromise has been obtained by fraud, his proper course is to move to have the order annulled before the judge who made it.—PARKER v. SIMPSON (1869), 18 W. R. 204.

action pltf.'s case herein.—HARPER v. CAMERON (1893), 2 B. C. R. 365.—CAN.

*s. ———. Extent of estoppel.—Must be found on face of judgment.]—*A judgment by default may operate by estoppel: but the ground & extent of that estoppel must be found on the face of the judgment itself, & cannot be inferred or deduced from the pleadings of the party, who has obtained the judgment, where deft. has said nothing, & has merely allowed the judgment to go by default.

IRISH LAND COMMISSION v. RYAN, [1900] 2 I. R. 565.—IR.

#### PART II. SECT. 2, SUB-SECT. 1.—B. (a) iv.

98 i. *General rule.*]—A judgment by consent raises an estoppel just in the same way as a judgment after the ct. has exercised a judicial discretion in the matter.—LAKSHMISHANKAR DEVESHANKAR v. VISHNURAM (1899), 1 L. R. 24 Bom. 77.—IND.

t. ———. *Date of dissolution of partnership.*]—Where in a partnership suit a

deft. has consented to a decree declaring the partnership dissolved as from a certain date, he is estopped from showing that the partnership was dissolved before that date.—CONNOR v. MCKAY (1882), 1 N. Z. L. R. C. A. 169.—N.Z.

a. *Distinction between consent decree & agreement of parties.*]—The difference between a consent decree declaring the agreement of parties, & the agreement of parties themselves, when the one or the other is sought to be afterwards enforced, goes no



**103.** —.]—A judgment by consent, or default, is as effective as an estoppel between the parties as a judgment whereby the ct. exercises its mind on a contested case. An action was brought against a co. to recover an instalment of a debt alleged to be due under an agreement, the existence of which was denied by the co.:—*Held*: that judgment by consent for plffs. precluded the liquidator in the winding up of the co. from denying the existence of the agreement on a proof being sent in for the total amount due under the agreement.—*Re SOUTH AMERICAN & MEXICAN CO., Ex p. BANK OF ENGLAND*, [1895] 1 Ch. 37; 64 L. J. Ch. 189; 71 L. T. 594; 43 W. R. 131; 11 T. L. R. 21; 39 Sol. Jo. 27; 12 R. 1, C. A.  
*Annotation*:—*Refd.* *Cooke v. Rickman* (1911), 81 L. J. K. B. 38.

**104.** — **Consent order.**—The ct. has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties.

A consent order, I agree, is an order; & so long as it stands it must be treated as such, & so long as it stands I think it is as good an estoppel as any other order (*LINDLEY, L.J.*).—*HUDDERSFIELD BANKING CO., LTD. v. LISTER (HENRY) & SON*, [1895] 2 Ch. 273; 64 L. J. Ch. 523; 72 L. T. 703; 43 W. R. 567; 39 Sol. Jo. 448; 12 R. 331, C. A.

*Annotations*:—*Consd.* *Ainsworth v. Wilding*, [1896] 1 Ch. 673. *Refd.* *Wilding v. Sanderson*, [1897] 2 Ch. 534. *Mentd.* *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Jellis v. Glover & Hobson*, [1908] 1 K. B. 388.

**105.** **Stay of proceedings.**—The lessors of pltf. brought three ejectments in the King's Bench, for the recovery of the same premises. That ct. stayed the proceeding in two of the actions, both parties assenting, & the rule was drawn up accordingly. Another ejectment was afterwards brought in the Common Pleas, upon a different demise, but substantially for the same cause of action:—*Held*: proceedings must be stayed.

I never saw so clear a case for the interposition of the ct. After the counsel on both sides have consented to the terms of a rule, an application is made to alter it, &, on being refused an attempt is made to evade it by bringing another action in this ct. (*PARK, J.*).—*DOE d. CARTHEW v. BRENTON* (1830), 6 Bing. 469; 4 Moo. & P. 186; 8 L. J. O. S. C. P. 143; 130 E. R. 1361.

*Annotation*:—*Distd.* *Wade v. Simeon* (1845), 1 C. B. 610.

**106.** —.]—An action for a malicious arrest cannot be maintained where the former cause was terminated by a *stet processus* by the consent of the parties.—*WILKINSON v. HOWEL* (1830), Mood. & M. 495, N. P.

*Annotations*:—*Refd.* *Norrish v. Richards* (1835), 3 Ad. & El. 733; *Steward v. Gromett* (1859), 7 C. B. N. S. 191; *Gilding v. Eyre* (1861), 10 C. B. N. S. 592; *Johnson v. Emerson* (1871), L. R. 6 Exch. 329.

**107.** — **Order not amounting to absolute stay.**—In an action by an indorsee against an indorser of a bill:—*Held*: it was no defence that pltf., before the commencement of the suit, had consented to a judge's order, in an action against the drawer, that upon payment of the debt & costs within one month, all further proceedings should be stayed, & that unless such payment were so made, pltf. should be at liberty to sign final judgment; although the plea also stated that pltf. could have obtained such judgment before the expiration of the month; inasmuch as

further than this, that in the former case it would not be open to a party to question the accuracy of the decree, as expressing what at the time was the contract which had been made.—*v. HARI GOVIND* (1906),

I. L. R. 31 Bom. 15.—**IND.**

**b. Agreement to abide result of action pending elsewhere.**—Where judgment in an action at law is entered up by consent for pltf., & by agreement

such order did not amount to an absolute stay of proceedings.—*MICHAEL v. MYERS* (1843), 0 Man. & G. 702; 1 Dow. & L. 792; 7 Scott, N. R. 444; 13 L. J. C. P. 14; 7 Jur. 1156; 134 E. R. 1075.

*Annotations*:—*Refd.* *Isaac v. Daniel* (1846), 6 L. T. O. S. 368. *Mentd.* *Jones v. Jones* (1847), 16 M. & W. 699.

**108.** **Quashing order of removal.**—Where resps. consent to have their own order of removal quashed without communicating their reasons for doing so, either to sessions or the opposite party, the judgment of sessions is conclusive against them, & they cannot afterwards be allowed to show that their order was quashed for a mere informality.—*R. v. CHURCH KNOWLE (INHABITANTS)* (1837), 7 Ad. & El. 471; 2 Nev. & P. K. B. 359; Nev. & P. M. C. 353; Will. Woll. & Dav. 627; 7 L. J. M. C. 4; 1 J. P. 248; 1 Jur. 841; 112 E. R. 547.

*Annotations*:—*Refd.* *R. v. Landkey* (1847), 9 Q. B. 905; *R. v. St. Peter's, Droitwich* (1847), 2 New Sess. Cas. 531.

—.]—*See, further*, POOR LAW.

**109.** **Order for trial of issue—Writ to sheriff not in conformity with order.**—Deft., appearing & consenting to an order for a writ to try the issue, two issued being joined, was held to be estopped from moving to set aside the writ, which directed the sheriff to try "the issues," although he objected at the trial, that the writ was not warranted by the order.—*HUMBLESTONE v. WELHAM* (1847), 5 C. B. 195; 10 L. T. O. S. 164; 136 E. R. 850.

**110.** **Judgment invalid—Non-compliance with statutory formalities.**—(1) Where a judgment obtained by consent is void for non-compliance with Debtors Act, 1869 (c. 62), s. 27, the ct. will refuse to grant leave to issue execution upon & in pursuance of R. S. C. Ord. 42, r. 23.

(2) Deft. against whom the judgment is sought to be issued is not estopped from setting up the invalidity of the judgment merely on the ground that it had not been set aside.—*JONES v. JAGGAR* (1886), 54 L. T. 731, D. C.

*Annotation*:—*As to* (1) *Refd.* *Gowan v. Wright* (1886), 18 Q. B. D. 201.

**111.** **Judgment valid ex facie—Facts ousting jurisdiction of court not set up.**—*RIVER RIBBLE JOINT COMMITTEE v. CROSTON URBAN DISTRICT COUNCIL*, No. 298, *post*.

**112.** **Judgment obtained on contract by corporation—Contract ultra vires.**—Where by contract, *ex facie* legal & regular, applt. co. purported to incur liability to resp. for railway construction in an amount which was in reality calculated to cover the amount of bonus & of price of issued shares payable by agreement between resp. & all the shareholders of the co. irrespective of either actual or estimated cost of construction:—*Held*: (1) the contract was *ultra vires* of the co.; (2) a consent judgment obtained on the contract declaring resp.'s lien on the co.'s railway & other property, the question of *ultra vires* not having been raised either in the pleadings or on the facts stated, was of no greater validity than the contract.

(3) In a suit by the co. to set aside the contract & judgment:—*Held*: they must be set aside on terms which were consented to.—*GREAT NORTH-WEST CENTRAL RY. CO. v. CHARLEBOIS*, [1899] A. C. 114; 68 L. J. P. C. 25; 79 L. T. 35, P. C.

*Annotations*:—*As to* (2) *Refd.* *Islington Vestry v. Hornsey C.*, [1900] 1 Ch. 695; *Cullen v. Elwin* (1904), 20 T. L. R. 490. *Generally, Mentd.* *A.-G. for Canada v. Standard Trust Co. of New York*, [1911] A. C. 498.

the fruits of the judgment are to abide the result of an equity suit relating to the same subject-matter, such does not work an estoppel.—*WARD v. NATIONAL BANK OF NEW ZEALAND* (1884), 3 N. Z. L. R. 33.—**N.Z.**

*Sect. 2.—What are matters of record: Sub-sect. 1, B. (a) iv. & v.]*

----- for relief against forfeiture—On payment of costs in several actions for recovery of houses—Only one action necessary.]—Pltf. was the assignee of four leases, each lease comprising a certain number of houses, & deft. was the assignee of four sub-leases of the houses. The leases & sub-leases contained the usual covenants by the lessees to repair. Deft. sub-let all the houses to weekly tenants. The houses becoming out of repair, the original lessor served notices on pltf. requiring him to repair, & pltf. served similar notices on deft. The object of pltf. in serving the notices & in bringing the subsequent actions was to have the repairs to the houses executed & not to recover possession thereof. Pltf. subsequently brought four actions against all the weekly tenants to recover possession of the houses comprised in the four sub-leases respectively, & served a copy of the writ upon each of the tenants. Deft. obtained leave to defend as landlord, & the repairs having been executed, an order was made by consent in each action giving deft. relief from forfeiture, & staying all further proceedings, deft. to pay to pltf. his costs of the action as between solr. & client. Upon taxation, the master allowed the costs of the four actions:—*Held*: the object of the action being to enforce execution of the repairs & not to recover possession of the houses, it was only necessary to sue deft.; but deft. having by the consent orders in which he agreed to pay the costs of each action, precluded himself from setting up that only one action was necessary, & must pay the costs of each action.—*GEEN v. HERRING*, [1905] 1 K. B. 152; 74 L. J. K. B. 62; 53 W. R. 326; 21 T. L. R. 93; *sub nom.* *GEEN v. HERRING*, *GEEN v. MACKINTOCK*, *GEEN v. HUMPHRIES*, *GEEN v. FAGG*, 92 L. T. 37, C. A.

*In matrimonial causes.]—See HUSBAND & WIFE.*

*Compromise.]—See Sub-sect. 1, B. (a) v., post.*

*Discontinuing proceedings.]—See Sub-sect. 1, B. (a) i., ante.*

*Dismissing proceedings.]—See Sub-sect. 1, B. (a) ii., ante.*

*Withdrawal of juror by consent.]—See Sub-sect. 1, B. (a) vii., post.*

*Setting aside consent judgments.]—See JUDGMENTS.*

#### v. On Compromise of Proceedings.

**114. General rule.]—**A decree obtained by arrangement between the contending parties, the ct. bestowing no judicial examination on the merits of the question, can never be *res judicata*.—*JENKINS v. ROBERTSON* (1867), L. R. 1 Sc. & Div. 117, H. L.

*Annotation:—Expld. Re South American & Mexican Co., Ex p. Bank of England*, [1895] 1 Ch. 37.

**115. Obtained by fraud.]—***PARKER v. SIMPSON*, No. 102, *ante*.

**116. Whether conclusive on third parties—Absent voluntarily.]—**The general principle is that where a person has had full notice, & has had the opportunity of taking part in the suit, he will

be bound by its decision; but he will not be bound by a compromise into which the parties to the suit may enter.

A., one of the next of kin, was aware that the validity of the will was contested in a suit between the exor. & her sister. The suit was compromised at the trial, & the will pronounced for:—*Held*: A. was not precluded by the compromise from calling in the probate & putting the exor. again on proof of the will.—*WYTCHERLEY v. ANDREWS* (1871), L. R. 2 P. & D. 327; 40 L. J. P. & M. 57; 25 L. T. 134; 35 J. P. 552; 19 W. R. 1015.

*Annotations:—Consd. Young v. Holloway*, [1895] P. 87; *Re King, Jackson v. A.-G.*, [1917] 2 Ch. 420. *Refd. Re Lart. Wilkinson v. Blades*, [1896] 2 Ch. 788; *Birch v. Birch*, [1902] P. 62.

— *In legal proceedings in reference to charities.]—See CHARITIES*, Vol. VIII., p. 401, Nos. 2299-2302.

**117. Made in ignorance of facts.]—**Deft. purchased, through his broker, 300 shares in a joint-stock co., & gave directions that they should be transferred into the name of his son, G. On the same day pltf. instructed his broker to sell 100 shares in the co., & they were bought by deft.'s broker, on his account, through a jobber in the ordinary way, & were transferred to G., & were registered in his name. At that time G. was an infant, of which fact pltf. was not aware. Soon afterwards the co. was wound up voluntarily, & G. then brought an action by his father, as next friend, against pltf., who was an auditor of the co., charging him with fraud in selling the shares, knowing that the co. was in an insolvent condition, & claiming damages. The action was compromised on the terms that all charges of fraud should be withdrawn, & that the purchase-money should be repaid to G. The liquidators, on discovering that G. was an infant, substituted the name of pltf. for his as a contributory of the co. Pltf. then filed a bill against deft., charging that he was the real purchaser of the shares, & that pltf. was not aware of that fact when he entered into the compromise with G., & claiming to be indemnified by deft. against all loss in respect of the transaction:—*Held*: the compromise was an effectual bar to pltf.'s claim to relief, & the fact of his ignorance that deft. was the real owner of the shares was immaterial.—*MAYNARD v. EATON* (1874), 9 Ch. App. 414; 43 L. J. Ch. 641; 30 L. T. 241; 22 W. R. 457, L. C. & L. J.J.

**118. —.]—**Compromise of an action brought by one partner against his co-partner to set aside a sale of his share in the partnership business, on the ground that certain partnership assets had been undisclosed at the time of the sale:—*Held*: a bar to a subsequent action brought by reason of the alleged discovery that further partnership assets had been undisclosed, pltf. having deliberately made his election whereby he was bound.—*LAW v. LAW*, [1905] 1 Ch. 140; 21 T. L. R. 102; *sub nom. Re LAW, LAW v. LAW*, 74 L. J. Ch. 169; 92 L. T. 1; 53 W. R. 227; 49 Sol. Jo. 118, C. A.

**119. Made in respect of doubtful rights.]—**Testator bequeathed the residue of his estate to

#### PART II. SECT. 2, SUB-SECT. 1.— B. (a) v.

**114 i. General rule.]—**A compromise, whether embodied in a judgment of the ct. or extra-judicial, has the effect of *res judicata*, & is an absolute defence to an action on the original cause of action.—*CACHALIA v. HARBERER & Co.* (1905), T. S. 457.—**S. AF.**

**c. Whether conclusive on third parties.]—**A person, although cited to see proceedings, is not estopped by

judgment therein as the result of a compromise to which he was not a party & of which he knew nothing.—*RITCHIE v. MALCOLM*, [1902] 1 I. R. 403.—**IR.**

**d. —.]—**In an action of declarator of public right of way, a verdict obtained by the pursuers was set aside by the ct. & a new trial was granted. Thereafter pursuers agreed to defenders obtaining decree of *absolutor*, on defenders agreeing to

take a certain sum in full of expenses. In a second action raised by other pursuers against defenders, concluding for declarator of the same right of way:—*Held*: the decree of *absolutor* in the former action having been the result of a compromise, could not support a plea of *res judicata*.—*JENKINS v. ROBERTSON* (1867), 5 Macph. (Ct. of Sess.) 27; 39 Sc. Jur. 384 (H. L.).—**SCOT.**

**119 i. Made in respect of doubtful**



his daughter "if & when she shall attain the age of 25 years or marry under that age, the same to be bound with *fidei-commissum* so that my daughter may enjoy the . . . annual income thereof . . . solely for her use & benefit, & after her death the said residue shall be paid & belong to her child or children." The daughter brought an action against the exors. for an account & to recover certain sums alleged to have been improperly paid by them, but this action was compromised. She afterwards married, & a second action was brought against the exors. on behalf of her children:—*Held*: (1) the residuary gift could not be treated as a trust, but that there was nothing in the will which could be construed as debarring the daughter from the inheritance as the heir by birth of testator until she attained 25 or married, & after that time as the heir burdened with a *fidei-commissum*; (2) where a *fidei-commissum* is conditional, the *fidei-commissary* may be bound by a compromise made by the fiduciary, if he acts *bond fide* in respect of a doubtful right, as long as such compromise does not effect an alienation of property, the children were bound by the compromise entered into in the former action, & the second action was not maintainable.—*DE MONTMORT v. BROERS* (1887), 13 App. Cas. 149; 57 L. J. P. C. 47; 58 L. T. 198, P. C.

*Annotation*:—*Generally*, *Mentd.* *Farnum v. British Guiana, Administrator-General, Willems v. British Guiana, Administrator-General* (1889), 14 App. Cas. 651.

**120. Matters not raised in suit.**—In 1874 A. settled certain funds upon trust for himself for life, & after his death upon trust as to one-fifth for W. & his children. By the settlement A. reserved to himself for life the power to direct the investments of the trust funds as though he were absolute owner; & after his death the trustees were empowered to invest the trust funds upon freehold, leasehold or chattel real securities "including equitable mtges. by a deposit" with the

usual power to vary investments. The settlement also contained the usual power to invest in the purchase of freeholds or long leaseholds. In 1877 A. died, & at that time £6,400, part of the trust funds, stood invested on second mtge. of certain freeholds & leaseholds, S. being the mtgor. In 1878 S. became financially embarrassed & foreclosure or sale by the first mtgees. was imminent, which would have resulted in the total loss of the £6,400 & thereupon the trustees, acting *bond fide* & with a view to save the trust estate, purchased of S. his equity of redemption for £2,000. In 1879 L., a beneficiary, commenced an action against the trustees & W., alleging improper investments & claiming administration & accounts on the footing of wilful default. The trustees in their answers to interrogatories set out clearly the circumstances attending the purchase of the equity of redemption. In 1880 the usual judgment for administration was obtained including an inquiry as to the improper investments. In 1881, before the chief clerk made his certificate a compromise of the action was sanctioned by the ct. on petition, to which all parties interested, including W.'s children, were parties, under which L.'s share of the trust estate was raised & paid out to her & all further proceedings in the action were stayed. The petition did not refer to the alleged breaches of trust. In Apr. 1888, W.'s children commenced an action against the same trustees alleging that the purchase of the equity of redemption was a breach of trust & claiming usual relief. Defts. denied the breach of trust & asserted that under the circumstances the purchase was prudent & proper. They also pleaded the order of compromise in the first action in bar of pltf.'s claim:—*Held*: (1) the purchase of the equity of redemption was an unauthorised investment & a breach of trust; (2) the compromise was not a bar to pltf.'s claim, the breach of trust not having been by negligence, inadvertence, or

*rights.*—Persons doubting their rights, & compromising, are bound by such compromise.—*BURKE v. CROSSIE* (1811), 1 Ball. & B. 504.—*IR.*

**120 i. Matters not raised in suit.**—When deft. in ejectment, pending the proceedings, entered into an agreement, subsequent to the service of the ejectment, with the agent of the lessor of pltf., to give a consent for judgment with a stay of execution, & that he should have the crops; in an action of trespass for mesne rates:—*Held*: this agreement did not preclude pltf. from recovering nominal damages for the trespass antecedent to the date of the agreement.—*BALDWIN v.* (1849), 1 Ir. Jur. 215.—*IR.*

**e. Compromise after judgment.**—Where a *fi. fa.* goods were placed in a sheriff's hands & a levy made, but pltf. afterwards compromised with deft., receiving payment by instalments, but giving no directions to the sheriff to discharge deft.'s property:—*Held*: on a return of *nulla bona* several months afterwards, when deft. had absconded without satisfying the balance of the debt, pltf. could not sue for a false return, as he was precluded by his arrangement with deft.—*EVERARD v. LEONARD* (1833), 3 O. S. 121.—*CAN.*

**f. Contract for sale of land.**—*Substitution of new agreement.*—Pltf. went into possession of land under an agreement under seal to purchase from defts. An action of trespass was brought against them by D. who was in possession under a prior agreement of a similar character. On the trial of the action pltf. agreed to relinquish their claim on being paid the amount of their deposit, & defts. agreed to

convey to D.:—*Held*: pltf. having become parties to this agreement were estopped from claiming damages against defts. on account of their failure to carry out their agreement to convey to pltf.—*WENTZELL v. ROSS* (1897), 30 N. S. R. 136.—*CAN.*

**g. Document imperfectly drawn.**—*Inference of compromise clear.*—The ancestors of pltf. & deft. received a joint grant of land from the Crown, & occupied different parts of the land as tenants in common. N. gave a deed to his brother A. of his right & title in the whole grant, but remained in possession of the land occupied by him, as before. A controversy which arose subsequently was settled by the heirs of A. conveying to N. one portion of the land, & N. executing to the heirs of A. what was intended as a release & quit-claim of all his interest in the other portion of the land, including that in question:—*Held*: although the release was badly drawn & failed to express in clear & distinct terms the nature of the transaction between the parties, as this was the clear inference to be drawn from the documentary evidence & the surrounding circumstances, the ct. would give effect to it.—*MCQUEEN v. MCQUEEN* (1907), 42 N. S. R. 253; 4 E. L. R. 310.—*CAN.*

**h. Compromise out of court.**—Where a previous action regarding a right of way had been compromised out of ct. between the parties themselves there is no estoppel.—*SMITH v. MACGILLIVRAY* (1908), 5 E. L. R. 561.—*CAN.*

**k. Assignee of lease under covenant to indemnify lessee.**—*Estopped by arrangement made by lessee in good faith.*—

Pltf. became lessee of land in England, & after some years he assigned the balance of the term to deft., who assumed covenants contained in the lease for maintenance & repair, & undertook to indemnify pltf. At the expiration of the lease the lessor demanded from deft. £486 in respect of dilapidations, which deft. disputed, while admitting liability for £75. The lessor then demanded payment from pltf., who settled the claim by paying £450, & demanded indemnity from deft., who had left England. Pltf. sued deft. & obtained a judgment by default in England, the writ being served in Minnesota, U.S.A. Deft. ultimately resided in Manitoba, where pltf. sued him on the English judgment. On the facts:—*Held*: deft. estopped from disputing the settlement made by pltf., & his own obligation to indemnify.—*MARSHALL v. HOUGHTON*, [1922] 3 W. W. R. 65; 68 D. L. R. 308; *affd.*, 33 Man. L. R. 166.—*CAN.*

**l. Agreement as to mode of execution of decree.**—*Execution of agreement as a decree.*—The parties to a decree agreed as regards the mode of payment & the interest payable. For many years such agreement was executed as a decree, without objection being taken by the judgment-debtor:—*Held*: the judgment-debtor was not by reason that he had submitted to the execution of such agreement as a decree, estopped from objecting to its continued execution as a decree.—*STOWELL v. BILINGS* (1876), 1 L. R. 1 All. 250.—*IND.*

**m. Test for determining whether there is an estoppel.**—The test for determining whether there is an estoppel in any particular case in



**Sect. 2.—What are matters of record: Sub-sect. 1, B. (a) v., vi., vii., viii., ix. & x.]**

accident omitted to be brought before the ct. on the hearing of the petition.—**WORMAN v. WORMAN** (1889), 43 Ch. D. 296; 61 L. T. 637; 38 W. R. 442.

**121. —.**—**CLOUTTE v. STOREY**, No. 271, *post*.

—**See, generally**, Sect. 3, sub-sect. 1, B. (d), (e), *post*.

**Validity of compromise—By barrister.]—See BARRISTERS**, Vol. III., pp. 339–345.

—**By solicitor.]—See, generally**, SOLICITORS.

#### vi. Nonsuit.

**122. General rule.]—A** pltf. cannot now elect to be nonsuited; if he offers no evidence at the trial deft. is entitled to a verdict.

The sole question on this appeal is whether the old system by which a pltf. at his own election could lose his writ, as it was said, & at his election bring another action for the same cause, is still a system which exists in our law. I am very clearly of opinion that it does not. Our whole system has been changed, & the reason why the word “nonsuit” itself is not now to be found in the rules is that it was determined that the power of a pltf. at the common law to claim a nonsuit, or pltf. in equity to dismiss his bill at his own option, should no longer be permitted, & it is probable that the word “discontinuance” was supposed to apply to both forms of procedure both at common law & in equity. Accordingly by R. S. C., Ord. 26, r. 1, the only mode by which a pltf. can submit to defeat is under that Ord., unless he allows the proceedings to go on until the verdict is recorded against him (**LORD HALSBURY, C.**).—**FOX v. STAR NEWSPAPER CO.**, [1900] A. C. 19; 69 L. J. Q. B. 117; 81 L. T. 562; 48 W. R. 321; 16 T. L. R. 97; 44 Sol. Jo. 116, H. L.

**123. Failure of process—By negligence of court or of party.]—ANON.** (1311), Sel. Soc. Y. B., Vol. VI., p. 193.

**124. Election to be nonsuited.]—PIDDLE v. COMYN** (1309), Sel. Soc. Y. B., Vol. II., pp. 11, 13.

**Default of appearance.]—See** No. 90, *ante*.

**125. After verdict for defendant.]—After** verdict found for deft., the ct. will, in its discretion, order a nonsuit to be entered, in order that pltf. may not be precluded from bringing another action.—**HODGSON v. FORSTER** (1822), 1 B. & C. 110; 2 Dow. & Ry. K. B. 221; 107 E. R. 42.

**In county court.]—See** COUNTY COURTS, Vol. XIII., pp. 505, 506, 507–510, Nos. 502, 504, 574–596.

**Setting aside nonsuit.]—See** JUDGMENTS.

#### vii. On Withdrawal of Juror.

**126. By consent of parties.]—The** withdrawing a juror by consent of the parties is no bar to a future suit on the same cause of action.—**SANDERSON v. NESTOR** (1826), Ry. & M. 402, N. P.  
**Annotation:—Expld.** **Gibbs v. Ralph** (1845), 14 M. & W. 804.

**127. —.]—Where** judgment passed for pltf., on a demurrer to one plea, & the cause was taken down for trial upon another, & a juror was then

withdrawn by consent:—**Held**: pltf. could not obtain the costs of the demurrer.

The parties having withdrawn a juror it is the same as if no trial at all had taken place. Either pltf. or deft. may go down to trial again (**COLERIDGE, J.**).—**BURDON v. FLOWER** (1839), 7 Dowl. 786; 4 Jur. 317.

**Annotations:—Consd.** **Dunston v. Paterson** (1859), 5 C. B. N. S. 267. **Expld.** **Thomas v. Exeter Flying Post Co.** (1887), 18 Q. B. D. 822. **Refd.** **Bentley v. Dawes** (1854), 10 Exch. 347.

**128. —.]—Where**, upon the trial of a cause, a juror is withdrawn by consent of counsel, if pltf. afterwards bring another action for the same cause, the ct. will stay the proceedings.—**GIBBS v. RALPH** (1845), 14 M. & W. 804; 15 L. J. Ex. 7; 153 E. R. 701.

**Annotation:—Expld.** **Thomas v. Exeter Flying Post Co.** (1887), 18 Q. B. D. 822.

**129. —.]—A** ct. has power to discharge, by consent, a jury from giving a verdict upon any of the issues in a case; & where the jury has been discharged, & the record does not show that it was done without consent, the discharge must be taken to be regular, & cannot be made the ground of error.—**SCOTT v. BENNETT** (1871), L. R. 5 H. L. 234; 20 W. R. 686, H. L.

**130. —.]—The** withdrawal of a juror upon terms is not necessarily the final determination of an action; & if there be a substantial breach by one of the parties of the terms upon which the juror was withdrawn, the ct. before whom the case came for trial has jurisdiction to re-try the action.—**THOMAS v. EXETER FLYING POST CO.** (1887), 18 Q. B. D. 822; 56 L. J. Q. B. 313; 56 L. T. 361; 35 W. R. 594; 3 T. L. R. 515, D. C.

**131. —Consent subsequently withdrawn.]—**An action of trespass to land was sent for trial to a county ct. under 30 & 31 Vict. c. 142, s. 10. The cause came on for trial before a jury, but before the trial was completed the parties agreed that a juror should be withdrawn & that the judge should say what should be done between them. At the next meeting of the ct., the judge was ready to pronounce his opinion, but deft., without assigning any reason, withdrew his consent, & the judge consequently did not give any decision:—**Held**: the withdrawal of a juror had not put an end to the action, because deft. had not performed his part of the arrangement under which pltf. consented to such withdrawal; & the ct. made absolute a rule calling upon the judge of the county ct. to appoint a day for a rehearing.—**NORBURN v. HILLIAM** (1870), L. R. 5 C. P. 129; 39 L. J. C. P. 183; 22 L. T. 67.

**Annotation:—Expld.** **Thomas v. Exeter Flying Post Co.** (1887), 18 Q. B. D. 822.

**132. At suggestion of judge.]—Where** at the trial of an action the judge suggests the withdrawal of a juror, & pltf. acts on the suggestion, the ct. will stay the proceedings in a second action commenced by same pltf. for the same cause, even where on the first occasion he conducted the case in person.—**MOSCATI v. LAWSON** (1835), 4 Ad. & El. 331; 7 C. & P. 35, n.; 1 Har. & W. 572; 111 E. R. 811.

**Annotations:—Consd.** **Harries v. Thomas** (1836), 2 M. & W. 32. **Mentd.** **Doc d. Bennett v. Hale** (1850), 15 Q. B. 171.

**See, generally**, JURIES.

consequence of a decree passed on a compromise is whether the parties decided for themselves the particular matter in dispute by the compromise & the matter was expressly embodied in the decree of the ct. passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree.—**VENKATA PERUMAL (RAJA BAHADUR) v. THATA RAMASAMY CHETTY** (1911),

I. L. R. 35 Mad. 75.—**IND.**

**n. Defamatory statements made in compromised action—Compromise no bar to action for damages.]—An** action of damages in respect of defamatory statements made on record in an action is not barred by a compromise of the action.—**BELL v. BLACK & MORRISON** (1866), 38 Sc. Jur. 211; 3 Sh. Dig. 1618; 3 Macph. (Ct. of

Soss.) 1026.—**SCOT.**

#### PART II. SECT. 2, SUB-SECT. 1.—B. (a) vi.

**o. Whether bar to fresh action—On same facts.]—A** judgment of nonsuit is no bar to the right of pltf. to bring a fresh action upon the same facts.—**POWELL v. HARCOURT** (1886), 5 N. Z. L. R. 249.—**N.Z.**

Consent judgments generally, *see* Sub-sect. 1, B. (a) iv., *ante*.

viii. *Effect of Appeal.*

**133. General rule.]**—When the word “final” is used, as I think it is in some authorities with reference to judgments, that does not mean, I apprehend, a judgment which is not open to appeal, but merely “final” as opposed to “interlocutory.” A judgment is, in my opinion, not the less an estoppel between the parties to the action because it may be reversed on appeal (COZENS-HARDY, L.J.).—HUNTLY (MARCHIONESS) *v.* GASKELL, [1905] as reported in 2 Ch. 656; 75 L. J. Ch. 66; 93 L. T. 785; 22 T. L. R. 20, C. A.

**134. Appeal pending.]**—Trespass for mesne profits between July 10, 1826, & commencement of the suit. Pleas, that pltf. was not possessed of the premises *modo et forma*; that the premises were the soil & freehold of deft. during all the time, etc. Replication, by way of estoppel, to each plea, that, after July 10, 1826, pltf. commenced an action of ejectment for recovery of the same premises on a demise laid July 10, 1826, for fourteen years, & a demise laid Dec. 26, 1831, for seven years, & an ouster on Dec. 27, 1831, & had judgment to recover his terms; concluding with a prayer of judgment if deft. ought, during the terms, to be admitted, etc.:—*Held*: (1) the replication was good; (2) a rejoinder, stating that no writ of execution was ever issued nor had pltf. ever had possession of the premises, but that a writ of error upon the judgment was still pending & undetermined, was bad.—DOE *v.* WRIGHT (1839), 10 Ad. & El. 763; 2 Per. & Dav. 672; 113 E. R. 289.

*Annotations*:—As to (1) *Consd.* Doe *v.* Wellsman (1848), 2 Exch. 368; Bather *v.* Brayne (1849), 7 C. B. 815; Wilkinson *v.* Kirby (1854), 15 C. B. 430. *Refd.* Freeman *v.* Cooke (1848), 2 Exch. 654; Waters *v.* Waters (1848), 2 De G. & Sm. 591; Litchfield *v.* Ready (1850), 5 Exch. 939; Doe *v.* Challis (1851), 17 Q. B. 166; Matthew *v.* Osborne (1853), 13 C. B. 919; Feversham *v.* Emerson (1855), 11 Exch. 385. As to (2) *Refd.* Burnaby *v.* Earle (1874), L. R. 9 Q. B. 490. *Generally, Mentd.* Ryan *v.* Clark (1849), 14 Q. B. 65.

PART II. SECT. 2, SUB-SECT. 1.—  
B. (a) viii.

**p. Appeal pending.—Effect of decision of lower court.]**—A former judgment by a ct. of competent jurisdiction upon the same cause of action is conclusion between the same parties in a subsequent suit brought in another ct., notwithstanding the pendency of an appeal against it.—BULKIRAM NATHURAM *v.* GUJARAT MERCANTILE ASSOCN., LTD. (1867), 4 Bom. A. C. 81.—IND.

**q. — — —.]**—A judgment liable to appeal or under appeal is only a provisional & not a definitive or final adjudication, & cannot operate as *res judicata* during the interval preceding the appeal or the interval preceding the decision of the appeal.—BALKISHAN *v.* KISHAN LAL (1888), I. L. R. 11 All. 148.—IND.

**r. — — —.]**—Issue not decided in appeal.]—When the judgment of a ct. of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata*, & becomes *res sub judice*; & if the appellate ct. declines to decide that issue, & disposes of the case on other grounds, the judgment of the first ct. upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the ct. of appeal.—NILVARU *v.* NILVARU (1881), I. L. R. 6 Bom. 110.—IND.

**s. Abortive appeal — Appeal withdrawn.]**—In a suit brought against her husband's nephew, a Hindu widow alleged that certain property was her

husband's separate property. The ct. held that the property was joint property. The widow appealed, but subsequently withdrew the appeal. On the widow's death, the nephew filed the present suit to recover possession of the property from the daughter, who resisted the claim on the ground that the decision in the first suit was not binding on her:—*Held*: (1) the first decree operated as *res judicata* against deft., inasmuch as it was a decree against the widow as representing her husband's estate; (2) the withdrawal of the appeal by the widow was not sufficient to deprive the decree of its operative character in law.—GHCLABHAI *v.* BAI JAVAR (1912), I. L. R. 37 Bom. 172.—IND.

**t. Judgment in appeal.—Effect of.]**—Where the High ct. confirms on appeal the decree of a subordinate ct., such confirmation leaves the decree of the High ct. as the only decree which exists for the purpose of execution, & the decree of the lower ct. becomes incorporated with it.—NANCHAND *v.* VITHU (1894), I. L. R. 19 Bom. 258.—IND.

**a. — — —.]**—An appellate judgment operates by way of estoppel as regards all findings of the lower ct., which though not referred to in it, are necessary to make the appellate decree possible only on such findings.—NARAYANAN CHETTY *v.* KANNAMMAI ACHI (1905), I. L. R. 28 Mad. 338.—IND.

**b. Cross decrees — Appeal from one decree—Decree not appealed from**

**135. — — —.]**—HUNTLY (MARCHIONESS) *v.* GASKELL, No. 133, *ante*.

**136. Abortive appeal — Appeal dismissed on technical grounds.]**—L., a pauper, was by order of two justices on Mar. 3, 1896, adjudged to be last legally settled in the parish of M. in the U. Union. The guardians of the U. Union appealed to quarter sessions against the said justices' order, but the appeal was dismissed on technical grounds & the order was confirmed. L. subsequently became chargeable to the W. Union as a lunatic, & an order of justices was obtained on Nov. 13, 1903, against the U. Union, the grounds of which order set up the before-mentioned order of Mar. 3, 1896:—*Held*: an abortive appeal against an order of removal not heard on its merits does not affect the order so as to rob it of its *in rem* effect.—UXBRIDGE UNION *v.* WINCHESTER UNION (1904), 91 L. T. 533; 2 L. G. R. 969, D. C.

**Foreign judgment.]**—See CONFLICT OF LAWS, Vol. XI., p. 454, Nos. 1106–1108, 1112.

ix. *Irregular Judgments.*

**Conclusive — Until set aside.]**—See Nos. 45, 46, *ante*.

Setting aside judgments, *see* JUDGMENTS.

—— **Foreign judgments.]**—See CONFLICT OF LAWS, Vol. XI., pp. 463, 464, Nos. 1193, 1194.

x. *Other Judgments.*

**137. Judgment not given on merits — Insufficiency of pleading.]**—If A. brings an action of covenant against B. & a special verdict is found, but upon the perusal of the declaration a fault therein appears, this judgment shall not be a bar in another action; because special & not given upon the verdict, but upon the insufficiency of the declaration; otherwise it had been, if given generally, for it should have been intended upon the verdict & merits of the cause.—EALLES *v.* LAMBERT (1650), 2 Hale, P. C. 393.

**no bar to decision of appeal.]**—Where cross-suits between the same parties on the same facts were tried together & judgment was given on the same day, but separate decrees were passed & an appeal was preferred against one of the decrees alone:—*Held*: the decree unappealed did not operate as a bar under Civil Procedure Code, s. 13, so as to preclude the appellate ct. from dealing with the decree appealed against. The doctrine of *res judicata* has no application when the very object of the appeal is to get rid of the decision, which is pleaded in bar.—PANCHANANDA VELAN *v.* VAITHINATHA SASTRIAL (1905), I. L. R. 29 Mad. 333.—IND.

**c. — — —.]**—From the decree in a suit for adjustment of accounts both parties appealed. Both appeals were decided by one & the same judgment. Two decrees were framed; but these were in substance identical. Pltf. appealed from the decree in one appeal only:—*Held*: his appeal was not barred by reason of his not having appealed also from the decree in the other appeal.—DAMODAR DAS *v.* SHEORAM DAS (1907), I. L. R. 29 All. 730.—IND.

**d. Reversal or suspension of decree on appeal—Money paid under decree recoverable.]**—Money recovered under a decree cannot be recovered back in a fresh suit while the decree under which it was recovered remains in force; if the decree has been reversed or suspended the money paid is recoverable.—NAGANNA *v.* VENKATAPPAYYA (1923), I. L. R. 46 Mad. 895.—IND.



*Sect. 2. —What are matters of record: Sub-sect. 1, B. (a) x. & (b) i. & ii.]*

**138.** ———.]—A former judgment against *pltf.* is no bar to a second action for the same cause, if it appears on the record to have been given for the insufficiency of the declaration, although erroneously entered as if he had been barred by the plea.—*SKEDWIN v. LAMPEN* (1675), *Freem. K. B.* 198; 89 *E. R.* 141; *sub nom.* *LAMPEN v. KEDGEWIN*, 1 *Mod. Rep.* 207; *sub nom.* *ROZAL v. LAMPEN*, 2 *Mod. Rep.* 42.

*Annotations:—***Refd.** *Hustler v. Raines* (1695), 2 *Lut.* 1414; *Hitchin v. Campbell* (1772), 2 *Wm. Bl.* 827.

**139.** ———.]—**Want of evidence.**—Plea of a former suit & decree signed & enrolled in the Ct. of Ch., in respect to the same matters, allowed, though the bill in the Ct. of Ch. was dismissed, not on the merits, but for want of evidence.—*JONES v. NIXON* (1831), *You.* 359; 159 *E. R.* 1032.

*Annotation:—***Refd.** *Hall v. Hall & Richardson* (1879), 27 *W. R.* 664.

**140.** ———.]—**Absence of principal witness—Adjournment proper course.**—(1) In an action by a wife for arrears of an annuity the husband claimed that the deed of separation under which the annuity was payable should be cancelled having, as he alleged, been obtained by fraudulent concealment of the previous adultery of the wife with F. No particulars of acts of adultery were pleaded. The judge found that the adultery was not proved. In a subsequent action for further arrears the husband raised the same plea, again giving no particulars of acts of adultery. It was stated by counsel & on affidavit that fresh alleged acts of adultery with F., also committed before the execution of the deed, but discovered since the first action, would be relied on. The county ct. judge, without hearing evidence, held that the issue of adultery was *res judicata*, & refused to try it:—**Held:** inasmuch as the issue in the first action was, in the absence of particulars of adultery, such acts of adultery as should appear in evidence, & in the second action, again in the absence of particulars, such acts as should similarly appear, the matter was not necessarily *res judicata*, & the case must go back for a new trial to ascertain the nature of the present allegations of adultery.

(2) There is no difficulty in seeing what, in its strict & proper sense the plea of *res judicata* means. If the *res*, the thing actually & directly in dispute, has been already adjudicated upon, of course by a competent ct., it cannot be litigated again. There is a wider principle often treated as covered by the plea of *res judicata*, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the ct. in the earlier proceedings & which he chose not to put forward (*LUSH, J.*).

(3) Observations on nature of estoppel (*see* No. 1, *ante*).—**ORD v. ORD**, [1923] 2 *K. B.* 432; 92 *L. J. K. B.* 859; 129 *L. T.* 605; 39 *T. L. R.* 437, *D. C.*

**141.** ———.]—**Ground of privilege.**—It is only in cases of gross contempt of ct. that the ct. will make an order for the committal of a Member of Parliament. The ct. declined to make an order for the committal of a Member of the House of Commons during the session of Parliament for non-compliance with an order directing him to pay money & deliver over documents within a specified time. Parliament having subsequently been dissolved, & the late Member of Parliament not having been re-elected at the ensuing general election, the motion for his committal was renewed

within forty days after the dissolution:—**Held:** the privilege of the late Member of Parliament extended over a period of forty days after the dissolution, & in the circumstances, the refusal of the former motion was no bar to the subsequent application grounded on the same contempt.—*Re ANGLO-FRENCH CO-OPERATIVE SOCIETY* (1880), 14 *Ch. D.* 533; 49 *L. J. Ch.* 388; 28 *W. R.* 580.

*Annotation:—***Mentd.** *Re Armstrong, Ex p. Lindsay*, [1892] 1 *Q. B.* 327.

——.]—**Judgment on default.**—*See* Sub-sect. 1, B. (a) iii., *ante*.

——.]—*See, also*, No. 633, *post*.

**142. Fine & recovery—Party joining for conformity.**—Where one is required to join in a fine for conformity, he shall not be estopped.—*CROMWEL'S (LORD) CASE, CROMWEL (LORD) v. ANDREWS* (1601), 2 *Co. Rep.* 693; 76 *E. R.* 574.

*Annotations:—***Mentd.** *Harvy v. Thomas* (1589), *Cro. Eliz.* 216; *Drury's Case* (1608), 6 *Co. Rep.* 73 a; *Fraunces's Case* (1609), 8 *Co. Rep.* 89 b; *Rowles v. Mason* (1612), 2 *Brownl.* 192; *Bowles's Case* (1615), 11 *Co. Rep.* 79 b; *R. v. Zakar* (1615), 3 *Bulst.* 88; *Allen v. Wedgewood* (1616), 3 *Bulst.* 168; *Havergil v. Hare* (1616), 3 *Bulst.* 250; *Eaton v. Butler* (1628), *W. Jo.* 180; *Davies v. Kempe* (1663), *Cart.* 2; *Smith v. Farnaby* (1666), *Cart.* 52; *Dixon v. Harrison* (1669), *Vaugh.* 36; *Adeson v. Otway* (1677), *Freem. K. B.* 227; *Jones v. Morley* (1697), 12 *Mod. Rep.* 159; *Ratcliffe's Case* (1719), 1 *Str.* 267; *Doe d. Odiarne v. Whitehead* (1759), 2 *Burr.* 704; *Roe d. Wragham v. Hersey* (1771), 3 *Wils.* 274; *Davies v. Bush* (1825), *M'Cle. & Yo.* 58; *Doe d. Bruno v. Martyn* (1828), 7 *L. J. O. S. K. B.* 60; *Clifford v. Turrell* (1845), 14 *L. J. Ch.* 390; *Crofts v. Middleton* (1856), 8 *De G. M. & G.* 192; *Gilbertson v. Richards* (1860), 5 *H. & N.* 453; *Berkeley Peerage* (1861), 8 *H. L. Cas.* 21.

**143.** ———.]—By the chirograph of a fine, the caption appeared to be on Oct. 23, 1701, whereas in fact the fine was not acknowledged till Mar. 2 following, & this was offered to be proved:—**Held:** no proof of the time of acknowledging a fine ought to be admitted contrary to, or against the chirograph thereof; & a record, which is the chirograph of a fine, cannot be falsified until it is vacated or reversed.—*SAY & SEALE (LORD) v. LLOYD* (1712), 4 *Bro. Parl. Cas.* 73; 2 *E. R.* 50, *H. L.*; *affg. S. C. sub nom. LLOYD v. SAY & SEAL (VISCOUNT)* (1711), 1 *Salk.* 341; *sub nom. SAY & SEAL'S (LORD) CASE*, 10 *Mod. Rep.* 40.

*Annotations:—***Mentd.** *Greenough v. Gaskell* (1833), 1 *My. & K.* 98; *Mill v. Hill* (1852), 3 *H. L. Cas.* 828; *Dart v. Clayton* (1864), 4 *New Rep.* 221.

**144.** ———.]—H. being tenant in tail in possession of certain lands, with the reversion to the heirs of her late husband, executed a deed-poll in 1735, which operated as a covenant to stand seised to the use of her only son, G. in fee. G. afterwards, & during the lifetime of his mother, suffered a recovery of the same lands to the use of himself in fee. He died, in 1779, without issue, having by his will devised the lands to trustees, in trust to pay an annuity to his nephew, & subject thereto to his great nephew B. for life, with certain remainders over. The trustees entered into & continued in possession until the death of the annuitant in 1790, when they gave possession to B., who continued in possession of the rents & profits of the entirety up to the time of his death in 1824, & did various acts showing that he claimed & held under the will. On the death of G. without issue, the estate tail would have descended in moieties to two co-parceners; & at the time of the entry of B., in 1790, was vested as to one moiety in B., & as to the other in A.:—**Held:** G. was not remitted to his title under the estate tail, the recovery suffered by him having estopped him.—*WOODROFFE v. DOE d. DANIELL* (1846), 15 *M. & W.* 769; 15 *L. J. Ex.* 356; 7 *L. T. O. S.* 368; 153 *E. R.* 1061, *Ex. Ch.*; *affd. sub nom. DOE d.*



DANIEL v. WOODROFFE (1849), 2 H. L. Cas. 811, H. L.

*Annotations*:—**Mentd.** Tarte v. Darby (1846), 15 L. J. Ex. 326; Spotswood v. Barrow (1850), 5 Exch. 110; Cowan v. Milbourn (1867), L. R. 2 Exch. 230.

—.]—*Compare* No. 747, *post*.

*See, now*, Fines & Recovery Act, 1833 (c. 74).

**145. Prohibition.**—Pltf.'s solr., who carried on business within the jurisdiction of the Mayor's Ct. of London, wrote to deft. demanding payment of £7 6s. 6d. for goods sold & delivered. Neither of the parties resided or carried on business, nor was the contract entered into, within the jurisdiction. Deft., in a letter written to pltf.'s solr., posted outside, but received within, the jurisdiction, admitted that he owed £5 6s. 6d. Pltf. having brought an action in the Mayor's Ct. to recover £7 6s. 6d. for goods sold & delivered, deft. obtained a writ of prohibition staying proceedings therein. Pltf. then brought a second action to recover £5 6s. 6d. on an account stated, & deft. obtained a second writ of prohibition:—*Held*: the prohibition in the first action was not an estoppel against the bringing of the second action.—GRUNDY v. TOWNSEND (1888), 36 W. R. 531; 4 T. L. R. 402, C. A.

*Annotation*:—**Mentd.** Warwick v. Warwick (1918), 31 T. L. R. 475.

**Order in affiliation proceedings.**—*See* Nos. 410, 411, *post*.

**146. Judgment in inferior court of record.**—(1) Foreign attachment is no bar without a recovery. Pendency of action in inferior ct. not pleadable; *aliter* of a recovery there. (2) *Nolle prosequi* in inferior ct. is a bar.—NELSON v. NELSON (1670), Freem. K. B. 6; 89 E. R. 6.

**147.** —.]—Judgment in inferior ct. pleadable in bar or abatement to an action in superior cts.—ATKINSON v. WOODBURN (1673), 2 Lev. 94; 83 E. R. 465.

—.]—Where pltf. sued his steward in an inferior ct., for £4,000 which was a less sum than he knew to be due to him upon the final investigation of deft.'s accounts, & upon judgment by default verified for £3,400 only:—*Held*: upon a plea of judgment recovered in answer to a second action in the ct. [of King's Bench] for the balance due, pltf. was concluded by the action brought in the inferior ct.—BAGOT v. WILLIAMS (1824), 3 B. & C. 235; 5 Dow. & Ry. K. B. 87; 107 E. R. 721.

*Annotations*:—**Refd.** Hadley v. Green (1832), 2 Cr. & J. 374; Holland v. Clark (1842), 1 Y. & C. Ch. Cas. 151; Stewart v. Todd (1846), 9 Q. B. 767; Geils v. Geils (1852), 20 L. T. O. S. 145; Pigot v. Cadman (1857), 26 L. J. Ex. 134; Barber v. Lamb (1860), 8 C. B. N. S. 95; Routledge v. Hislop (1860), 2 E. & E. 549; Srimut Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar (1866), 11 Moo. Ind. App. 50; Stevens v. Tillett (1870), L. R. 6 C. P. 147; Jones v. Brassey & Ballard (1871), 24 L. T. 947.

— **County court.**—*See* COUNTY COURTS, Vol. XIII., pp. 505, 506.

**Interlocutory judgment.**—*See* No. 204, *post*.

(b) *Judgments in rem*.

i. *Judgments Determining Status of Person.*

*See, also*, JUDGMENTS.

**149. Judgment establishing certificate of bishop—As to legitimacy of party.**—ANON. (1310), Y. B. Mich. 3 Edw. II. 53.

**150. Proceedings for breach of revenue laws—Conviction for penalties.**—The record of condem-

nation is admissible, being *in rem*, but not the record of conviction for penalties as it was *in personam* & was not evidence in any case where the parties were different (GIBBS, C.J.).—HART v. M'NAMARA (1817), 4 Price, 154, n.; 146 E. R. 424, n.

*Annotation*:—**Refd.** De Mora v. Concha (1885), 29 Ch. D. 268.

**Decree of Probate Court as to foreign domicile.**—*See* CONFLICT OF LAWS, Vol. XI., p. 366, No. 460.

**Judgment on election petition.**—*See* ELECTIONS, Vol. XX., p. 175.

**151. Judgment determining status of particular person or family.**—Decree in a suit by A. against B., claiming as widow, to succeed to her husband's estate, in preference to B., his nephew, on the ground of the family being divided:—*Held*: not to operate as *res judicata*, or capable of being pleaded in bar to a suit by C., a daughter, claiming to succeed to her father's estate on A.'s death, on the ground that the property was self-acquired by her father.

Such judgment, though viewed otherwise by the ct. below, determines only an issue raised concerning a particular person, & is not a judgment *in rem*, but simply a judgment *inter partes*.—KATAMA NATCHIAR v. SHIVAGUNGA (RAJAH) (1863), 9 Moo. Ind. App. 539, 543; 19 E. R. 843, P. C.

*Annotations*:—**Refd.** Srimut Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar (1866), 11 Moo. Ind. App. 50; Stree Yanumula Venkayamah v. Stree Yanumula Boochia Vankondora (1870), 13 Moo. Ind. App. 333. **Mentd.** Jowala Buksh v. Dharum Singh (1866), 10 Moo. Ind. App. 511; Beer Pertab Sahce v. Rajender Pertab Sahce (1868), 12 Moo. Ind. App. 1; Neelkisto Deb Burmono v. Beerchunder Thakoor (1869), 12 Moo. Ind. App. 523; Suraneni Venkata Gopala Narasimha Row, Bahadoor v. Suraneni Lakshma Venkama Row (1869), 13 Moo. Ind. App. 113; Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar (1872), 14 Moo. Ind. App. 570; Chelikani Venkayamma Garu v. Chelikani Venkataramanayamma Bahadur Garu (1902), 18 T. L. R. 685; Parbati Kunwar v. Rani Chandarpal Kunwar (1909), 25 T. L. R. 551.

**152.** —.]—HILL v. CLIFFORD, CLIFFORD v. TIMMS, CLIFFORD v. PHILLIPS, No. 239, *post*.

**153. Winding-up order.**—A winding-up order is not a judgment *in rem*, & if made improperly, is not binding on strangers.—*Re* BOWLING & WELBY'S CONTRACT, [1895] 1 Ch. 663; 64 L. J. Ch. 427; 72 L. T. 411; 43 W. R. 417; 39 Sol. Jo. 345; 2 Mans. 257; 12 R. 218.

*Annotations*:—**Mentd.** James v. Buena Ventura Nitrate Grounds Syndicate (1895), 11 T. L. R. 568; New York & Continental Line (1909), 54 Sol. Jo. 117; Llewellyn v. Kasintoe Rubber Estates, [1911] 2 Ch. 670.

**154. Domicil.**—CONCHA v. CONCHA, No. 258, *post*.

**Removal orders.**—*See* POOR LAW.

**Judgments of courts not of record.**—*See* Part III., *post*.

**Foreign judgments.**—*See* CONFLICT OF LAWS, Vol. XI., pp. 463 *et seq*.

ii. *Judgments Determining Status of Thing.*

*See, also*, JUDGMENTS.

**155. Judgment that contract simoniacal—Incumbent by usurpation.**—WALKER v. HAMERSLY (1684), Skin. 90; 3 Lev. 115; 90 E. R. 43.

*Annotations*:—**Mentd.** Barret v. Glubb (1776), 2 Wm. Bl. 1052; Alston v. Atlay (1837), 7 Ad. & El. 289.

**156. Proceedings for breach of revenue laws—Condemnation of goods.**—Condemnation of goods in the Exchequer is so conclusive, & so alters their property, that trespass will not lie against the officer who seized them, to try the

PART II. SECT. 2, SUB-SECT. 1.—  
B. (b) i.

a. *Decree of declarator of marriage.*—A decree of declarator of marriage is a judgment *in rem* & is therefore

binding on all persons whomsoever.—LONGWORTH v. YELVERTON (1867), 5 Macph. (Ct. of Sess.) 144; 39 Sc. Jur. 635; L. R. 1 Sc. & Div. 218 (H. L.).—SCOT.

PART II. SECT. 2, SUB-SECT. 1.—  
B. (b) ii.

1. *Judgment declaring will a forgery—Subsequent application for probate of will.*—The question of the

*Sect. 2.—What are matters of record: Sub-sect. 1, B. (b) ii.]*

point of forfeiture again.—SCOTT v. SHEARMAN (1775), 2 Wm. Bl. 977; 96 E. R. 575.

*Annotations:—Distd.* Henshaw v. Pleasance (1777), 2 Wm. Bl. 1174. *Consd.* Wood v. Chessal (1778), 2 Wm. Bl. 1254. *Refd.* De Mora v. Concha (1885), 29 Ch. D. 268.

157. ———.]—THOMAS v. WITHERS (1776), cited 5 Term Rep. 117.

*Annotations:—Consd.* Wilkins v. Despard (1793), 5 Term Rep. 112. *Refd.* Bailey v. Harris (1849), 12 Q. B. 905.

158. ———.]—*Sci. fa.* on a bond conditioned that a certain boat should not be employed in smuggling:—*Held*: the record of condemnation of the boat was conclusive evidence of deft.'s having broken the condition of the bond.—R. v. MATTHEWS (1797), 5 Price, 202, n.; 146 E. R. 582, n.

159. ———.]—Information against calico printers for penalties:—*Held*: the fact of the pieces not having been stamped was proved by the record which could not be controverted.—A.-G. v. REYNOLDS (1801), 5 Price, 203, n.; 146 E. R. 582, n.

160. ———.]—HART v. M'NAMARA, No. 150, ante.

161. ———.]—A record of condemnation of goods seized, for an act of forfeiture created by one statute, is not evidence on a charge of an offence against the same party, with respect to the same goods, created by another statute. *Qu.*: whether such a record is conclusive evidence in any case, of all the facts stated therein, so as to affect a deft. collaterally, in any other proceeding against him, for penalties for the act of forfeiture.—A.-G. v. KING (1817), 5 Price, 195; 146 E. R. 579. *Annotation:—Mentd.* R. v. Whittaker (1823), 1 Hag. Adm. 145.

162. ———. **Acquittal.**]—The judgment of acquittal in the Exchequer which was given in evidence, being a judgment *in rem*, is conclusive as to the question of the illegitimacy of the seizure, & precludes all reasoning upon the construction of the permit (LORD KENYON, C.J.).—COOKE v. SHOLL (1793), 5 Term Rep. 255; 101 E. R. 143.

**Conviction under 2 Geo. 3, c. 28.**]—*See* No. 412, post.

**Conviction for non-repair of highway.**]—*See* No. 418, post.

Criminal & quasi-criminal judgments generally, *see* Sect. 3, sub-sect. 1, E.; sub-sect. 2, E., post.

163. **Determination by court of summary jurisdiction—Under Private Street Works Act, 1892 (c. 57)—That street was highway.**]—In proceedings taken by an urban authority under the above Act, to compel owners of premises to do private street works in a street, the determination by a ct. of summary jurisdiction that the street is a highway repairable by the inhabitants at large is a judgment *in rem* & conclusive as to the status of the street, & the question whether it is so repairable is *res judicata* in any future proceedings under the Act.—WAKEFIELD CORPN. v. COOKE, [1904] A. C. 31; 73 L. J. K. B. 88; 89 L. T. 707; 68 J. P. 225; 52 W. R. 321; 20 T. L. R. 115; 48 Sol. Jo. 130; 2 L. G. R. 270, H. L.; *affg.*, [1903] 1 K. B. 417, C. A.; *reversg.*, [1902] 1 K. B. 188, D. C. *Annotations:—Consd.* Scott v. Lowe (1902), 86 L. T. 421. *Mentd.* Pearce v. Maidenhead Corpn. (1907), 76 L. J. K. B. 591; Outen v. Auty, [1919] 2 K. B. 278.

164. **Revocation of patent.**]—A patentee brought an action for infringement of the patent.

Defts. set up by way of defence that the patent was invalid on the ground of user prior to the grant of the patent. That defence failed, & pltf. at the trial obtained judgment for an injunction, & an order for an inquiry as to damages. Pending the inquiry, defts., having discovered further instances of prior user, petitioned for revocation of the patent, & obtained an order for its revocation:—*Held*: for the purpose of the inquiry as to damages, defts. were estopped by the judgment in the action from alleging that the patent was invalid, & therefore, pltf. was entitled to substantial damages notwithstanding the revocation of the patent.

The order of revocation is in the nature of a judgment *in rem* which terminates the *res*, i.e., the letters patent, at the date when the order is made. . . . As regards the world at large, every one is bound by the fact that the patent ceased to exist at the date of the making of the order of revocation (FLETCHER MOULTON, L.J.).

That [*R. v. Hutchings*, No. 631, post] is no real authority as to the effect of an estoppel upon an estoppel, as it is called. It is true that the textbooks apparently do suggest that where that state of affairs does exist, the matter may be at large, & that Lord Selborne does instance the possibility of a judgment *in rem* having that effect, but, as far as any real decision goes, no such decision has been called to my attention. . . . The question, therefore, for me to decide is whether or not I can apply that principle of an estoppel upon an estoppel in the present circumstances. . . . I think I am not justified in deciding that I ought to apply a principle for which I can find no authority (PARKER, J.).—POULTON v. ADJUSTABLE COVER & BOILER BLOCK CO., [1908] 2 Ch. 430; 77 L. J. Ch. 780; 99 L. T. 647; 24 T. L. R. 782; 52 Sol. Jo. 639, C. A.

**Judgments of English Prize Courts.**]—*See* PRIZE LAW.

**Judgments of courts not of record.**]—*See* Part III., post.

**Foreign judgments—Generally.**]—*See* BILLS OF EXCHANGE, Vol. VI., p. 438, No. 2817; CONFLICT OF LAWS, Vol. XI., pp. 463 *et seq.*

165. ———. **Admiralty & Prize Courts.**]—A peremptory sentence in a Ct. of Admlty. beyond sea will conclude the parties here.—NEWLAND v. HORSEMAN (1681), 1 Vern. 21; 2 Cas. in Ch. 74; 23 E. R. 275, L. C.

166. ———.]—The sentence in a foreign Ct. of Admlty., decreeing a ship to be lawful prize, is conclusive; & therefore though erroneous the owner cannot recover the ship back by trover against the vendee.—HUGHES v. CORNELIUS (1682), 2 Show. 232; T. Raym. 473; Skin. 59; 89 E. R. 907.

*Annotations:—Consd.* Geyer v. Aguilar (1798), 7 Term Rep. 681; Christie v. Secretan (1799), 8 Term Rep. 192; Baring v. Clagett (1802), 3 Bos. & P. 201; Lothian v. Henderson (1803), 3 Bos. & P. 499; The Justyn (1862), 6 L. T. 553; Castrique v. Imrie (1870), L. R. 4 H. L. 414. *Refd.* Ewer v. Jones (1703), 2 Ld. Raym. 934; Green v. Waller (1703), 2 Ld. Raym. 891; Oddy v. Bovill (1802), 2 East, 473; Donaldson v. Thompson (1808), 1 Camp. 429; Stirling v. Vaughan (1809), 11 East, 619; Dobree v. Napier (1836), 2 Bing. N. C. 781; Hobbs v. Henning (1865), 17 C. B. N. S. 791; Phillips v. Eyre (1870), 10 B. & S. 1001; The City of Mecca (1879), 41 L. T. 444; De Mora v. Concha (1885), 29 Ch. D. 268.

167. ———.]—The Ct. of K. B. will give credit to a sentence given in the Ct. of Admlty. in France.—BEAK v. TYRRELL (1688), Carth. 31;

genuineness of a will is not *res judicata* for the purpose of proceedings under Probate & Administration Act, 1881.—CHINNASAMI v. HARIHARABADRA (1893), 1 L. R. 16 Mad. 380.—IND.

g. Judgment establishing will in solemn form—Result of compromise—Subsequent proceedings questioning validity of will.]—A person, although cited to see proceedings is not estopped

from questioning the validity of a will proved in solemn form as the result of a compromise.—RITCHIE v. MALCOLM, [1902] 2 I. R. 403.—IR.

Comb. 120; Holt, K. B. 47; 3 Mod. Rep. 194; 1 Show. 6; 90 E. R. 623.

*Annotation*:—**Refd.** Omychund v. Barker (1744), 1 Atk. 21.

**168.** ———.]—Sentence of a foreign Admty. condemning a ship as unfit, not to be read in an action on the charterparty, this being a contract under seal at land, in which case according to our law the Admty. has no jurisdiction.—**BURTON v. FITZGERALD** (1737), 2 Stra. 1078; 93 E. R. 1043.

**169.** ———.]—On an action on a policy of insurance, a condemnation by a foreign Ct. of Admty. is not conclusive evidence that the ship was not neutral, unless it appear that the condemnation went upon that ground.—**BERNARDI v. MOTTEUX** (1781), 2 Doug. K. B. 575; 99 E. R. 364.

*Annotations*:—**Apld.** Saloucci v. Woodmass (1784), 3 Doug. K. B. 345. **Consd.** Lothian v. Henderson (1803), 3 Bos. & P. 499. **Refd.** Pollard v. Bell (1800), 8 Term Rep. 434; Baring v. Clagett (1802), 3 Bos. & P. 201; Hobbs v. Henning (1865), 17 C. B. N. S. 791.

**170.** ———.]—**MAYNE v. WALTER** (1782), 3 Doug. K. B. 79; 99 E. R. 548.

*Annotations*:—**Distd.** Geyer v. Aguilar (1798), 7 Term Rep. 681. **Refd.** Barzillai v. Lewis (1782), 3 Doug. K. B. 126; Calvert v. Bovill (1798), 7 Term Rep. 523; Pollard v. Bell (1800), 8 Term Rep. 434; Baring v. Clagett (1802), 3 Bos. & P. 201; Lothian v. Henderson (1803), 3 Bos. & P. 499; Siffken v. Lee (1807), 2 Bos. & P. N. R. 484; Dalgleish v. Hodson (1831), 9 L. J. O. S. C. P. 138.

**171.** ———.]—**SALOUCCI v. WOODMAS** (1784), 2 Park's Marine Insurances, 8th ed. p. 727.

**172.** ———.]—In an action on a policy of insurance on goods warranted American, on board a ship from London to Virginia, a sentence of a foreign ct., which after reciting that "forasmuch as the true destination of the vessel was for the English islands, having been hired & loaded a London, & having on board eighty barrels of gunpowder, declares the ship & cargo a good prize," is not conclusive evidence against the warranty of neutrality; because the special grounds assigned for the sentence do not necessarily lead to such a conclusion.—**CALVERT v. BOVILL** (1798), 7 Term Rep. 523; 101 E. R. 1111.

*Annotations*:—**Folld.** Dalgleish v. Hodgson (1831), 7 Bing. 495. **Refd.** Hobbs v. Henning (1865), 17 C. B. N. S. 791.

**173.** ———.]—By the sentence of a French Ct. of Admty., it appeared that the ship insured warranted American, had been condemned as enemy's property, for want of having on board a rôle d'équipage or list of the crew, such as is required by marine ordinance of France & adjudged by the ct., there to be requisite within the meaning of the treaty of commerce between France & America:—**Held**: conclusive evidence against the warranty of neutrality, though in fact the ship was American.—**GEYER v. AGUILAR** (1798), 7 Term Rep. 681; 101 E. R. 1196.

*Annotations*:—**Consd.** Lothian v. Henderson (1803), 3 Bos. & P. 499. **Refd.** Baring v. Clagett (1802), 3 Bos. & P. 201; Hobbs v. Henning (1865), 17 C. B. N. S. 791; De Mora v. Concha (1885), 29 Ch. D. 268.

**174.** ———.]—A sentence of a foreign Ct. of Admty. is only conclusive here, in an action on a policy of assurance, as to the express ground of sentence; but not as to any of the premises, noticed in the consideration part of the sentence, that led to the adjudication.—**CHRISTIE v. SECRETAN** (1799), 8 Term Rep. 192; 101 E. R. 1340.

*Annotations*:—**Consd.** Garrels v. Kensington (1799), 8 Term Rep. 230; Lothian v. Henderson (1803), 3 Bos. & P. 499; Bell v. Carstairs (1811), 14 East, 374. **Refd.** Hobbs v. Henning (1865), 17 C. B. N. S. 791. **Mentd.** Gibson v. Small (1853), 4 H. L. Cas. 353; Bickard v. Shepherd (1861), 14 Moo. P. C. C. 471; Burges v. Wickham (1863), 1 B. & S. 669.

**175.** ———.]—A warranty of neutrality in a policy of insurance is not falsified by a sentence of a foreign Ct. of Admty. condemning a ship for navigating contrary to the ordinances of that

belligerent state, to which the neutral country had not assented.—**POLLARD v. BELL** (1800), 8 Term Rep. 434; 101 E. R. 1474.

*Annotations*:—**Folld.** Bird v. Appleton (1800), 8 Term Rep. 562. **Consd.** Lothian v. Henderson (1803), 3 Bos. & P. 499. **Refd.** Baring v. Clagett (1802), 3 Bos. & P. 201; Reimers v. Druce (1857), 23 Beav. 145; Hobbs v. Henning (1865), 17 C. B. N. S. 791; Castrique v. Imrie (1870), 1 L. R. 4 H. L. 414.

**176.** ———.]—A warranty of neutrality in a policy of assurance, is not falsified by a sentence of a foreign Ct. of Admty. condemning a ship for navigating contrary to the ordinances of that belligerent state to which the neutral country had not assented.—**BIRD v. APPLETON** (1800), 8 Term Rep. 562; 101 E. R. 1547.

*Annotations*:—**Refd.** Baring v. Clagett (1802), 3 Bos. & P. 201; Lothian v. Henderson (1803), 3 Bos. & P. 499; Baring v. Royal Exchange Assce. Co. (1864), 5 East, 99; Reimers v. Druce (1857), 23 Beav. 145; Simpson v. Fogo (1863), 11 W. R. 418; Castrique v. Imrie (1870), 1 L. R. 4 H. L. 414.

**177.** ———.]—**KINDERSLEY v. CHASE** (1801), 2 Park's Marine Insurances 8th ed. 743, P. C.

*Annotations*:—**Consd.** Baring v. Clagett (1802), 3 Bos. & P. 201. **Apld.** Lothian v. Henderson (1803), 3 Bos. & P. 499. **Refd.** Bolton v. Gladstone (1809), 2 Taunt. 85; De Mora v. Concha (1885), 29 Ch. D. 268.

**178.** ———.]—An assured upon an American ship & cargo, provided with such a passport as is required by the treaty between America & France, & with all other usual American papers & documents, is entitled to recover against an underwriter of a policy on such ship & goods in case of a capture by a French privateer, notwithstanding a sentence of condemnation of the same as lawful prize by a French Ct. of Admty.; such sentence proceeding on the ground of a breach of French ordinances requiring certain particulars to be observed in respect of the ship documents beyond what was necessary by the treaty.—**PRICE v. BELL** (1801), 1 East, 663; 102 E. R. 257.

*Annotations*:—**Consd.** Baring v. Clagett (1802), 3 Bos. & P. 201. **Refd.** Lothian v. Henderson (1803), 3 Bos. & P. 499.

**179.** ———.]—Policy of insurance on a ship warranted American. To negative this warranty, a sentence of condemnation of a French ct. at St. Domingo was given in evidence:—**Held**: this sentence was conclusive evidence that the ship was not American.—**BARING v. CLAGETT** (1802), 3 Bos. & P. 201; 127 E. R. 111.

*Annotations*:—**Apld.** Lothian v. Henderson (1803), 3 Bos. & P. 499. **Refd.** Baring v. Christie (1804), 5 East, 398.

**180.** ———.]—Sentence of condemnation of a prize, taken by a French privateer & carried into Spain, by a French ct. sitting there, Spain being then a belligerent ally of France in the war against Great Britain, is valid; & such condemnation, proceeding on the ground of the property being enemy's & British, is conclusive in an action on a policy against the underwriter by the assured who had insured it as Danish, which in fact it was, Denmark being then neutral.—**ODDY v. BOVILL** (1802), 2 East, 473; 102 E. R. 450.

**181.** ———.]—It seems that the sentence of a foreign Ct. of Admty. condemning a ship warranted neutral, is conclusive evidence against the warranty of neutrality.—**LOTHIAN v. HENDERSON** (1803), 3 Bos. & P. 499; 127 E. R. 271, H. L.

*Annotations*:—**Folld.** Bolton v. Gladstone (1804), 5 East, 155. **Refd.** Hobbs v. Henning (1865), 17 C. B. N. S. 791; Castrique v. Imrie (1870), 1 L. R. 4 H. L. 414; De Mora v. Concha (1885), 29 Ch. D. 268.

**182.** ———.]—Where a foreign Ct. of Prize professes to condemn a ship & cargo on the ground of an infraction of treaty, in not being properly documented, etc., as required by the treaty between the captors & captured; such sentence is conclusive in our cts. against a



*Sect. 2.—What are matters of record: Sub-sect. 1, B. (b) ii. & (c).]*

warranty of neutrality of such ship & cargo in an action upon a policy of insurance against the underwriter; although inferences were drawn in such sentence from *ex parte* ordinances in aid of the conclusion of such infraction of treaty.—*BARING v. ROYAL EXCHANGE ASSURANCE CO.* (1804), 5 East, 99; 102 E. R. 1007.

*Annotation:—Mentd.* Von Tungeln v. Dubois (1809), 2 Camp. 151.

**183.** ———.]—A sentence of a foreign Ct. of Prize is conclusive evidence in an action upon a policy of insurance upon every matter within the jurisdiction of such ct. upon which it has professed to decide.

Therefore, where a Danish ship, warranted neutral, was captured by a French ship of war, Denmark being at peace with France, & the ct. in which she was libelled as prize, professing to consider that the built of the vessel was unknown, that she was sold to a neutral subject only since the declaration of war, that the bill of sale does not mention her place of built or her original owner, that the mate & third officer were naturalised Danes only since the declaration of war, & that the greater part of the crew were subjects of hostile powers, condemned the ship as good & lawful prize; such condemnation is conclusive against the warranty of neutrality in an action on the policy against the underwriter; & no evidence could be received to falsify the facts affirmed by such sentence, nor to show that the conclusion was unfounded; although the sentence proceeded to refer to certain ordinances of France containing rules to direct the judgment of its Cts. in the consideration of the question of neutrality; by which rules the Prize Ct. appear to have regulated their judgment in the conclusion they had drawn.—*BOLTON v. GLADSTONE* (1804), 5 East, 155; 1 Smith, K. B. 372; 102 E. R. 1028; *subsequent proceedings* (1809), 2 Taunt. 85.

*Annotations:—Refd.* De Mora v. Concha (1885), 29 Ch. D. 268. *Mentd.* Von Tungeln v. Dubois (1809), 2 Camp. 151.

**184.** ———.]—The sentence of a foreign Ct. of Admlty. is evidence only of what it positively & specifically affirms in the adjudicative part of it, not of what may be gathered from it by way of inference.—*FISHER v. OGLE* (1808), 1 Camp. 418, N. P.

*Annotations:—Apld.* Dalglish v. Hodgson (1831), 7 Bing. 495. *Refd.* Hobbs v. Henning (1865), 17 C. B. N. S. 791.

**185.** ———.]—The sentence of a Ct. of Admlty., sitting under a commission from a belligerent power, in a neutral country, will not be recognised in our cts.; & that is to be considered a neutral country for this purpose, in which the forms of an independent neutral govt. are preferred, although the belligerent may have a body of troops stationed there, as in reality to possess the sovereign authority.—*DONALDSON v. THOMPSON* (1808), 1 Camp. 429, N. P.

*Annotations:—Refd.* Hobbs v. Henning (1865), 5 New Rep. 406. *Mentd.* Crenaldi v. Powell, The Gerasimo (1857), 11 Moo. P. C. C. 88.

**186.** ———.]—If it can be discerned on the face of the sentence of a foreign Ct. of Prize, that the Ct. condemned on the ground that the property was enemy's property, the sentence is conclusive evidence in the cts. here that the property was not neutral; although it appears on the face of the sentence that the Ct. attained that conclusion through the medium of rules of evidence & rules of presumption established only by the particular ordinances of their own country, & not admissible on general principles.—*BOLTON v. GLADSTONE* (1809), 2 Taunt. 85; 127 E. R. 1008.

**187.** ———.]—If a ship insured is merely represented as neutral, a sentence of a foreign Ct. of Admlty., condemning her for a violation of the laws of neutrality, is not evidence to falsify the representation.—*VON TUNGELN v. DUBOIS* (1809), 2 Camp. 151, N. P.

**188.** ———.]—Pltf. declared on a policy from Jutland to Leith, & averred a loss by seizure. The captain stated that the ship was pursuing her course for Leith, when she was captured by a Swedish frigate, five German miles off the coast of Norway. Deft. produced a Swedish sentence of condemnation, for breaking the blockade of Norway:—*Held*: (1) this was conclusive evidence that the blockade had been violated; (2) it was not sufficient evidence to fix the captain with barratry; *qu.*: (3) whether pltf. could have recovered, without a count for barratry; (4) whether upon a count for barratry, a sentence of condemnation for the breach of a blockade would be conclusive.—*EVERTH v. HANNAM* (1815), 6 Taunt. 375; 2 Marsh. 72; 128 E. R. 1080.

**189.** ———.]—The sentence of a foreign Ct. of Admlty. is not conclusive as to the ground of condemnation, unless it be explicitly stated what the ground is.—*DALGLEISH v. HODGSON* (1831), 7 Bing. 495; 5 Moo. & P. 407; 9 L. J. O. S. C. P. 138; 131 E. R. 192.

*Annotations:—Consd.* Hobbs v. Henning (1865), 17 C. B. N. S. 791. *Expld.* Castrique v. Inrie (1870), L. R. 4 H. L. 414. *Refd.* De Mora v. Concha (1885), 29 Ch. D. 268. *Mentd.* Simpson v. Fogo (1863), 1 New Rep. 422; Francis, Times v. Carr (1900), 82 L. T. 698.

**190.** ———.]—*HOBBS v. HENNING*, No. 22, ante.

#### (c) Orders in Civil Proceedings.

**191. Rule of court.**—A rule of ct. is not a record, but only a remembrance (*HULLOCK, B.*).—*R. v. BINGHAM* (1829), 3 Y. & J. 101; 148 E. R. 1110; *affd.* (1830), 1 Cr. & J. 245, Ex. Ch.

**192. Commitment.**—*MIDDLETON v. SYLVESTER (MANUCAPTORS OF)* (1661), 1 Sid. 216; 82 E. R. 1066.

*Annotations:—Refd.* Waytes v. Briggs (1694), 5 Mod. Rep. 8; Turner v. Eyles (1803), 3 Bos. & P. 456.

**193. Chancery order.**—An order or bare commission of Ch. is no evidence.—*TURNER v. NURSE* (1704), 6 Mod. Rep. 149; 87 E. R. 907.

**194. Discharge of defendant out of custody—On ground of bankruptcy—Defendant estopped from disputing validity of bankruptcy in subsequent proceedings.**—If a person against whom a commission of bkpt. is sued out, obtains his discharge out of custody in an action by a judge's order, on the ground of his bkpey., he is afterwards precluded from contesting the validity of the commission in a ct. of law.—*GOLDIE v. GUNSTON* (1816), 4 Camp. 381, N. P.

*Annotations:—Folld.* Watson v. Wace (1826), 5 B. & C. 153. *Refd.* Munk v. Clark (1835), 2 Bing. N. C. 299; *Ex p.* Carter (1851), 1 De G. M. & G. 212.

**195.** ———.]—Where a commission of bkpt. issued against a person then in custody at the suit of petitioning creditor, & who afterwards applied to the Ct. of K. B., & obtained his discharge under 49 Geo. 3, c. 121, s. 14, on the ground that he had become bkpt., & that his detaining creditor had proved under the commission:—*Held*: he could not, in an action against the assignees, dispute the validity of the commission.—*WATSON v. WACE* (1826), 5 B. & C. 153; 7 Dow. & Ry. K. B. 633; 108 E. R. 57.

*Annotations:—Consd.* Heane v. Rogers (1829), 9 B. & C. 577. *Refd.* Munk v. Clark (1835), 2 Bing. N. C. 299; Freeman v. Cooke (1848), 2 Exch. 654; *Ex p.* Carter (1851), 1 De G. M. & G. 212. *Mentd.* Stratford & Moreton Ry. v. Stratton (1831), 2 B. & Ad. 518.

**196. Changing venue—Term of order that party**

**should admit handwriting of attesting witness.]—**In an action on a bond, to which deft. had pleaded *non est factum*, the judge made it one of the terms of an order to change the venue, that deft. should admit the handwriting of the attesting witness on the trial of the cause. The cause was tried, & pltf. obtained a verdict, which the ct. afterwards set aside & granted a new trial on payment of costs, giving deft. leave to amend the oyer & set out the condition more fully, which was accordingly done, & deft. then pleaded a special plea, alleging that the condition had been altered since the execution of the bond:—*Held*: pltf. was entitled to use the admission contained in the judge's order on the second trial, & that it was binding on deft.—*LANGLEY v. OXFORD (EARL)* (1836), 1 M. & W. 508; 2 Gale, 63; Tyr. & Gr. 808; 5 L. J. Ex. 166; 150 E. R. 535.

**197. For payment out of particular fund.]—**Where the ct. orders payment out of a particular fund, it is tantamount to a decision, not only that such fund is liable to make such payment, but also the interest directed to be computed thereon.

By the decree, arrears of maintenance were ordered to be paid out of a fund in ct., consisting of both of corpus & rents of real estate, & it was referred to the master to calculate interest on the arrears. Upon the matter coming before the ct. upon the master's report:—*Held*: it was not then competent for the parties to contend, that the arrears & interest were not payable out of the corpus, for the point must be considered settled by the prior decree.—*DAVIS v. BROWNE* (1851), 14 Beav. 127; 18 L. T. O. S. 33; 51 E. R. 235; *on appeal, sub nom. TORRE v. BROWNE* (1855), 5 H. L. Cas. 555, H. L.

*Annotations*:—*Mentd.* Booth v. Coulton (1861), 2 Giff. 514; Edwards v. Warden (1876), 1 App. Cas. 281; Wheatly v. Davies (1876), 35 L. T. 306; *Re* Hiscoe, Hiscoe v. Waite (1902), 71 L. J. Ch. 347.

**198. Declaration of rights of parties.]—**Testator directed his trustees to apply such part of a moiety of the surplus rents, as they in their discretion should see fit, for the maintenance, etc., of his younger children during his widow's life, & at her decease, to pay them £1,000 a piece. Subject thereto, A. was absolutely entitled to the estate. In a suit for the performance of the trusts, the estate was sold, & a fund was set apart to provide for the widow's dower, which was ordered to be charged with the legacies payable at her death, & A. was declared entitled to the remaining fund. The widow died, & no provision having been made for the children's maintenance under the discretionary direction, a younger child sought to obtain payment out of the dower fund:—*Held*: whatever his rights might be they had been concluded by the previous orders made in this cause.—*LIVESEY v. HARDING* (1855), 21 Beav. 227; 52 E. R. 846.

**199. — “Until further order.”]**—Testator directed trustees to stand possessed of residuary real & personal estate upon trust to pay thereout to his wife, during her life, such an annual sum as, together with the income of a settled fund of £10,000, should produce to her “a clear annual income of £1,500.” He gave several legacies & annuities, & towards the end of his will declared that “no deduction shall be made from any of the legacies given by this my will, or to be given by any codicil thereto, for the legacy tax or any other matter, cause or thing whatever.” An administration suit having been brought, an order was made in 1861 that the trustees of the will should repay to the widow certain sums which had been deducted from her annuity by mistake for suc-

cession duty, & that they should pay her until further order an annuity of £1,500 free of all deductions except income tax; but no express declaration of her rights was made. This order was acted upon until 1882, when a petition was presented by the widow asking that the income tax which had been deducted might be paid to her, & that in future her annuity might be paid free of income tax:—*Held*: the order of 1861 amounted to a declaration of the right of the widow to receive the annuity free of all deductions except income tax, notwithstanding the words “until further order,” & the matter was *res judicata* & could not now be reconsidered.—*PEARRETH v. MARRIOTT* (1882), 22 Ch. D. 182; 52 L. J. Ch. 221; 48 L. T. 170; 31 W. R. 68, C. A.

*Annotations*:—*Consd.* Thompson v. Thompson, [1923] 3 Ch. 205. *Refd.* Badar Bee v. Habib Merican Noordin, [1909] A. C. 615; Hook v. Administrator-General of Bengal (1921), 37 T. L. R. 378. *Mentd.* *Re* Loveless, Farrer v. Loveless, [1918] 2 Ch. 1; *Re* Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury, [1924] 1 Ch. 315.

**200. To proceed on execution—“Under which sheriff is in possession.”]**—P. having recovered judgment against F., the sheriff, on Apr. 15, seized F.'s goods in Hampshire, under a *fi. fa.* in that action, & left a man in possession. On the same day F. executed a bill of sale to W., & a writ of *fi. fa.*, in an action by W. against F., was lodged with the sheriff for execution. On May 1, F. was taken in Middlesex under a writ of *ca. sa.* issued at the suit of P., & thereupon P.'s attorney, at Southampton, immediately wrote to request the sheriff to withdraw from possession under the *fi. fa.* The officer received the letter, but his man continued in possession of the goods & did not in fact withdraw. The officer however told W. that he would hold for him under his writ. A summons to set aside the writ of *ca. sa.* on the ground that it had been irregularly issued “no return to the *fi. fa.*, under which the sheriff now holds deft.'s property having been made,” was taken out on May 3, & on May 4 F. was discharged out of custody, & an order was made by consent that “P. should be at liberty to proceed on the *fi. fa.* under which the sheriff is in possession.” The summons was taken out & the consent to the order given by R., the London agent of W., who was the attorney for F. in the action of P. v. F., upon F.'s instructions. W. knew nothing about the terms of the order at the time it was made, & when he heard of it took no steps to inform P. that he objected to it, or that it was made without his authority:—*Held*: W. was bound by the statement, that the sheriff was in possession, contained in the order made in the cause of P. v. F., & consented to by R. as the London agent of W.—*WITHERS v. PARKER* (1860), 5 H. & N. 725; 29 L. J. Ex. 320; 2 L. T. 602; 6 Jur. N. S. 1033; 8 W. R. 550, Ex. Ch.

*Annotation*:—*Consd.* *Re* Newen, Carruthers v. Newen, [1903] 1 Ch. 812.

**201. In administration suit—Disallowance of part of creditor's claim—Subsequent suit for account of disallowed balance.]—**A claim was carried in by a creditor under a decree for the administration of the estate of A., a portion of which claim was disallowed by the chief clerk. The creditor subsequently after the assets had been distributed paid further monies on account of the estate & then filed a bill against the residuary legatees for an account of what was due to him under his original claim, as well as in respect of that which had subsequently accrued:—*Held*: the creditor was not precluded by the decision of the chief clerk from having an account taken of



*Sect. 2.—What are matters of record: Sub-sect. 1, B. (c) & (d); sub-sect. 2. Sect. 3: Sub-sect. 1, A.]*

the balance that had been disallowed.—*THOMAS v. GRIFFITH* (1860), 2 De G. F. & J. 555; 30 L. J. Ch. 465; 3 L. T. 761; 7 Jur. N. S. 293; 45 E. R. 736; *sub nom.* *GRIFFITH v. THOMAS*, 9 W. R. 293, L. C. & L. J.J.

**202. — Fund carried to separate account.]—**An order in an administration action directing that a fund in ct. shall be carried over to a separate account does not amount to a definite & conclusive ascertainment & declaration of right so as to operate as a *res judicata* & deprive the person really entitled of the fund in favour of the persons named or indicated in the title of the separate account.—*THOMPSON v. THOMPSON*, [1923] 2 Ch. 205; 92 L. J. Ch. 544; 129 L. T. 461; 67 Sol. Jo.

**203. In consolidated suits by mortgagees—Direction for specified mortgages to be kept down—Right to dispute subsequently validity of mortgages.]—**Several incumbrancers' suits having been consolidated, a decree was made in them all, directing certain incumbrances to be kept down, & the several plffs.' costs to be added to the debts:—*Held*: a party to one of the suits was estopped by the decree from disputing the validity of one of the incumbrances directed to be kept down.—*FORD v. TYNTE* (1864), 3 New Rep. 559; 10 L. T. 93.

**204. Interlocutory order.]—**An interlocutory order in the nature of a finding or verdict is conclusive if the time for appealing from it has expired.—*WHITE v. WITT* (1877), 5 Ch. D. 589; 46 L. J. Ch. 560; 36 L. T. 123; 37 L. T. 110, C. A.  
*Annotation:—**Refd.* *Standard Discount Co. v. La Grange* (1877), 3 C. P. D. 67.

**205. Stay of proceedings.]—***WARWICK v. EAST*, [1889] W. N. 80.

**206. —.]—**Pltf. in an action having become bkpt., his trustee in bkpcy. elected not to continue the action, & thereupon an unconditional order was obtained by deft.'s staying further proceedings. B. having purchased the trustee's interest, commenced a second action for the same relief as that asked by the former action. Upon motion to dismiss the second action, as an abuse of the process of the ct. & as frivolous & vexatious:—*Held*: the action ought not to be dismissed in a summary way as frivolous & vexatious, as the motion gave rise to a question that required consideration, namely, whether the order staying the proceedings in the former action was equivalent to a judgment for debts.—*BEAN v. FLOWER* (1895), 73 L. T. 371; 11 T. L. R. 523, C. A.

**207. Winding-up order.]—***Re BOWLING & WELBY'S CONTRACT*, No. 153, *ante*.

**208. Balance order against contributory of company.]—**An action lies by the liquidator in the name of the co. against a contributory for calls made before the winding up, notwithstanding that the liquidator has obtained a balance order in the winding up for payment of the same moneys under Cos. Act, 1862 (c. 89), s. 101.—*WESTMORELAND GREEN & BLUE SLATE CO. v. FEILDEN*, [1891] 3 Ch. 15; 60 L. J. Ch. 680; 65 L. T. 428; 40 W. R. 23; 7 T. L. R. 585, C. A.

*Annotations:—**Distd.* *Pritchett v. English & Colonial Chamberlyn v. Allen* (1892), 36 Sol. Jo. 348.

*—See, generally, COMPANIES, Vol. X., pp. 919, 920.*

**209. Order made under mistake—Of law.]—**A will proved in 1874 gave an immediate legacy of £200 to a chapel building fund, & also a reversionary

bequest, payable after the death or remarriage of testator's widow. The exors. believed that these legacies transgressed the then operative Statutes of Mortmain, & an order was made in chambers dated May 8, 1876, directing that the £200 should fall into the residue. Testator's widow died in 1909:—*Held*: the representatives of the building fund were entitled to the reversionary bequest, inasmuch as the fund had other objects than those involving the purchase of land, to which the money might be applied, & the order of 1876 did not constitute an estoppel by *res judicata*, as such order had been in respect of another bequest, & had been based on a belief which was erroneous.—*Re SURFLEET'S ESTATE, RAWLINGS v. SMITH* (1911), 105 L. T. 582; 56 Sol. Jo. 15.

**In bankruptcy proceedings—Order of discharge.]—***See* *BANKRUPTCY, Vol. IV., pp. 579 et seq.*

*(d) Convictions and Orders in Criminal and Quasi-Criminal Proceedings.*

**Whether conclusive.]—***See* *Sect. 3, sub-sect. 1, E., post.*

**Whether bar to subsequent proceedings.]—***See* *Sect. 3, sub-sect. 2, E., post.*

**Pleas of autrefois acquit & autrefois convict.]—***See* *CRIMINAL LAW, Vol. XIV., pp. 336 et seq.*

#### SUB-SECT. 2.—OTHER RECORDS.

**210. Answer in suit in equity.]—**Where deft. has disclaimed by his answer, although he is retained as a party, & it is found that he has an interest, the answer being a matter of record, he is absolutely barred from any claim.—*WOOD v. TAYLOR* (1855), 3 Eq. Rep. 513; 25 L. T. O. S. 7; 3 W. R. 321.

*—See, also, No. 249, post.*

**Statements in pleadings since Judicature Acts.]—***See* *Part VI., Sect. 3, sub-sect. 2, B. (c), post.*

**211. Date of enrolment of deed of bargain & sale.]—**A man made a lease for years May 10, & then the lessor bargained & sold this to another by deed enrolled bearing date Apr. 10, & it was entered to be conveyed Apr. 10 before, but in truth it was delivered & acknowledged & enrolled afterwards:—*Held*: the bargainee was without remedy at the common law, for he could not plead that it was acknowledged or delivered after the date of the day of acknowledging it.—*HOWARD'S CASE* (1589), Owen, 138; 74 E. R. 958; *sub nom.* *HOLLAND v. DOWNE*, Sav. 91; *sub nom.* *HOLLAND & FRANKLIN'S CASE*, 1 Leon. 183; *sub nom.* *HOLLAND & BONIS'S CASE* (1587), 3 Leon. 175.

*Annotations:—**Consd.* *R. v. Hopper* (1817), 3 Price, 495. *Refd.* *Garrick v. Williams* (1811), 3 Taunt. 540.

**212. File of proceedings in bankruptcy.]—**After the creditors of a bkpt. have resolved under sect. 28 of Bkpcy. Act, 1869 (c. 71), to accept a composition offered by bkpt., bkpt., though undischarged, has a *locus standi* to apply to the ct. to reduce the amount of the proof of a creditor, & the mere fact that the proof has been upon the file of the proceedings in the bkpcy. for upwards of a year does not estop bkpt. from making the application.

The file of the proceedings in a bkpcy. is not of a nature of a record, & does not create an estoppel.—*Re BOND, Ex p. BACON* (1881), 17 Ch. D. 447; 44 L. T. 831; 29 W. R. 574, C. A.

**Fine.]—***See* *No. 143, ante.*

**Sheriff's return.]—***See* *SHERIFFS & BAILIFFS.*



## SECT. 3.—EFFECT OF RES JUDICATA.

## SUB-SECT. 1.—AS AN ESTOPPEL.

## A. In General.

**213. General rule.]**—(1) From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first, that the judgment of a ct. of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another ct.; secondly, that the judgment of a ct. of exclusive jurisdiction, directly upon the point is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another ct., for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment (*per CUR.*).

(2) A sentence in the Spiritual Ct. against a marriage in a suit of jactitation of marriage is not conclusive evidence, so as to stop the counsel for the Crown from proving the marriage in an indictment for polygamy (*per CUR.*).

(3) Admitting such sentence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion (*per CUR.*).

(4) Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of cts. of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal (*per CUR.*).

(5) In civil suits all strangers may falsify, for covin, either fines. or real or feigned recoveries; & even a recovery by a just title, if collusion was practised to prevent a fair defence; & this, whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas (*per CUR.*). —KINGSTON'S (DUCHESS) CASE (1776), 1 East,

P. C. 468; 1 Leach, 146; 20 State Tr. 355; 2 Smith, L. C. 12th ed. 754.

**Annotations:—**As to (1) *Consd.* R. v. Knappoft (1824), 2 B. & C. 883; R. v. Hartington Middle Quarter (1855), 4 E. & B. 780; Routledge v. Hislop (1860), 1 E. & E. 549; R. v. Hutchings (1881), 11 Q. B. D. 300; Priestman v. Thomas (1884), 9 P. D. 210; Isaacs v. Salbstein, [1916] 2 K. B. 139. *Refd.* Stafford v. Clark (1824), 9 Moore, C. P. 724; Barrs v. Jackson (1842), 1 Y. & C. Ch. Cas. 585; Robertson v. Struth (1844), Dav. & Mer. 772; De Bode v. R. (1848), 13 Q. B. 364; Bailey v. Harris (1849), 13 Jur. 341; Bank of Australasia v. Nias (1851), 16 Q. B. 717; R. v. Blakemore (1852), 2 Den. 410; R. v. Haughton (1853), 1 E. & B. 501; Cammell v. Sewell (1858), 3 H. & N. 617; Howlett v. Tarte (1861), 10 C. B. N. S. 813; Hunter v. Stewart (1861), 4 De G. F. & J. 168; The Justyn (1862), 6 L. T. 553; Simpson v. Fogo (1863), 8 L. T. 61; Flitters v. Alfrey (1874), L. R. 10 C. P. 29; Dover v. Child (1876), 34 L. T. 737; Leggett v. G. N. Ry. (1876), 1 Q. B. D. 599; Caird v. Moss (1886), 33 Ch. D. 22; Borough v. Collins (1890), 15 P. D. 81; A.-G. for Trinidad & Tobago v. Epiché, [1893] A. C. 518; N. E. Ry. v. Dalton Overseers, [1898] 2 Q. B. 66; Bynoe v. Bank of England, [1902] 1 K. B. 467; Turley v. Daw (1906), 94 L. T. 216; Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips, [1907] 2 Ch. 236; Burdett v. Horne (1911), 27 T. L. R. 402; Bedford v. Cowtan, [1916] 1 K. B. 980; Port of London Authority v. Woolwich Corp., [1924] 1 K. B. 30. As to (2) *Consd.* Barrs v. Jackson (1845), 1 Ph. 582. *Refd.* Meddowcroft v. Huguenin (1844), 4 Moo. P. C. C. 386; R. v. Haughton (1853), 1 E. & B. 501; Abouloff v. Oppenheimer (1882), 10 Q. B. D. 295. As to (3) *Consd.* Galbraith v. Neville (1789), 1 Doug. K. B. 6, n.; Abouloff v. Oppenheimer (1882), 10 Q. B. D. 295. *Refd.* Thompson v. Blackhurst (1833), 1 Nev. & M. K. B. 266; Bandon v. Becher (1835), 9 Bli. N. S. 532; Barrs v. Jackson (1845), 1 Ph. 582; Shedden v. Patrick (1854), 23 L. T. O. S. 191. As to (4) *Consd.* Patch v. Ward (1867), 3 Ch. App. 203. *Refd.* White v. Hall (1806), 12 Ves. 321; Bland v. Lynam (1827), 5 L. J. O. S. C. P. 87; Bandon v. Becher (1835), 9 Bli. N. S. 532; Meddowcroft v. Huguenin (1844), 4 Moo. P. C. C. 386; Tarry v. Newman (1846), 15 M. & W. 645; R. v. Blakemore (1852), 2 Den. 410; Nawab Sidhee Nuzur Ally Khan v. Ojoodhyaram Khan (1866), 10 Moo. Ind. App. 540; Ochsenbein v. Papelier (1873), 8 Ch. App. 695; Abouloff v. Oppenheimer (1882), 10 Q. B. D. 295; Boswell v. Coaks (1894), 86 L. T. 365, n. As to (5) *Consd.* Ochsenbein v. Papelier (1873), 8 Ch. App. 695. *Refd.* Accidental Death Ins. Co. v. Mackenzie (1861), 5 L. T. 20; Rogers v. Hadley (1863), 1 Jur. N. S. 898; Leggett v. G. N. Ry. (1876), 1 Q. B. D. 599. *Generally, Mentd.* Wilson v. Rastall (1792), 4 Term Rep. 753; Kennell v. Abbott (1799), 4 Ves. 802; Martin v. Nicolls (1830), 3 Sim. 458; R. v. Wye (1838), 7 Ad. & El. 761; R. v. Caley (1841), 5 Jur. 709; Hill v. Barry (1842), 7 Jur. 10; R. v. Sow (1843), 4 Q. B. 93; O'Brien v. R. (1849), 3 Cox, C. C. 360; R. v. Basingstoke (1850), 14 Q. B. 611; Liverpool Bank v. Fogo (1860), 2 L. T. 594; Swan v. North British Australasian Co. (1862), 7 H. & N. 603; R. v. Fanning (1866), 10 Cox, C. C. 411; Finney v. Finney (1868), L. R. 1 P. & D. 483; Stinson v. Farnham (1871), L. R. 7 Q. B. 175; Seton v. Lafone (1886), 18

## PART II. SECT. 3, SUB-SECT. 1.—A.

**213 i. General rule.]**—In order that the authority of *chose jugée* may be invoked, the litigation must not only be between the same parties & for the same causes or reasons, but must also be for the same thing or object.—STANSTEAD CORPN. v. BEACH (1899), Q. R. 8 Q. B. 276.—CAN.

**213 ii. —.]**—To establish plea of *res judicata* there must be a decision on the subject-matter of the litigation & between the same parties.—DUNLOP v. HANEY (1900), 7 B. C. R. 307.—CAN.

**213 iii. —.]**—A judgment in a former action, until set aside, operates as an estoppel where pleaded to a second action for the same subject-matter.—MUMFORD v. ARCADIA POWDER Co. (1905), 37 N. S. R. 375.—CAN.

**213 iv. —.]**—Parties to an action have no right after having tried a question in issue between them & obtained the decision of one ct. to litigate the same matter over again in another.—BONHAM v. THE SARNOR (1921), 21 Exch. C. R. 183.—CAN.

**213 v. —.]**—A finding to become *res judicata* as between co-pltfs. must have been essential for the purpose of giving relief against defts.—RUKHMINI v. DHONDO MAHADU (1911), 1 L. R. 36 Bom. 207.—IND.

**213 vi. —.]**—Pltf.'s father, claim-

ing to be the trustee of a temple, demised temple lands in 1866 on kanom to first deft., & second deft. was the ultimate assignee of the kanom interest at the date of suit. Pltf.'s claim to the trusteeship was negatived by decree of ct. in 1894 when a third party was declared to be the trustee. It was found that pltf. was not the trustee at the date of the present suit instituted by pltf. for recovery of possession of the kanom lands from second deft.:—*Held*: second deft. was not estopped from denying pltf.'s right on the ground that he was no longer the trustee, though he would be estopped from denying the title of the temple.—THUPPAN NAMUDRIPAD v. ITTICHIRI AMMA (1914), 1 L. R. 37 Mad. 373.—IND.

**213 vii. —.]**—The three requisites of a plea of *res judicata* are that the action in respect of which judgment has been given must have been between the same parties or their privies concerning the same subject-matter, & founded upon the same cause of complaint as the action in which the defence is raised.—HIDDINGH v. DENYSSEN (1885), 3 S. C. 424.—S. AF.

**213 viii. —.]**—The requisites of a valid defence of *res judicata* are that the new demand must be for the same thing that has already been finally adjudicated upon, that it must be for the same cause & between the same

parties.—BERTRAM v. WOOD (1892), 10 S. C. 177.—S. AF.

**213 ix. —.]**—In order to sustain a plea of *res judicata* it must be clear that the parties to the suit are the same as those to the previous suit.—PRETORIUS v. BARKLY EAST DIVISIONAL COUNCIL (1914), App. D. 408.—S. AF.

**h. Foreign judgment.]**—A foreign decree founded on for execution in this country affords only *prima facie* evidence of the truth & justice of the claim of pursuer, & is liable to be impugned on cause shown by defender.—SOUTHGATE v. MONTGOMERIE (1837), 15 Sh. (Ct. of Sess.) 507; 12 Fac. Coll. 473.—SCOT.

**k. Judgment by justices functi officio.]**—Defts. S. & A. H. were the makers of a joint & several promissory note in favour of K., or order, which K. indorsed to pltf. The note was sued in the first instance before two justices of the peace. At the trial deft. demanded a jury, & on the jury failing to agree they were dismissed by the justices & judgment given ordering each party to pay his own costs. Pltf. afterwards commenced proceedings in the county ct. to recover the amount of the note with interest:—*Held*: the first suit was not *res judicata*. The magistrates when they discharged the jury were *functi officio*; at all events they did not finally settle the matter in issue between the parties.—CREELMAN

**Sect. 3.—Effect of *res judicata*: Sub-sect. 1, A. & B. (a).]**

Q. B. D. 139; Kingston-upon-Hull Corp'n. v. Harding (1892), 62 L. J. Q. B. 55; Wallis v. Hands (1893), 62 L. J. Ch. 586; Ballantyne v. Mackinnon, [1896] 2 Q. B. 455; Dalton v. Fitzgerald (1897), 66 L. J. Ch. 604; *In the Estate of Crippen*, [1911] P. 108; C. (otherwise H.) v. C., [1921] P. 399.

**214.** ———.]—ORD v. ORD, No. 140, *ante*.

**215.** ——— **Grounds of decision.**]—By an agreement between two cos., one co. was to buy the business of the other co., the consideration to be paid in shares of the buying co., to be issued to the selling co. & divided amongst its shareholders. Resolutions approving of this agreement & also authorising the creation of the requisite new shares, all the shares authorised by the arts. of assocn. having been already issued, were passed at one extraordinary general meeting of the buying co., & were confirmed at a second meeting. A large majority of the shareholders of the selling co. assented to the agreement, & applied for & received what purported to be new shares of the buying co. Certain dissentient shareholders, however, filed a bill in Chancery & obtained a decision that the agreement was void. These shareholders were, afterwards, by way of compromise, paid a sum of money by the official liquidator of the buying co., then in liquidation, & the suit in Chancery was stayed. Certain former shareholders of the selling co., holders of what purported to be new shares in the buying co., then applied to be repaid the money which they had paid to the buying co. for premium & on calls upon their shares:—*Held*: (1) as the buying co. did really acquire, by a title which, though originally defective as against the dissentient shareholders, had been in the end confirmed, the

property of the selling co., & as the shares were issued *bonâ fide*, the holders of the new shares could not now repudiate them; (2) the directors of a co., after a resolution to increase the capital of a co., by the issue of new shares had been approved of by two meetings, according to Companies Act, 1862 (c. 89), ss. 50, 51, could proceed to issue the shares, & it was not necessary, under sect. 12, to have the articles varied at two meetings & the issue of the shares authorised by two other meetings.

(3) The buying co. had brought against one of the holders of new shares an action to recover calls, in which action judgment had been given for debt:—*Held*: the judgment was conclusive, & this holder of shares must be repaid what he had paid for premium & calls on the shares.

(4) A judgment is not only conclusive with reference to the actual matter decided, but also with reference to the grounds of the decision, provided that the grounds of the decision can be clearly discovered from the judgment itself.—*Re BANK OF HINDUSTAN, CHINA & JAPAN, CAMPBELL'S CASE, HIPPISEY'S CASE, ALISON'S CASE* (1873), 9 Ch. App. 1; 43 L. J. Ch. 1; 29 L. T. 521; 22 W. R. 113, L. C. & L. J.J.

**Annotations.**—As to (1) **Consd.** Hope v. International Financial Soc. (1876), 4 Ch. D. 327. **Refd.** *Re* County Palatine Loan & Discount Co., Teasdale's Case (1873), 9 Ch. App. 54; Eichbaum v. City of Chicago Grain Elevators, [1891] 3 Ch. 459; *Re* Wakefield Rolling Stock Co., [1892] 3 Ch. 165; As to (2) **Refd.** Imperial Hydro-pathic Hotel Co., Blackpool v. Hampson (1882), 23 Ch. D. 1; Taylor v. Pilsen Joel & General Electric Light Co. (1884), 27 Ch. D. 268; *Re* Briton Medical & General Life Assocn. (1889), 5 T. L. R. 502; Mosely v. Koffyfontein Mines, [1910] 2 Ch. 382; *Re* North Cheshire Brewery Co. (1920), 64 Sol. Jo. 463. As to (3) **Refd.** *Re* Ruby Consolidated Mining Co., Askew's Case (1874), 43 L. J. Ch. 633. As to (4) **Refd.** Harriman v. Harriman, [1909] P. 123.

*v.* STEWART (1895), 28 N. S. R. 185.—**CAN.**

**l. Interlocutory decision.**]—The Divisional ct. is not concluded by a prior judgment of that ct. given upon an interlocutory appeal in the same case.—EDISON GENERAL ELECTRIC CO. v. EDMONDS (1896), 4 B. C. R. 354.—**CAN.**

**m. ——— Judge in chambers.**]—*Held*: debts were not estopped by the interlocutory decision of a judge in chambers.—KINGSTON v. SALVATION ARMY (1904), 24 C. L. T. 309; 7 O. L. R. 681; 3 O. W. R. 556.—**CAN.**

**n. Decisions of municipal councils.**]—The legal rules touching *res judicata* do not apply to the decisions of municipal councils, which are only administrative acts.—ST. CHRISTOPHE CORPN. v. ARTHABASKA CORPN. (1906), Q. R. 29 S. C. 493.—**CAN.**

**o. Application for stay of execution—Pending appeal.**]—Judgment having been given for pltf., debt. appealed to the ct., & applied for a stay of execution pending the appeal. The application was dismissed. On renewal of the application:—*Held*: debt. having previously applied for a stay & failed, the matter was now *res judicata*.—COVERT v. JANZEN (1908), 1 Sask. L. R. 424; 9 W. L. R. 133.—**CAN.**

**p. Registrar's order referring matter to judge.**]—A case is not *res judicata* through the matter being referred by registrar to a judge.—REEVES v. KONSCHUR (1909), 10 W. L. R. 680; 2 Sask. L. R. 125.—**CAN.**

**q. Application for transfer of action.**]—A county ct. judge should not entertain an application for transfer of an action under King's Bench Act, R. S. M. 1902, c. 40, s. 90, if it has been already refused by a judge of the King's Bench on an application under the same section, as the matter is

*res judicata*.—EMERSON TOWN v. FORRESTER (1910), 19 Man. L. R. 665.—**CAN.**

**r. Motion to set judgment aside—On ground of fraud & discovery of new evidence.**]—An action in the supreme ct. of Sask. was tried by a judge of that ct., who gave judgment in favour of pltf. Defts. appealed from that judgment to the supreme ct., which affirmed the judgment & refused to order a new trial. Defts. launched a further appeal, to the supreme ct. of Canada, & before it was heard, moved to set aside the original judgment & for a new trial, on the grounds of fraud & the discovery of new & material evidence:—*Held*: the matter was *res judicata*.—WILLOUGHBY v. SASKATCHEWAN VALLEY & MANITOBA LAND CO. (1911), 17 W. L. R. 177.—**CAN.**

**s. Matter must be heard & finally decided.**]—To support the defence of *res judicata*, it is not enough that the parties to the suits are the same, & that the same matter is in issue. The matter must have been heard & finally decided.—SHEOSAGAR SINGH v. SITARAM SINGH (1897), 1 L. R. 21 Cal. 617; L. R. 24 Ind. App. 56; 1 C. W. N. 290.—**IND.**

**t. Must be based on grounds stated in the judgment.**]—A plea of *res judicata* must be based on the grounds of the decision actually stated in the judgment.—JALASUTRAM LAKSHMINARAIN v. BOMMADEVERA VENKATA NARASIMHA NAIDU (1905), 1 L. R. 29 Mad. 42.—**IND.**

**u. Res judicata & estoppel distinguished.**]—Estoppel & *res judicata* are entirely different. *Res judicata* precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying one thing at one time & the opposite at another.—CASSAMALLY JAIRAJBHAI v. SIR CURRIMBOY EBRA-

HIM (1911), 1 L. R. 36 Bom. 214.—**IND.**

**b. ———.] Res judicata** ousts the jurisdiction of the ct., while estoppel does no more than shut the mouth of a party. Estoppel never means anything more than that a person shall not be allowed to say one thing at one time & the opposite of it at another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over.—BHAIHANKER NANABHAI v. MORARJI KESHAVJI & CO. (1911), 1 L. R. 36 Bom. 283.—**IND.**

**c. Declaratory decree.**]—A suit for partition of land was withdrawn as against one debt. who was entitled to part of the land. Pltf. & remaining debts. entered into a compromise in the terms of which the ct. passed a decree for delivery of a share of the land to pltf. The decree-holder having died without executing the decree, his heir now sued for partition of the land & delivery of the above share, joining as debts. the various persons entitled to shares:—*Held*: the decree in the former suit could only operate as a declaratory decree, & did not preclude pltf. from bringing the present suit.—BEEMABAI v. YAMUNABAI (1890), 1 L. R. 13 Mad. 313.—**IND.**

**d. ———.]**—A Khoti village was owned by two families known as Varang & Desai. In 1854, two members of the Desai family brought a suit for partitioning the one-half share of the Desai family in the village. That suit ended in a decree which awarded them the share. The decree remained unexecuted. In 1904, pltf., a member of the Varang family, sued the Varang as well as the Desai members, to obtain his 1/84th share by partition of the village. Some of the debts. in both families admitted pltf.'s claim & asked that their shares also should be awarded to them on partition. It was contended that the



**216. — Judgment in rem.]—**BALLANTYNE v. MACKINNON, No. 268, *post*.

**217. — —.]—**HILL v. CLIFFORD, CLIFFORD v. TIMMS, CLIFFORD v. PHILLIPS, No. 239, *post*.

**218. Decision on merits.]—**A decision on the merits is a decision on the issue taken, after hearing all the evidence legally tendered on both sides.—R. v. EVENWOOD & BARONY (INHABITANTS) (1843), 3 Q. B. 370; 3 Gal. & Dav. 145; 12 L. J. M. C. 101; 7 J. P. 626; 7 Jur. 697; 114 E. R. 548.

*Annotations:—***Appld.** *Ex p.* Ackworth Overseers (1843), 3 Q. B. 397. **Folld.** R. v. Charlbury & Walcott (1843), 3 Q. B. 378. **Consd.** R. v. Ellet (1843), 7 J. P. 721. **Refd.** R. v. Perranzabuloe (1844), 8 J. P. 516; R. v. Conningsby (1848), 11 L. T. O. S. 103; De Mora v. Concha (1885), 29 Ch. D. 268.

**Judgment as bar to subsequent proceedings by plaintiff.]—**See Sect. 3, sub-sect. 2, *post*.

See, also, Sect. 1, *ante*.

### B. In respect of What Matters.

#### (a) Matters of Law.

**219. General rule—Reasons for decision.]—**Before the passing of Local Government Act, 1894 (c. 73), pltf. was duly elected assistant overseer of the poor of a certain parish by the inhabitants of the parish in vestry assembled at a salary, in the events which happened, of £85 a year, & was duly appointed by a warrant of justices. In 1896 the Local Govt. Board, acting under sect. 33 of that Act, made an order conferring on the council of the urban district in which the parish was situate the power of appointing & subject as mentioned in Art. 6, of revoking the appointment of the assistant overseer of the parish. Art. 6 provided that "Nothing in this order shall apply to the revoking of the appointment of any person now holding office as assistant overseer in any parish to which this order extends, nor, without his consent, to his re-appointment, & every such assistant overseer shall continue to hold office upon the same terms as at present." In Sept. 1905, the inhabitants of the parish, without revoking pltf.'s appointment, &

without his resigning, passed a resolution increasing his salary by £115 a year, & in Aug. 1906, two justices issued a warrant which, after reciting that the inhabitants had nominated & elected pltf. & had fixed the yearly sum of £200 as his salary together with such a sum as he might be allowed for work in connection with the registration of voters, proceeded to appoint him assistant overseer to perform the duties & receive the salary fixed by the inhabitants. In an action by pltf. against the overseers of the parish, who refused to pay the increased salary, it was held on Mar. 23, 1907, that pltf. had not been duly appointed at the increased salary, because, among other reasons, the power of re-nomination & re-election, which were necessary before the salary of an assistant overseer could be increased, had been vested in the urban district council. In Sept. 1912, the inhabitants, without any resignation of pltf. or revocation of his appointment, resolved that he should be paid a salary of £250 a year for performing the duties of overseer of the poor with certain exceptions; & in Oct. 1912, two justices issued a warrant which, after reciting that the inhabitants had nominated & elected pltf. & had fixed his yearly salary at £250, proceeded to appoint him assistant overseer to execute the duties & receive the salary fixed by the inhabitants. In 1916 the inhabitants again, without any resignation of pltf. or revocation of his appointment, resolved that pltf. should be paid a salary of £250 a year for performing the duties of overseer of the poor with the same exceptions as before, & again two justices issued a warrant reciting his nomination & election by the inhabitants & appointing him to be overseer of the poor & empowering him to perform the duties & receive the salary fixed by the inhabitants. In an action by pltf. against the overseers of the parish claiming a declaration that he was entitled under the warrant of 1912, or alternatively under the warrant of 1916, to salary at the rate of £250 a year:—*Held*: pltf. was not estopped by the judgment of Mar. 23, 1907, from contending that the power of revoking

claim of the Desai dofts. to obtain their share in the village, was barred as *res judicata* in virtue of the decree of 1854, which awarded to them half a share in the village:—*Held*: the first decree was a declaratory decree & did not operate as *res judicata* in the present suit.—JAGU BABAJI v. BALU LAXMAN (1912), 1 L. L. R. 37 Bom. 307.—**IND.**

**e. Effect of civil procedure code.]—**While Civil Procedure Code, s. 11, prevents the re-trial of issues directly & substantially in issue in a previous suit, the plea of *res judicata* still remains, apart from the limited provisions of the code.—HOOK v. BENGAL ADMINISTRATOR-GENERAL (1921), 37 T. L. R. 378.—**IND.**

**f. Action for possession of land.]—**Although a judgment in an action of ejectment could not always be relied on as an estoppel because of its form & its fictitious parties, the judgment in an action for the possession of land, under the present procedure, may be pleaded as an estoppel.—KELLY v. BENTINCK, CRAIG v. BENTINCK (1902), 22 N. Z. L. R. 235.—**N.Z.**

**g. Judgment in special case put hypothetically.]—**The fact that a judgment has been given on a statement of facts in a special case put hypothetically is no ground why it should not operate as an estoppel.—KELLY v. BENTINCK, CRAIG v. BENTINCK (1902), 22 N. Z. L. R. 235.—**N.Z.**

**h. Must be raised at trial—Cannot be decided on pleadings alone.]—**The *exceptio rei judicatae* is a plea in bar, & can only be raised at the trial,

& cannot be decided on the pleadings alone.—LAMB v. COLONIAL SECRETARY (1902), T. S. 319.—**S. AF.**

### PART II. SECT. 3, SUB-SECT. 1.—

#### B. (a).

**219 i. General rule.]—**Pltf., on a motion by deft. for a new trial, submitted, in the belief that the case was concluded by a recent decision of the ct. On the new trial a verdict was returned for deft. Pltf. now moved for a new trial on a ground which involved a point substantially the same as that on which he had previously submitted:—*Held*: he was estopped from arguing the point, although he might, on the previous motion, have been mistaken in supposing that the case was concluded by any decision of the ct.—M'ROBERTS v. CARTER (1888), 9 N. S. W. L. R. 458.—**AUS.**

**219 ii. —.]—**Pltfs. owned land adjoining the yards of a ry. co., who in 1888 constructed a siding for pltfs.' use in their business. In 1901 dofts. succeeded to the rights of the co., & in 1904 removed the siding. Pltfs. applied to the Dominion Board of R. Comrs. for an order that the siding be replaced, & in February, 1906, the Board made an order restoring the spur track facilities formerly enjoyed by pltfs. The Supreme ct. of Canada held that the Board had jurisdiction to make the order:—*Held*: the finding as to the jurisdiction of the Board was binding upon dofts., & the question of jurisdiction, was *res judicata*.—ROBIN-

SON v. CANADIAN NORTHERN RY. CO. (1910), 13 W. L. R. 8.—**CAN.**

**219 iii. —.]—**Pltf.'s traction-engine having been injured by reason of the collapse of a township bridge over which it was being driven, & this action being brought against the township corpn. to recover damages for the injury:—*Held*: the question of deft. corpn.'s liability was concluded by a previous case which arose out of the same occurrence.—PIPHER v. WHITCHURCH TOWNSHIP (1917), 39 O. L. R. 244; 34 D. L. R. 702.—**CAN.**

**k. — Construction of will.]—**Testatrix by her will gave a sum to trustees upon trust to pay the income to her husband for life, & after his death to pay & divide the income equally between her five children for their respective lives, with a power to appoint the capital of their respective shares by deed or will. On an originating summons to which three sons were parties, an order had been made declaring that the children took life interests after the death of their father in their respective shares, with a power of appointment superadded, "the said respective shares to remain in the hands of the trustees during the respective lives" of such children. Subsequently, by an originating summons taken out by those sons, the question was asked whether in the event of the sons appointing their respective shares to themselves by deed they would be entitled absolutely to those shares subject only to the life interest of their father:—*Held*: the



Sect. 3.—Effect of *res judicata*: Sub-sect. 1, B. (a),

his appointment & re-electing him at an increased salary remained in the vestry after the order of the Local Govt. Board made in 1896.

No question of fact which was directly in issue between the parties to the action before BRAY, J., & which was decided by him, could be further litigated by either party, & the same would apply to the exact point decided by BRAY, J., whether it were a point of law or of mixed law & fact. But the reasons which led the learned judge to his decision upon the precise point do not bind the parties in a subsequent litigation (BANKES, L.J.).

The present applts., as overseers of the poor for the time being of this parish, are as privies bound by the actual decision of BRAY, J.; but neither party is estopped by the reasons on which he based

matter was *res judicata* by reason of the former order of the ct.—ROOM v. BAIRD (1915), 19 C. L. R. 283.—AUS.

l. — Decree for foreclosure — Subsequent suit to try validity of mortgage.]—In a suit against a mtgor. who had mtged. reversionary interests in residuary real & personal estate to a co., a decree for foreclosure was made absolute in 1895, & the co. subsequently sold the properties. A suit was subsequently instituted against the co. by the mtgor., who alleged that the mtge. transactions were *ultra vires* the co. & the mtge. therefore invalid:—Held: the mtgor. was estopped by the decree for foreclosure from disputing the validity of the mtges.—GOLDRING v. NATIONAL MUTUAL LIFE ASSOCN. OF AUSTRALASIA, LTD. (1916), 22 C. L. R. 336.—AUS.

m. — Validity of will admitted to probate.]—The last will of deceased was duly admitted to probate by the ct. of probate for the county of C. There was no appeal from the decree & no application to have the will proved in solemn form. The widow of deceased brought an action against the exor. to have the will declared null & void & to cancel the probate granted:—Held: the question of the validity of the will was *res judicata*.—DICKSON v. DICKSON (1920), 52 N. S. R. 365.—CAN.

n. — Construction of decree by court.]—In reference to an application for execution of a decree, a ct. made an order between the parties construing the decree to award interest at a certain rate till payment:—Held: no contrary construction could be placed upon the decree in a subsequent application in the execution proceedings.—BENI RAM v. NANHU MAI. (1884), 1 L. R. 7 All. 102; 1 L. R. 11 Ind. App. 181.—IND.

o. Effect of order for new trial.]—As to the question whether an agreement was an enforceable contract a prior decision ordering a new trial does not operate as an estoppel.—GRAY v. DALGETY & CO., LTD. (1916), 21 C. L. R. 509.—AUS.

p. —.]—To a demand by F. for payment of an account, K. replied by pointing out errors & demanding payment of the amount of a cheque drawn by a third party, in the felonious conversion of which, he alleged, F.'s wife took part & that the rights in the said cheque had been transferred to him. The supreme ct. of Nova Scotia held that the whole letter was privileged, but ordered a new trial of the whole case:—Held: as the order was for a new trial without restriction & the evidence given on the former trial is not before the ct., the question of privilege is not *res*

*judicata* by the decision of the provincial ct.—KINNEY v. FISHER (1921), 62 S. C. R. 546.—CAN.

221 i. Matter of mixed law & fact.]—On a previous suit a particular stipulation contained in a particular *Kabuliyat* having been held to be valid as between the parties, it is not open to the ct. subsequently to try the issue whether that particular stipulation is valid or not, the question being a mixed question of law & fact.—BISHNU PRIYA CHOWDHURANI v. BHABA SUNDARI DEBYA (1901), 1 L. R. 28 Calc. 318.—IND.

221 ii. —.]—A judgment in a previous suit between the same parties not based on a misapprehension as to a general rule of law, but deciding a question of mixed law & fact is binding as *res judicata* in a subsequent suit.—KOYYANA CHITTEMMMA v. DOOSY GAVARAMMA (1905), 1 L. R. 29 Mad. 225.—IND.

q. Order overruling demurrer—Not appealed against.]—A defence setting up non-compliance with a condition in a contract having been demurred to, & pltf. not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was held to be *res judicata*.—GRAND TRUNK RY. CO. v. McMILLAN (1889), 16 S. C. R. 543.—CAN.

r. —.]—McKEAN v. JONES (1891), 19 S. C. R. 489.—CAN.

s. Order on objection to status of petitioner—Not appealed against.]—The preliminary objection was to the status of petr., & copies of the voters' preliminary objection was to the lists were filed but no other evidence offered. The ct. set aside the objection "without prejudice to the right of resp. if so advised to raise the same objection at the trial of the petition." No appeal was taken from this decision & the case went to trial, where the objection was renewed but was overruled by the trial judges who held that they had no right to entertain it, & on the merits they allowed the petition & voided the election:—Held: the objection raising the question of the qualification of petr. was properly raised by preliminary objection & disposed of, & the judges at the trial had no jurisdiction to entertain such objection.—PRESCOTT ELECTION CASE (1892), 20 S. C. R. 196.—CAN.

t. Decision admitting will to probate—Subsequent action to declare will invalid—Plaintiff not party to first contest.]—The high ct. has jurisdiction to entertain an action for a declaration of the invalidity of the will, notwithstanding the decision of a surrogate ct. admitting the will to probate, after a contest to which pltf. in the high ct. action was not a party, & the validity

his decision (BANKES, L.J.).—JONES v. LEWIS, [1919] 1 K. B. 328; 88 L. J. K. B. 657; 120 L. T. 200; 83 J. P. 61; 17 L. G. R. 105, C. A.

220. Court in which estate to be administered.]—It would be a scandal upon the administration of justice, if, after we have stopped the suit in Ch., & prevented the receiver in Ch. from interfering with the assets, we were then to say, There are a great quantity of assets which we will not administer, but will send them back to be realised & administered in the Ct. of Ch. on principles which the Ct. of Ch. has borrowed from the Ct. of Bkpcy. (JAMES, L.J.).—*Re WHITE, Ex p. MORLEY* (1873), 8 Ch. App. 1026; 43 L. J. Bcy. 28; 29 L. T. 442; 21 W. R. 940, L. JJ.

Annotations:—Mentd. *Re Simpson* (1874), 9 Ch. App. 574, n.; *Re White, Ex p. Dear* (1876), 1 Ch. D. 514; *Re Mellor, Ex p. Butcher* (1880), 13 Ch. D. 465; *Re Head, Ex p. Kemp* (1893), 10 Morr. 76; *Re Daniel, Ex p. Powell* (1896), 75 L. T. 143.

of the will was not *res judicata* by the decision of the surrogate ct.—BADENACH v. INGLIS (1913), 29 O. L. R. 165; 4 O. W. N. 1495.—CAN.

a. — Subsequent action to declare confirmation of deed contained in will invalid.]—The will of a Mahomedan lady, which confirmed a deed of release of testatrix's property to debt., was admitted to probate under Probate & Administration Act, 1881, though pltf., who were her heirs, had entered a caveat against it. Pltfs. then brought an action to compel debt. to account for two-thirds of testatrix's property, a Mahomedan having only power to dispose of one-third of his property by will. It was admitted that, apart from the effect of the probate, the deed of release & the confirmation thereof in the will were of no effect, as having been obtained by undue influence, but it was contended that pltfs. were estopped by the probate from denying the validity of the confirmation of the deed contained in the will:—Held: probate granted under the Act of 1881 did not create an estoppel as contended.—KURRATULAIN BAHADUR (MIRZA) v. PEARA (SAHEB) (1905), 21 T. L. R. 650.—IND.

b. Judgment upholding validity of debentures—Debenture holder suing on his own behalf—Subsequent action against other debenture holders of same company.]—By a deed executed in 1895 property of a co. was conveyed to trustees for the holders of second debentures to be thereafter issued. The arts. of assocn. of the co. provided that no director should vote in respect of any matter in which he was individually interested. They fixed the quorum of directors at two. At a meeting of directors held on May 12, 1903, at which three directors (two of them being D. & K.) were present, it was resolved that certain second debentures should be issued in trust for D. & K. as security for advances made by them to the company, which debentures were subsequently issued.

At a meeting of directors, held on May 16, 1903, at which five directors (including C. & T.) were present, each of the directors present agreed to advance a certain sum to provide new plant, & it was resolved to issue certain second debentures in trust for those making such advances, as security for the same. At a meeting of directors held on June 25, 1903, at which C. & T. were not present, these debentures were issued.

At a meeting of directors held on January 20, 1904, at which K., D., & H. were the directors present, it was resolved to issue certain second debentures in trust for persons making advances to the co., as security for such advances, & in pursuance of this resolution second debentures were

**221. Matter of mixed law & fact.]—JONES v. LEWIS, No. 219, ante.**

(b) *Matters of Fact.*

**222. General rule.]—JONES v. LEWIS, No. 219, ante.**

**223. Exemption of land from tithes.]—**A verdict & judgment against a rector, obtained in proceedings in prohibition as far back as the year 1680 will, in case of any claim to tithes being made by a subsequent rector, be conclusive against him of the existence of a binding composition real.—**WYNNIATT v. LINDON (1839), 8 L. J. Ch. 121; 3 Jur. 50, L. C.**

**224. Date of conviction.]—**The record of a prisoner's conviction, showing that he was convicted on a certain day, does not operate as an estoppel, so as to shut out evidence of the actual day on which the conviction took place.

As far as the record is concerned, the Assizes may be regarded as of one day; but that day is a legal day, which may, & often does consist of

more than one natural day of 24 hours. The ct. will itself take judicial notice that the Assizes are continued from day to day (MAULE, J.).—**WHITAKER v. WISBEY (1852), 12 C. B. 44; 21 L. J. C. P. 116; 19 L. T. O. S. 156; 16 Jur. 411; 8 Cox, C. C. 109; 138 E. R. 817.**

*Annotations:—*Expld. **R. v. Roberts (1873), L. R. 9 Q. B. 77.**  
*Reid.* **Preston v. Peeke (1858), 31 L. T. O. S. 162.**

**Matter of mixed law & fact.]—See No. 219, ante.**

(c) *Cause of Action.*

**225. General rule.]—**(1) If assignees of a bkpt. have brought an action, & have attempted to prove one item of their demand, & fail, because they could not prove an act of bkpcy. sufficiently early, they cannot bring another action for that claim which they could not before succeed in.

(2) The record in the former action is evidence in the second action, without being pleaded, though not conclusive as an estoppel.—**STAFFORD v. CLARK (1824), 2 Bing. 377; 1 C. & P. 403; 9**

issued in trust for C. & T. (directors). In pursuance of the same resolution second debentures were also issued to K. & D.

In the course of the present action, which was brought by a holder of first debentures, D. & K. applied to the judge for liberty to institute a joint action to establish their rights in respect of the second debentures issued to them. An order was made giving D. liberty to proceed with an action against the trustees of the second debenture holders & the co., for the purpose of establishing the rights of the appets. The action was brought by D. alone, & dealt with his rights only. It resulted in a judgment in his favour as regarded his debentures. The validity of the debentures issued to K., C., & T. having been challenged in the present proceedings by the other second debenture holders & by the liquidator of the co.:—*Held*: the judgment in D.'s action could not be relied on by K., C., or T., by way of estoppel.—**COX v. DUBLIN CITY DISTILLERY (No. 2), [1915] 1 L. R. 345.—IR.**

**c. Judgment for instalment of purchase-money—Due on contract for sale of land—Subsequent action for balance—Proof of title.]—**The fact that in a former action for an instalment of purchase-money the deft.-purchaser raised no question as to title & pltf. vendor recovered judgment raises no estoppel against deft. pleading want of title in a subsequent action for the balance of the purchase-money.—**MACKAY v. PROHAR & PAINE, [1922] 3 W. W. R. 482; [1923] 2 W. W. R. 272; 2 D. L. R. 1148.—CAN.**

**d. Order made in execution proceedings—Allowing claim based on deed of sale—Subsequent action on deed of sale.]—**Pltf. purchased two distinct plots of land (A & B) from G. by a deed of sale. In 1884, in execution of a decree against G. plot A was attached & sold as his property & purchased by deft. Pltf. did not intervene & at that time took no steps to establish his alleged right to this land. In 1885 deft. obtained another decree against G. & in execution, attached plot B. Pltf. intervened, & claimed the property attached as his own under the sale-deed. Deft. disputed the sale, but the ct. allowed pltf.'s claim. Deft. did not file a suit to set aside this order. Pltf. then filed a suit to establish his title to plot A, relying on his sale-deed. Deft. again disputed the sale:—*Held*: the order in the execution-proceeding did not operate as *res judicata*, & did not estop deft. from contesting the validity of the sale-deed.—**DINKAR**

**BALLAL CHAKRADEV v. HARI SHIRDIHAR APTE (1889), 1 L. R. 14 Bom. 206.—IND.**

**e. — Subsequent order of substitution.]—**A. executrix to the estate of her husband, executed a mtge.-bond. She then adopted a son, B. After the adoption, a suit was brought on the mtge.-bond against A., & a decree was passed in terms of a compromise for payment by instalments, the mtged. property remaining hypothecated as before. Default was made in payment of the instalments, & the decree-holder applied for execution of the decree from time to time & obtained partial satisfaction. In the meantime, the ct. of Wards took the management of the estate from A. & in the course of execution proceedings the original decree-holder died, & on an appln. for execution, N. then a minor, was substituted as decree-holder, & B. was substituted as judgment-debtor in the place of A.:—*Held*: B. was precluded by the previous proceedings from questioning the order of substitution.—**NORENDRA NATH PAHARI v. BHUPENDRA NARAIN ROY (1895), 1 L. R. 23 Calc. 374.—IND.**

**f. Order refusing probate of will—Subsequent suit by executors as beneficial owners.]—**Pltfs. applied for probate of a will of which they were appointed executors. Defts. opposed their application, which was rejected. Pltfs. thereupon filed the present suit, as the persons beneficially entitled under the will for a declaration that the property of deceased belonged to them, & for an injunction to restrain deft. from obstructing them in the enjoyment of it:—*Held*: the suit was not barred by the order refusing probate of the will.—**GANESH JAGANNATH DEV. v. RAMOHANDRA GANESH DEV (1896), 1 L. R. 21 Bom. 563.—IND.**

**g. Subject-matter of two suits must be the same.]—**A decision on a question of law in a previous suit is not *res judicata* in a subsequent suit between the same parties, when the subject-matters of the two suits are different.—**GOPU KOLANDAVELU CHETTY v. SAMI ROYAR (1905), 1 L. R. 28 Mad. 517.—IND.**

**h. Erroneous decision on point of law.]—**A decision in a previous suit on a question of law, even if erroneous, would operate as *res judicata* in a subsequent suit.—**BISHNU PRIYA CHOWDHURANI v. BHABA SUNDARI DEBYA (1901), 1 L. R. 28 Calc. 318.—IND.**

**k. —.]—**An erroneous decision upon a point of law may yet as between the parties to it, but no further, be a sufficient *res judicata* to preclude them

from re-agitating it.—**WAMAN v. HARI (1906), 1 L. R. 31 Bom. 128.—IND.**

**l. —.]—**An erroneous decision on a question of law in an application for execution does not operate as a bar in a subsequent application to recover arrears which accrued subsequently.—**AITAMMA v. NARAINA BHATTIA (1907), 1 L. R. 30 Mad. 504.—IND.**

**m. —.]—**An erroneous decision on a question of law in a previous suit is no bar, in a subsequent suit between the same parties, to the ct. deciding the same question, provided the decision in the latter suit does not in any way question the correctness of the former decree or in any way affect its operation.—**MANGALATHAMMAL v. NARAYANSWAMI AIYAR (1907), 1 L. R. 30 Mad. 461.—IND.**

**n. —.]—**A decision in a previous execution proceeding which merely lays down what the law is, & is found to be erroneous, cannot have the force of *res judicata* in a subsequent proceeding for a different relief.—**BAIJ NATH GOENKA v. PADMANAND SINGH (1912), 1 L. R. 39 Calc. 848.—IND.**

**o. Orders passed in execution.]—**Previous orders passed in execution & allowing execution on a construction of a decree, as to mesne profits or as to interest or the like have the force of *res judicata*, though the latter appln. be in respect of a different subject-matter.—**SUBBA CHARIAR v. MUTHUVEERAN PILLAI (1913), 1 L. R. 36 Mad. 553.—IND.**

**PART II. SECT. 3, SUB-SECT. 1.—**  
**B. (b).**

**p. Fact necessary to found jurisdiction—Appearing on face of order of inferior court.]—**A party moving for a writ of prohibition against an order of an inferior ct. is not estopped from denying statements of fact necessary to found the jurisdiction of the inferior ct. appearing on the face of the order in question on the motion.—**Re BOLE (1892), 2 B. C. R. 208.—CAN.**

**q. Judgment against executor by default—Nulla bona return—Devastavit.]—**An exor. who was sued did not appear at the hearing, & judgment was given against him. On execution being issued against the goods of his testator a return of *nulla bona* was made. An action on the judgment suggesting a *devastavit* was therefore commenced against the exor.:—*Held*: the former judgment was conclusive evidence against the exor. as to the possession of assets, & the return was evidence against him that he had wasted the assets.—**TRAVERS v. MILLET (1880), 1 N. Z. L. R. 1.—N.Z.**



**Sect. 3.—Effect of *res judicata*: Sub-sect. 1, B. (c) & (d).]**

Moore, C. P. 724; 3 L. J. O. S. C. P. 48; 130 E. R. 352.

*Annotation*:—As to (2) *Reid*. Holland v. Clark (1842), 1 Y. & C. Ch. Cas. 151.

**226. Judgment in possessory action—Not conclusive in respect of real rights.]—BASSET v. BENNETT** (1767), cited 3 East, 364; 102 E. R. 630.

*Annotation*:—*Dbtd.* Outram v. Morewood (1803), 3 East, 346.

**227. Judgment disaffirming exclusive right to river—Second action trying same right.]—The flux & reflux of the tide is *prima facie* evidence of a navigable river. But not absolutely inconsistent with an exclusive right. A judgment in an action on the case, disaffirming an exclusive right to a river, is strong evidence in another action trying the same right. But not conclusive.—MILES v. ROSE** (1814), 5 Taunt. 705; 1 Marsh. 313; 128 E. R. 868.

*Annotation*:—*Mentd.* R. v. Montague (1825), 4 B. & C. 598.

**PART II. SECT. 3, SUB-SECT. 1.—B. (d).**

**230 i. General rule.]—Trespass for breaking & entering the south forty acres of the east half of lot twenty-two. Plea, judgment recovered by deft. against pltf. & another in a former action of trespass brought by deft. for breaking & entering that part of the half lot lying north of the south forty acres, & averring that the trespass now complained of & the trespass complained of in the former action were committed on the same piece of ground; which piece pltf. had contended in the former action formed part of the south forty acres, but which the jury in that action had found to lie north of the south forty acres:—Held: a good plea by way of estoppel.—LEINSTER v. STABLER** (1868), 17 C. P. 532.—CAN.

**230 ii. —.]—In an action to set aside a deed of assignment pltf. died before the case was ready for judgment, & resp. petitioned to continue the suit as legatee under a will dated Nov. 17, 1869. Applt. contested on the ground that this will had been revoked by a later will which was contested by resp. as null & void. Upon that issue the ct. declared the later will null & void:—Held: the judgment was *res judicata* between the parties & final on the petition for continuance of the suit.—BAPTIST v. BAPTIST** (1892), 21 S. C. R. 425.—CAN.

**230 iii. —.]—Where a *capias* is based on a judgment the question of indebtedness as fixed by the judgment is *chose jugée*, & deft. is precluded from questioning the correctness of the amount so found to be due by him.—CUSHING v. FORTIN** (1892), Q. R. 1 S. C. 512.—CAN.

**230 iv. —.]—A motion will not be reheard where it is renewed on the same grounds on which it was previously decided.—WISWELL v. WALLACE** (1894), 26 N. S. R. 505.—CAN.

**230 v. —.]—Question excluded having been raised & decided adversely in previous action between same parties.—ZWICKER v. MORASHI** (1903), 36 N. S. R. 365.—CAN.

**230 vi. —.]—BARRETTE v. CANADIAN BANK OF COMMERCE** (1905), 1 W. L. R. 171.—CAN.

**230 vii. —.]—A. brought a suit against B. for arrears of rent. B. admitted the sum claimed, but contended that the rent was due for a larger area of land than that specified in the plaint. An issue was framed on such contention, & decided against B. In a subsequent suit by B. to have it declared that a sum of money,**

equal in amount to the sum paid on admission in the former suit, comprised the rent due on all the lands held by him under A.:—Held: such suit was barred as being *res judicata*.—BUSSUN LALL SHOOKUL v. CHUNDER DASS (1879), 1 L. R. 4 Calc. 686; 4 C. L. R. 1.—IND.

**230 viii. —.]—A husband, upon whom an order for maintenance of his wife had been made, objected to the payment on the ground that his wife was living in adultery. The magistrate, entertaining this objection, disallowed it, on the ground that the charge of adultery against the wife was not established. The husband subsequently again objected to the payment of the allowance on the same ground. The magistrate, entertaining the second objection, allowed it, & directed the husband to discontinue paying the allowance. His order was based on proof of adultery by the wife before the date of the order of the former magistrate:—Held: the second magistrate was wrong in law in re-opening matters already adjudicated upon.—LARAITH v. RAM DIAL** (1882), 1 L. R. 5 All. 224.—IND.

**230 ix. —.]—Where a final decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining what were the real matters of controversy in the cause.—AMRITESWARI DEBI v. SECRETARY OF STATE FOR INDIA** (1897), 1 L. R. 24 Calc. 504; L. R. 24 Ind. App. 33; 1 C. W. N. 249.—IND.

**230 x. —.]—In a suit to set aside a decree as having been obtained against pltf. by fraud substantially the only ground relied upon was that the suit had been improperly instituted against pltf. as of full age when in fact he was a minor. This had been decided against pltf. in earlier proceedings between the parties:—Held: the suit was not maintainable.—NIADAR MAL v. RAUNAK HUSAIN** (1907), 1 L. R. 29 All. 608.—IND.

**230 xi. —.]—Civil Procedure Code, s. 144 (c) governs a case in which a person seeks to set aside an auction-sale on the ground of fraud & on the ground that the decree-holder himself held a mtge. on the property brought to sale. This plea had been urged successfully by applt. in a regular suit brought by resp., but the former now pleaded that the remedy should be by suit & not by execution-proceedings:—Held: applt. cannot be allowed to go behind the issue decided in the course of the previous litigation.—GAYA PRASAD MISR v. RANDHIR SINGH** (1906), 1 L. R. 28 All. 681.—IND.

**228. Judgment in action for use & occupation—Second action for use & occupation between same parties.]—In an action for use & occupation, a judgment for a former action for use & occupation between the same parties, given in favour of pltf., is evidence of deft.'s having occupied, but is not conclusive; & the jury ought to take into their consideration all the circumstances under which that judgment was obtained.—JONES v. REYNOLDS** (1836), 7 C. & P. 335, N. P.; *subsequent proceedings*, 4 Ad. & El. 805.

**229. Judgment in ejectment—Subsequent action of trespass for mesne profits.]—DOE v. WRIGHT**, No. 134, *ante*.

**Judgment as bar to subsequent proceedings by plaintiff.]—See Sect. 3, sub-sect. 2, B. (a), *post*.**

**(d) Matters in Issue.**

**230. General rule.]—KINGSTON'S (DUCHESS) CASE**, No. 213, *ante*.

**230 xii. —.]—A., a landlord, tendered a patta to B., his tenant. The issue was raised whether the patta tendered was proper, & the ct. found that it was a proper patta. Decree was accordingly given for rent in favour of A. A. tendered a similar patta to B. for a subsequent year, & B. again raised a similar objection. In a suit brought by A. for the rent:—Held: the question of the extent of deft.'s holding was directly & substantially an issue in the previous suit & must be taken to have been heard & finally decided in pltf.'s favour.—BAYYAN NAIDU v. SURYANARAYANA** (1914), 1 L. R. 37 Mad. 70.—IND.

**230 xiii. —.]—In a case before the Privy Council certain facts were admitted as the facts on which the title to compensation under Wellington Harbour Board & Corp'n. Land Act, 1882, was founded. In a subsequent case before the compensation ct. it was admitted that the case before the Privy Council should be taken to embody all the facts on which the title to compensation in the subsequent case was founded:—Held: it must be taken that the title was such title as was found by the Privy Council to exist in the previous case.—JOSEPH v. WELLINGTON CORPN.** (1886), 5 N. Z. L. R. 37.—N.Z.

**230 xiv. —.]—Defender in an action for payment of calls created counter issues of inducement to purchase shares by false & fraudulent representations on the part of pursuers & also that pursuer had acted as brokers in the purchase had violated their duty & induced the purchase. Defender had previously in another action against him at the instance of the same pursuers for payment of the price of the same shares advanced by the pursuers on his account obtained counter issues to the same effect, which had resulted in a verdict & decree against him:—Held: this amounted to *res judicata* & proposed counter issues disallowed.—NATIONAL EXCHANGE CO. v. DREW** (1861), 23 Dunl. (Ct. of Sess.) 1278; 33 Sc. Jur. 641.—SCOT.

**230 xv. —.]—In defence to an action by the directors of a co. for payments of calls averments were made that the calls were not required for the legitimate purposes of the co. These matters became the subject of an action of reduction of the minutes making the calls, until the issue of which reduction the action for calls was stayed, the parties thereto agreeing by minute to abide by the result of the action of reduction. The judgments in the reduction was "assolvie defenders from the conclusions of the**



**231.** —.]—A record evidence only of what is in issue, & appears on the record, ought to be conclusive of the matter; therefore, evidence is not admissible to show that any matter occurred at the trial not appearing on the face of the record.

In order to make a record evidence to conclude any matter, it should appear that that matter was in issue, which should appear from the record itself (LORD KENYON, C.J.).—SINTZENICK v. LUCAS (1793), 1 Esp. 43, N. P.

**232.** —.]—The rule against re-agitating matter adjudicated is subject generally to this restriction, that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, & however binding & conclusive the decision may, as to its immediate & direct object, be, those facts are not all necessarily established conclusively between the parties, & that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object (KNIGHT-BRUCE, V.-C.).—BARRS v. JACKSON (1842), 1 Y. & C. Ch. Cas. 585; 7 Jur. 54; 62 E. R. 1028; *on appeal* (1845), 1 Ph. 582, L. C.

*Annotations:—*Apprvd. R. v. Hutchings (1881), 6 Q. B. D. 300. **Consd.** Abouloff v. Oppenheimer (1882), 10 Q. B. D. 295; *Re Allsop & Joy's Contract* (1889), 61 L. T. 213; Stephenson v. Garnett, [1898] 1 Q. B. 677. **Apprvd.** R. v. Ollis, [1900] 2 Q. B. 758. **Consd.** Bedford v. Cowtan, [1916] 1 K. B. 980; *Ord v. Ord*, [1923] 2 K. B. 432. **Refd.** Nelson v. Couch (1863), 15 C. B. N. S. 99; A.-G. v. Partington (1864), 3 H. & C. 193; Hobbs v. Henning (1864), 17 C. B. N. S. 791; Finney v. Finney (1868), L. R. 1 P. & D. 483; Spencer v. Williams (1871), L. R. 2 P. & D. 230; Priestman v. Thomas (1884), 53 L. J. P. 109; De Mora v. Concha (1885), 29 Ch. D. 268; Caird v. Moss (1886), 33 Ch. D. 22. **Mentd.** Hope v. Gloucester Corpn. (1855), 7 De G. M. & G. 647; Enolin v. Wylie (1862), 31 L. J. Ch. 402; *Re De Penny*, De Penny v. Christie, [1891] 2 Ch. 63.

**233.** —.]—(1) A bill in Chancery is not evidence of the truth of the facts stated in it, as against the party in whose name it is filed, even though his privity be shown, but is only admissible to prove that a suit was instituted, & the subject-matter of it.

(2) *Semle*: pleadings in equity as well as at common law are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, & if denied, to be proved & ultimately submitted for judicial decision.

(3) The facts actually decided by an issue in any suit cannot be again litigated between the same parties, & are conclusive evidence between them; so are the material facts alleged by one party which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though for the

purposes of the cause he is bound by those that are material, ought not, it should seem, to be treated as confessions of the truth of the facts stated.—BOILEAU v. RUTLIN (1848), 2 Exch. 665; 12 Jur. 899; 154 E. R. 657.

*Annotations:—*As to (1) **Consd.** British Thomson-Houston Co. v. British Insulated & Helsby Cables, [1924] 2 Ch. 160. **Refd.** Richards v. Morgan (1863), 4 B. & S. 641; Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437; *Re Walters*, Nelson v. Walters (1889), 61 L. T. 872. As to (2) **Refd.** Thomas v. Cross (1852), 7 Exch. 728; Buckmaster v. Meiklejohn (1853), 8 Exch. 634. As to (3) **Consd.** Howlett v. Tarte (1861), 10 C. N. B. S. 813; *Ord v. Ord*, [1923] 2 K. B. 432. **Refd.** Hutt v. Morrell (1849), 3 Exch. 240; Gordon v. Whitehouse (1856), 18 C. B. 747; Butler v. Butler, [1894] P. 25; British Thomson-Houston Co. v. British Insulated & Helsby Cables, [1924] 2 Ch. 160.

**234.** —.]—Judgments of cts. of concurrent jurisdiction are evidence only where the very same matter comes distinctly in issue between the same parties. The judgments of cts. of exclusive jurisdiction are evidence whether the matter arises incidentally or is the matter directly at issue (LORD CHELMSFORD).—MACKINTOSH v. SMITH & LOWE (1865), 4 Macq. 913, H. L.

*Annotation:—***Mentd.** Mackintosh v. Lord Advocate (1876), 2 App. Cas. 41.

**235.** —.]—(1) The judgment of a ct. of competent jurisdiction is, as evidence, conclusive as to the matters at issue, whenever the same matters shall be afterwards in question between the same parties in another ct.

(2) The judgment of a county ct. as to matters within its jurisdiction is, by 9 & 10 Vict. c. 95, s. 89, of equal validity for the purposes of evidence with the judgment of a superior ct. although the county ct. may not show upon what issues or upon what grounds the decision was given.—FLITTERS v. ALLFREY (1874), L. R. 10 C. P. 29; 44 L. J. C. P. 73; 31 L. T. 878; 23 W. R. 442.

*Annotations:—*As to (1) **Consd.** Priestman v. Thomas (1884), 9 P. D. 70. **Refd.** Dover v. Child (1876), 45 L. J. Q. B. 462.

**236.** —.]—CONCHA v. CONCHA, No. 258, *post*.

**237.** —.]—The estoppel is an estoppel only so far as regards all matters necessary to be decided in the suit, is a proposition which applies not merely to estoppels *in rem*, but also to estoppels *inter partes* (CHITTY, J.).—*Re ALLSOP & JOY'S CONTRACT* (1889), 61 L. T. 213.

*Annotation:—***Refd.** *Ord v. Ord*, [1923] 2 K. B. 432.

**238.** —.]—BALLANTYNE v. MACKINNON, No. 268, *post*.

**239.** —.]—Three several arts. of partnership for carrying on the business of dentists, entered into by two persons named Clifford with pltf. in the first action & defts. in the other two actions, all contained a provision that if either partner should be guilty of "professional misconduct" the other partner should be at liberty to give notice in writing determining the partnership. The General Medical Council, acting under the powers of the Dentists Act, 1878 (c. 33), made an order directing the registrar to strike the Cliffords'

action as laid":—*Held*: on a fair interpretation of the interlocutor the judgment was one of *absolvitor* on the merits in the sense of the minute & inquiry into the merits of the action for calls was thereby excluded.—GLASGOW, AIRDRIE & MONKLANDS JUNCTION RY. CO., v. DREW (1861), 23 Dunl. (Ct. of Sess.) 835; 33 Sc. Jur. 443.—SCOT.

**230 xvi.** —.]—A firm of contractors, who had constructed works for a ry. co. & had received payment of the contract price, brought an action against the co. concluding for payment of an additional sum. Defenders

were assoltzied.

Thereafter the contractors sought to invoke an arbitration clause contained in the contract, & lodged a claim with the arbiter therein named for a sum made up of substantially the same items as had been the subject of the petitory action. The railway co. having brought an action to interdict the arbitration from proceeding with regard to these items:—*Held*: as the items claimed in the arbitration were included in the action, & as the question litigated & decided there was whether those items were due, the *media concludendi* in the action & the

arbitration were the same; & that, accordingly, the plea of *res judicata* was well founded, & excluded the jurisdiction of the arbiter.—GLASGOW & SOUTH-WESTERN RY. CO. v. BOYD & FORREST, [1918] S. C. 14.—SCOT.

**r.** — *Actions may differ in form.*—The defence of *res judicata* is not defeated by the fact that the action differs in form from the previous action if the matter in issue is the same. Thus a decision on a claim for damages for trespass may be *res judicata* to a claim for use & occupation.—WOLFAERT v. COLONIAL GOVERNMENT (1899), 16 S. C. 250.—S. AF.

*Sect. 3.—Effect of res judicata: Sub-sect. 1, B. (d).]*

names off the register of Dentists, on the ground that they had been guilty of conduct "which was infamous or disgraceful in a professional respect" within the words of the Act. Pltf. in the first action & defts. in the other two actions thereupon gave notices determining the partnership. These three actions were brought to determine the validity of the notices. The Order of the Medical Council was tendered in evidence:—*Held*: (1) (COZENS HARDY, M.R. & BUCKLEY, L.J.) the order was admissible as *prima facie* evidence of the fact that the Cliffords were guilty of acts "infamous or disgraceful in a professional sense," & there being no rebutting evidence, that fact was proved; (2) (GORELL BARNES, P.) the order was admissible as evidence & conclusive evidence of the fact that defts.' names had been erased from the register by order of the council, & might be admissible against defts. for some purposes other than the truth of the fact of misconduct to show the grounds upon which it was made, & that there was other sufficient evidence that the Cliffords had been guilty of professional misconduct.

(3) A judgment *in rem* has been defined to be an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose; & there is authority for the proposition that in certain judgments *in rem* the judgment or order is conclusive against all the world, not merely for the immediate purpose thereof, but as to the existence of the ground on which the ct. purposes to decide. . . . The authorities however seem to me only to deal with the use or effect of the judgment in question upon which the judgment is conclusive for its proper purpose or object, & not with regard to other issues (GORELL BARNES, P.).—HILL v. CLIFFORD, CLIFFORD v. TIMMS, CLIFFORD v. PHILLIPS, [1907] 2 Ch. 236; 76 L. J. Ch. 627; 97 L. T. 266; 23 T. L. R. 601, C. A.; *affd.* on other grounds, [1908] A. C. 12, 15, H. L.

*Annotations*:—*As to* (3) *Reid*. Bird v. Keep (1918), 118 L. T. 633; Law v. Chartered Institute of Patent Agents, [1919] 2 Ch. 276.

**243 i. Judgment in ejectment—Suit to discover title.**—Although a judgment in an action for ejectment may not always create an estoppel, it does so where the title to the land itself & the permanent right of possession have been tried & determined.—DOMINION TRUST CO., LTD. v. MASTERTON (1914), 20 B. C. R. 389; 20 D. L. R. 305.—CAN.

**b. — Denial of title.**—A judgment in ejectment for part of the premises is an estoppel against deft.'s denial of pltf.'s interest in such portion.—DOE v. LANGS (1852), 9 U. C. R. 676.—CAN.

**t. Bastardy proceedings.**—In a complaint before justices against the putative father for maintenance of an illegitimate child former orders made against the father for maintenance even though such orders are bad, are an estoppel against the alleged father denying that he was the father.

Where two maintenance orders were obtained against the father by the child's mother, & a third was afterwards obtained against him by the father of the mother (she then being dead) the parties are the same, & the two former orders can be adduced as *res judicata* at the application for the third.—HANLEY v. MCMASTERS (1889), 15 V. L. R. 322.—AUS.

**a. Order of court of revision—Assessment of property.**—A person assessed for property exempt from taxation, who has appealed to the ct. of revision, is bound by their decision.

**240. —.**—HARRIMAN v. HARRIMAN, No. 8, *ante*.

**241. —.**—JONES v. LEWIS, No. 219, *ante*.

**242. Judgment against parishioner for not setting out tithes in kind—Suit by parishioners to establish modus in lieu of tithes.**—Bill for a modus, etc., deft. pleaded a verdict & judgment obtained by him in an action of debt against deft. R. for not setting forth titles etc. & plea was allowed.—BLUCK v. ELLIOT (1673), Cas. temp. Finch, 13; 23 E. R. 8.

*Compare* Nos. 254, 273, *post*.

**243. Judgment in ejectment—Suit to discover title.**—Bill to discover a title, deft. pleads two verdicts, & judgment obtained in ejectment by his father, & a writ of possession under which he claims; & the plea was allowed.—PITR v. HILL & BROADWAY (1673), Cas. temp. Finch, 70; 23 E. R. 37.

**244. Judgment against plaintiff's title—Suit to discover title.**—Bill to discover a title & deed; deft. pleads a conveyance from pltf. himself, & a verdict at law obtained against pltf.'s title upon a full evidence.—HELLAM v. GRAVE (1675), Cas. temp. Finch, 205; 23 E. R. 112.

**245. Judgment that leases void—Suit to supply defective execution of power to make leases.**—Bill to supply a defective execution of a power to make leases, etc. Deft. pleaded, that on a special verdict at law, judgment was given, that the leases were void; the plea was held good, & the bill dismissed.—TEMPLE v. BALTINGLASS (VIS-COUNTRESS) (1677), Cas. temp. Finch, 275; 23 E. R. 151.

**246. Decree for foreclosure—Suit to redeem.**—To a bill to be let in to redeem alleging that the money due on the mtge. was greatly overpaid by the perception of the rents of the mortgaged premises, a plea of a decree for a foreclosure signed & inrolled under which the premises had been absolutely foreclosed was allowed.—MALLOCK v. GALTON (1735), 1 Dick. 65; 3 P. Wms. 352; 21 E. R. 192, L. C.

*Annotation*:—*Mentd.* Kelsall v. Kelsall (1834), 2 My. & K. 409.

**247. Unsuccessful suit by second incumbrancer**

*v. LONDON CITY* (1866), 26 U. C. R. 263; *affd.*, 28 U. C. R. 457.—CAN.

**b. Order in interpleader action.**—Pltf., a division ct. bailiff, having seized a quantity of wheat under a warrant of execution against one P. which deft. claimed, an interpleader summons issued, & on its return was adjourned with leave to deft. to file his claim in fifteen days. Afterwards the case came up for final hearing, when the judge made this order, "the claimant not having put in his claim or complied with the order above made is barred, & is ordered to pay the costs in fifteen days." Pltf., as such bailiff, thereupon brought this action to recover the wheat, which deft. had obtained possession of pending the summons:—*Held*: the minute so made by the judge in the interpleader issue was equivalent to stating that the claim was dismissed, & was final & conclusive upon deft., & that he could not be heard to say that the bailiff had not seized the wheat.—HUNTER v. VANSTONE (1882), 7 A. R. 750.—CAN.

**c. Action on promissory note—Question of warranty.**—In an action in the division ct. against the now pltf., on notes given by him for the price of a machine, the question of the warranty was tried, & decided against the now pltf.:—*Held*: the matter was *res judicata*, & the judgment in the division ct. was therefore a good de-

fence, by way of estoppel, to the present action.—RADFORD v. MERCHANTS' BANK (1883), 3 O. R. 529; 3 S. C. R. 366.—CAN.

**d. Mortgage decree—Subsequent inquiry as to order of liability of several defendants—Defendants estopped from denying priority of plaintiff's mortgage.**—The usual mtge. decree with a reference as to encumbrances was made. Subsequently the master made a report finding that the pltf. & certain of the defts. had encumbrances upon the whole land. This was not appealed from. Afterwards an order was made referring it to the master to inquire whether as between themselves any one or more of the defts. was or were entitled to be relieved from the payment of pltf.'s mtge., & to fix the order of liability:—*Held*: defts. were estopped from denying the priority of pltf.'s mtge.—RENEWICK v. BERRYMAN (1886), 11 Man. L. R. 387.—CAN.

**e. Injunction in action for infringement—Subsequent infringement—Defendant estopped from denying validity of patent—Or former infringement.**—Pltf., in 1876, patented improvements in the mariners' compass, the chief features of which were an exceedingly light compass card. In 1885, deft., who had previously patented certain improvements of the mariners' compass constructed a compass card, & sold the same, admittedly an infringement of pltf.'s patent, & proceedings having been commenced consented to a



for foreclosure—On ground that deed of first incumbrancer void—Suit by mortgagor against first incumbrancer for redemption.]—A second incumbrancer filed a bill in Grenada, to which the mtgor. & first incumbrancer were parties defts., impeaching one of the deeds under which the first incumbrancer claimed, & praying that the equity of redemption of the mortgaged premises might be sold. By a decree made in that suit, the ct. in Grenada declared the impeached deed void, the effect of which was to reduce considerably the claim of the first incumbrancer; he, therefore, appealed from that decree to the Privy Council, who reversed the decree of the ct. in Grenada, & established the deed in question. Before that suit was finally concluded, the mtgor. filed a bill here against the first incumbrancer for redemption, praying that the same deed might be declared void, which had been affirmed by the Privy Council:—*Held*: he was concluded by the decree of the Privy Council from raising, in a new suit, the question as to the validity of that instrument.

If a subsequent incumbrancer in this country files a bill for redemption of the prior incumbrancer & foreclosure of the mtgor., who are both parties defts., & in that suit the debt of the prior incumbrancer is established at a certain sum by the decree of the ct., it cannot be argued, that the mtgor. is not bound by that decree as to the extent of the debt of the prior incumbrancer, so long as the decree remains unimpeached. In the West Indies the relief given to a mtgee. is not foreclosure, but a sale of the equity of redemption; & such was the nature of the suit in Grenada. But the form of relief can make no difference in the principle, that the mtgor., being deft. in the suit in the same interest with pltf., the subsequent incumbrancer, must be equally bound by the decree which establishes the amount of the debt of the first incumbrancer (LEACH, M.R.).—*FARQUHARSON v. SETON* (1828), 5 Russ. 45; 38 E. R. 944.

*Annotations*:—*Refd.* Cottingham v. Shrewsbury (1843), 3 Hare, 627; Henderson v. Henderson (1843), 3 Hare, 100; Green v. Pledger (1844), 3 Hare, 165.

perpetual injunction. In 1888, deft. constructed another card resembling pltf.'s in some respects, but differing in others, but the same combination of results were obtained in both cards, thought not in the same degree. Pltf. charged defts. new compass card as a fresh infringement & a breach of the injunction, & moved for an attachment:—*Held*: deft. was estopped by the injunction from questioning either the validity of the patent or the fact that his previous card was an infringement.—*THOMSON v. MOORE* (1889), 6 R. P. C. 426.—*CAN.*

i. *Acquiescence in judgment.*—In an action *en bornage* between M. & B. a surveyor was appointed by the superior ct. to settle the line of division between the lands of the respective parties, & his report, indicating the position of the boundary line, was homologated, & the ct. directed that boundaries should be placed at certain points on said line. M. appealed from that judgment to the ct. of Review on the grounds that the report gave B. more land than he claimed & that the line should follow the direction of a fence between the properties that had existed for over thirty years. The ct. of Review gave effect to this contention & ordered the boundaries to be placed according to it, in which judgment both parties acquiesced & another surveyor was appointed to execute it:—*Held*: the judgment of the ct. of Review in which the parties acquiesced was *chose jugée* between them.—*MEROIER v. BARRETTE* (1895), 25 S. C. R. 94.—*CAN.*

g. —.]—A tenant of a piece of ground in natural pasture at entry, the term of removal from which was stipulated to be Whitsunday having, under a permission in his lease brought into cultivation during the currency, & having acquiesced in the refusal of a bill of suspension of a decree of removing as at Whitsunday:—*Held*: the refusal of the bill of suspension formed *res judicata* as to his claim, so far as founded on the lease.—*BLAIR v. LYALL* (1826), 4 Sh. (Ct. of Sess.) 365.—*SCOT.*

h. *Motion of Crown for extension of time to appeal.*—At the trial judgment was given for the suppliants, & the order for judgment was duly entered. An application by the Crown to extend the time of appealing from the judgment was refused. After passing of Supreme Ct. Amendment Act, 1897, the Crown gave a new notice of appeal:—*Held*: the former decision had finally determined the rights of the parties, & the appeal should be quashed.—*KOKSILAH v. R.* (1897), 5 B. C. R. 600.—*CAN.*

k. *Habeas corpus.*—A person confined or restrained of his liberty is now limited to only one writ of *habeas corpus* with a right of appeal to the ct. of appeal, whose judgment which might have been appealed against becomes final & conclusive, & may be pleaded as *res judicata*.—*TAYLOR v. SCOTT* (1899), 30 O. R. 475.—*CAN.*

l. *Judgment leaving matters in statu quo.*—When the full ct. varied the judgment of the trial judge dis-

248. Judgment that rent payable annually to trustees—Subsequent action for use & occupation—Tenant estopped from disputing landlord's title to rent.]—Parochial trustees, under the authority of a local Act had built a workhouse on lands belonging to charity trustees in the same parish, & in 1821 disputes arose between the two sets of trustees, as to whether any rent was payable therefore, & the question was brought before the Master of the Rolls by an amicable suit in 1821, who decreed that a certain rent should be paid by the parochial trustees, which was accordingly paid till 1833:—*Held*: (1) use & occupation might be maintained for the rent in arrear from 1833, as the decision of the Master of the Rolls was binding upon the parties; (2) the trustees were estopped from disputing the title of the charity trustees to demand the rent for the next year, in an action for use & occupation.—*ALLISON v. STARK* (1838), 9 Ad. & El. 255; 1 Per. & Dav. 183; 1 Will. Woll. & H. 719; 3 J. P. 178; 112 E. R. 1208; *sub nom.* *ALLISON v. STARK*, 8 L. J. M. C. 13.

*Annotations*:—*As to* (2) *Refd.* Gouldsworth v. Knights (1843), 11 M. & W. 337. *Generally.* *Mentd.* Doe d. Norton v. Webster (1840), 4 Per. & Dav. 270; Doe d. Edney v. Benham, Doe d. Edney v. Billett (1845), 7 Q. B. 976; Deptford Churchwardens v. Sketchley (1847), 8 Q. B. 394; Cornish v. Cleife (1864), 11 L. T. 606.

*Compare* No. 228, *ante*.

249. Decree treating annuity as valid—Action to set aside annuity.]—Grantor of an annuity had admitted, in his answer to a bill in Ch., that the annuity was a subsisting charge on his estates, & the decree & proceedings in the suit had treated the annuity as valid. In those circumstances, grantor's devisee was restrained from proceeding, at law, to set aside the annuity for want of a memorial.—*ROBERTS v. MADOCKS* (1843), 13 Sim. 549; 60 E. R. 213; *affd.* (1845), 6 L. T. O. S. 185, L. C.

250. Unsuccessful summons for prohibition—On ground that hereditaments of greater value than twenty pounds—Subsequent action in county court—Defendant estopped from disputing value of

missing an action to "adverse" a mining claim, by expressly excepting from the judgment "any declaration affecting the title of either party to their respective mineral claims," the parties were, by implication, left in the same position as they stood before the action was brought, & therefore the subject-matter was not *res judicata*.—*DUNLOP v. HANEY* (1900), 7 B. C. R. 307.—*CAN.*

m. *Confession of judgment.*—A confession of judgment for a portion of the amount claimed is a judicial admission of pltf.'s right of action & constitutes complete proof against the party making it.—*CITIZENS LIGHT & POWER Co. v. ST. LOUIS TOWN* (1904), 34 S. C. R. 495.—*CAN.*

n. *Order dismissing opposition—On default of giving security.*—In proceedings for the sale of lands under execution, applts. filed an opposition to secure a charge thereon. On failure to give security as required the opposition was dismissed, & the judgment dismissing the opposition was affirmed:—*Held*: the judgment dismissing the opposition on default to furnish the required security was *chose jugée*.—*FONTAINE v. PAYETTE* (1905), 36 S. C. R. 613.—*CAN.*

o. *Action to recover possession—Question of title not decided.*—In a suit to recover possession of certain land, where it appeared that there had been a previous suit between the same parties with respect to the same land, in which the then pltf. sought to have their possession confirmed, & that in



## ESTOPPEL.

### Sect. 3.—Effect of *res judicata*: Sub-sect. 1, B. (d)

**hereditaments.]**—Pltf. having sued in a county ct. to recover possession of certain hereditaments, deft. applied at Chambers for a prohibition, on the ground that the annual value thereof was greater than £20; the judge dismissed the summons, & deft. did not appeal from his decision. At the trial of the action the judge of the county ct. refused to receive evidence from deft. that the hereditaments were of greater value than £20 a year, & he gave judgment for pltf.:—**Held**: the decision of the judge of the county ct. was right; for by the dismissal of the summons the value of the hereditaments was conclusively ascertained for the purposes of the action, which therefore must be assumed to be within his jurisdiction.—**SYMONS v. REES** (1876), 1 Ex. D. 416; 25 W. R. 116.

**251. Judgment that will forged—Suit for revocation of probate—Party estopped from denying forgery.]**—In an action in the Probate Div. T. & G. propounded an earlier & P. a later will. The action was compromised, & by consent verdict & judgment were taken for establishing the earlier will. Subsequently P. discovered that the earlier will was a forgery, & in an action in the Ch. Div., to which T. & G. were parties, obtained the verdict of a jury to that effect, & judgment that the compromise should be set aside. In another action in the Probate Div. for revocation of the probate of the earlier will:—**Held**: T. & G. were estopped from denying the forgery.—**PRIESTMAN v. THOMAS** (1884), 9 P. D. 210; 53 L. J. P. 109; 51 L. T. 843; 32 W. R. 842, C. A.

**Annotations**:—**Consd.** *Poulton v. Adjustable Cover & Boiler Block Co.*, [1908] 2 Ch. 430. **Refd.** *Re Owtram, Marshall v. Edelston* (1884), 50 L. T. 592; *Cole v. Langford*, [1898] 2 Q. B. 36; *Wyatt v. Palmer* (1899), 80 L. T. 639; *Birch v. Birch*, [1902] P. 62.

that suit the lower cts. had decided the case both on the question of title & of possession, but on special appeal the high ct. had dealt only with the question of possession, & in dismissing the appeal had not gone into the question of title, & the deft. in that suit subsequently sued to recover possession of the land:—**Held**: the question of title was still open between the parties, & had not been heard & finally decided by a ct. of competent jurisdiction in a former suit.—**GUNGA-BISHEN BHUGT v. ROGHONATH OJAH** (1881), 1 L. R. 7 Cal. 381; 9 C. L. R. 34.—**IND.**

**p. Between co-defendants.]**—Where an adjudication between the defts. is necessary to give the appropriate relief to pltf., the adjudication will be *res judicata*, between the defts. as well as between pltf. & defts. But for this effect to arise, there must be a conflict of interest between defts. & a judgment defining the real rights & obligations of defts. *inter se*.—**RAM-CHANDRA NARAYAN v. NARAYAN**

**q. —.]**—Pltfs., as purchasers of a share of an estate, sued to recover their share of the rent of certain tenures held in that estate by defts. Defts. denied being in possession as alleged. Another co-sharer in the same estate had previously brought a suit against defts. for the rent of the same tenures, & in that suit pltfs., & other co-sharers of the estate were made co-defts., & the decision in that suit was that defts. were in possession:—**Held**: the decree in the former suit was not a *res judicata*.—**SURENDER NATH PAL CHOWDHRY v. BROJO NATH PAL CHOWDHRY** (1886), 1 L. R. 13 Cal. 352.—**IND.**

**r. —.]**—A judgment in a previous suit is not *res judicata* as between co-defts., so as to bar a subsequent suit brought by one of them, unless there was a conflict of interest between them & the judgment determines the real rights & obligations of defts. *inter se*.—**BALAMBHAT v. NARAYANBHAT** (1900), 1 L. R. 25 Bom. 74.—**IND.**

**s. —.]**—Where an adjudication between defts. is necessary to give the appropriate relief to pltf., the adjudication will be *res judicata* between defts. as well as between pltf. & defts. But for this effect to arise there must be a conflict of interest between defts. & a judgment defining the real rights & obligations of defts. *inter se*.—**CHAJJU v. UMRAO SINGH** (1900), 1 L. R. 22 All. 386.—**IND.**

**t. —.]**—Civil Procedure Code, s. 13, does not preclude the decision upon any issue from operating as *res judicata* merely because the issue is raised as between co-defts., if the matter involved was directly & substantially in issue in a former suit & the other necessary conditions are satisfied. The words "between the same parties" in sect. 13 qualify not only the words "former suit," but the whole expression "in issue in a former suit."—**MANGNIRAM v. SYED MUHAMMAD MEHDI HOSSEIN KHAN** (1904), 1 L. R. 31 Cal. 95; 8 C. W. N. 30.—**IND.**

**a. —.]**—An adjudication between co-defts. in a previous suit on a point actively contested between them, operates as *res judicata* in a subsequent suit between them, in which they are arrayed as pltf. & deft.—**KANDIYIL CHERIYA CHANDU v. CALICUT ZAMORIN** (1905), 1 L. R. 29 Mad. 515.—**IND.**

**b. —.]**—A decision in a previous suit on a matter raised &

**252. Unsuccessful summons by mortgagees for payment out of money in court—Summons by mortgagor for payment out.]**—Testator, who died in 1878, by his will gave his residuary real & personal estate to trustees upon trust for conversion at their discretion & for division between his four children equally. The trustees in the exercise of their discretion retained unconverted certain real property in which testator had an estate *pur autre vie*, & treated it as forming part of testator's residuary estate. In Oct. 1889, two of the children mortgaged their interest in this real property & "the proceeds thereof." In July, 1896, & again in January, 1905, the trustees paid into ct. certain moneys representing the shares of the mtgors. in the rents & profits of such unconverted real property. No part of the principal money secured by the mtge. or any interest thereon had been paid, nor had any acknowledgment been given, & no steps had been taken by the mtgees. in respect of their mtge. until 1905, when they took out a summons for payment out to them of the moneys in ct. The summons was dismissed by the master in chambers, & there was no appeal. In 1906, by summons, to which the mtgees. were made resps. the mtgors. asked for the payment out to them of the moneys:—**Held**: after the mtgees.' summons claiming the moneys in ct. had been dismissed, & there having been no appeal, the matter was *res judicata*.—**Re HAZELDINE'S TRUSTS**, [1908] 1 Ch. 34; 77 L. J. Ch. 97; 97 L. T. 818; 52 Sol. Jo. 29, C. A.

**Annotations**:—**Mentd.** *Re Fox, Brooks v. Marston*, [1913] 2 Ch. 75; *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413.

**253. Judgment that gifts by devise of annual sums void—Suit for declaration that devise void.]**—Applt. petitioned to have it declared that the devise & gifts contained in a certain clause of testator's will were void, & that the lands com-

actively contested between co-defts. in such suit will operate as *res judicata* in a subsequent suit in which co-defts. are arrayed as pltf. & deft.—**YUSUF SAHIB v. DURGI** (1907), 1 L. R. 30 Mad. 447.—**IND.**

**c. —.]**—In order that any decision between co-defts. might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interests among defts., & that there was a judgment defining the real right & obligations of defts. *inter se*.—**HARI ANNAJI v. VASUDEV JANARDAN** (1914), 1 L. R. 38 Bom. 438.—**IND.**

**d. —.]**—A decision as between co-defts. cannot be *res judicata* under Code of Civil Procedure, s. 11, unless it was necessary to decide an issue between them in order to grant relief to pltf.—**MUHAMMAD AHMAD v. ZAHUR AHMAD** (1922), 1 L. R. 44 All. 334.—**IND.**

**e. —.]**—Where an adjudication between defts. is necessary to give the appropriate relief to pltf., the adjudication will be *res judicata* between defts. as well as between pltfs. & defts. But for this effect to arise there must be a conflict of interests between defts. & a judgment defining the real rights & obligations of the defts. *inter se*.—**MEHRA v. DEVI DITTA MAL** (1921), 1 L. R. 2 Lah. 88.—**IND.**

**f. Judgment based on oath of party.]**—An adjudication by a ct. on an oath made by one of the parties to the suit would make the matter or issue covered by the adjudication *res judicata* in a subsequent litigation between the same parties.—**SANYASI BARITYA v. ARTASWARO** (1913), 1 L. R. 36 Mad. 287.—**IND.**

**g. Judgment on two**

prised therein & the income thereof being undisposed of belonged to testator's next of kin. It appeared that in 1872 the ct. in a suit relating to the same will had declared the said gifts to be void & that they "fell into the undevise residue of testator's estate"; that thereafter the gifts which were of annual sums were paid to testator's next of kin with the assent of all parties interested, & that in 1891 in another suit relating to the same clause the ct. had declared that defts., who included the trustees of the will, were estopped from contending that the said annual sums were not wholly undisposed of:—*Held*: the decision of 1872 as to the true construction of the clause applied to the corpus of the property comprised therein & was not limited to the gifts of the annual sums & was *res judicata* against the claim of resps., the residuary legatees.—*BADAR BEE v. HABIB MERICAN NOORDIN*, [1909] A. C. 615; 78 L. J. P. C. 161, P. C.

*Annotation*:—*Refd.* Long v. Gowlett, [1923] 2 Ch. 177.

**Judgment as bar to subsequent proceedings by plaintiff.**—*See* Sect. 3, sub-sect. 2, B. (b), *post*.

(e) *Matters not in Issue.*

**254. General rule.**—To render the matter of a judgment *res judicata*, so as to make this a valid plea, it is necessary not only that the subject & parties, but that the grounds of judgment, or

*Where finding on one would suffice.*—Where a judgment is based on the findings on two issues, the findings on both the issue will operate as *res judicata*, though the finding on only one would be sufficient to sustain the judgment.—*VENKATARAJU v. RAMANAMMA* (1913), 1 L. R. 38 Mad. 158.—**IND.**

**h. Civil Procedure Code, 1908, s. 11—Not exhaustive.**—Code of Civil Procedure, 1908, s. 11, is not exhaustive of the circumstances in which an issue is *res judicata*.—*HOOK v. BEN-GAL ADMINISTRATOR-GENERAL* (1921), 1 L. R. 48 Cal. 499.—**IND.**

**k. Judgment as to genuineness of will.**—A competition for the office of exor. arose between the next of kin & the party nominated "sole exor. & universal legatory" in a document which he alleged to be a holograph testamentary writ, but which the next of kin alleged to be forged. It was found that the document was not the genuine writing of deceased, & the next of kin were preferred. In an action by the representative of the same party against the next of kin as exors. dative, founded on the same document, & concluding for payment to him as "universal legatory" of the whole movable estate of deceased:—*Held*: the judgment in the prior litigation was *res judicata*.—*ANDERSON v. GILL* (1860), 23 Dunl. (Ct. of Sess.) 250; 33 Sc. Jur. 111.—**SCOT.**

## PART II. SECT. 3, SUB-SECT. 1.—B. (e).

**254 i. General rule.**—Declaration, first & second counts for penning back water on pltf.'s land. Deft. by his plea set up the consent & acquiescence of pltf.'s ancestor under whom pltf. claimed. Pltf. replied that a former action had been brought by her against deft. for a similar penning back of the water; that deft. had filed his bill to restrain that action, & had in that bill alleged the same matters now alleged in the plea, which bill was dismissed. Rejoinder, that the ct. of chancery gave no judgment in respect of matters in the plea, but dismissed the bill in respect of other matters:—*Held*: on demurrer, rejoinder good.—*DEAN v. GRAY* (1872), 22 C. P. 202.—**CAN.**

*media concludendi*, should be the same. Thus, where one had granted a general obligation, for the purpose of indemnifying others, to pay certain debts stated in a list referred to by the obligation after the death of the grantor, the Ct. of Session & House of Peers decided, that the obligation being of a moveable nature must affect the *jus relictæ*. It was afterwards found that a personal bond of corroboration, with interest & penalty, for payment of one of the debts in the list, had been given to the creditor himself by the grantor of the general obligation of indemnity, which bond was unsatisfied at the grantor's death:—*Held*: as the previous judgments had been pronounced solely with reference to the general obligation, the particular bond, though produced in process, not having been attended to, the question as to this debt was still open upon this new ground.—*GRAHAM v. MAXWELL* (1814), 2 Dow. 314; 3 E. R. 878, II. L.

**255.**—In appellate proceedings interest upon the accumulated sum of principal & interest is chargeable on the debtor from the date of a judgment in the Ct. of Session to the date of the judgment in the Ct. of Appeal, although resp. has obtained an inhibition against the lands of applt. before the date of the original judgment. Where a matter is, by the pleadings, specifically made the subject of demand, & the judgment is general for

**254 ii.**—*NOTTAWASAGA CORPN. v. HAMILTON & NORTH WESTERN RY. CO.* (1888), 16 A. R. 52.—**CAN.**

**254 iii.**—A final judgment setting aside an intervention to a seizure of the dividends of bank shares founded upon an allegation that such dividends formed part of a substitution is not *res judicata* as to the corpus of said shares nor as to the dividends of other shares claimed under a different title.—*MUIR v. CARTER, HOLMES v. CARTER* (1889), 16 S. C. R. 473.—**CAN.**

**254 iv.**—*DELORME v. CUSSON* (1897), 28 S. C. R. 66.—**CAN.**

**254 v.**—A person whose indorsement on a promissory note has been forged is not estopped from denying his signature by the fact that he had allowed judgment to go against him by default in a previous action by the same pltf. on an indorsement of his name on a prior promissory note forged by the same person, although the forger negotiated the second note after such judgment.—*SIMON v. SINCLAIR* (1907), 17 Man. L. R. 389.—**CAN.**

**254 vi.**—In an action for damages for criminal conversation, deft. pleaded that the matter was *res judicata*.

The judgment in the former action had decided that the common law action for criminal conversation did not exist in the colony:—*Held*: the former judgment was not on the merits of the issues raised in the action commenced by pltf. after action for criminal conversation had been revived.—*MITCHELL v. LEMM* (1910), 5 Hong Kong, L. R. 140.—**HONG KONG.**

**254 vii.**—A mere statement of an alleged rate of rent in a plaint in a rent-suit in which an *ex p.* decree has been obtained is not a statement as to which it must be held that an issue within Civil Procedure Code, s. 13, was raised between the parties, so that deft. is concluded upon it by such decree.—*MODHUSUDUN SHAHA MUNDUL v. BRAE* (1889), 1 L. R. 16 Cal. 300.—**IND.**

**254 viii.**—After dissolution of a certain partnership, two separate suits were brought in 1889 by different partners for specific sums of money due to them, &, in the alternative, for such other amount as might be found due on

an adjustment of accounts. The Munsif appointed an Ameen, who examined the accounts & ascertained the respective claims of the partners, & pltf. in those suits obtained decrees on the basis of the Ameen's adjustment of account. The present suits were brought in 1891 by certain other partners, who were defts. in the suits of 1889, on the allegation that the partnership account had been already adjusted by the Ameen appointed in the suits of 1889, & that the debts & dues of all parties had been determined by the ct.:—*Held*: neither sect. 13 nor sect. 43 of Civil Procedure Code was a bar to the present suits, the issue now in suit not having been determined in the former suits.—*DHANI RAM SHARA v. BHAGIRATH SHAHA* (1895), 1 L. R. 22 Cal. 692.—**IND.**

**254 ix.**—In a suit between A. & B. a question of title was raised & decided in B.'s favour, but on appeal the judge refused to go into it, saying that B. might bring a fresh suit:—*Held*: a subsequent suit by B. raising the same question was not barred as *res judicata*.—*EMAMOODEEN SHOW-DAGHUR v. FUTTEH ALI*, 3 C. L. R. 447.—**IND.**

**254 x.**—A discharge in an administration suit imputed fraud & improper motives to the administrator, in not having let lands to a particular tenant; & also sought to charge him with wilful default in not letting the lands. The charge of fraud was disproved:—*Held*: since the charges of fraud were distinct, resp. was not precluded, by failing to establish fraud, from relying on a case of wilful default.—*CONOLLY v. CONOLLY* (1866), 17 L. Ch. R. 208.—**IR.**

**1. Construction of will.**—The three sons of testator named in the will survived him, but the second of them died before the youngest attained the age of 25 years. On an originating summons before the death of the second son an order was made declaring that upon the youngest of the three attaining the age of 25 years, the three would become absolutely entitled to the residue & that the gifts over "on the death of the sons of testator are applicable in the event of their death before the said period but no longer":—*Held*: the order did not operate as *res judicata* to preclude the



**Sect. 3.—Effect of res judicata: Sub-sect. 1, B. (e).]**

demandant, yet, if a particular part of the demand, as the rate of interest was not discussed or specifically decided in the suit, it is not *res judicata*.

—**GRAHAM v. KEBLE** (1820), 2 Bli. 126; 4 E. R. 274, H. L.

**Annotation:—Mentd.** *Rowe v. Young* (1820), 2 Bli. 391.

**256. —**—**]**—*Semble*: on an issue whether the occupier of close T. had, as appurtenant to it, right of common in a tract called M., the party asserting such right cannot give in evidence the verdict in an action between strangers to the depending suit, where the issue was, whether the occupier of B., another close belonging to the owner of T., had a right of common in M., & the jury found for the commoner.—**WILLIAMS v. MORGAN** (1850), 15 Q. B. 782; 117 E. R. 654.

**257. —**—**Matter not directly in issue—Judgment deciding whether bond given in pursuance of agreement—Defendant not estopped from pleading illegality of agreement in action thereon.]**—To an action of debt on an indenture whereby deft. covenanted to pay pltf. £600 with interest, on a certain day, deft. pleaded by way of estoppel, that pltf. had impleaded him in a former action of debt on bond, conditioned in the penal sum of £1,200, for payment of £600 & interest, being the same principal sum & interest as were secured to pltf. by an indenture of even date with the bond; in which action deft. pleaded a usurious agreement made between pltf. & himself, & averred that the bond was given in pursuance of the said agreement; pltf. traversed the latter allegation, & thereupon, issue was joined, & found for deft. The plea in the present action then alleged the identity of the indenture in this & in the former action mentioned, & of the £600 & interest in this & in the former action mentioned:—**Held**: no estoppel, inasmuch as the existence of a usurious agreement was not directly in issue in the former action, but only the question whether the bond was given in pursuance of the agreement alleged in the plea, & the admission of the usurious agreement on the record in that action was not sufficient to estop pltf. from contesting it in this action.—**CARTER v. JAMES** 841), 2 Dow. & L. 236; 13 M. & W. 137; 13 L. J. Ex. 373; 3 L. T. O. S. 183; 8 Jur. 912; 153 E. R. 57.

**Annotation:—Refd.** *Hutt v. Morrell* (1849), 12 L. T. O. S. 405.

**258. —**—**Matter not material.]**—A native of Chili made his will in London & died. A caveat having been entered on behalf of his daughter, the exors. propounded the will in solemn form, alleging that testator was domiciled in England. The daughter pleaded that the deceased was at the date of the will & until his death domiciled in Chili, & that the will was not duly executed according to the law of Chili. The judge of the Probate Ct. made a decree by which he pronounced

for the validity of the will, found that the deceased was at the date of the will & at his death a domiciled Englishman, & decreed probate to the exors. The daughter afterwards filed a bill against the exors., alleging that testator was a domiciled Chilian, that his will being executed in England according to English law was good by the law of Chili but so far only as testator could by the law of Chili dispose by will of one-fourth of his personal estate, & that the other three-fourths belonged to the daughter. The exors. by answer set up the decree of the Probate Ct. as a bar. An order having been made for inquiry as to testator's domicile, in an administration suit under circumstances which, it was contended, made it equivalent to an order in the suit by the daughter against the exors., the question whether the order was right was litigated between the daughter & the residuary legatee:—**Held**: (1) the decree of the Probate Ct. was not conclusive *in rem* as to the domicile, because the finding as to the domicile was not necessary to the decree; (2) the decree of the Probate Ct. was not conclusive *inter partes* as to the domicile, as between the daughter & the residuary legatee, for the exors. could not, by litigating in the probate suit a question of domicile which it was not necessary to decide for the purposes of that suit, conclude the residuary legatee as to testator's power of disposing of his property, & that as the residuary legatee was not bound the daughter could not be bound, since estoppel must be mutual.—**CONCHA v. CONCHA** (1886), 11 App. Cas. 541; 56 L. J. Ch. 257; 55 L. T. 522; 35 W. R. 477, H. L.; *affg.* S. C. *sub nom.* **DE MORA v. CONCHA** (1885), 29 Ch. D. 268, C. A.

**Annotations:—As to** (1) **Refd.** *Ord v. Ord*, [1923] 2 K. B. 432. **As to** (2) **Appld.** *Re Allsop & Joys Contract* (1889), 61 L. T. 213. **Refd.** *Re Larard, Ex p. Yeomans & Heap* (1886), 3 Mans. 317; *Worman v. Worman* (1889), 43 Ch. D. 296. **Generally, Refd.** *Mirza Kurratullah Bahadur v. Peara Saheb* (1905), 21 T. L. R. 650. **Mentd.** *The Parisian* (1887), 13 P. D. 16; *Strauss v. Goldschmidt* (1892), 8 T. L. R. 239; *Re De Nicols, De Nicols v. Curlier* (1898), 46 W. R. 532.

**259. —**—**]**—**ORD v. ORD**, No. 140, *ante*.

**260. Judgment in action for obstruction of watercourse—Second action for obstruction of watercourse—No precise issue raised in former action.]**—In a second action for obstructing a watercourse upon a plea of not guilty, & where a verdict for pltf. in another action brought against deft. for another obstruction to the same watercourse:—**Held**: pltf. had not obtained such a determination of his right by the former verdict as the law considered conclusive.—**EVELYN v. HAYNES** (1782), cited in 3 East, p. 365; 102 E. R. 637.

**Annotations:—Consd.** *Outram v. Morewood* (1803), 3 East, 346. **Appld.** *Hooper v. Hooper* (1825), M'Cle. & Yo. 509.

**261. Decree for corporation to grant lease under covenant—Suit contesting validity of covenant.]**—By an indenture, of 1539, lands were conveyed by

determination on a subsequent originating summons of the construction of the will in reference to the gift to the three sons.—**ROGERS v. ROGERS** (1916), 21 C. L. R. 296.—**AUS.**

**m. Judgment in ejectment—Action for mesne profits—Whether defendant estopped from disputing plaintiff's title.]**—A judgment in ejectment against the casual ejector does not estop a deft., in an action for mesne profits, from disputing the title of pltf. from the time of the demise laid in the action of ejectment.—**PONTON v. DALY** 1 U. C. R. 187.—**CAN.**

**n. Judgment for damages for negligence—Action for indemnity—Plaintiff estopped from disproving his own negligence.]**—Deft., being the

owner of a steam-boat of which pltf. was master, sent him to tow a ship to St. J.; the ship in launching lost her rudder, & was towed in that state to St. J., & while going into the harbour in the night came in collision with & sunk a schooner, the owner of which recovered damages against pltf. for negligence. In an action by pltf. against deft. for indemnity, the declaration alleged & it was proved, that towing vessels was a dangerous business & that the danger was much increased by the loss of the rudder. It was also proved that pltf. might have replaced the rudder, & need not have entered the harbour in the night:—**Held**: pltf. was estopped by the judgment recovered against him by the owner of the schooner, from dis-

proving his own negligence.—**LEAVITT v. PARKS** (1851), 2 All. 282.—**CAN.**

**o. Judgment in action of covenant on mortgage—Subsequent action in ejectment—Whether defendant estopped from impeaching mortgage on new plea.]**—The recovery of a judgment in an action of covenant upon a mtge. on pleas of "*non est factum*," & that deft. was not indebted as alleged, & payment before action, did not estop deft. from impeaching the same mtge. in ejectment subsequently brought thereon, on the ground of usury.—**EDINBURGH LIFE ASSURANCE CO. v. CLARK** (1861), 10 C. P. 351.—**CAN.**

**Judgment in action for trespass—Suit to discover title—Extent of estoppel.]**—A judgment in favour of



O. to the corp'n. of G. for charitable purposes, subject to a covenant by the corp'n. that whenever a certain term of 99 years then vested in certain parties in respect of a particular farm should expire, then if any one of the heirs of M. should make request to the corp'n. within one year after the farm should "fortune to be void" then & so often as any such chance should fall the corp'n. should grant a new lease of the farm to such heir for 31 years reserving 20 marks rent & 20 marks fine, & to continue from time to time for evermore if any such request within that time should be made at the end of every lease. In 1723 a decree of the Ct. of Ch. was made ordering the corp'n. to grant a new lease according to the covenant, & in 1731, another decree of the Ct. was made supplementary to the former, but in these suits no question of perpetuity was dealt with, the A.-G. was no party, & the corp'n. did not dispute the right renewal. Successive leases were made by the corp'n., the last being granted in 1815:—*Held*: the decrees of 1723 & 1731 being made in suits not raising the question of perpetuity & to which the A.-G. was not a party, did not establish the validity of the covenant.—*HOPE v. GLOUCESTER CORPN.* (1855), 7 De G. M. & G. 647; 25 L. J. Ch. 145; 26 L. T. O. S. 144; 2 Jur. N. S. 27; 4 W. R. 138; 44 E. R. 252, L. JJ.

*Annotation*:—*Mentd.* A.-G. v. Greenhill (1863), 33 Beav. 193.

**262. Recovery in ejectment—Action of trespass for mesne profits—Whether defendant estopped from denying trespasses before date of writ or after judgment.**—To a plea of "not possessed" to a declaration in trespass for mesne profits, pltf. replied by way of estoppel a judgment for him in ejectment, in which his title was laid alternatively at the date of the writ, or on & since a prior day; & the replication stated that the action was brought for trespasses committed on & after such prior day:—*Held*: the replication was bad, as deft. was not estopped from denying trespasses before the date of the writ or after the judgment.—*SCOTT v. REYNELL* (1856), 26 L. T. O. S. 256; 4 W. R. 249.

**263. ——— Estoppel as to duration of plaintiff's title.**—To trespass for mesne profits defts. pleaded title to the lands in themselves during the time for which mesne profits were claimed. Pltf. replied, by way of estoppel, as to so much of the mesne profits as had accrued since a certain day named, that he sued out a writ of ejectment, for the purpose of recovering possession of the lands, wherein he claimed to be entitled from such day, & that thereupon such proceedings were had that he recovered the lands & possession of them:—*Held*: the judgment in ejectment did not operate as an estoppel with respect to the duration of pltf.'s title, & the

replication was therefore bad.—*HARRIS v. MULKERN* (1875), 1 Ex. D. 31; 45 L. J. Q. B. 244; 34 L. T. 99; 40 J. P. 24; 24 W. R. 208.

**264. Unsuccessful suit in equity—Suit dismissed for want of equity in plaintiff to displace legal estate—Action by defendant to restrain ejectment.**—Deft. filed a bill against pltf. claiming a prior legal estate in certain mortgaged hereditaments, & that bill was dismissed upon equitable grounds alone, leaving deft. to pursue his remedies at law. Deft. then brought an action of ejectment, & pltf. filed the present bill to restrain him from proceeding with that action, alleging that deft. intended to raise at law the same questions as had been already decided in the suit:—*Held*: bill could not be sustained on the ground that the former bill had been dismissed only because there had not been shown to be any equity in the then pltf. to displace the legal estate.—*WAINE v. CROCKER* (1862), 3 De G. F. & J. 421; 31 L. J. Ch. 285; 5 L. T. 702; 10 W. R. 204; 45 E. R. 941.

**265. Decision that patent not illegal or void—Subsequent action for another infringement—Whether defendant estopped from disputing validity of patent.**—Pltf. had filed a bill in Ch. against deft. for infringing his patent, & prayed for an injunction. The matter was referred to an arbitrator, who by his award decided by inference, but by inference only, that pltf. was the true & first inventor, & therefore the letters patent were not void. This might be collected from the award, although in the award it was not so stated directly & positively. In an action afterwards by pltf. against deft.:—*Held*: (1) deft. was not estopped by that award from denying that pltf. was the true & first inventor, & therefore the patent was void; such an award in that form was no estoppel.

(2) There is a great difference between a thing being conclusive in evidence & an estoppel (*WILDE, B.*).—*NEWALL v. ELLIOT* (1863), 1 H. & C. 797; 1 New Rep. 441; 32 L. J. Ex. 120; 7 L. T. 753; 9 Jur. N. S. 359; 11 W. R. 438; 158 E. R. 1105.  
*Annotation*:—*As to* (1) *Refd.* Bedford v. Cowtan, [1916] 1 K. B. 980.

**266. Judgment in action for damages for wrongful dismissal—Action against employee for damaging employer's materials—Employers & Workmen Act, 1875 (c. 90).**—Applt. was employed by resps. & was discharged for neglecting his work, resps. refusing to pay him wages in lieu of notice. He took proceedings against them in the county ct. At the hearing no counterclaim or set-off was filed or set up, but evidence was produced to show that he had been guilty of negligence. A verdict was given in his favour:—*Held*: resps. were not precluded from preferring a claim before justices against him for wrongfully & negligently damaging their materials, for the only matter decided by the county ct. was whether there was such negligence

pltf. in an action for trespass to lands upon pleas (amongst others) of lands not pltf.'s & *liberum tenementum*, is not a complete estoppel, preventing deft. in another suit from questioning the pltf.'s title to any part of the lands. The judgment is only an estoppel with regard to the title of that portion of the land upon which it had been shown that deft. had trespassed.—*HUNTER v. BIRNEY* (1879), 27 Gr. 204.—*CAN.*

**q. Proceedings before Probate court—Administration suit.**—An administration suit is not *res judicata* by reason of the proceedings had before Probate ct.—*PARKS v. PARKS* (1825–1897), N. B. Dig. 316.—*CAN.*

**r. Order nisi for foreclosure—Change into order for sale before final**

**order.**—An order nisi for foreclosure changed into one for sale. The first order had been contested & not appealed from:—*Held*: the matter is not *res judicata*.—*CASE (J. L.) Co. v. PRESTON* (1909), 12 W. L. R. 12.—*CAN.*

**s. Judgment dismissing action on preliminary point—Finding on merits—Whether a bar in subsequent action.**—*Semble*: where a former suit between the same parties in respect of the same subject-matter has been dismissed on a preliminary point, a finding in that suit on the merits in pltf.'s favour, will not bar defts. from putting forward the same defence on the merits in a subsequent suit by same pltf. against the same deft.—*NUNDO LALL v. BIDHOO MOOKHY*

(1886), I. L. R. 13 Calc. 17.—*IND.*

**t. Decree against mortgaged property—Order for arrest of judgment debtor—Whether personal liability of judgment debtor concluded by order.**—A decree obtained on a mtge. directed that the judgment-debtor should pay the sum adjudged out of the property mtged. After executing the decree against the mtged. property, the decree-holder made an application for execution against the person of the judgment-debtor. A notice was issued calling upon him to show cause why execution should not be further proceeded with. But the notice did not give him any intimation of the application for the arrest of his person. He did not appear, & in his absence, an

**Sect. 3.—Effect of *res judicata*: Sub-sect. 1, B. (e) & (f).]**

on his part as would justify his dismissal without notice.—**HINDLEY v. HASLAM** (1878), 3 Q. B. D. 481; 27 W. R. 61, D. C.

**Annotation:—Mentd.** Keates v. Lewis Merthyr Consolidated Collieries, [1910] 2 K. B. 445.

**267. Judgment for execution of agreement—Action by defendant to rectify agreement.]—**After money has been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement on the ground that such construction was contrary to the intention of all parties is barred.

C. & co. built a ship for B., & a considerable sum remained due to them, for which they had a lien on the ship. M. had made advances to B. An agreement was made between the three parties for sale of the ship by C., & for the distribution of the proceeds. The agreement was very obscure, & left it doubtful in what order the claims of C. & of M. were to be paid. After the sale M. sued C. for an account of the proceeds, & judgment was given in the Ct. of the County Palatine for carrying into execution the trusts of the agreement, & for the requisite account. On taking the account before the registrar, C. claimed to be allowed his debt, but the registrar held that M. had priority. The proceeds were amply sufficient to pay M.'s claim, but not C.'s also. The V.-C. affirmed the view of the registrar, & made an order for C. to pay M.'s claim. C. appealed, but the appeal was dismissed & the money was paid to M. After this C. brought an action to rectify the agreement by making it provide that C.'s claim should have priority over that of M. M. pleaded that the agreement having been executed & the money paid under the order of the Palatine Ct., C. was not entitled to any relief:—**Held**: the action must be dismissed, for that although, the question of rectification not having been before the Palatine Ct., there was no *res judicata*, C. could not come to have the agreement rectified after it had been worked out, & the fund distributed, under the order of the Ct. in the Palatine action.—**CAIRD v. MOSS** (1886), 33 Ch. D. 22; 55 L. J. Ch. 854; 55 L. T. 453; 35 W. R. 52; 2 T. L. R. 665, C. A.

**Annotation:—Mentd.** Moore v. Fulham Vestry, [1895] 1 Q. B. 399.

**268. Judgment for salvage in Admiralty Court—Subsequent action by shipowner against underwriter—Whether underwriter estopped from defence that loss did not arise from perils insured against.]—**The captain of a steamer that had, during a voyage, run short of coal engaged a steam trawler to tow her to her port of discharge. The owner of the trawler brought an action in the Admlty. Ct. & recovered a sum of money for salvage. In an action by the owner of the steamer to recover, from an underwriter who had insured the ship against perils of the sea, the amount paid under the judgment:—**Held**: deft. was not concluded by the judgment of the Admlty. Ct. from setting

order was made for his personal arrest; but the order was not executed. Subsequently a fresh application was made for execution against the person of the judgment-debtor:—**Held**: the question as to the personal liability of the judgment-debtor to satisfy the decree was not concluded by the order made in the previous execution-proceedings for execution to issue against his person.—**BUDAN v. RAMCHANDRA BRUNJGAYA** (1887), 11 L. R. 11 Bom. 537.—**IND.**

**a. Judgment of rent court—Subsequent suit to discover title.]—**When an

assistant collector hears a suit for profits, or for rent, or any other suit, which under the Rent Act he is competent to hear, although it may be necessary for him for the purposes of that suit to decide every question, whether of title or otherwise, which may be raised before him, his decision of such question cannot operate as *res judicata* in respect of any suit which may afterwards be brought in a civil ct. in which the proprietary title to the land out of which such profits or rents may arise is in issue.—**ASHRAF-UN-NISSA v. ALI AHMAD** (1904),

up that the loss did not arise from any of the perils insured against.

As to a judgment being only conclusive as to the point decided, there is as to this in our opinion no distinction between a judgment *in rem* & a judgment *in personam*, excepting that in the one "the point" adjudicated upon, which in a judgment *in rem* is always as to the status of the *res*, is conclusive against all the world as to that status, whereas in the other "the point," whatever it may be, which is adjudicated upon, it not being as to the status of the *res*, is only conclusive between parties or privies (*per cur.*).—**BALLANTYNE v. MACKINNON**, [1896] 2 Q. B. 455; 65 L. J. Q. B. 616; 75 L. T. 95; 45 W. R. 70; 12 T. L. R. 601; 8 Asp. M. L. C. 173; 1 Com. Cas. 424, C. A.

**Annotations:—Appld.** Jones v. Lewis, [1919] 1 K. B. 328. **Refd.** Minna Craig S.S. Co. v. Chartered Mercantile Bank of India, London & China, [1897] 1 Q. B. 55. **Mentd.** Trinder, Anderson v. North Queensland Insce. (1897), 66 L. J. Q. B. 802; The Veritas, [1901] P. 304.

**269. Actions for defamation—Judgment on admissions that statements defamatory & untrue—Whether defendant estopped from pleading fair comment & privilege in second action.]—**Deft. who has admitted in one action for libel that certain charges made against pltf. were both defamatory & untrue, is not, when sued by same pltf. in a second action for libel for another publication of the same charges, estopped from raising the defences of fair comment & privilege.—**MANGENA v. WRIGHT**, [1909] 2 K. B. 958; 78 L. J. K. B. 879; 100 L. T. 960; 25 T. L. R. 534; 53 Sol. Jo. 485.

**Annotation:—Mentd.** Adam v. Ward (1915), 31 T. L. R. 299.

**270. Discharge of order nisi for habeas corpus—Order nisi obtained by fugitive offender—Subsequent application to Court of Appeal under Fugitive Offenders Act, 1881 (c. 69), s. 10.]—**An order *nisi* for a *habeas corpus* was obtained in the K. B. Div. on the application of a person in custody under Fugitive Offenders Act, 1881 (c. 69), but was afterwards discharged. The affidavit upon which the order *nisi* was obtained stated (*inter alia*) matters material as grounds for the exercise of the power given by sect. 10 of the Act, but the order *nisi* was in form simply for a *habeas corpus*, & not, in the alternative, for relief to the prisoner under sect. 10. On the argument of the order *nisi*, the matters referred to in the affidavit as aforesaid were discussed, & the ct. pronounced them insufficient as grounds for the exercise of the powers given by sect. 10 of the Act in favour of prisoner. The order ultimately drawn up was, however, simply for discharge of the order *nisi* for a *habeas corpus*. An application was subsequently made to the Ct. of Appeal to exercise the powers given by sect. 10, as having original jurisdiction in that behalf under the Act concurrently with the High Ct. A preliminary objection was taken to the hearing of the application on the ground that the matter had been previously adjudicated upon by the K. B. Div.,

1 L. R. 26 All. 601.—**IND.**

**b. Ex parte order on application for restitution—Notice silent as to relief claimed.]—**A. applied in execution for restitution of money with interest thereon paid to B. under a decree, which was subsequently reversed. The notice to B. did not specify the nature of the claim & an *ex p.* order allowing the claim was made. The application, however, was dismissed for default in payment of process fees, & A. subsequently put in a similar application. B. appeared & objected to the interest claimed which was 12 per



& was therefore *res judicata*:—*Held*: inasmuch as the only matter adjudicated upon by the order of the K. B. Div., as drawn up, was that the order nisi for a *habeas corpus* should be discharged, the matter of the application to the Ct. of Appeal was not *res judicata*.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. SAVARKAR*, [1910] 2 K. B. 1056; 80 L. J. K. B. 57; 103 L. T. 473; 26 T. L. R. 561; 54 Sol. Jo. 635, C. A.

*Annotations*:—*Mentd. Ex p. Le Gros* (1914), 30 T. L. R. 249; *R. v. Garrett, Ex p. Sharf*, [1917] 2 K. B. 99.

**271. Compromise of questions "now in dispute"**—*Suit in respect of subsequent matters in dispute.*—In an action by the mtgee. of a life interest under a settlement against the trustees for administration a compromise was effected & confirmed by the ct., all parties interested under the settlement being parties thereto. It was thereby agreed (*inter alia*) that certain funds subject to the trusts of the settlement be paid into ct. by the trustees to an account entitled "The shares of the P. co. & its incumbrancers, subject to the life interest of H. & her mtgee."

Subsequently proceedings were commenced by C. & H. against the P. co. to set aside certain appointments made under a power in the settlement in favour of L. who had assigned his interests to the co. for value, subject to a mtgc.:—*Held*: (1) C. & H. were not debarred from raising the question of the validity of the appointment on the ground that they had been parties to the com-

promise in the previous action, for the recitals showed that the questions "now in dispute" only were the subject of the settlement; (2) it is not in accordance with principle or authority to construe deeds of compromise of ascertained specific questions so as to deprive any party thereto of any right not then in dispute, & not in contemplation by any of the parties to such deed.—*CLOUTTE v. STOREY*, [1911] 1 Ch. 18; 80 L. J. Ch. 193; 103 L. T. 617, C. A.

*Annotation*:—*Reid. Thompson v. Thompson*, [1923] 2 Ch. 205.

**272. Judgment in respect of immediate bequest to chapel buildings—Suit in respect of reversionary bequest to same fund.**—*Re SURFLEET'S ESTATE, RAWLINGS v. SMITH*, No. 209, *ante*.

**273. Finding that desertion at specified date not proved—Allegation of desertion at later date.**—A previous finding by a competent ct. that desertion at an earlier date had not been proved is no bar to a finding of desertion between the same parties at a later date.—*FROUD v. FROUD* (1920), 123 L. T. 176; 36 T. L. R. 505; 26 Cox, C. C. 605, D. C.

**Judgment as bar to subsequent proceedings by plaintiff.**—*See Sect. 3, sub-sect. 2, B. (c), post.*

(f) *Matters only collaterally in Issue.*

**274. General rule.**—*KINGSTON'S (DUCHESS) CASE*, No. 213, *ante*.

*cent.*:—*Held*: as the notice to B. was silent as to the nature of the claim, the first order granting A.'s application *ex p.* had not the force of *res judicata* so as to estop B. from disputing the claim in subsequent proceedings.—*NARAYANA PATTAR v. GOPALAKRISHNA PATTAR* (1905), 1 L. R. 28 Mad. 355.—*IND.*

*c. Ex parte order for execution of decree by attachment—Subsequent motion to set aside attachment.*—A decree-holder applied for execution of his decree by attachment & sale of properties in the possession of resps., the sons of deceased judgment-debtor. Notice went to resps. to show cause why they should not be brought on record as legal representatives of deceased judgment-debtor for purposes of execution; they did not appear & an order was made *ex p.*:—*Held*: they were not estopped by this order from moving to set aside the attachment on the ground that the properties did not belong to the judgment-debtor.—*SUBRAMANIA AYYAR v. RAJESWARA DORAI (RAJA)* (1916), 40 Mad. 1016.—*IND.*

#### PART II. SECT. 3, SUB-SECT. 1.—B. (f).

**274 i. General rule.**—The findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of, as to pltf.'s right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, & do not constitute a final decision of the kind contemplated by Civil Procedure Code, s. 13.—*JAMAITUNNISSA v. LUTFUNNISSA* (1885), 1 L. R. 7 All. 606.—*IND.*

**274 ii.** —.—*KARIM MAHOMED JAMAL v. RAJOOA* (1887), 1 L. R. 12 Bom. 174.—*IND.*

**274 iii.** —.—A finding in a judgment to operate as *res judicata*, the ct. being a ct. of jurisdiction competent to try the subsequent suit, must be material & necessary to support the precise & particular ground or grounds on which the decree or some operative part of it was made, otherwise the finding must be considered either as superseded by the decree, or as entirely

immaterial, or as no more than incidental & subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the suit.—*SHIB CHARAN LAL v. RAGHU NATH* (1895), 1 L. R. 17 All. 174.—*IND.*

**274 iv.** —.—The high ct. of the N.-W. provinces in determining the question whether certain persons were entitled to letters of administration with the will annexed, construed testator's will, & finding that the applicants were residuary legatees under the will, held that they were entitled to such letters of administration. The widow of testator, who had unsuccessfully opposed the grant then filed a suit for the construction of her late husband's will:—*Held*: the application for letters of administration was not a suit properly so called, & the finding on the construction of the will by the ct. of the N.-W. provinces, being incidental & for the purpose of determining the question of the representative title of the applicants, could not be regarded as concluding pltf. by *res judicata* from obtaining a construction of the will in the suit brought by her.—*ARUNMOYI DAS v. MOHENDRA NATH WADADAR* (1893), 1 L. R. 20 Calc. 888.—*IND.*

**274 v.** —.—A finding between co-defts. unnecessary for the determination of the suit, or the rights of the parties involved in the suit, is not *res judicata*.—*BAPU v. BHABANI* (1897), 1 L. R. 22 Bom. 245.—*IND.*

**274 vi.** —.—The judgment of a resident magistrate on a subject immediately & properly within his jurisdiction is no estoppel if it is not professed to be judicially decided, but is decided merely collaterally & incidentally.—*OTAGO & SOUTHLAND INVESTMENT CO., LTD. v. BURNS* (1874), 1 J. R. 165; 2 C. A. 551.—*N.Z.*

**274 vii.** —.—A party is not estopped by a finding in an action between the same parties where the finding was on a collateral matter, & was not in the matter directly in issue in the former suit.—*HUTCHISON v. MULDRICK* (1911), 30 N. Z. L. R. 336.—*N.Z.*

**274 viii.** —.—A judgment upon a question raised, but not material or

necessary for the decision of the issue between the parties, will not form *res judicata*.—*BLANTYRE (LORD) v. WEMYSS (EARL)* (1844), 3 Bell, Sc. App. 34.—*SCOT.*

*d. Order disallowing objection in execution proceedings—Subsequent suit for declaration of title.*—G. brought a suit against I. for the establishment of her rights as purchaser of certain immovable properties sold in execution of a decree obtained against I. After the settlement of issues, but before the suit was finally disposed of, I. died, & his brother J. was made deft. as his legal representative.

J. consented to the suit being tried on the defence raised by I. & upon issues already settled. The suit was decreed, it being held that G. was the purchaser. In execution of this decree, under which G. sought to obtain possession, J. objected that he was entitled to a half share of some, & to the entire sixteen annas of the other, properties, & that his brother I. had no right whatever in the same. This objection was disallowed by the ct. executing the decree on the ground that it had not been raised in the original suit, & that, as the decree had been passed in the presence of J., he was not entitled to urge it.

Thereupon J. brought a suit against G. to establish his rights:—*Held*: the order passed in the execution proceedings disallowing J.'s objection was no bar to the suit under Code of Civil Procedure, s. 244.—*GOURMONI DABBE v. JUGUT CHANDRA AUDHIKARI* (1889), 1 L. R. 17 Calc. 57.—*IND.*

*e. Finding on unnecessary issue.*—Where an issue is not necessary for the decision of the suit in which it is raised, the decree couched in general terms does not cover the finding on that issue, nor can the insertion of such finding in the decree give it the force of *res judicata*.—*GHELA ICHHARAM v. SANKALCHAND JETHA* (1893), 1 L. R. 18 Bom. 597.—*IND.*

**1. Judgment for rent—Subsequent action for declaration of title.**—A. sued B. & others for rent; & the matter in issue was the share for which A. was entitled to rent. Pltf. obtained a decree for the whole rent. In a



**Sect. 3.—Effect of *res judicata*: Sub-sect. 1, B. (f)**

**275.** —.]—Where a corpn. is liable to repair a highway *ratione tenuræ*, & has applied to the justices for an order under Highway Act, 1862 (c. 61), s. 35, & has paid a fixed sum in full discharge of all claims in respect of the repair of such highway, the only effect of such order is to take away from it any extra cost that will fall upon it by reason of its having to repair *ratione tenuræ*, & it is not exempted from the usual highway rates of the parish for the repair of the highways in that parish generally. The N. E. Ry. Co. were, prior to Apr. 1881, liable to repair a certain highway *ratione tenuræ*. In Apr. 1881, an order was made under Highway Act, 1862 (c. 61), s. 35, & the co. paid a fixed sum under that order. In Aug. 1881, they were rated to the highway rate of their parish, & on appeal the rate was quashed. In June, 1897, they were rated again in respect of the repairs of the highways in the parish, & forthwith, appealed against the rate:—*Held*: the question was not *res judicata*, & the quarter sessions were not estopped from deciding otherwise in the appeal, for judgment in a concurrent or exclusive jurisdiction was neither evidence of any matter that came collaterally into question though within the jurisdiction of the ct., nor of any matter incidentally cognisable, nor of any matter to be inferred by the argument of the case, & therefore, although the judgment of 1881 was that the rate be quashed, & the question as to that rate could never be brought into question again, the construction of the Act was only incidentally cognisable.—**NORTH EASTERN RY. CO. v. DALTON OVERSEERS**, [1898] 2 Q. B. 66; 67 L. J. Q. B. 715; 78 L. T. 524; 62 J. P. 484; 46 W. R. 582; 14 T. L. R. 421; 42 Sol. Jo. 554, D. C.; *reversd.* on other grounds, [1899] 1 Q. B. 1026, C. A.; *sub nom.* DALTON OVERSEERS v. NORTH EASTERN RY. CO., [1900] A. C. 315, H. L.

**(g) Matters Available in Former Proceedings.**

**276. General rule.**—The next of kin of an intestate filed their bill in equity in the Supreme Ct. of Newfoundland, against A., the brother & deceased partner of intestate, for an account of the estate of the father of A., & of intestate, possessed by A., & an account of the partnership transactions, & the dealings of A. with the estate since the death of intestate. The bill was taken, *pro confesso*, against A. in the colonial ct., & on a reference, the master reported that certain sums were due to the several next of kin on the account of the estate of intestate's father possessed by A.; but that no account between A. & intestate had been laid before him: the Supreme Ct. decreed that the sums found by the master to be due to the next of kin & the costs should be paid to them by A. The next of kin brought their actions in

this country against A. upon the decree. A. then filed his bill against the next of kin & personal representative of intestate, stating that intestate's estate was indebted to him on the partnership accounts, & on private transactions; alleging various errors & irregularities in the proceedings in the Supreme Ct., & that A. intended to appeal therefrom to the Privy Council; & praying that the estate of intestate might be administered, the partnership accounts taken, the amount of the debt due to A. ascertained & paid, & the next of kin restrained by injunction from proceeding in their actions:—*Held*: (1) demurrer, for want of equity, would be allowed on the ground that the whole of the matters were in question between the parties, & might properly have been the subject of adjudication in the suit before the Supreme Ct. of Newfoundland; (2) as the Privy Council was the Ct. of Appeal from the Colonial Ct., & had jurisdiction to stay the execution of the decree pending the appeal, the Ct. would not interfere by injunction on the ground of error or irregularity in the decree of the Colonial Ct.

*Qu.*: whether, in a case of error shown in the judgment of the Ct. of a foreign country, from which there was no appeal to any of Her Majesty's Cts., the decision would be the same.

(3) Where a given matter becomes the subject of litigation in, & of adjudication by a ct. of competent jurisdiction, the ct. requires the parties to that litigation to bring forward their whole case, & will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the ct. was actually required by the parties to form an opinion & pronounce a judgment, but to every point which properly belonged to the subject of litigation, & which the parties, exercising reasonable diligence, might have brought forward at the time (**WIGRAM, V.-C.**).—**HENDERSON v. HENDERSON** (1843), 3 Hare, 100; 1 L. T. O. S. 410; 67 E. R. 313.

*Annotations*:—*As to* (1) *Refd.* **Srimut Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar, Shivagunga** (1866), 11 Moo. Ind. App. 50; *Mutrie v. Binney* (1887), 35 Ch. D. 614; *As to* (2) *Refd.* **Srimut Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar, Shivagunga** (1866), 11 Moo. Ind. App. 50; *Re Henderson, Nouvion v. Freeman* (1887), 57 L. J. Ch. 367; *Mutrie v. Binney* (1887), 35 Ch. D. 614; *Pemberton v. Hughes*, [1899] 1 Ch. 781. *As to* (3) *Consd.* **Simpson v. Fogo** (1863), 1 Hem. & M. 195; **Worman v. Worman** (1889), 43 Ch. D. 296; **Bake v. French**, [1907] 1 Ch. 428. *Refd.* **Srimut Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar, Shivagunga** (1866), 11 Moo. Ind. App. 50.

**277: S. P. HENDERSON v. HENDERSON** (1814), 6 Q. B. 288; 1 New Pract. Cas. 22; 13 L. J. Q. B.

subsequent suit by B. & others against A. for declaration of title to land purchased by them in execution of their intge. decree:—*Held*: as the issue in the rent suit was for what share pltf. was entitled to rent, & not to what share of the property was the pltf. entitled as owner, the question of title could be said to have been in issue in that suit only incidentally & not directly, & it could not have been entertained in the form in which it was not raised; therefore the subsequent suit was not barred as *res judicata*.—**SRIHARI BANERJEE v. KHITISH CHANDRA RAI** (1897), 1 L. R. 24 Calc. 569; 1 C. W. N. 509.—**IND.**

**PART II. SECT. 3, SUB-SECT. 1.—B. (g).**

**276 i. General rule.**—In a suit by a wife, the supreme ct. made a decree for judicial separation & gave the husband custody of the children, certain rights of access being reserved to the wife.

The wife was at the time pregnant, but no order was asked for or made with regard to the child about to be born. After the child's birth, the wife took proceedings against her husband before a magistrate, under the Act, for the maintenance of the child:—*Held*: the existence of the decree of judicial

separation, whether as regarded as the foundation for the plea of *res judicata*, erroneously rejected by the inferior ct., or as ousting the jurisdiction of the inferior ct., was a bar to the proceedings inasmuch as the relief sought by the wife, was relief which she might have obtained & might still obtain from the supreme ct.—**BROWN v. BROWN** (1905), 3 C. L. R. 373.—**AUS.**

**g. Defence—Action for amount due under award—Failure of defendant to question validity of award.**—First count of declaration on a promissory note. Second for amount due under an award founded on a submission

274; 3 L. T. O. S. 178; 115 E. R. 111; *sub nom.* HENDERSON v. HENDERSON, SIMS v. HENDERSON, 8 Jur. 755.

**Annotations:**—*Consd.* Bank of Australasia v. Nias (1851), 16 Q. B. 717; Simpson v. Fogo (1863), 1 Hem. & M. 195. Barber v. Lamb (1860), 8 C. B. N. S. 95; Scott v. Pilkington, Munroe v. Pilkington (1862), 8 Jur. N. S. 557; Vanquelin v. Bouard (1863), 15 C. B. N. S. 341; Ellis v. M'Henry (1871), L. R. 6 C. P. 228. **Mentd.** Re Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468; Sheehy v. Professional Life Assoc. (1857), 2 C. B. N. S. 211; Marbella Iron Ore Co. v. Allen (1878), 47 L. J. Q. B. 601.

**278. Defence.**—This [statute of Usury in bar to a *sci. fa.*] was no plea to defeat a judgment; but if such matter had been, deft. ought to have pleaded that, upon the first action in bar, & so not to suffer the judgment (*per* CUR.).—MIDDLETON v. HALL (1601), Gouldsb. 128; 75 E. R. 1042.

**279. — Plene administravit.**—If an exor. plead to an action on bond payment, & omit to plead *plene administravit*, & a verdict be given against him on such plea; it operates as an admission of assets in an action founded on that judgment, suggesting a *devastavit*.—ERVING v. PETERS (1790), 3 Term Rep. 685; 100 E. R. 803. **Annotations:**—*Refd.* Hooper v. Summersett (1810), Wight. 16; Leonard v. Simpson (1835), 2 Bing. N. C. 176; *Re* Higgins's Trusts (1861), 2 Giff. 562.

**280. — — — — —**—Prior to the decree for administration of an insolvent estate a simple contract creditor obtained a common law judgment *de bonis testatoris* for her debt against the extrix. The extrix., who was also a simple contract creditor, did not plead *plene administravit* or set up her right of retainer in the common law action:—*Held:* the judgment was conclusive that the extrix. had assets to satisfy it & she could not retain against the judgment creditor in the administration action.—*Re* MARVIN, CRAWTER v. MARVIN, [1905] 1 Ch. 490; 74 L. J. Ch. 699; 93 L. T. 599; 54 W. R. 74; 21 T. L. R. 765.

— — — — —.]—*See, generally*, EXECUTORS.

**281. — — — — —**—Where an ejectment was brought to recover possession of lands extended under an *elegit* upon a judgment confessed, which had been entered up upon a warrant of attorney given for securing an annuity, it is too late for the grantor to object to the consideration of such annuity upon a summary application for staying the proceedings after verdict in such ejectment, because he had an opportunity of making his defence to the action.—WITHEY v. WOOLLEY (1798), 7 Term Rep. 540; 101 E. R. 1121.

**Annotations:**—*Refd.* Fielde v. Cole (1801), For. 125. **Mentd.** Descenfans v. O'Bryen (1803), 3 East, 559.

to arbitration. Pleas, 1. Payment. 2. Set-off on common counts. On motion to set aside a verdict for pltf., on the grounds: 1. That the arbitrators exceeded their authority in making their award. 2. That since the making of said award money had been received by pltf. to deft.'s use:—*Held:* as no defence had been set up to the award at the trial, & no action taken to set aside the award, deft. could not now set up such a defence; & if moneys had been received by pltf. to deft.'s use, since the award, deft. could on the pleadings have shown the same at the trial. v. SOMMERS (1863), 14 C. P. 97.—CAN.

**278 i. — — — — —**—Where a deft. has been sued by a pltf. upon his right of ownership, pltf.'s recovery negatives all grounds of defence to that action then existent & within pltf.'s knowledge.—JANAKI AHMAL v. KAMAJA-THAMMAL (1871), 7 Mad. 263.—IND.

**278 ii. — — — — —**—The same effect must be given to a matter which might & ought to have been, but has not been, made a ground of defence in the former suit, as must be given to it if it had been made a ground of defence in

the former suit.—ABDULLAKHAN v. KHANMIA (1908), 1 L. R. 32 Bom. 315.—IND.

**h. — — — — — Action on foreign judgment.**—In a suit upon a foreign judgment, deft. can not be permitted to plead a defence which he had an opportunity of pleading in the foreign ct.—LONDON, BOMBAY & MEDITERRANEAN BANK v. BURJORI SORABJI LYWATTA (1885), 1 L. R. 9 Bom. 346.—IND.

**k. — — — — — Action on mortgage bond—Failure of defendant to demand account—Action for rent not maintainable.**—MAHABIR PERSHAD SINGH v. MACNAGHTEN (1889), 1 L. R. 16 Calc. 682; L. R. 16 Ind. App. 107.—IND.

**l. — — — — — Action for recovery of possession—Failure of defendant to set up alternative defence—Action for pre-emption not maintainable.**—Deft. in a suit for the recovery of possession of immoveable property pleaded only a right to the proprietary possession of the property in himself. This defence failed, & a decree was given in favour of pltf. Subsequently pltf. sold a portion of the property &

**282. — — — — —**—Where upon a summary application to set aside an annuity for non-compliance with 17 Geo. 3, c. 26 requirements, the rule was discharged upon discussion of the merits, the ct. will not entertain a similar application between the same parties on the same state of facts, though grounded upon a new objection to the annuity, which was not before urged or considered.

If an action be brought & the merits of the question discussed between the parties, & a final judgment obtained by either, the parties are concluded, & cannot canvas the same question in another action, although some objection or argument might have been urged upon the first trial which would have led to a different judgment (LORD KENYON, C.J.).—GREATHEAD v. BROMLEY (1798), 7 Term Rep. 455; 101 E. R. 1073.

**Annotations:**—*Foll.* Schumann v. Weatherhead (1801), 1 East, 537. *Refd.* Nowington v. Levy (1870), L. R. 6 C. P. 180; L. C. C. v. Dundas, [1904] P. 1.

**283. S.P. SCHUMANN v. WEATHERHEAD** (1801), 1 East, 537; 102 E. R. 207.

**Annotations:**—**Mentd.** Jones v. Jones (1833), 1 Cr. & M. 721; Splents v. Lefevre (1864), 11 L. T. 114.

**284. — — — — — Action for price of goods sold—Failure of purchaser to raise matters in reduction of damages—Whether action by purchaser for breach of contract maintainable.**—(1) *Semble:* where an action has been brought for the value of goods furnished at a stipulated price & the purchaser does not either in bar of the action or to reduce the damages object to the quality of the goods, but allows the seller to recover a verdict for the full price agreed upon, he cannot afterwards maintain a cross-action on the ground of the goods being of a bad quality & unfit for the purpose for which they were ordered.

(2) As soon as the purchaser of the goods discovers that they do not answer the order given for them, he ought to return them to the vendor or send him notice to take them back & if he does neither, he cannot afterwards maintain an action on the ground of the article being quite unfit for the purposes for which he ordered it.—FISHER v. SAMUDA (1808), 1 Camp. 190, N. P.

**Annotations:**—*As to* (1) *Consd.* Davis v. Hedges (1871), L. R. 6 Q. B. 687. *Refd.* Jones v. Bright (1829), 5 Bing. 533. *Generally, Mentd.* Allen v. Cameron (1833), 3 Tyr. 907; Francis v. Baker (1839), 3 Jur. 771; Shepherd v. Pybus (1842), 11 L. J. C. P. 101; Randall v. Newson (1877), 2 Q. B. D. 102.

**285. — — — — —**—In all actions for the price of goods sold & delivered with a warranty of work & labour, as well as in actions

deft. brought a suit for pre-emption:—*Held:* the suit must fail, inasmuch as pltf.'s claim was one which might have made when deft. in the former suit as an alternative to his defence of title.—PULANDAR SINGH v. JWALA SINGH (1898), 1 L. R. 20 All. 516.—IND.

**m. — — — — — Action for rent—Failure of defendant to object to item as illegal—Point not judicially determined.**—Where, in a suit for rent, the rent claimed expressly includes an item which is objected to as an illegal cess, the mere fact, that, in a previous rent suit between the same parties regarding the same tenure, deft. did not raise the same plea, although he could have done so, would not in the absence of a judicial determination of the point in the previous suit, preclude him from raising the plea in the subsequent suit.—WOOMESH CHANDRA MATRA v.

*Failure of defendant to plead payment—Claim to set off in subsequent action.*—In a suit for rent, deft. claimed a set-off for a certain sum which he said he had paid



*Sect. 3.—Effect of res judicata: Sub-sect. 1, B. (g).]*

for goods supplied under a particular contract, it is competent for deft. to give in evidence a breach of the warranty or contract, & to show how much less the subject-matter of the action is worth by reason of such breach. In such case a deft. must be considered as having obtained satisfaction for the breach, to the extent of the abatement he is capable of obtaining in the price, & he is precluded recovering in another action on the same breach, to that extent, & no more; he cannot set off, by a proceeding in the nature of a cross-action, the amount of damage which he has sustained by the breach. Declaration on a special *assumpsit* on a contract to build a ship according to a specification, assigning a breach in not building the ship with scantling, fastening, & planking, according to the specification, & alleging special damage. Plea that deft. had sued pltf. for the balance of the agreed price of the ship, after payment of £3,500 & also for a sum of £150, for extra work, in the form of an action for work & labour, & for goods sold & delivered; that issue was joined, & on the trial of the cause, the now pltf. gave evidence in his defence of the same breach of contract alleged in the declaration, & insisted, if the amount of compensation to which he was entitled exceeded & equalled the balance & value of the extra work, the now pltf. was entitled to a verdict; if less, then he was entitled to a reduction upon the amount of both, to the extent of such amount of compensation; that the learned judge who tried the cause so directed the jury, & the jury found that the now deft. had committed a breach of the contract, & that the now pltf. was entitled to some compensation, which they deducted from the price of the ship, & the value of the extra work; that the now deft. had judgment for the amount, after such deduction had been made, since the commencement of this suit:—*Held*: the plea was bad on general demurrer, & did not disclose any mutual agreement between pltf. & deft. to leave the amount claimed to the determination of the jury, as arbitrators.—*MONDEL v. STEEL* (1841), 8 M. & W. 858; 1 Dowl. N. S. 1; 10 L. J. Ex. 426; 151 E. R. 1288.

*Annotations*:—*Consd.* *Davis v. Hedges* (1871), L. R. 6 Q. B. 687. *Refd.* *Rigge v. Burbidge* (1846), 15 M. & W. 598; *Towerson v. Aspatria Agricultural Co-op. Soc.* (1872), 27 L. T. 276; *Bow, McLachlan v. Ship Camosun*, [1909] A. C. 597. *Mentd.* *Bartlett v. Holmes* (1853), 13 C. B. 630; *The Camilla* (1858), Sw. 312; *Sayers v. London & Birmingham Flint Glass & Alkali Co.* (1858), 27 L. J. Ex. 294; *Bannerman v. White* (1861), 8 Jur. N. S. 282; *Horsfall v. Thomas* (1862), 6 L. T. 462; *Oastler v. Pound* (1863), 1 New Rep. 393; *Dakin v. Oxley* (1864), 15 C. B. N. S. 646; *Meyer v. Dresser* (1864), 16 C. B. N. S. 646; *Heyworth v. Hutchinson* (1867), L. R. 2 Q. B. 447; *Bright v. Rogers*, [1917] 1 K. B. 917.

**286.** ————.]—An action was brought against a party for special damage incurred by pltf., owing to deft. having improperly constructed an article which he had to manu-

facture & put up for pltf. On demurrer:—*Held*: a plea pleaded by way of estoppel, that the now deft. had recovered the price of the article in an action against the now pltf., & therefore, he ought not now to maintain his action for the special damage, on the ground that he might have set it off in the former action, was a bad plea.—*BIGGE v. BARHAYS* (1846), 7 L. T. O. S. 232.

*See, generally, SALE OF GOODS.*

**287.** ———— **Action for work done—Failure of customer to raise matters in reduction of damages—Whether action by customer for breach of contract maintainable.**—In an action for damages for the non-performance & improper performance of certain work which pltf. had employed deft. to do, the defence set up was that deft. had sued pltf. for the price of the work alleged to have been improperly done, & pltf. had settled by paying the whole amount then sued for; & that, as pltf. might have given the non-performance & the defective performance complained of in evidence in reduction of damages, pltf. was precluded from bringing a cross action for them:—*Held*: though pltf. might have used the causes of action for which he sued in reduction of the claim in the former action, yet he was not bound to do so, but might maintain a separate action for them.—*DAVIS v. HEDGES* (1871), L. R. 6 Q. B. 687; 40 L. J. Q. B. 276; 25 L. T. 155; 20 W. R. 60.

*Annotations*:—*Distd.* *Caird v. Moss* (1886), 33 Ch. D. 22. *Consd.* *Re Hilton, Ex p. March* (1892), 67 L. T. 594. *Refd.* *Bow, McLachlan v. Ship Camosun*, [1909] A. C. 597; *Bright v. Rogers*, [1917] 1 K. B. 917.

**288.** ———— **Action for breach of contract—Failure of defendant to set up agreement for commission in reduction of damages—Action for commission not maintainable.**—It was agreed between A. & B. that A. for certain commission should ship a cargo of wheat of a specific quality, at a foreign port for B. in England. The wheat shipped by A. being found upon its arrival to be of an inferior quality, B. brought an action against A. for breach of the agreement, & recovered damages:—*Held*: A. could not afterwards maintain an action against B. for the commission, as his claim for this might have been given in evidence in the former action to reduce the damages.—*KIST v. ATKINSON* (1809), 2 Camp. 63, N. P.

*Annotation*:—*Refd.* *Mondel v. Steel* (1841), 8 M. & W. 858.

**289.** ————.]—*Qu.*: whether a deft. in execution can make successive applications to set aside proceedings on different grounds of objection, all of which were discoverable at the time of the first application.—*BICKNELL v. WETHERELL* (1841), 1 Q. B. 914; 1 Gal. & Dav. 460; 10 L. J. Q. B. 345; 6 Jur. 366; 113 E. R. 1381.

**290.** ————.]—A railway co. in 1856 took possession, without the consent of the owner, pltf.'s predecessor in title, of a piece of land forming part of a field, the residue of which belonged to another person & was also taken by the co. Neither pltf.

on account of previous arrears of rent, but for which no credit had been given by pltf. in a suit for the rent of that period. That suit had been heard *ex p.* & decreed in pltf.'s favour:—*Held*: the plea of payment now raised should have been made a ground of defence in the previous suit & deft. was precluded from claiming a set-off in regard to it.—*JAMADAR SINGH v. SERAZUDDIN AHAMAD CHOWDHURY* (1908), 12 C. W. N. 862; 1 L. R. 35 Calc. 979.—*IND.*

**o.** ———— **Action against mortgagee for redemption—Failure of defendant to set up claim to pre-empt—Effect on action for pre-emption.**—The owner of a share in a village mtgd. three-

quarters of that share to R., & afterwards sold the entire share to D. D. the purchaser, sued the mtgee., R., for redemption, & obtained a decree. Subsequently R., who was a co-sharer in the village, brought a suit for pre-emption of the share against D. & the original mtgor.:—*Held*: the fact that R. had not advanced his claim to pre-empt as a defence to D.'s suit for redemption did not have the effect of making R.'s claim in his suit for pre-emption *res judicata*.—*RAM CHAND v. DURGA PARSAD* (1904), 1 L. R. 26 All. 61.—*IND.*

**p.** ———— **Action on bill of exchange—Failure of defendant to set up guarantee by plaintiff's agent—Action against**

**plaintiff for damages.**—A party brought an action of damages against the agent for a bank, & the bank for which he acted, in which he set forth that the agent had guaranteed to the pursuer delivery of certain locomotive engines which were in course of being constructed for him, on condition of receiving his acceptance for £1,000 of the contract price, & that in implementation of his part of the agreement, pursuer granted the acceptance & the bill was indorsed over by the agent to the bank; that the agent failed to implement his guarantee, that the bank thereafter raised an action on the bills in England & obtained judgment against pursuer which they



**r. --- Waiver of objection ---**  
**Omission of competent defence.**—It is not a good defence against a plea of *res judicata* that there were objections to the citation of a defender, which had been pleaded but afterwards competently waived; or that a competent defence had been omitted.—**CARMICHAEL v. ANSTRUTHER (1866), 38 Sc. Jur. 440.—SCOT.**

*Sect. 3.—Effect of res judicata: Sub-sect. 1, B. (g),*

sufficient to satisfy the requirements of Stat. Frauds, s. 4:—*Held*: deft. not having raised this defence in the former action, was precluded from raising it in the second action.—*HUMPHRIES v. HUMPHRIES*, [1910] 2 K. B. 531; 79 L. J. K. B. 919; 103 L. T. 14, C. A.

*Annotation*:—*Apld.* *Cooke v. Rickman*, [1911] 2 K. B. 1125.

**295. ——— Judgment for sum admitted due —Defence of no consideration for agreement not available in action for further rent.]—**Pltf. sued deft. in the K. B. Div. for rent alleged to be due under an agreement, & judgment was signed under Ord. 14, for a part of the sum claimed which deft. admitted that she owed. In a subsequent action in the county ct. between the same parties for further rent under the same agreement, deft. raised the defence that there was no consideration for the agreement:—*Held*: deft. having admitted in the first action that rent was due from her under the agreement was estopped from raising in the second action the defence of no consideration for the agreement.—*COOKE v. RICKMAN*, [1911] 2 K. B. 1125; 81 L. J. K. B. 38; 105 L. T. 896; 55 Sol. Jo. 668, D. C.

**296. ———.]—**In Apr. 1921, defts. duly made & published the poor & district rates for the financial year 1921-1922, in accordance with the valuation list then in force, & requests for payment of the rates were made to pltf. co. shortly afterwards, but pltf. co. did not pay any portion of the rates. On Jan. 10, 1922, pltf. co. served notice of objection to the valuation list in so far as it concerned their property, & on Mar. 2, 1922, the assessment committee amended the valuation list with the result that the rates payable by pltf. co. were reduced. On Mar. 23, a new demand note was served on pltf. co. but no payment was made by them. Subsequently, a petition to wind up pltf. co. was presented by a creditor, but on Jan. 4, 1923, the withdrawal of the petition was sanctioned by the ct., & the ct. also sanctioned a scheme of arrangement which contained a clause providing (*inter alia*) that "all debts which on a liquidation of the co. would be entitled to any preference or priority in payment shall to the extent of such preference or priority & in so far as they shall not have been paid be paid in full by the co." On Jan. 10, 1923, defts. took out a summons, dated back to May 19, 1922, to pltf. co. to show cause why they should not be proceeded against in default of the payment of the rates. Pltf. co. did not appear on the hearing of the summons, & the magistrates, on defts.' applications, issued distress warrants. Pltf. co. claimed an injunction to restrain defts. from taking any further proceedings by distress to recover the rates:—*Held*: pltf. co., on the hearing of the summons for a warrant of distress for non-payment of the rates, could have raised before the magistrates the defence that the rates had ceased to be due by reason of the scheme which was binding on defts., as the magistrates, whose duties were not merely ministerial, had jurisdiction to consider the scheme as a defence to the summons, & the decision of the magistrates although given in the absence of pltf. co. was binding on pltf. co. in respect of all defences which might have been raised before the magistrates, & pltf. co. were, therefore, precluded from contending that the distress which was levied under the warrant granted by the magistrates was unlawful by reason of the provisions of the scheme.—*KERSHAW, LEESSE & Co. v. STOCKPORT OVERSEERS*,

[1923] 2 K. B. 129; 92 L. J. K. B. 784; 129 L. T. 563; 21 L. G. R. 452.

**297. Facts.]—**Where a rule has been discharged, in the bail ct., that fact is an answer to a similar application in the full ct., though there may be new facts stated in the affidavits, if they might have been brought before the ct. on the first occasion.—*ROSSET v. HARTLEY* (1835), 7 Ad. & El. 522, n.; 1 Har. & W. 581; 5 Nev. & M. K. B. 415; 5 L. J. K. B. 49; 112 E. R. 566.

*Annotation*:—*Refd.* *Tilt v. Dickson* (1847), 4 C. B. 736.

**298. ——— Judgment by consent—Facts ousting jurisdiction not raised—Cannot be set up in subsequent proceedings.]—**By Rivers Pollution Prevention Act, 1876 (c. 75), s. 3, it is made an offence to permit sewage to flow into a "stream" from a sewer constructed at the date of the passing of the Act without using the best practicable means to render the sewage harmless; & by sect. 20 the term "stream" is defined to include only such tidal waters as may be determined by the Local Govt. Board by order. Jurisdiction is by the Act given to the county ct. to make an order restraining the further commission of the offence, & ordering the offenders to execute the necessary sewage works to render the sewage harmless & to inflict penalties for disobedience to such order. Proceedings having been taken in a county ct. under the Act against defts. for permitting sewage to flow into a certain river, & neglecting to use the best practicable means to render the sewage harmless, defts. consented to an order declaring them to have committed the alleged offence & ordering them to execute the necessary sewage works to prevent its continuance. At the date of that order defts. were under the belief that the part of the river into which the sewage flowed was non-tidal. Subsequently defts., having been summoned for penalties for disobedience of the order, sought to show that the part of the river into which the sewage flowed was tidal water, & that as there had been no order of the Local Govt. Board declaring it to be a stream, they had committed no offence:—*Held*: the order of the county ct. was equivalent to a judgment, & defts. were estopped from disputing that they had committed the alleged offence, or from contending that the order of the ct. in so far as it applied to the *locus in quo* was without jurisdiction.—*RIVER RIBBLE JOINT COMMITTEE v. CROSTON URBAN DISTRICT COUNCIL*, [1897] 1 Q. B. 251; *sub nom.* *RIBBLE JOINT COMMITTEE v. CROSTON URBAN DISTRICT COUNCIL*, 66 L. J. Q. B. 384; 45 W. R. 348, D. C.

**Judgment as bar to subsequent proceedings by plaintiff.]—**See Sect. 3, sub-sect. 2, B. (d), *post*.

(h) *Matters not Available in Former Proceedings.*

**299. Fresh circumstances — Action against surety—Dividends in fact received by creditor from principal debtor's estate—Right of surety to sue for dividends so received.]—**A guarantee for a fixed sum was given by pltf. to a banking co. to secure advances made to A. The bank advanced a larger sum to A., & on his death proved against his estate in an administration suit for the amount, & received dividends thereupon. Afterwards the bank brought an action at law against pltf. & recovered the amount of the guarantee. Pltf. when the action was brought, did not know of the receipt of dividends by the bank, & the same were not wholly received till afterwards:—*Held*: pltf. was entitled in equity to the dividends received in the proportion which the sum guaranteed bore to the whole debt proved, & under the circumstances,



pltf. had not lost this equity by omitting to raise the same defence at law.—**THORNTON v. M'KEWAN** (1862), 1 Hem. & M. 525; 1 New Rep. 16; 32 L. J. Ch. 69; 11 W. R. 140; 71 E. R. 230.

*Annotations*:—**Mentd.** Midland Banking Co. v. Chambers (1869), 4 Ch. App. 398; Goodwin v. Gray (1874), 22 W. R. 312; Ellis v. Emmanuel (1876), 1 Ex. D. 157; Luke v. South Kensington Hotel Co. (1877), 7 Ch. D. 789.

*See, generally*, GUARANTEE.

**300.** — **Order carrying fund to separate account—Subsequent application for priority in respect of undisclosed claim—Applicant present when order made.**—By an order made on further consideration, funds were carried over to “the account of the perpetual annuity of deft. & her issue,” with a direction to pay the dividends thereon to deft. for life. Deft. charged her interest in this fund, & the incumbrancers obtained stop orders thereon. Subsequently, it was discovered that the time the order was made deft. was jointly & severally liable with testator for breaches of trust which had been wholly made good out of testator's estate. The order was made in the presence of pltf., who was not at the time aware of deft.'s separate account, notwithstanding the stop orders:—*Held*: though deft. was liable to contribute towards making good the loss occasioned by her breach of trust, & could take nothing beneficially from testator's estate until she had done so, still as between pltf. & the incumbrancers the matter was *res judicata*, & the incumbrancers were entitled to priority over the claim now made for contribution for breach of trust.—**Re EYTON, BARTLETT v. CHARLES** (1890), 45 Ch. D. 458; 59 L. J. Ch. 733; 63 L. T. 336; 39 W. R. 135.

*Annotations*:—**Consd.** Edgar v. Plomley, [1900] A. C. 431; Thompson v. Thompson, [1923] 2 Ch. 205. **Refd.** Cloutte v. Storey, [1911] 1 Ch. 18.

**301** —.] — **Appls.** had from time immemorial repaired a certain highway *ratione tenuræ* & were consequently exempt from contributing to the repair of other highways in the district. In 1782 the highway was placed under trustees who materially altered it. In 1862 the trust expired, but applts. believing that their liability still existed continued to repair the highway. In 1866 the Ct. of Q. B. decided that they were not liable to be rated for the repair of the highways in the district, but the fact of the alteration of the highway by the trustees was not brought before the Ct. In 1892 the highway was declared a main road & applts. ceased to repair it:—*Held*: (1) the duty to repair *ratione tenuræ* & with it the exemption from being rated had come to an end by the alteration of the highway by the trustees; (2) the previous decision did not make the case *res judicata* as the fact of the alteration had not been brought to the attention of the Ct.

I do not think that [previous] decision precludes us from dealing with the matter in the light of new facts which were not before the ct. then (**COLLINS, J.**).—**HEATH v. WEAVERHAM OVERSEERS**, [1894] 2 Q. B. 108; 63 L. J. M. C. 187; 70 L. T. 729; 58 J. P. 557; 42 W. R. 478; 10 T. L. R. 414; 38 Sol. Jo. 400; 10 R. 274, D. C.

*Annotations*:—*As to* (1) **Refd.** Dalton Overseers v. N. E. Ry., [1900] A. C. 345; Ferrand v. Bingley U. C., [1903] 2 K. B. 445.

**302.** — **Denial of validity of patent in action for infringement—Discovery of further anticipations—Whether defendant estopped from denying**

**validity in second action on same patent.**—In an action by a patentee claiming damages for an infringement & an injunction, deft. denied the infringement. He also denied the validity of the patent, alleging, amongst other things, that it had been anticipated by certain specifications.

The cts. upheld the validity of the patent, but granted no injunction or damages on the ground that the evidence as to the alleged infringement was, under the circumstances, not admissible. In a second action between the same parties in respect of the same patent, deft. again denied the validity of the patent, alleging that it had been anticipated by certain specifications which were not before the ct. in the first action, & which he had discovered since that action:—*Held*: the validity of the patent was *res judicata*, & the judgment in the first action estopped deft. from again denying the validity of the patent.—**SHOE MACHINERY Co., LTD. v. CUTLAN**, [1896] 1 Ch. 667; 65 L. J. Ch. 314; 71 L. T. 166; 40 Sol. Jo. 336; 13 R. P. C. 141.

*Annotation*:—**Refd.** Humphries v. Humphries, [1910] 2 K. B. 531.

— **Review of weekly payments—Workmen's Compensation Acts.**—*See* MASTER & SERVANT.

— **Applications to set aside judgments.**—*See* JUDGMENTS.

**Fresh evidence—Applications to set aside judgments.**—*See* JUDGMENTS.

**Judgment as bar to subsequent proceedings by plaintiff.**—*See* Sub-sect. 2, B. (c), *post*.

(i) *Statements in Pleadings.*

**303. General rule.**—**BOILEAU v. RUTLIN**, No. 233, *ante*.

**304.** —.] — Where a party in his pleading makes an admission, the admission so made is not only for that purpose, but for every purpose, & he will be estopped afterwards, although in another action between the same parties, from pleading the same matter.

We constantly allow Stat. Limitations, & if we allow that & the plea of payment, we should allow what is a defence in point of law, & this estoppel is considered a defence by law, that the same matter shall not be twice litigated; & where there is an admission on the point, the party is precluded. We should give effect to it without reference to whether it is the truth or not. It is the law, therefore we ought to allow this plea (**POLLOCK, C.B.**).—**HUTT v. MORELL** (1849), 3 Exch. 240; 6 Dow. & L. 447; 12 L. T. O. S. 405; 13 Jur. 215; 154 E. R. 832.

**305. Declaration or statement of claim—Action of trover—Statement that debt paid off—Subsequent action for money had & received.**—(1) M., a trader, being largely indebted to his bankers, & being pressed by them for security, executed a conveyance to them of certain stock & effects enumerated in a schedule annexed to the deed, with a power of sale on default in payment of £1,000, on demand: the deed recited that M. was indebted to the bankers in the sum of £1,000, but it contained no stipulation for fresh advances by them; & though it did not in terms purport to convey all M.'s property, it appeared that the agent of the bankers who negotiated the transaction was aware that M. already possessed no other property: M. retained possession of the

PART II. SECT. 3, SUB-SECT. 1.—  
B. (i).

a. *Defence—Disqualification by insanity—Contrary plea in subsequent action.*—Defts. having in a previous suit set up the defence that K. was

disqualified by insanity & taken the decision of the ct. on that ground, were estopped now from setting up the defence that he was not so disqualified, & that he was entitled to succeed.—**BRIJHOOKUN LAL AWASTEE v.**

**MAHADEO DOBEY** (1876), 15 B. L. R. 145 n.; 17 W. R. 422.—**IND.**

t. — *Admission by defendant.*—Pltfs. sued to recover their share of an annuity chargeable on a 7½ biswa share of a certain village for the



*Sect. 3.—Effect of res judicata: Sub-sect. 1, B. (i), (j)*

effects, so conveyed until a few days before a fiat in bkpcy. issued against him:—*Held*: the execution of this deed was an act of bkpcy.

(2) The assignees brought an action of trover to recover the value of the goods seized by the bankers under colour of the deed, & also, an action for money had & received to recover the moneys paid to M.'s account subsequently to the act of bkpcy.:—*Held*: plffs. were not estopped from recovering in the latter action, by reason of their having set up as one ground upon which they were entitled to recover in the action of trover, that the debt to secure which the deed was executed had since been paid off.

The question is whether the assignees, by setting up in the action of trover as one ground of their action that the original debt had since been paid off, had so irrevocably adopted the subsequent payments, & appropriated them to the liquidation of the original debt, as to be precluded from recovering the amount in an action for money had & received (*TINDAL, C.J.*).—*LINDON v. SHARP* (1843), 6 Man. & G. 895; 7 Scott, N. R. 730; 13 L. J. C. P. 67; 134 E. R. 1154.

*Annotations*:—As to (1) *Refd.* *Graham v. Chapman* (1852), 12 C. B. 85; *Re Barrell, Ex p. Bailey* (1853), 3 De G. M. & G. 531; *Re Murgatroyd, Ex p. Bland* (1855), 6 De G. M. & G. 757; *Re Nurse, Ex p. Foxley* (1868), 18 L. T. 862; *Re Winstanley, Ex p. Sheen* (1876), 1 Ch. D. 560; *Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313. *Generally, Mentd.* *Graham v. Furber* (1854), 2 C. L. R. 452; *Mercer v. Peterson* (1868), 18 L. T. 30.

**306. — Action by corporation on contract—Admission that contract duly executed—Company estopped from contesting in cross-action validity of contract.**—(1) In the case of a contract entered into with a corpn., which is executed before action brought, & under which deft. has received the whole benefit of the consideration for which he bargained, it is no answer to an action of *assumpsit* by the corpn., that the corpn. itself was not originally bound by the contract by reason of its not having been made under their common seal.

(2) *Seemle*: even if the contract had been executory only on the part of the corpn. their suing upon it would amount to an admission on record by them that such contract was duly entered into on their part, so as to be obligatory on themselves, & such admission on the record would estop them from setting up as an objection in a cross-action that the contract was not sealed with their common seal.—*FISHMONGERS' Co. v. ROBERTSON* (1813), 5 Man. & G. 131; 12 L. J. C. P. 185; 134 E. R. 510; *sub nom.* *FISHMONGERS' Co. v. ROBERTSON, FISHMONGERS' Co. v. BOOTH, FISHMONGERS' Co. v. STAINES*, 6 Scott, N. R. 56.

*Annotations*:—As to (1) *Refd.* *Paine v. Strand Union* (1846), 8 Q. B. 326; *British, etc. Life Insce. v. Browne* (1852), 20 L. T. O. S. 67; *Australian Royal Mail Steam Navigation Co. v. Marzette* (1855), 11 Exch. 228; *South of Ireland Colliery v. Waddle* (1868), L. R. 3 C. P. 463. As to (2) *Consd.* *Copper Miners' Co. v. Fox* (1851), 16 Q. B. 229; *Kidderminster Corpn. v. Hardwick* (1873), L. R. 9 Exch. 13. *Refd.* *Boileau v. Rutlin* (1848), 2 Exch. 665; *Liverpool Borough Banking Co. v. Eccles* (1859), 28 L. J. Ex. 122.

**307. —.]—BOILEAU v. RUTLIN, No. 233, ante.**

**308. — Plaintiff appearing as defendant by same solicitor in subsequent suit.**—By deed, estates were settled to the use of trustees for a term, without impeachment of waste, except the cutting of ornamental timber, & subject thereto to the use of successive tenants for life, without

impeachment of waste, except the cutting of ornamental timber. The trusts of the term were declared to be, by felling timber & setting the same, except ornamental timber, of which enough should always remain to "preserve the beauty of the place unimpaired"; or by sale or mtge. of the hereditaments, except the mansion house, to raise three sums of £10,000 each, & pay the same to three persons named. A bill was filed by a tenant for life, for the opinion of the ct. whether the estate comprised in the term, or the timber, was the primary fund for the payment of the sum of £10,000. To this bill demurrers were allowed. A bill was then filed by the trustees of the term, praying a declaration that they had a discretion which to resort to, & that the power of the tenants for life to cut timber was subservient to their powers. A motion was made in this suit for an injunction to restrain the tenant for life in possession from felling 700 oak trees, but it was refused, & the sale was completed. A bill was then filed by all the tenants for life in remainder against the tenant for life in possession, who was also the party entitled to two of the sums of £10,000, the trustees of the term, & the persons entitled to the third sum of £10,000 praying an injunction against the felling of the 700 oak trees, or any other ornamental timber in the terms of the settlement of the estate:—*Held*: (1) infant defts. who appeared by the same solr. as they did as plffs. in a former suit, were not bound by the allegations in such former suit, on the mere ground of being so represented by the same solr.; (2) acquiescence by one of several plffs. in an act complained of & proposed to be done by a deft., was a sufficient answer to a motion for an injunction against such act, so far as that plff. was concerned, but parties could not be held to acquiesce in the claims of others unless they were fully cognisant to their right to dispute them.—*MARKER v. MARKER* (1851), 9 Ilare, 1; 20 L. J. Ch. 246; 17 L. T. O. S. 176; 15 Jur. 663; 68 E. R. 389.

*Annotations*:—*Generally, Mentd.* *Micklethwait v. Micklethwait* (1857), 26 L. J. Ch. 721; *Ashby v. Hincks* (1888), 58 L. T. 557; *Stafford v. Sutherland* (1892), 36 Sol. Jo. 381.

**309. — In suit in equity—Subsequent action at law.**—Where a deft. to an action pleaded unsuccessfully an equitable plea grounded, not on equitable principles, but on the course & practice of a ct. of equity:—*Held*: he was not precluded by the decision at law from filing a bill on the same grounds for an injunction to restrain proceedings in the action.—*PHELPS v. PROTHERO, PROTHERO v. PHELPS* (1855), 7 De G. M. & G. 722; 25 L. J. Ch. 105; 26 L. T. O. S. 231; 2 Jur. N. S. 173; 4 W. R. 189; 44 E. R. 280, L. J. J.

*Annotations*:—*Consd.* *Tredegar v. Windus* (1875), L. R. 91 Eq. 607. *Refd.* *Collins v. Cave* (1858), 27 L. J. Ex. 146; *Waterloo v. Bacon* (1866), 35 L. J. Ch. 643. *Mentd.* *Simpson v. Prothero* (1857), 29 L. T. O. S. 325; *Ormes v. Beadel* (1860), 2 Giff. 166; *Jenner v. Morris* (1861), 3 L. T. 871; *Royal Bristol Permanent Bldg. Soc. v. Bomash* (1887), 35 Ch. D. 390.

**310. — Allegation in suit that no rights capable of assertion at common law.**—A plff. in equity filed his bill stating that a policy had become void at law, & claiming to have it treated as valid in equity. After bill dismissed the same plff. sued at law on the policy:—*Held*: a bill would lie to restrain the action, & injunction would be granted accordingly.—*TREDEGAR (LORD*

years 1309, 1310 & 1311 Fasli. In a previous suit between the same parties in respect of the years 1306, 1307 & 1308, plffs.' right to receive the annuity

had been admitted by deft., & a decree passed accordingly:—*Held*: the fact that the two suits related to different years did not prevent the judgment in

the former operating as *res judicata* in the latter.—*DWARKA DAS v. ARHAY SINGH* (1908), 1 L. R. 30 All. 470.—**IND.**

*v. WINDUS* (1875), L. R. 10 Eq. 607; 44 L. J. Ch. 268; 32 L. T. 590; 23 W. R. 511.

**311. — Statement that contract dated in 1915—Application for stay of execution on ground that contract made in 1910—Courts (Emergency Powers) Acts.]**—The ct. held that deft. was estopped by the indorsement on the writ & the judgment by default from asserting that the sum was due under the contract of 1910 [& not under a contract of 1915 alleged in the statement of claim.]—*CRIBB v. FREYBERGER*, [1919] W. N. 22; 146 L. T. Jo. 214, C. A.

**312. Defence—Plea of plene administravit—Executor estopped in subsequent proceedings on devastavit.]**—In *assumpsit* by A. against B., C., & D., as extrix. & exors of E., for a debt due from E., C. & D. severally pleaded *plene administravit*. B. pleaded *plene administravit* except as to £383 6s. 7d., & also except as to certain goods of the value of £481 13s. 6d. A. signed judgment for £1,280 13s., to be levied—as to £865 0s. 1d., of the assets confessed—& as to the residue of assets *in futuro*. Under a *fi. fa.* the goods produced £400 9s. 5d. B. gave a cheque on the bankers, with whom the £383 6s. 7d. had been deposited, which was dishonoured, not being signed by C. & D.:—*Held*: B. was bound by her admission that the money was in her hands, & consequently was guilty of a *devastavit* to the amount of the £383 6s. 7d.

*Semble*: B. was liable for no more than £400 9s. 5d. in respect of the goods.—*COOPER v. TAYLOR* (1844), 6 Man. & G. 989; 7 Scott, N. R. 950; 13 L. J. C. P. 92; 2 L. T. O. S. 348; 8 Jur. 450; 134 E. R. 1193.

*Annotation*:—*Refd.* *Jowsbury v. Mummary* (1872), L. R. 8 C. P. 56.

**313. — Unsuccessful plea on equitable grounds in action at law—Based on course & practice of court of equity—Subsequent suit in equity based on same equitable grounds.]**—*PHELPS v. PROTHERO*, *PROTHERO v. PHELPS*, No. 309, *ante*.

**314. —**—An admission contained in a statement of defence in one action cannot properly be treated as conclusive in other proceedings between the same parties, but on a different issue.—*Re WALTERS, NEISON v. WALTERS* (1889), 61 L. T. 872; *revid.* on other grounds (1890), 63 L. T. 328, C. A.

**315. — Statement that defendant surviving partner of firm—Subsequent action by defendant on contract of indemnity.]**—A married woman suing as a member of a firm has, thereby, sufficient separate estate to justify her in maintaining an action.

A co. entered into a contract with a business firm to indemnify them against a particular claimant, the co. being at liberty to use the name of the firm in defending any action brought by claimant, & the firm agreeing to give all assistance required. At the time when this contract was entered into an action had been commenced by the particular claimant; it was defended by the co. in the name of the firm, & in their pleadings the co. stated that E. had become the surviving partner of the firm. Judgment was given in the action against the firm, & execution was threatened. E., who was a married woman,

would not sanction an appeal to the House of Lords, & brought an action against the co. to enforce the contract of indemnity:—*Held*: E. was entitled to the benefit of the contract of indemnity, as she was, in any case, estopped from denying her liability as surviving partner of the firm, & was, consequently, liable under the judgment.—*EDDOWES v. ARGENTINE LOAN & MERCANTILE AGENCY CO., LTD.* (1890), 62 L. T. 602; *revid.* on other grounds, 63 L. T. 364, C. A.

**316. Replication—Omission to traverse allegation in defence.]**—*CARTER v. JAMES*, No. 257, *ante*.

**Effect of statements in pleadings on hearing of action.]**—*See* Part VI., Sect. 3, sub-sect 2, B. (c), *post*.

(j) *Continuing Causes of Action.*

**Judgment as bar to subsequent proceedings by plaintiff.]**—*See* Sub-sect. 2, B. (f), *post*.

(k) *Admissibility of Evidence to show What Matters in Issue.*

**317. General rule.]**—*SINTZENICK v. LUCAS*, No. 231, *ante*.

**318. — Whether evidence admissible to show grounds of decision.]**—(1) Where applts. against an order of removal gave a notice of appeal, signed by four churchwardens & four overseers, & afterwards, a statement of their grounds of appeal, signed by two churchwardens, & two overseers only:—*Held*: they were not estopped from showing that there were in fact only two churchwardens & two overseers in their parish.

(2) Where resps. consent to have their own order of removal quashed, without communicating their reasons for doing so, either to the sessions or the opposite party, the judgment of sessions is conclusive against them, & they cannot afterwards be allowed to show that their order was quashed for a mere informality.—*R. v. CHURCH KNOWLE (INHABITANTS)* (1837), 7 Ad. & El. 471; 2 Nev. & P. K. B. 359; Nev. & P. M. C. 353; Will. Woll. & Dav. 627; 7 L. J. M. C. 4; 1 J. P. 218; 1 Jur. 811; 112 E. R. 517.

*Annotations*:—*As to* (2) *Distd. R. v. Landkey* (1847), 9 Q. B. 905. *Refd.* *R. v. St. Peter's, Droitwich* (1847), 2 New Sess. Cas. 531.

**319. —**—Resps. are not estopped by a general entry on the records of the sessions, that an order is quashed, from showing that it was in fact quashed not upon the merits, even where the entry was made in pursuance of a general consent in writing that the order might be quashed, for such evidence does not contradict either the record or the agreement. Where applts. relied upon the fact of a previous order having been quashed, & proved this by the records of the ct., which showed that the order had been quashed without saying how, & the sessions refused to allow resps. to show that it was quashed, not upon the merits:—*Held*: they had not heard the appeal, & a *mandamus* would lie to compel them to do so.—*R. v. FLINTSHIRE J.J.* (1844), 1 New Sess. Cas. 288; 13 L. J. M. C. 163; *sub nom.* *R. v. FLINTSHIRE J.J., LLANGERNIEW PARISH v. CWM PARISH*, 3 L. T. O. S. 207; 8 J. P. 677; 9 J. P. 135; 8 Jur. 929.

**320. —**—An order of removal, & an

#### PART II. [SECT. 3, SUB-SECT. 1.— B. (k).

a. *General rule—Whether evidence admissible to prove compromise of previous action.]*—In an action of ejectment on the title deft. in order to show a surrender, by operation of law, of a tenancy, previously sub-

sisting in pltf. proposed to give parol evidence that a previous action between the same parties but not affecting the land, had been compromised:—*Held*: as the *postea* in the former action contained nothing from which it could be inferred that the verdict in that action had been taken by consent, no foundation was laid for the reception

of such evidence as explanatory of the record: that the evidence tended to contradict the record, & was inadmissible.—*KEANE v. O'BRIEN* (1871), L. R. 5 C. L. 531.—*IR.*

b. — — — — — *JAFFRAY v. SIMPSON* (1835), 13 Sh. (Ct. of Sess.) 1122; 10 Fac. Coll. 15.—*SCOT.*



*Sect. 3.—Effect of res judicata: Sub-sect. 1, B. (k),*

order of sessions confirming it, were quashed by this Ct., on a case stated for their opinion, because the examination, relied upon as showing a settlement by renting a tenement, stated that "rent," was paid. Resps. again removed the paupers to the applt. parish, which appealed again, relying upon the former judgment in Q. B. as an estoppel. On a case stated by the sessions, confirming the latter order subject to the opinion of this Ct., it appeared that, in the former case, the sessions had stated that, if this Ct. held the objection good, the order of removal was to be quashed "for deficiency in the examination": it appeared also that the judgment of this Ct. was, simply, that the orders should "be severally quashed":—*Held*: (1) resps. were not estopped by the former judgment in Q. B., but might have shown, if they had been able, that it proceeded on matter of form only; (2) appls. were at liberty, if necessary, to show by evidence, which the sessions had not allowed them to do, that the judgment turned on matter of substance; (3) the objection, admitted on the present case to have been as above stated, was substantial & valid; (4) the quashing of the former orders by this Ct., being general in terms, & not explained by evidence, must be deemed a quashing on the merits; (5) if the provisional judgment of the sessions in the first special case could be looked to, the words "for deficiency of the examination" might have been explained by evidence, or by a special entry, to mean a deficiency merely formal, but unexplained they must be taken to import a substantial defect.—*R. v. LEEDS (INHABITANTS)* (1847), 9 Q. B. 910; 2 New Mag. Cas. 305; 3 New Sess. Cas. 44; 17 L. J. M. C. 1; 10 L. T. O. S. 131; 12 J. P. 21; 11 Jur. 1077; 115 E. R. 1524.

**321.** ———.]—Where upon a case sent up to the Ct. of Q. B. containing questions as to points of substance as well as form, the decision is given upon the formal objections alone, but the order is quashed generally, evidence is admissible upon a subsequent appeal, to show that the formal objections alone were decided, & the settlement, therefore, not finally determined.—*R. v. ST. PETER'S, DROITWICH (INHABITANTS)* (1847), 9 Q. B. 886; 2 New Sess. Cas. 531; 16 L. J. M. C. 38; 11 J. P. 212; 11 Jur. 225; 115 E. R. 1514; *sub nom.* *R. v. DROITWICH (INHABITANTS)*, 2 New Mag. Cas. 68; 8 L. T. O. S. 363.

*Annotations*:—*Expld.* *Heston Overseers v. St. Bride's Overseers* (1853), 1 R. & B. 583. *Refd.* *R. v. Widecombe-in-the-Moor* (1847), 9 Q. B. 894.

Removal orders generally, *see* POOR LAW.

———.]—*Compare* No. 215, *ante*.

**322.** ———.]—In an action of trespass for breaking & entering pltf.'s land, & building thereon a wall & cornice, a verdict was found for deft. on the plea of *liberum tenementum*. In a subsequent action, by the devisees of the former deft. against

the former pltf. & his wife, for injury to the reversion by the wife breaking & entering the land & pulling down the cornice:—*Held*: defts. were estopped, by the record in the former action, from giving evidence to show that the land under the cornice had not then been in dispute.—*WHITTAKER v. JACKSON* (1864), 2 H. & C. 926; 33 L. J. Ex. 181; 11 L. T. 155; 159 E. R. 383.

**323. Judge's reasons.**]—*Re* BANK OF HINDUSTAN, CHINA & JAPAN, CAMPBELL'S CASE, HIPPISEY'S CASE, ALISON'S CASE, No. 215, *ante*.

—.]—*Compare* Nos. 219, 319, 321, *ante*.

**324. Order directing issue.**]—Where issues have been directed in a suit between the parties predecessors in title, the findings upon the issues will not alone create an estoppel, but must be considered in connection with the order directing the issues & the decree made upon the findings.—*ROBINSON v. DULEEP SINGH* (1878), 11 Ch. D. 798; 39 L. T. 313; 27 W. R. 21, C. A.; *subsequent proceedings* (1879), 11 Ch. D. 823.

*Annotations*:—*Refd.* *Re May* (1883), 25 Ch. D. 231. *Mentd.* *Robertson v. Hartopp* (1889), 43 Ch. D. 484; *Chesterfield v. Harris*, [1908] 2 Ch. 397; *Malvern Hills Conservators v. Whitmore* (1909), 8 L. G. R. 179.

**325. Pleadings**—Although not pleaded in second action.]—In order to raise the defence of *res judicata* it is not necessary to set forth in detail in the defence the pleadings in the other action the judgment in which is said to operate as *res judicata* but, in order to judge whether the same questions were at issue in the first action as in the second the ct. will look at the pleadings in the first action though they were not set forth in the defence in the second action.

*Qu.*: whether a judgment obtained in one action before the trial of another can operate by way of estoppel as *res judicata* unless the judgment was obtained before the issue of the writ in the second action.—*HOUSTOUN v. SLIGO (MARQUIS)* (1885), 29 Ch. D. 448; 52 L. T. 96; 1 T. L. R. 217; *on appeal*, 29 Ch. D. 457, C. A.

*Annotation*:—*Refd.* *Caird v. Moss* (1886), 33 Ch. D. 22.

**326. Verdict.**]—Where the judgment-roll in an action, as made up does not accurately represent that which really was found at the trial, a ct. of equity ought not, in a subsequent proceeding between the same parties, to grant pltf. an injunction to enforce a right which was not established by any finding of the jury in the former proceedings, notwithstanding what appears on the face of the judgment-roll.

It appears that the judgment-roll, as is frequently the case, had not been formally made up at the time of the trial, & was not in fact made up until after the suit in equity had been commenced, when it was required for the purposes of the case which pltf. was then setting up. The *postea* was accordingly drawn up, by pltf.'s attorney, & it was therein stated that the jury had found the issues on the first & second counts for pltf., & the issues on

**323 i. Judge's reasons.**]—In a question of *chose jugée* the *dispositif* only of the first judgment can be taken into account.

The *motifs* of the judgment can be considered only for the purpose of

2 W. W. R. 761; 67 D. L. R. 636; 32 Man. L. R. 210.—CAN.

*c. In trials by jury.*]—When an issue arises on the plea of *res judicata*, the identity of the facts in the former cases with those in the existing case is a matter for the jury when the trial is by a jury in a division ct.—*Re COWAN v. AFFIE* (1893), 24 O. R. 358.—CAN.

*d. Writ of summons.*]—To an action for work done, deft. pleaded a previous action by pltf. in the county ct. for the same cause of action, which was dismissed with costs:—*Held*: the writ of summons in the previous action, being specially indorsed, was proper evidence for the ct. that the previous judgment embraced the same claim as

that now sued for.—*MUMFORD v. ARCADIA POWDER CO.* (1905), 37 N. S. R. 375.—CAN.

*e. Case referred to arbitration—Whether evidence admissible to show case not tried by jury.*]—After the jury had been sworn, the matters in dispute in the action were, by consent, referred to arbitration. In pursuance of the terms of the submission, the findings of the arbitrators on the issues & the assessment of damages were entered on the *postea* as the verdict of the jury; & the record was made up in the ordinary form, as if the case had been tried throughout by the jury. No certificate was obtained from the judge at the trial:—*Held*: pltf. was

**323 ii.** ———.]—In cases wherein the defence of *res judicata* is raised the ct. is entitled to look at the reasons for judgment in the former action as well as the pleadings & formal judgment to ascertain with precision the issues decided therein.—*JOHANESSON v. CANADIAN PACIFIC RY. CO.*, [1922]



the third count for debts. It seems, therefore, clear, that the judgment-roll as made up by pltf. did not accurately represent that which really had been found at the trial. It is said that debts. are estopped by the judgment-roll from denying the exclusive right of pltf. to occupy the box on all six nights of the week. It may be doubted whether in reality, looking at the whole of the judgment-roll, any such estoppel can be said to be established, but admitting for the purposes of argument that the judgment-roll as it stands would establish the estoppel, it is perfectly clear to their Lordships, upon the true construction of the findings of the jury, that they did not intend to find any such exclusive right in pltf.; & their Lordships do not think that they can go behind the terms of the findings, which seem to them perfectly capable of interpretation without any explanation (LORD HERSCHELL, C.).—WANT v. Moss (1894), 70 L. T. 178, P. C.

**In bankruptcy proceedings.]—See** BANKRUPTCY, Vol. IV., pp. 323–327, Nos. 3034–3073.

(l) *Election of Remedy.*

**Judgment as bar to subsequent proceedings by plaintiff.]—See** Sub-sect. 2, B. (g), *post*.

(m) *Where Money paid into Court.*

**327. In action for price of chattel—Defendant not estopped from suing for negligence—In construction of chattel.]—In an action for the stipulated price of a specific chattel, deft. pleaded payment into ct. of a sum which pltf. took out in satisfaction of the cause of action:—Held: deft. in that action was not estopped thereby from suing pltf. for negligence in the construction of the**

not estopped by the record from showing that the case had not been tried by a jury, but had been referred to arbitration.—SCOTT v. BENNETT (1868), 1 L. R. 3 C. L. 217.—IR.

**f. Opinion of the court.]—The opinion of the ct. expressed at advising, on a question not argued by the parties & not referred to in the interlocutor of the court:—Held: not to foreclose the parties from subsequently raising the question for judgment.—MOUBRAY'S TRUSTEES v. MOUBRAY (1896), 23 R. (Ct. of Sess.) 809; 33 Sc. L. R. 643; 4 S. L. T. 43.—SCOT.**

**g. Pleadings & judgment.]—To determine the issues decided in a previous case the pleadings & judgment are the only evidence admissible.—BOSHOF MUNICIPALITY v. BOSHOF KERKRAAD (1892), 10 C. L. J. 252.—S. AF.**

**PART II. SECT. 3, SUB-SECT. 1.—B. (m).**

**h. Payment in action by solicitor to recover costs—Subsequent action against solicitor for damages.]—Appls. employed resp. as their solr. in legal proceedings which proved abortive, in consequence, as they alleged, of the negligence of resp. Resp. took proceedings in the High Ct. to recover payment from applts. for professional services, & applts. deducted from the amount claimed the costs of the abortive litigation & paid the balance into ct. under Rules of Civil Procedure, Rule 376, "in satisfaction in full of the claim." Resp. took the money out of ct. under Rule 377 "in full satisfaction of his claim." Appls. afterwards commenced an action against resp. for damages for his alleged negligence in the conduct of the legal proceedings above mentioned:—Held: resp. was not estopped by former proceedings from disputing the alleged negligence.—STEPHENS & CO. v. ALLEN (1921), 91 L. J. P. C. 32.—S. AF.**

chattel.—RIGGE v. BURBIDGE (1846), 15 M. & W. 598; 4 Dow. & L. 1; 15 L. J. Ex. 309; 153 E. R. 988.

*Annotation:—*Refd. Davis v. Hodges (1871), 25 L. T. 155.

**328. Acceptance "in full satisfaction of claim" of money paid into court—In action by solicitor for payment for professional services—Action by client against solicitor for negligence—Solicitor not estopped from disputing negligence.]—Appls. employed resp. as their solr. in legal proceedings which proved abortive, in consequence, as they alleged, of the negligence of resp. Resp. took proceedings to recover payment from applts. for professional services, & applts. deducted from the amount claimed the costs of the abortive litigation & paid the balance into ct. in satisfaction in full of the claim. Resp. took the money out of ct., in full satisfaction of his claim. Appls. afterwards commenced an action against resp. for damages for his alleged negligence in the conduct of the legal proceedings above mentioned:—Held: resp. was not estopped by the former proceedings from disputing the alleged negligence.—STEPHENS & CO. v. ALLEN (1921), 91 L. J. P. C. 32; 126 L. T. 458, P. C.**

**Judgment as bar to subsequent proceedings by plaintiff.]—See** Sub-sect. 2, B. (h), *post*.

*C. On What Parties Binding.*

(a) *Parties.*

i. *In General.*

**329. General rule.]—Estoppels in fait & by record by fine or recovery shall bind not only the party to the estoppel, but also all privies who claim under him; but if the heir do not claim as**

**k. Failure to pay money into court—Terms accepted by court as indulgence—Effect of subsequent failure.]—A decree was passed in a pre-emption suit awarding possession to pltf. on payment of Rs.1,200 within two months. On appeal the amount payable by pltf. was increased by Rs.380:15:0 & the time of payment was extended to five months from the appellate ct. decree. Pltf. deposited the amount declared by the original decree to be payable & obtained possession of the property in suit. The additional sum made payable by the appellate cts. decree not having been paid, the vendees applied for execution of the decree & costs. Pltf. appeared & offered to pay Rs.260 at once & the balance in two months, which was accepted by the ct. Before the time so allowed had expired the vendees put in a further application asking that the property in suit might be returned to them because pltf. had not complied with the terms of the appellate decree. Pltf. thereupon deposited the balance of the sum due from him under the last order of the ct.:—Held: neither the principle of *res judicata* nor the principle of estoppel debarred the vendees from taking up the position that, by reason of pltf.'s failure to deposit the amount of the appellate cts. decree within time, the suit *ipso facto* stood dismissed.—SHEO MANGAL v. MUSAMMAT HULSA (1921), 1 L. R. 44 All. 159.—IND.**

**to act for him in an application to have the lunacy order set aside. Before making the application the solicitor obtained an order from the ct. directing that his costs of the application should in any event be paid by the committee out of his estate. The application was dismissed, & a previous order as to the solicitor's costs was embodied in the order dismissing the application. Before the costs had been paid M. recovered, & having been declared sane by the ct., & having had the management of his estate restored to him, refused to pay the costs. The solicitor brought an action against M. & obtained a verdict:—Held: the order for the payment of costs out of M.'s estate did not operate as *res judicata* as between him & M., not having been made in a proceeding in which they were independent parties.—MCLAUGHLIN v. FREEHILL (1908), 5 C. L. R. 858.—AUS.**

**329 iii. —.]—Where A. is sued by B., & is seeking to set off a demand for which he has already obtained a verdict against B.:—Held: he is estopped by such verdict from bringing the same identical demand a second time before the jury by way of set-off.—RUSSELL v. ROWE (1850), 7 U. C. R. 484.—CAN.**

**329 iv. —.]—In an action against the sheriff & his sureties for not arresting a party at pltf.'s suit:—Held: debts. were not concluded with regard to the fact of the arrest being made, by the decision in that suit which could not act as an estoppel being *res inter alios acta*.—MCINTOSH v. JARVIS (1852), 8 U. C. R. 535.—CAN.**

**329 v. —.]—Where in an interpleader issue (the execution creditor being deft.) it appeared that pltf. had taken a bill of sale of the goods in question from the execution debtor while the *fi. fa.* was in the sheriff's hands:—Held: he was not thereby**

**PART II. SECT. 3, SUB-SECT. 1.—C. (a) i.**

**329 i. General rule.]—Where A. acting by direction of B. commits a trespass on land, & unsuccessfully defends an action by the owner in respect thereof, the judgment is no estoppel of B.—PARK CO. v. SOUTH HUSTLER'S RESERVE CO. (1883), 5 V. L. R. 4.—AUS.**

**329 ii. —.]—M. who had been declared insane retained a solicitor**

**Sect. 3.—Effect of *res judicata*: Sub-sect. 1, C. (a) i.]**

privy, but by his own purchase, or from another ancestor, he shall not be bound.—EDWARDS v.

ROGERS (1640), W. Jo. 456; Cro. Car. 543; 82 E. R. 239.

**Annotations:—**Consd. Collingwood v. Pace (1662), 1 Vent. 413. Reidd. Round v. Kello (1690), Freem. K. B. 498; Goodtitle v. Morse (1789), 3 Term Rep. 365; Doe d. Marchant v. Errington (1839), 6 Bing. N. C. 79.

estopped from denying the debtor's title, this action not being upon the deed, & between other parties.—MACAULAY v. MARSHALL (1860), 20 U. C. R. 273.—CAN.

**329 vi.** —.—.]—DIAMOND v. COLEMAN (1876), 38 U. C. R. 632; 25 C. P. 236.—CAN.

**329 vii.** —.—.]—D., the purchaser of land, gave a mtge. thereon, & subsequently allowed taxes to accumulate on the land, which was sold to realise such taxes when D. bought it. D. having made default in payment of the mtge., proceedings were instituted pending which D. conveyed this & other property to his two sons, who gave a mtge. back securing the support & maintenance of D. & his wife, & pltf., after recovering judgment, filed a bill impeaching the transaction for fraud:—*Held*: the judgment so recovered by pltf. against D. was not evidence against the sons.—ALLAN v. MCTAVISH (1881), 28 Gr. 539; *reversd.*, 8 A. R. 440.—CAN.

**329 viii.** —.—.]—The fact that a person under bond to keep the peace has been convicted subsequently of attempt to commit an assault, does not debar the bondsmen from pleading & proving in an action against them on the bond, that the acts of the person so convicted did not amount to a breach of the bond. The conviction, while proof of the fact that the person was found guilty, is not *chose jugée* as to the bondsmen, who were not parties to the cause.—CASGRAIN v. LEBLANC (1893), Q. R. 4 S. C. 350.—CAN.

**329 ix.** —.—.]—A judgment maintaining the validity of a seizure of movables seized at the instance of a hypothecary creditor, is not *chose jugée* against an opponent who was not a party to the suit.—WOOD & DAVIS (1895), Q. R. 4 Q. B. 453.—CAN.

**329 x.** —.—.]—A judgment on *certiorari* quashing a search warrant would not estop deft., from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside, & such judgment was a judgment *inter partis* only.—SLEETH v. HURLBERT (1896), 25 S. C. R. 620.—CAN.

**329 xi.** —.—.]—The plea of *res judicata* is good against a party who has been in any way represented in former suit deciding the same matter in controversy.—DINGWALL v. McBEAN (1900), 20 C. L. T. 374; 30 S. C. R. 441.—CAN.

**329 xii.** —.—.]—*Semble*: a judgment in an undefended action brought by deft. against a co., declaring that deft. was not a shareholder, was not a defence to this action, brought by other subscribers to compel deft. to pay for the shares he had subscribed.—PATTERSON v. TURNER (1904), 22 C. L. T. Occ. N. 163; 3 O. L. R. 373; 1 O. W. R. 82.—CAN.

**329 xiii.** —.—.]—Where a person who might have an eventual interest in substituted lands has not been made a party on proceedings for authority to sell the lands, the order authorising the sale is, as to him, *res inter alios acta*.—PREVOST v. PREVOST (1901), 35 S. C. R. 193.—CAN.

**329 xiv.** —.—.]—An action was brought by the A.-G. as pltf., on relation of a city corpn. & an individual, & by the corpn. as pltf., also, against an electric railway co., to restrain the latter from erecting gas works in the city. Pltfs., alleged that three by-laws of the city prohibited the erection of the works. Defts. denied the validity of the by-laws, & set up that by virtue of the

powers derived from another co., they were not subject to the by-laws. At the trial, defts. sought to amend by alleging that the question of their having these powers was *res judicata* because of the judgment of the Judicial Committee of the Privy Council in a former action brought by the city corpn. alone against defts.:—*Held*: as against the city corpn., the amendment should be allowed, & defts. should have an opportunity of proving the added defence; but as against the A.-G., the amendment should not be allowed, as he was not a party to the former action.—A.-G. FOR MANITOBA v. WINNIPEG ELECTRIC RY. CO. (1912), 21 W. L. R. 908; 5 D. L. R. 823; 2 W. W. R. 854; 22 Man. L. R. 761.—CAN.

**xv.** —.—.]—In an action brought by the I. H. Co. of Canada on lien notes made in favour of the I. H. Co. of America, which was shown to be a separate co., pltf. was non-suited on the ground that there was no assignment pleaded, & no attempt to prove one, to the former co.:—*Held*: the defence of *res judicata* was not good in a subsequent action brought upon the same notes against the same deft. by the I. H. Co. of America, on the ground that the two actions were not between the same parties.—INTERNATIONAL HARVESTER CO. v. LEESON (1914), 30 W. L. R. 293; 7 W. W. R. 590; (1915), 31 W. L. R. 219.—CAN.

**329 xvi.** —.—.]—Where a judgment is obtained for a real estate commission & a subsequent action is brought by the agent against the solrs. who acted for all parties to the transaction to recover monies alleged to have been received by them for him the doctrine of *res judicata* does not apply in the second action.—CHALMERS v. MACHRAY (1916), 33 W. L. R. 656; 9 W. W. R. 1435; *affd.*, 55 S. C. R. 612.—CAN.

**329 xvii.** —.—.]—A. sold to B. certain logs of timber, & 95 logs were delivered to B. in part performance of the contract. C. brought a suit against A. & B., claiming the logs under another title. Pending this suit, C. entered into an agreement with D., selling him the logs in the event of being successful in his suit. The judgment of the ct. of first instance was in C.'s favour, & under such judgment D. obtained possession of the logs in suit. This judgment was on appeal reversed. B. then brought a suit in the nature of an action of trover against C. & D. for the logs & damages. The ct., without entering into the merits, dismissed the suit:—*Held*: D. was not a party to the original suit or bound by the judgment in that suit.—AGA SYED ABDOL HOSSANI v. LENAINE & SNADDEN (1869), 13 Moo. Ind. App. 69.—IND.

**329 xviii.** —.—.]—A deed of gift, valid & operative between the parties thereto, cannot be avoided because in another suit between different parties it has been held to be fraudulent as against creditors.—RAMANUGRA NARAIN v. MAHASUNDOR KUNWA (1873), 12 B. L. R. 433.—IND.

**329 xix.** —.—.]—A claim in execution to a house which had been attached was dismissed, & claimant then sued the decree-holder to establish her title to it. It appeared that the house had been previously attached in execution of another decree obtained by A. against the same judgment-debtor, & his father (since deceased); that pltf. had then preferred a claim, which was allowed; that the judgment-debtor had taken no steps to have the order allowing the claim set aside;

& that a suit filed by A. with that object had been dismissed:—*Held*: deft., not having been a party to the former proceedings, was not estopped from contesting pltf.'s claim.—GNA-NAMBAL v. PARVATHI (1892), 1 L. R. 15 Mad. 477.—IND.

**329 xx.** —.—.]—S. died in 1865, leaving two sons, N. & G. M. took possession of the property of S. under a will alleged by her to have been executed by S. In 1867 G. brought his suit as one of the heirs of S. to set aside the will & made his brother a co-deft. The Principal Sudder Ameen dismissed the suit, finding on the evidence that the will was genuine. In 1869 N. brought this suit for his share as heir of S. against M.:—*Held*: N.'s claim was not barred by the finding of the ct. in G.'s suit, as N. was no party to that suit.—NABIN CHANDRA MAZUMDAR v. MUKTA SUNDARI DEBI, 7 C. L. R. App. 38; 15 W. R. 309.—IND.

**329 xxi.** —.—.]—Husband & wife assigned her chose in action. A decree, pronounced in a suit to which the assignors were not parties, declared their rights *inter se* to the fund:—*Held*: the wife was not bound by the decree.—MARSHALL v. GIBBINGS (1855), 4 I. Ch. R. 276.—IR.

—.]—Pltf., who owner of mtged. property, agreed to sell it to deft., subject to the mtge. At deft.'s request the property was transferred to his wife instead of to himself & she took possession. Pltf. having been subsequently compelled to pay rates on the property sued deft.'s wife for the amount in the magistrates ct. Further default by her resulted in the holders of the mtge. obtaining judgment against pltf. for the principal & interest due under the mortgage, & this amount he now sought to recover from deft.:—*Held*: the judgment obtained by pltf. against deft.'s wife did not operate as an estoppel, since deft. was not a party to that action.—CHANT v. RHODES, [1917] N. Z. L. R. 184.—N.Z.

**329 xxiii.** —.—.]—A law agent, alleging that he had been employed by the creditors on the insolvent estate of a debtor, raised an action for payment of his accounts against the creditors, who had previously been assoilized from an action raised against them by the trustee for the expenses connected with the estate:—*Held*: the agent was no party to the previous case, & it could not be pleaded as *res judicata*.—LAIDLAW v. BLACKWOOD (1843), 15 Sc. Jur. 484.—SCOT.

**329 xxiv.** —.—.]—The police comrs. of a burgh raised an action of declarator against the county council to have it found that defenders had no power to levy or enforce payment of county general assessment upon lands & heritages within the burgh of Oban. The defenders were assoilized. Thereafter an owner & occupier of heritages situated within the burgh, brought a notice of suspension & interdict against the county council to have the county council interdicted from levying or enforcing payment of any assessment upon any lands or heritages situated within the burgh of Oban:—*Held*: the previous decision was not *res judicata*.—MACARTHUR v. ARGYLL COUNTY COUNCIL (1898), 25 R. (Ct. of Sess.) 829; 35 Sc. L. R. 612; 5 S. L. T. 394.—SCOT.

**xxv.** —.—.]—Deft., a partner in a firm, ceded all his rights in certain specific property to the creditors of



**330.** —.]—Between the same parties the record is an estoppel & also in an action against undertenants.—**COLLINGWOOD & RAMSEY v. SEVERAL DEFENDANTS** (1665), 1. Sid. 239; 82 E. R. 1081.

*Annotation*:—**Refd.** Stanynought v. Cosins (1746), Barnes, 456.

**331.** —.]—(1) A stranger being bound by a decree gotten by fraud, may falsify it.

(2) All that come *in pendente lite* are bound by a decree.—**STYLE v. MARTIN** (1669), 1 Cas. in Ch. 150; 22 E. R. 737.

**332.** —.]—(1) After a fact has once been judicially tried & ascertained, a party to the proceedings is estopped from denying its truth.

(2) If a man make a lease by indenture of land which is not his, & after purchase it, that lease shall bind him, his heirs & assigns; & an estoppel that affects the interest of the land shall run with it to whoever takes it; & none that are parties to, or claimants under, this recovery, shall falsify it (**HOLT, C.J.**).—**TREVIVIAN v. LAWRENCE** (1704), Holt, K. B. 282; 2 Ld. Raym. 1036, 1048; 6 Mod. Rep. 256; 1 Salk. 276; 3 Salk. 151; 87 E. R. 1003.

*Annotations*:—*As to* (1) **Expld.** Wraight v. Kitchingman (1719), 1 Stra. 197. **Consd.** Magrath v. Hardy (1838), 4 Bing. N. C. 782; Litchfield v. Ready (1850), 5 Exch. 939. **Refd.** Palmer v. Ekin's (1728), 2 Ld. Raym. 1550; Goodtitle v. Morse (1789), 3 Term Rep. 365; Taylor v. Needham (1810), 2 Taunt. 278; Vooght v. Winch (1819), 2 B. & Ald. 662; Stafford v. Clark (1824), 9 Moore C. P. 724; Right d. Jefferys v. Bucknell (1831), 2 B. & Ad. 278; Silvers v. Boswell (1841), 3 Man. & G. 524; Doe v. Wellsman (1848), 2 Exch. 368; Freeman v. Cooke (1848), 2 Exch. 654; R. v. Blakemore (1852), 5 Cox, C. C. 513; Feversham v. Emerson (1855), 11 Exch. 385; Rowbotham v. Wilson (1860), 8 H. L. Cas. 348. *As to* (2) **Consd.** Goodtitle v. Morse (1789), 3 Term Rep. 365. **Refd.** Palmer v. Ekins (1728), 2 Ld. Raym. 1550; Doe d. Lushington v. Llandaff (Lord Bishop) (1807), 2 Bos. & P. N. R. 491; Doe d. Christmas v. Oliver (1829), 10 B. & C. 181; Doe d. Downe v. Thompson, Downe v. Thompson (1847), 9 Q. B. 1037.

**333.** —.]—A person had been party to a prior suit touching the grant of an administration *cum testamento annexo*:—**Held**: he was barred from instituting proceedings for the purpose of claiming the administration as residuary legatee.—**THOMAS v. DAVIS** (1752), 1 Lee, 170; 161 E. R. 63.

**334.** —.]—If a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title.—**OUTRAM v. MOREWOOD** (1803), 3 East, 346; 102 E. R. 630.

*Annotations*:—**Expld. & Distd.** Vooght v. Winch (1819), 2 B. & Ald. 662. **Consd.** Barrs v. Jackson (1842), 1 Y. & C. Ch. Cas. 585. **Refd.** Doe v. Huddart (1835), 2 Cr. M. & R. 316; Eastmure v. Laws (1839), 5 Bing. N. C. 444; Jones v. Lewis, [1919] 1 K. B. 328. **Mentd.** Waters v. Waters (1848), 2 De G. & Sm. 591; Wilkinson v. Kirby (1854), 2 C. L. R. 1387; Hope v. Gloucester Corpn. (1855), 7 De G. M. & G. 647.

**335.** —.]—(1) Where a witness, who had been examined as to a fact respecting a right, is deceased, what he swore at that trial may be proved by a witness who heard him give his evidence, & it is admissible.

the firm & appointed H. to act as his agent to effect a sale of such property for the benefit of such creditors. Thereafter H. unsuccessfully sued the deft. under the said agreement for transfer of such property. Afterwards the said firm was declared insolvent & the trustee in the insolvent estate sued deft. for transfer of the said property under the said agreement:—**Held**: H. had not been appointed trustee for the creditors of the firm under the said agreement, & consequently a plea of *res judicata* founded

(2) Where a question of right of water has been tried, in an action on the case, the record of that trial is evidence in a second action against the same deft., though there are other defts., if they all claim under him.

The record of the former cause cannot be deemed a legal estoppel, so as to conclude the rights of the parties by its production; but it is binding so far, that I think myself bound to tell the jury to consider it as conclusive of the rights of the parties (**LORD ELLENBOROUGH, C.**).—**STRUTT v. ROY-INGDON** (1803), 5 Esp. 56, N. P.

*Annotations*:—*As to* (2) **Refd.** Wenman v. Mackenzie (1855), 25 L. J. Q. B. 41; Morgan v. Nicholl (1866), 36 L. J. C. P. 86.

**336.** —.]—If parties litigate a question in a ct. of competent jurisdiction, & a final decision be given thereon, such parties or those claiming through them, cannot afterwards reopen the same question in another ct. This restriction does not extend to other persons whose interest is almost identical with that of one of the parties to the first suit if they do not actually claim through such party.—**SPENCER v. WILLIAMS** (1871), L. R. 2 P. & D. 230; 40 L. J. P. & M. 45; 24 L. T. 513; *sub nom.* SPENCER & SPENCER v. WILLIAMS, *In the Goods of ELMSLEY*, 19 W. R. 703.

*Annotations*:—**Consd.** Magrath v. Reichel (1887), 57 L. T. 850. **Mentd.** Do Mora v. Concha (1885), 29 Ch. D. 268.

**337.** —.]—Testator, by will dated in 1827, devised his estate to trustees & their heirs upon trust that they & their heirs should stand seised of the same during the life of C., & also until the whole of testator's debts & the legacies thereafter mentioned were paid, upon trust to set & let the same & apply the rents & yearly profits, & the value of whatever timber might be considered at its best growth, from time to time, in discharge of his yearly profits from time to time until three legacies were paid, & from thenceforth to pay the rents & yearly profits to C. & his assigns during his life; & from & immediately after the decease of C. & the payment of the debts & legacies & all expenses incurred by the trustees, testator devised the estate to the heirs of the body of C., & for default of such issue, to his own right heirs. In 1830, the trustees, by deed reciting that the debts & legacies were paid, conveyed the estate to C. for his life. C., shortly afterwards, suffered a common recovery, & then mortgaged the estate in fee to W. C. & W. afterwards filed a bill against the heir of the surviving trustee & against the eldest son of C. praying for a declaration that C. took an equitable life estate tail under the will, & for a conveyance of the legal fee to W. The son put in an answer submitting that C. took only an equitable life estate, & that the conveyance by the trustee in 1830 was a breach of trust, & asking for a declaration to that effect. A decree was made without any declaration, directing the heir of the trustee to convey his estate under the will to W., subject to C.'s equity of redemption, & was inrolled. After the death of C. his eldest son filed his bill against W. to recover the estate, on the ground that the limitation to the heirs of the body

on the decision in his action could not be sustained in answer to the action by the trustee in the insolvency, as the parties to the actions were not the same.—**PRAGJU BHIMBHAI & Co.'s TRUSTEE v. DESAI** (1905), 26 N. L. R. 607.—**S. AF.**

**329 xxvi.** —.]—Where exception was taken to plff.'s maintaining his action on the ground that a judgment had been given for first deft. in a previous action, brought by plff.'s brothers, against defts. wherein the subject-matter, the claims & the prayers were

the same, which judgment was one *in rem* & binding on plffs. as *res judicata*:—**Held**: as the executor, the second deft., was held not to be subject to the jurisdiction of the ct. that pronounced judgment in the previous case & consequently not a party thereto, & as the claims against him, similar to those in the present action, were thereupon withdrawn, the parties & the matter were not the same & the plea of *res judicata* should fail.—**FITZGERALD v. GREEN** (1913), C. P. D. 403.—**S. AF.**



**Sect. 3.—Effect of *res judicata*: Sub-sect. 1, C. (a) i. & ii. & (b).]**

of C. was a contingent remainder, & that the trustees had committed a breach of trust in conveying so as to enable C. to destroy it by the recovery. W. by answer insisted on the inrolled decree as an adjudication on the question:—*Held*: (1) the trustees took a legal fee under the will; (2) the rule in Shelley's Case, therefore, applied, & C. acquired a good equitable fee by the recovery, because a general devise to trustees & their heirs under a will, the purposes of which required them to have some legal estate of freehold, *prima facie* gave the fee, & it lay on the parties alleging that they took a less estate to show what less estate would serve the purpose; (3) the trust to set & let, which could not be confined to an authority to let from year to year, & the direction as to the timber, were grounds for not cutting down this estate; (4) assuming the trustees not to have taken the fee, the estate for the life of C., which in that view of the case was in 1830 their only estate, was held in trust for C. only, & not upon any implied trust to preserve contingent remainders, & they were justified in conveying to C., though their doing so enabled him to destroy the contingent remainders; (5) as pltf. had not asked to be dismissed from the suit instituted by W. & C., but had raised the question of construction in that suit, he was bound by the decree, the direction in which to the trustee to convey his estate was a decision that he had an estate & that the trustees had taken the fee under the will.—*COLLIER v. WALTERS* (1873), L. R. 17 Eq. 252; 43 L. J. Ch. 216; 29 L. T. 868; 22 W. R. 209.

*Annotations*:—As to (1), (2) & (3) *Refd.* *Re Townsend's Contract*, [1895] 1 Ch. 716. *Generally, Mentd.* *Palmer v. Locke* (1881), 45 L. T. 229; *Re Green, Baldock v. Green* (1888), 40 Ch. D. 610; *Re Adams & Perry's Contract* (1899), 47 W. R. 326.

**338. — Amicable suit.]—ALLASON v. STARK.** No. 248, *ante*.

**339. Recovery against party in reversion—Freehold in stranger — Reversioner bound.]—**Tenant in fee simple, expectant upon an estate for life, bargained & sold to A. who was made tenant to the *præcipe* & he vouched the tenant in fee:—*Held*: this recovery, to the use of the reversioner for life, remainder in tail was good against him by estoppel.—*WEBB v. NECT* (1583), Cro. Eliz. 21; 78 F. R. 287.

*Annotation*:—*Mentd.* *Doc d. Poole v. Errington* (1834), 1 Ad. & El. 750.

**ii. Parties Suing or Defending in Different Right.**

**340. Judgment against wife — Action against husband & wife:] —**A recovery in ejectment

against the wife cannot be given in evidence in an action against the husband & wife for mesne profits. The judgment in ejectment could not be admitted as evidence against the husband because he was no party to that suit.—*DENN v. WHITE* (1797), 7 Term Rep. 112; 101 E. R. 882.

*Annotation*:—*Refd.* *Doc v. Harvey* (1832), 8 Bing. 239.

**341. Judgment against husband & wife suing as co-plaintiffs — Action by wife suing by next friend.] —**A decree against husband & wife, suing as co-pltfs., for matters, in some of which the wife has a separate interest, will not conclude the wife in another suit instituted by her through her next friend.—*HUGHES v. EVANS, EVANS v. HUGHES* (1823), 1 Sim. & St. 185; 1 L. J. O. S. Ch. 129; 57 E. R. 74.

*Annotations*:—*Consd.* *Wako v. Parker* (1838), 3 Keen, 59. *Refd.* *Re Defries, Nordon v. Levy* (1883), 31 W. R. 720.

**342. Judgment against defendant sued jointly with another — Action against defendant sued alone.] —**A judgment obtained by A. in an action of use & occupation, against B. & C., is no evidence to charge B. in a subsequent action brought by A. against him alone, for the use & occupation of the same premises for a subsequent period.—*CHRISTY v. TANCRED* (1842), 9 M. & W. 438; 11 L. J. Ex. 109; 152 E. R. 185; *subsequent proceedings, sub nom. TANCRED v. CHRISTY* (1843), 12 M. & W. 316, Ex. Ch.

*Annotations*:—*Mentd.* *Draper v. Crofts* (1846), 15 M. & W. 166; *Henderson v. Squire* (1869), L. R. 4 Q. B. 170.

**343. — — —.]—**Case by one attorney against another for falsely representing that he, deft., was authorised by F. as his agent, to employ pltf. as attorney of F. to bring actions in his name; that deft. did so employ pltf., who was compelled to discontinue the actions & pay the costs. Plea, that pltf. was not employed *modo et formâ*. Replication by way of estoppel, that pltf.'s bill of costs in the actions delivered to deft. & one O. & one J., was referred by a judge's order to a master for taxation, with liberty to deft. & J. to dispute the retainer; that the master allowed £192, & pltf. sued deft. O., & J., for that sum; & the question of retainer having been referred to the master, he certified that a retainer by deft., O., & J., was proved to the amount of £120; whereupon, pltf. obtained judgment for that sum, & costs:—*Held*: the replication was bad, the finding of the master in respect of the retainer being no estoppel in the present action.—*CALLOW v. JENKINSON* (1851), 6 Exch. 660; 2 L. M. & P. 403; 20 L. J. Ex. 321; 155 E. R. 710.

—.]—*Compare* No. 551, *post*.

**344. Judgment in action for infringement of patent — Petition by defendant for revocation of patent — Whether plaintiff estopped from raising**

whether the equity of redemption of the lands in suit had been sold to A. B. was *res judicata* & could not be reopened by defts. on the ground that pltfs. were litigating under a different title in the former suit.—*ALI MOIDIAN RAVUTHAN v. KLAYACHANIDATHIL KOMBIA ACHEN* (1882), 1 L. R. 5 Mad. 239.—*IND.*

**o. — — Judgment against plaintiff personally — Action by plaintiff as trustee.] —**A judgment-debtor, upon the attachment of certain land in execution of decrees passed against him personally by the revenue et., instituted a suit for a declaration & establishment of his right to such land, not as his own property, but as *wakf*, of which he was *mutawalli* or trustee:—*Held*: inasmuch as pltf. was not suing in his own right, but in his capacity as custodian, trustee, or manager of the *wakf* property, & he must therefore be taken to fill a character separate

**PART II. SECT. 3, SUB-SECT. 1. — C. (a) ii.**

**1. Parties—Failure to establish title as devisee—Claim as heir at law—Or purchaser.]—DOE d. HUSSEY v. GRAY** (1843), 1 Ont. Dig. 2167.—*CAN.*

**m. — — Judgment for foreclosure against plaintiff as assignee of mortgagor's equity of redemption—Action by plaintiff as trustee for creditors.] —**Pltf. as assignee for the benefit of creditors under 48 Vict. c. 26 (O.), brought this action on behalf of certain creditors to set aside as fraudulent a mtgo. made by his assignor, while insolvent, to defts. Defts. set up as a defence a judgment for foreclosure on the mtgo. to which pltf. as assignee was a party deft.:—*Held*: the judgment of foreclosure was no bar to this action. Pltf. acted in a dual capacity as assignee of the mtgor.'s equity of redemption, & also as a trustee for

creditors. It was in the former capacity he was made deft. in the foreclosure action, in which he could not have set up the fraud of his assignor, nor was he bound to have counterclaimed for his present cause of action; while in this action he was suing as trustee for creditors, & in another right.—*GLASS v. GRANT* (1888), 16 O. R. 233.—*CAN.*

**n. — — Dismissal of suit for redemption of mortgage—On ground of sale of equity of redemption—Second suit on repurchase of equity of redemption.] —**In 1870 pltfs. sued to redeem a mortgage of certain lands from defts.' predecessors in title. The suit was dismissed on the ground that pltfs.' equity of redemption had been sold in execution of a decree to A. B. Pltfs., having repurchased the equity of redemption from A. B., brought a second suit to redeem the lands in defts.' possession;—*Held*: the question

**validity of patent.]**—In an action for infringement of a patent, the ct. held that one of the claims in the specification had been anticipated & declared the patent invalid. Deft. presented petition for revocation of the patent:—*Held*: pltf's. were not estopped from setting up the validity of the claim on the petition.—*Re DEELEY'S PATENT*, [1895] 1 Ch. 687; 64 L. J. Ch. 480; 72 L. T. 702; 43 W. R. 517; 12 R. 272, C. A.; *on appeal, sub nom. DEELEY v. PERKES*, [1896] A. C. 496, H. L.

*Annotations*:—*Expld.* *Shoe Machinery Co. v. Cutlan*, [1896] 1 Ch. 108. *Refd.* *Re Lewis & Stirckler's Patent* (1896), 14 R. P. C. 24; *Poulton v. Adjustable Cover & Boiler Block Co.* (1908), 99 L. T. 647. *Mentd.* *Re Dellwick's Patent*, [1896] 2 Ch. 705; *Ludington Cigarette Machine Co. v. Baron Cigarette Machine Co.*, [1900] 1 Ch. 508; *Re Justice's Patent* (1901), 18 R. P. C. 241; *Re Geipel's Patent*, [1903] 2 Ch. 715; *Re Klaber & Steinberg's Patent* (1908), 77 L. J. Ch. 569; *Re Ralston's Patent No. 13444 of 1896, Re Preston & Ralston's Patent, No. 7970 of 1903* (1909), 100 L. T. 386; *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857.

**345.** ———.] — *POULTON v. ADJUSTABLE COVER & BOILER BLOCK CO.*, No. 164, *ante*.

**Privies.]**—*See* Nos. 346–363, *post*.

(b) *Privies.*

**346. General rule.]** — *EDWARDS v. ROGERS*, No. 329, *ante*.

**347.** ———.]—Verdict shall only be given in evidence amongst privies.

If one man has a title to several lands, & he bring ejectment against several defts. & recover against one, he shall not give that verdict in evidence against the rest, because the party against whom that verdict was had may be relieved against it, if it is not good, but the rest cannot, although they claim under the same title, & all make the same defence. So if two tenants defend a title in ejectment, & a verdict be had against one of them, it shall not be read against the other, unless by rule of ct. But if an ancestor has a verdict, the heir may give it in evidence, because he is privy to it; for he who produces a verdict must be either party or privy to it, & it shall never be received against different persons, if it do not appear that they are united in interest (*per* CUR.).

from that in which the decrees were passed against him by the revenue ct., his suit was not barred by Civil Procedure Code, s. 244.—*NATH MAL DAS v. TAJAMMUL HUSSAIN* (1884), 1 L. R. 7 All. 36.—IND.

**p.** ———.] *Judgment against party as factor—Subsequent action against same party personally.*—Where a party was called as defender in one action as factor on a trust estate, & a defence was finally repelled; & another action was brought against him personally, held competent to plead the same defence in the second action.—*M'NAT v. HAMILTON* (1831), 10 Sh. (Ct. of Sess.) 180.—SCOT.

**PART II. SECT. 3, SUB-SECT. 1.—**  
C. (b).

**346 i. General rule.]**—A decree on an award having been passed against an administrator at the instance of a creditor of the estate property referred to in the award was purchased by the decree-holder in execution proceedings with the sanction of the ct. Afterwards an administratrix appointed in the place of the administrator brought a suit to set aside the decree:—*Held*: the decree having been executed the execution bound the parties & all persons claiming through them, & the question was, therefore, *res judicata*.—*BAI MEHERBAI v. MAGANCHAND* (1905), 1 L. R. 29 Bom. 96.—IND.

**q. In blood—Grandson of heir.]**—An action having been raised by a trustee, adjudging on a trust bond for behoof of a party setting himself forth as apparent heir to an estate under a fee-simple destination, for setting aside the service & titles of the heir in possession, on an allegation of illegitimacy, & decree *absolutor* having been pronounced therein:—*Held*: *res judicata* against a grandson of such heir (now deceased), who claimed the same character, insisting in a reduction of the same titles, & on the same grounds, though not having incurred a representation to his grandfather.—*RUTHERFORD v. NISBET'S TRUSTEES* (1832), 11 Sh. (Ct. of Sess.) 123.—SCOT.

**r. In law—Principal & surety.]**—A judgment rendered without fraud against the principal is *chose jugée* against the surety.—*LAMY & DRAPEAU* (1881), 1 D. C. A. 237.—CAN.

**s. ———.] Mortgagee & mortgagee.]**—Where a vendor obtained judgment against the purchaser, declaring the deed of sale of certain immovables a nullity & setting it aside:—*Held*: the judgment was not *res judicata* against a mtgee. to whom the purchaser had in the meantime mtgd. his property.—*OUELLET v. ROCLETTE* (1883), 9 Q. L. R. 289.—CAN.

**t. In estate—Judgment debtor & purchaser at sale in execution of judgment debtor's property.]**—*Held*: there was a sufficient privity of estate between

—*LOCK v. NORBORNE* (1687), 3 Mod. Rep. 141; 87 E. R. 91.

**348.** ———.]—A decree of the Ct. of Ch. determining a matter of right is good evidence of that right, as to all persons claiming under the party against whom the decree was made, though at the distance of 100 years afterwards.—*BOROUGH v. WHICHCOTE* (1732), 3 Bro. Parl. Cas. 595; 1 E. R. 1520.

**349.** ———.]—*OUTRAM v. MOREWOOD*, No. 334, *ante*.

**350.** ———.]—*STRUTT v. BOVINGDON*, No. 335, *ante*.

**351.** ———.] **Title must be derived subsequent to proceedings.]**—A. being seised of two closes, which he claimed as heir-at-law, conveyed one to B. Both A. & B. were afterwards ousted by C., & brought actions of ejectment against him for the premises respectively, which they recovered. B. was again dispossessed by C. & again brought ejectment against him, claiming the same premises as in the former action, & by the same title. On the trial, B. offered to prove the deposition made by a witness, since deceased, upon the trial of the former ejectment between A. & C.:—*Held*: the evidence was inadmissible.

I also think that the evidence was not receivable. A passage has been cited from the Com. Dig. Evidence, A. 5, where it is said, that “a verdict in another action for the same cause shall be allowed in evidence between the same parties. So, it shall be evidence, where the verdict was for one under whom any of the present parties claim.” But that must mean a claim acquired through such party subsequently to the verdict (*LITTLEDALE, J.*).—*DOE d. FOSTER v. DERBY (EARL)* (1834), 1 Ad. & El. 783; 3 Nev. & M. K. B. 782; 3 L. J. K. B. 191; 110 E. R. 1406.

*Annotations*:—*Distd.* *Briscoe v. Lomax* (1838), 8 Ad. & El. 198. *Refd.* *Doe d. Strode v. Seaton* (1835), 5 L. J. Ex. 73; *Hodgson v. Walker* (1872), L. R. 7 Exch. 55; *Llanover v. Homfray, Phillips v. Llanover* (1881), 19 Ch. D. 224.

**352.** ———.]—(1) An order for delivery of possession made by the county ct. under 19 & 20 Vict., c. 108, s. 50, does not affect the rights of a person not a party to the proceedings.

the purchaser at a sheriff's sale under the execution against the judgment debtor, to enable the lessor of pltf. to estop such purchaser from setting up the same defence of usury unsuccessfully set up by the judgment debtor, under whom the purchaser claimed.—*MILIS v. KELLY* (1852), 2 C. P. 1.—CAN.

**a.** ———.]—The decision of a judge upon an interpleader issue, that certain land was not the homestead of an execution debtor, was held upon a claim subsequently made by a mtgee. claiming title through the execution debtor, who was not a party to the interpleader, to be *res judicata*.—*JOHNSON BROTHERS v. HEWITT* (1912), 19 W. L. R. 937; 1 D. L. R. 251; 5 Sask. L. R. 125.—CAN.

**b.** ———.]—A. brought a suit against B. to have it declared that B. possessed no right of way over his lands. This suit was dismissed, & B. obtained a decree establishing his right. Previous to the institution of this suit, A. had mortgaged the same lands to C., who, after the suit, caused the lands to be sold under his mtgo., & became the purchaser at the auction-sale. In a suit by C. against B. to have it declared that no such right of way existed over the lands:—*Held*: C. was not estopped by the previous decision against A., his mortgagor, from again raising the question of the validity of the right of



*Sect. 3. —Effect of res judicata: Sub-sect. 1, C. (b)*  
*& (c)*

*Semble*: it does not affect the rights of the person against whom it is made.

Deft. had obtained such an order in a proceeding against one U., his tenant:—*Held*: he was liable to an action of trespass brought by pltf., who was tenant to U.

(2) A verdict which is evidence against A. is not admissible against B. on the ground that B. claims under A., unless B. claims under A. by a title subsequent in date to the verdict (CHANNELL, B.).—HODSON v. WALKER (1872), L. R. 7 Exch. 55; *sub nom.* HUDSON v. WALKER, 41 L. J. Ex. 51; 25 L. T. 937; 20 W. R. 489.

353. —.]—SPENCER v. WILLIAMS, No. 336, *ante*.

354. —.]—JONES v. LEWIS, No. 219, *ante*.

355. In blood — Heir claiming by different ancestor.] — An estoppel which accrues by admittance of record, shall not conclude the heir who claims not the right by the same ancestor; otherwise of estoppels which stand upon recompense.—SYMS'S CASE (1608), 8 Co. Rep. 51 a; 77 E. R. 549; *sub nom.* GAME v. SYMMS, Cro. Jac. 217.

Annotations:—*Consd.* Fowle v. Dogle (1674), Freem. K. B. 157. *Refd.* Shipley's Case (1610), 8 Co. Rep. 134 a.

329, *ante*. v. ROGERS, No.

357. — Heir claiming by own purchase.] —EDWARDS v. ROGERS, No. 329, *ante*.

358. —.]—A fine differs from the case of a surrender; for that will be good against the heir by estoppel, although it passes no estate at all; but if a surrender is not good, there will be no estoppel, & no estate can pass into the hands of the lord (LORD HARDWICKE, C.).—TAYLOR v. PHILLIPS (1749), 1 Ves. Sen. 229; 27 E. R. 999, L. C.

Goodtitle v. Morse (1789), 3 Term Rep. *Consd.* Compton v. Collinson (1790), 1 Hy. Bl. 334.

359. — Heir surviving ancestor.] — GOODTITLE v. MORSE, No. 1028, *post*.

360. — Appearance by heir as one of next of kin.]—The fact that the validity of a will of real & personal estate executed since the passing of Wills Act, 1837 (c. 26) has been established before the Judicial Committee as regards the personal estate, in a proceeding to which the heir-at-law was a party in another capacity, does not take away his right to an issue *devisavit vel non*.—STACKY v. SPRATLEY (1858), 2 De G. & J. 94; 27 L. J. Ch. 725; 5 Jur. N. S. 28; 41 E. R. 923, L. J.J.; *subsequent proceedings* (1859), 4 De G. & J. 199, L. J.J.

Annotation:—*Mentd.* Re Somers, Somers v. Roxburgh (1900), 44 Sol. Jo. 551.

361. —.]—Where the same person was a legatee & devisee under a will, & propounded the will in her character of legatee only, the ct.

way over the said lands.—BONOMALEE NAG v. KOYLASH CHUNDER DEY (1878), I. L. R. 4 Calc. 692.—IND.

c. —.]—A mtgee. who has purchased at the sale in execution of his decree on the mtge. is bound by an estoppel that would have bound his mtgor.—KISHORY MOHUN ROY v. MAHOMED MUJAFAR HOSSEIN (1890), I. L. R. 18 Calc. 188.—IND.

d. — Company & shareholder.] —A winding-up order made against a co., after appearance & contestation by it of the petition, is *res judicata* & conclusive against the shareholders.—GREAT NORTHERN CONSTRUCTION CO. v. HYDE & SCOTT (1908), Q. R. 34 S. C. 432.—CAN.

e. — Female heir of Hindu & reversioner.]—After adopting a son

to her deceased husband a Hindu widow, in a suit by an alleged reversioner to set aside the adoption as made without the authority of the husband, alleged in her written statement & stated in ct. that she had authority & that the adoption was valid. The suit was dismissed because pltf. was found not to be a reversioner. The widow then brought a suit to set aside the adoption as having been made without authority & it was held that the adoption was valid. In the present suit brought by an alleged reversioner against the adopted son:—*Held*: notwithstanding the personal estoppel which bound her the widow represented the estate on the question as to whether the adoption was valid within the rule that where the estate of a deceased Hindu has vested in a

allowed her to be cited to see proceedings as devisee.

If parties are before the ct. in a suit, in whatever capacity, & take part in the litigation, they are bound by the decision in that suit, & the practice of issuing a separate citation to parties as heirs-at-law who have already appeared as next of kin, is a work of supererogation (CRESSWELL, V.).—EMBERLEY v. TREVANION (1860), 4 Sw. & Tr. 197; 29 L. J. P. M. & A. 142; 21 J. P. 392; 161 E. R. 1492.

Annotation:—*Apprvd. & Apld.* Beardsley v. Beardsley, [1899] 1 Q. B. 746.

362. —.]—Where the heir-at-law of testator is made deft., as one of testator's next of kin, in a probate action to establish his will, & appears & contests its validity in the action, he cannot, afterwards, dispute the validity of the will in respect of real estate affected by it, notwithstanding that he was not cited to appear in the action as heir-at-law.—BEARDSLEY v. BEARDSLEY [1899] 1 Q. B. 746; 68 L. J. Q. B. 270; 80 L. T. 51; 47 W. R. 284; 15 T. L. R. 173; 43 Sol. Jo. 225, D. C.

Annotation:—*Mentd.* Ex p. Tweed (1899), 68 L. J. Q. B. 794.

363. In law.] — T. having died, leaving J. his exor., J., in his capacity of exor., sold the estate of T., & received in payment a promissory note, in which he induced resp. to join as security; at the same time giving resp. a written indemnity, in his own capacity, against the consequence of his so doing. J. died, having appointed B. his exor., who also died intestate before the estate of J. had been fully administered. Applt. then took out administration *de bonis non* to the estate of J., & afterwards, sued resp. on the promissory note for the benefit of the creditors of T. In this suit resp. set up the indemnity given him by J., but it was held not to be available, & judgment was given against him. Resp. then sued applt. on the indemnity in a fresh suit, & judgment was given in his favour therein:—*Held*: the question was not *res judicata* by reason of the previous suit, for the defence was there held not to be available, because pltf. in that suit was suing in a different capacity from that in which he was now sued, & resp. had not, therefore, been before heard on the merits.—HACKING v. LEE (1860), 9 W. R. 70.

— Bankrupt & trustee in bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 637, 638, 905, 988, 1017, Nos. 5731, 5732, 7428, 8082, 8295.

364. In estate—Successive incumbents.] — R. v. W. DE L. (1364), Y. B. 38 Edw. 3, p. 31.

Annotations:—*Refd.* Beecher's Case (1608), 8 Co. Rep. 58 a.

*Mentd.* Tourson's Case (1610), 8 Co. Rep. 170 a.

365. — Ministers of Scottish church.]—The minister of the parish of B., Scotland, in 1875, raised an action of augmentation, modification, & locality, against the heritors. A scheme of

female heir, a decree fairly & properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir.—RISAL SINGH v. BALWANT SINGH (1918), I. L. R. 40 All. 593.—IND.

f. — Testatrix & executor.]—J. being indebted to pltf. in the sum of £360 died intestate. Pltf. having sued his widow as her husband's executrix, she gave a consent for judgment for the sum & costs. A. died. Pltf. brought this action against her executors to recover £372, suggesting a *devastavit* by A. of her husband's assets:—*Held*: the judgment against A. was conclusive as against her to show that she then had assets of J. to satisfy the amount, a *devastavit*



locality was prepared; D. lodged objection to the scheme, in so far as it localised minister's stipend on eighty-one acres of his land, alleging that these eighty-one acres were held under titles *cum decimis inclusis, et nunquam antea separatis*, & that in respect of certain judicial proceedings in 1795 & 1807 it was *res judicata* that these lands were so held. The proceedings relied on were as follows: In 1795 the then minister of B. raised an action of augmentation, etc., & produced a rental of the whole lands in the parish, in which he included the eighty-one acres in question as liable for teinds. The ancestor of D. " & the other heritors " lodged a minute stating (*inter alia*), that these eighty-one acres were held *cum decimis inclusis*, & craving that they might be struck out of the rental. On Dec. 2, 1795, the Teind Ct. pronounced an interlocutor ordering them to be struck out. Rectified schemes of locality were prepared, & objections lodged by other heritors, but the proceedings were not carried out to a final decree. In 1807 the same minister raised a new action of augmentation, etc., which, after certain objections were disposed of, proceeded to a final decree. In none of the schemes of locality since 1795 were the eighty-one acres included:—*Held*: the plea of *res judicata* was well founded.—*DUNDAS v. WADDELL* (1880), 5 App. Cas. 249, H. L.

**366.** ———.]—An incumbent who comes into a benefice is a privy in law to the patron who appointed him, so as to be entitled to the benefit, & subject to the burden, of the same estoppel as the patron. R., the incumbent of a living, sent in his resignation of the benefice to the bishop, on the understanding that the resignation was not to be formally accepted, nor the benefice declared vacant, until a date agreed upon between himself & the bishop. Before this date arrived R. withdrew his resignation, but the bishop refused to accept the withdrawal, & at the time agreed upon declared the benefice vacant, after which the patrons appointed another incumbent, who was duly instituted & inducted into the benefice. R. brought an action against the bishop to have his resignation declared null & void. To this action the patrons of the living were parties, & the sole question was whether the resignation was effectual, & it was decided against R. that the resignation was effectual & complete. R. refused to give up the parsonage-house & glebe lands, & in an action brought against him by the new incumbent, for an injunction to restrain him from continuing in wrongful possession of the premises & for trespass, R. set up, substantially, the same defence as in the former action, namely, that his resignation was not effectual:—*Held*: as the question of the effectuality of the resignation was raised & disposed of in the former action, to which the patrons

must be presumed to have been committed by her, for which her assets in her exors.' hands were answerable.—*ENNIS v. ROCHFORD* (1884), 14 L. R. 1r. 285.—*IR.*

**g.** ———.]—*Debenture holder & trustees for debenture holders.*—By a deed executed in 1895, property of a co. was conveyed to trustees for the holders of second debentures to be thereafter issued. The arts. of assocn. of the co. provided that no director should vote in respect of any matter in which he was individually interested, the quorum of directors being fixed at two. D., a director of the co., advanced moneys to the co. on the security of manufactured whiskey of the co. & also upon second debentures issued to him by the co. in 1903, but forming part of the series secured by

the trust deed of 1895. There was admittedly no quorum of independent directors present at the meeting which purported to authorise the issue of these debentures to D. The present action was instituted in 1905 by pltf. on behalf of himself & all other holders of first debentures claiming a declaration that certain first mortgage debentures were well charged on the property of the co., & a liquidator was subsequently appointed. In 1909 D. instituted an action for a declaration as to his rights against the co. in liquidation & the trustees for the second debenture-holders. The latter defts. delivered no defence, & D. obtained judgment against them by default. D.'s action subsequently resulted in a declaration by the House of Lords that D. was not entitled to a

were parties, & as R. would have been estopped from raising that question again in any proceedings between himself & the patrons, he was also estopped from raising the same question as a defence against the incumbent, who, as being a privy in law to the patrons, was entitled to take advantage of the same estoppel, & such defence should be struck out as frivolous & vexatious.—*MAGRATH v. REICHEL* (1887), 57 L. T. 850, D. C.; *on appeal*, 4 T. L. R. 296, C. A.; *sub nom.* *REICHEL v. MAGRATH* (1889), 14 App. Cas. 665, H. L.

*Annotations*:—*Apld.* *Macdougall v. Knight* (1890), 25 Q. B. D. 1. *Refd.* *Dunlop Pneumatic Tyre Co. v. Rimington* (1900), 17 R. P. C. 665. *Mentd.* *Barrett v. Day*, *Day v. Foster* (1890), 43 Ch. D. 435; *Remington v. Scoles*, [1897] 2 Ch. 1; *Stephenson v. Garnett*, [1898] 1 Q. B. 677; *Scott v. Scott*, [1912] P. 241; *Norman v. Mathews* (1916), 85 L. J. K. B. 857.

**367.** ———.]—*Sub-tenant.*—*COLLINGWOOD & RAMSEY v. SEVERAL DEFENDANTS*, No. 330, *ante*.

**368.** ———.]—*HODSON v. WALKER*, No. 352, *ante*.

**369.** ———.]—*DARTMOUTH (LADY) v. ROBERTS*, No. 66, *ante*.

**370.** ———.]—In an action brought by A. & B., for diverting water from their works, it appeared that A., when in the sole possession of the same works, had brought a former action for a similar injury, against the same defts., in which he had recovered a verdict & judgment against them; & it being proved that A. & B. were now in possession of the same works:—*Held*: (1) this was abundant *prima facie* evidence, that the present pltf. were privy in estate to the former pltf., & the verdict & judgment in the former action were admissible in evidence against the same defts. in this action; (2) the circumstances of B.'s having been examined as a witness in the former action, when he was disinterested, did not render such verdict & judgment inadmissible.—*BLAKEMORE v. GLAMORGANSHIRE CANAL CO.* (1835), 2 Cr. M. & R. 133; 1 Gale, 78; 5 Tyr. 603; 4 L. J. Ex. 146; 150 E. R. 57.

*Annotations*:—*Refd.* *Symons v. Blake* (1835), 2 Cr. M. & R. 416; *Christy v. Tancred* (1842), 9 M. & W. 438; *Hearn v. Turner* (1846), 2 C. B. 535; *R. v. French* (1878), 26 W. R. 437; *In the Estate of Crippen*, [1911] P. 108. *Mentd.* *Beavan v. Cox* (1850), 16 L. T. O. S. 65.

#### (c) Persons having Similar Interest.

**371. General rule.**—Agreement to inclose common, parties that have interest in the common & not privy to the agreement shall not be bound.—*THIRVETON v. COLLYER* (1665), 1 Cas. in Ch. 48; 1 Eq. Cas. Abr. 104; 22 E. R. 688; *sub nom.* *ANON.*, Nels. 79; 3 Rep. Ch. 13, L. C.

**372.** ———.]—*SPENCER v. WILLIAMS*, No. 336, *ante*.

**373. Judgment recovered against executors—Executors also trustees of real estate—Whether conclusive as against parties interested in real**

valid pledge of the whiskey, but was entitled to a valid lien on the debentures for the amount of his advances to the extent of the property comprised in the trust deed. On the hearing of a memorandum from the chief clerk in the present action:—*Held*: C., R., & G., as representing the holders of valid second debentures issued by the co. in 1895, were sufficiently represented by the trustees for the second debenture-holders in the action brought by D. against the co. & the said trustees, & the order of the House of Lords in the latter action operated as an estoppel so as to preclude C., R., & G. from relying in the present action on the invalidity in the creation of D.'s debentures.—*COX v. DUBLIN CITY DISTILLERY CO., LTD.* (No. 3), 1917] 1 L. R. 203, 208.—*IR.*

*Sect. 3.—Effect of res judicata: Sub-sect. 1, C. (c),*

*estate.*]—In a creditor's suit for administration of the real & personal estate of testator:—*Held*: a judgment recovered against the exors., who were also trustees of the real estate, was *prima facie* evidence of a debt as against the persons interested in the real estate, but they were at liberty to adduce rebutting evidence.—*HARVEY v. WILDE* (1872), L. R. 14 Eq. 438; 41 L. J. Ch. 698; 27 L. T. 471.

(d) *Members of Class.*

**374. General rule.**]—Where a general right is fairly contested & established against a representative class, parties not actually parties are still bound by representation, so far as the general right is tried & established. Pltfs. filed a statement of claim, seeking to carry out against deft. a decree establishing a general right of common. Def. demurred on the grounds, first, that he was no party to the original suit, & therefore not bound by the decree; & secondly, that under an Act of Parliament pltfs. were prohibited from taking proceedings, except such as were supplemental to the original suit, the decree in which they sought to enforce, without the leave of a certain body, & that they did not state that they had obtained such leave:—*Held*: (1) deft. was bound by the decree, so far as it established a general right of common; (2) the proceedings being original & not supplemental, the demurrer must be allowed on the second ground, with liberty for pltfs. to amend by obtaining leave, & in case they obtained such leave, the costs of the demurrer should be reserved.—*LONDON (CITY) SEWERS COMRS. v. GELLATLY* (1876), 3 Ch. D. 610; 45 L. J. Ch. 788; 24 W. R. 1059.

*Annotations*:—As to (1) *Consd.* *Conybeare v. Lewis* (1883), 48 L. T. 527. *Refd.* *McHenry v. Lewis* (1882), 21 Ch. D. 202; *Markt v. Knight S.S. Co., Sale & Frazz v. Knight S.S. Co.*, [1910] 2 K. B. 1021. *Generally, Mentd.* *Temperon v. Russell* (1893), 9 T. L. R. 298; *Taff Vale Ry. v. Amalgamated Soc. of Railway Servants*, [1901] A. C. 426.

**375. — Member having independent right.**]—(1) A person not a party to an action or summons, nor technically bound by the judgment, but fully cognisant of the proceedings, who stands by & deliberately takes the benefit of a decision on the construction of a will under which a particular fund is distributed, is estopped by his conduct, where the circumstances are identical, from reopening any of the questions covered by the former judgment by means of a fresh action or summons relating to another fund under the same will, though claiming in respect of a different interest.

(2) An order appointing some one to represent a class, such as next of kin, is not binding on one of the next of kin who has a distinct & independent interest in another capacity.—*Re LART, WILKINSON v. BLADES*, [1896] 2 Ch. 788; 65 L. J. Ch. 846; 75 L. T. 175; 45 W. R. 27; 40 Sol. Jo. 653.

*Annotation*:—As to (1) *Refd.* *Re King, Jackson v. A.-G.*, [1917] 2 Ch. 420.

**376. Miners of parish.**]—Decree that all miners within the parish of D. as well for the time being as to come shall pay to the vicar for tithe the tenth dish of lead ore cleaned:—*Held*: all miners within the parish were within the decree, though not parties to the decree, nor claiming in privity under any that were.—*BROWN v. BOOTH* (1690), 1 Eq. Cas. Abr. 164, pl. 5; 2 Vern. 184; 21 E. R. 960.

**PART II. SECT. 3, SUB-SECT. 1.—**  
C. (d).

**374 i. General rule.**]—If an *actio popularis* having for its object the

removal of obstructions from an alleged public road, is properly carried to a decision by pursuers entitled to sue as members of the public, that

decision will be *res judicata* against all other members of the public.—*POTTER v. HAMILTON* (1870), 8 Macph. (Ct. of Sess.) 1064; 42 Sc. Jur. 625.—*SCOT.*

**377. Tenants of manor.**]—*BROWN v. HOWARD* (1701), 1 Eq. Cas. Abr. 163; 21 E. R. 960.

*Annotation*:—*Mentd.* *York Corpn. v. Pilkington* (1737), *West temp. Hard.* 293.

**378. Inhabitants of town—Judgment establishing custom.**]—A decree had established a custom that all the inhabitants of M. should send their corn which was to be spent in their houses to be ground at pltf.'s mills:—*Held*: the decree bound all persons under the same description with the original defts.—*MANCHESTER MILLS CASE* (1757), 1 Doug. K. B. 222, n.; 99 E. R. 145.

(e) *Trustee and Cestui que trust.*

*See, generally, EXECUTORS; TRUSTS & TRUSTEES.*

**379. Action by husband & wife jointly—Against trustees of father's will—Judgment by wife against husband—For specific performance of agreement by husband to settle share under father's will.**]—In Feb. 1881, Mrs. N. by her next friend brought an action against her husband for specific performance of an ante-nuptial agreement to settle on her a share of property given to her by her father's will. In Mar. of the same year the husband brought an action in his own & his wife's name against the trustees of her father's will for an account of the said share. The trustees in their defence pleaded that pltf.'s right to an account depended upon the facts which were in issue in the first action. Before the hearing of the second action judgment was delivered in the first action establishing Mrs. N.'s right to a specific performance of the agreement to settle:—*Held*: (1) the second action must be regarded as that of the husband alone, & the judgment against him in the first action was an estoppel in fact to his setting up any right to an account of the share which that judgment had decided did not belong to him; (2) the pleading of the pendency of the action prevented any failure of the estoppel from the judgment not having been pleaded.—*Re DEFRIES, NORTON (OR NORDON) v. LEVY* (1883), 48 L. T. 703; 31 W. R. 720.

**380. Action by trustee not in fact representing beneficiaries—R. S. C., Ord. 16, r. 8.**]—In 1918, C., an exor. & trustee, who bore the same names as his father, testator, who had died in 1908, mortgaged to deft. co., for his own purposes & without the knowledge of his mother who was his co-exor. & co-trustee, leasehold houses which had been assigned in 1907 to testator by whom the leases, or an attested copy, & the assignments had been registered at the Land Registry, & they bore a red ink indorsement to that effect. The exors. had also been registered as proprietors of the houses in question & were described in the register as "exors." of testator. When obtaining the loan C. produced the documents which his father had registered but did not produce the probate of his father's will or the land certificates, & fraudulently represented himself to be the person to whom the leases had been assigned. The co. advanced the money to C. without inspecting the register, believing that he was the absolute owner of the leaseholds, & in executing the mtges. C. in fact personated his father. Upon the instalments falling into arrear the co. made inquiries of C. & obtained the land certificates from him, & discovered that he was one of two exors. & had personated his father, but he assured the co. that the money was borrowed for exorship.



purposes. The co. then commenced foreclosure proceedings against the exors., C. & his mother, for whom C., without her authority, entered an appearance. The statement of claim alleged that the mtge. money had been raised by the exors. for exorship purposes & had been duly executed by C. as exor. & with the knowledge & consent of his mother, & alternatively that the two exors. had been guilty of fraud. No defence was delivered & the subsequent proceedings were served at an address for service given by C., which was not the address of his mother's residence, & she did not have any actual cognisance of them. The co. obtained judgment, & after the order for foreclosure absolute was made, the co. was entered on the Land Register as proprietor of the leaseholds in question, & put the property up for sale. The children of the testator, other than C., who, subject to their mother's life interest, were, with C., the ultimate beneficiaries under testator's will, then commenced this action for a declaration that the mtges. & foreclosure order were invalid as against them. New trustees of the will had been appointed before the trial of the action & were co-pltfs.:—*Held*: pltf. beneficiaries were not in fact represented by the exors. in the foreclosure action & were not bound by the judgment therein or, by virtue of R. S. C., Ord. 16, r. 8, estopped from establishing their rights.

R. S. C., Ord. 16, r. 8, applies where the exor. or trustee in fact represents the beneficiaries whose interests it is his duty to protect, but does not apply where the beneficiaries have solid grounds for impeaching a transaction between a fraudulent exor. or trustee & pltf.—*Re DE LEEUW, JAKENS v. CENTRAL ADVANCE & DISCOUNT CORPN.*, [1922] 2 Ch. 540; 91 L. J. Ch. 617; 127 L. T. 350.

(f) *The Crown.*

See CONSTITUTIONAL LAW, Vol. XI., p. 529, No. 337.

(g) *Strangers.*

**381. General rule.**—It is against the course of law, that any judgment, decree, or proceeding betwixt other parties should bind the witness of or in any way conclude, a third person (NORTH, L.C.J.).—*BARNARDISTON v. SOAME* (1676), 6 State Tr. 1063; *sub nom. SOAMES v. BARNARDISTON*, Freem. K. B. 430; 89 E. R. 321, Ex. Ch.; *affd.* (1689), 6 State Tr. 1117, H. L.

*Annotations*:—*Refd.* Kendall v. John (1708), Fortes. Rep. 104. *Mentd.* Onslow's Case (1681), 2 Vent. 37; *Prideaux v. Morice* (1700), 1 Lut. 82; *Ashby v. White* (1703), 2 Ld. Raym. 938; *Ford v. Tilly* (1706), 2 Salk. 653; *Musgrave v. Nevins* (1724), 2 Ld. Raym. 1358; *Myddelton v. Wynn* (1746), Willes. 597; *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; *Bradlaugh v. Gossett* (1884), 50 L. T. 620; *Everett v. Griffiths*, [1920] 3 K. B. 163.

**382.** —.]—A bkpt. having obtained his certificate under a joint commission issued against him & others, is not estopped when suing a stranger in trover from controverting the validity of the commission, or from taking advantage of its illegality as against such stranger, between whom & pltf. there is no reciprocity.—*BUTTS v. BILKE* (1817), 4 Price, 240; 146 E. R. 452.

*Annotations*:—*Mentd.* Till v. Wilson (1828), 7 B. & C. 684; *Fowler v. Coster* (1830), 10 B. & C. 427.

**383.** —.]—By a decree in Jan. 1853, inquiries as to the heir-at-law & next of kin were directed to the chief clerk in Chambers; & notice for the first time was ordered to be given to the A.-G., who afterwards attended in Chambers. By another decree of June, 1853, when the A.-G. was present, it was ordered that the accounts should be taken, & that the testatrix's personal estate not

specifically bequeathed should be applied in payment of her debts & funeral expenses in due course, & then in payment of legacies. The chief clerk's certificate of Dec. 1853 certified, amongst other things, that all the pecuniary legacies given by the testatrix's will, which were payable at her death, had been paid, & were allowed in the account of personal estate.

It being found afterwards that the legacies were a charge on both the real & personal estate:—*Held*: the A.-G. was not bound by the decree of 1853, & by the certificate which followed.—*CRADOCK v. OWEN* (1854), 2 Sm. & G. 241; 2 Eq. Rep. 381; 23 L. T. O. S. 19; 2 W. R. 319; 65 E. R. 382.

*Annotations*:—*Mentd.* *Re Higginson & Dean, Ex p. A.-G.*, [1899] 1 Q. B. 325; *Re Bond, Panes v. A.-G.* (1900), 82 L. T. 612.

**384.** —.]—As a general rule, where one person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, & to be reimbursed by the debtor against the money paid to redeem them, & in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor; & the right to indemnity exists although there may be no agreement to indemnify, & although there may be in that sense no privity between the owner of the goods & the debtor. Deft. bought the business of an ironmonger in his own name for his two sons; he paid the greater part of the purchase-money. The banking account of the business was kept by him, & he drew the cheques on that account. A society having obtained judgment in an action against deft., certain goods of his sons were seized by the sheriff; the sons claimed the goods; but upon an interpleader summons taken out by the sheriff, the claim of the sons was barred, & the goods were sold. They realised £1,300, & this sum was paid into ct. in the action by the society against deft. as a security for what might be found due to the society from deft. upon taking certain accounts. Deft.'s sons were afterwards adjudicated bkpts., & pltf. was appointed their trustee. The defendant agreed with the plaintiff that, in consideration of his sons' goods having been seized & sold on behalf of the society in respect of an alleged claim against him, he would pay £300 *per annum* to pltf. until he should have paid a sufficient sum to pay the trade creditors of his sons in full. Pltf. having brought the present action to recover £1,200 due by virtue of the above-mentioned agreement, or in the alternative £1,300, the value of the goods seized:—*Held*: even if deft.'s express promise to pay £1,200 was not legally binding upon him, nevertheless the action was maintainable, for although the decision upon the interpleader summons did not estop deft. from showing that the seizure by the sheriff was unlawful, nevertheless he had by his conduct led to the seizure, & the goods of his sons had been legally taken for his debt, & deft., therefore, was bound to indemnify his sons, & pltf., as their trustee in bkpcy., was entitled to have judgment entered for him for the sum of £1,200, which he was willing to accept instead of £1,300, the value of the goods seized.

In order to bring the case within the general principle, it is necessary that the goods seized shall have been lawfully seized. In this case, it has been decided between the owners of the goods seized, i.e. the sons, & the sheriff seizing them, that the goods were rightfully seized; & although deft. is not estopped by this decision, & is at liberty, if he can, to show that the seizure was one



*Sect. 3.—Effect of res judicata: Sub-sect. 1, C. (g).]*

which the sheriff was not justified in making, he has not done so (LINDLEY, L.J.).—EDMUNDS *v.* WALLINGFORD (1885), 14 Q. B. D. 811; 54 L. J. Q. B. 305; 52 L. T. 720; 49 J. P. 549; 33 W. R. 647, C. A.

*Annotations:—Mentd.* The Orchis (1890), 15 P. D. 38; *Re* Button, *Ex p.* Haviside, [1907] 2 K. B. 180.

**385.** —.]—Pltf. in an action to recover possession of certain land alleged that though the legal estate was outstanding in a third person, he had the equitable title to possession by reason of an agreement with the owner of the legal estate for the sale of the land to him. It was alleged that the equitable title was in other persons who were not parties to the action. The owner of the legal estate was not a party to the action:—*Held*: under the circumstances pltf. could not maintain the action.

It is true that D. was a witness in the action, but he is not estopped against anybody by what he has sworn; so that his being a witness is not equivalent to his being a party to the cause, & he might claim—I do not at all say that he would do so—the property himself, notwithstanding that he had sworn that it was not his. That is the reason why the mere fact of his being a witness is not equivalent to his being a party to the cause (LORD ESHER, M.R.).—ALLEN *v.* WOODS (1893), 68 L. T. 143; 4 R. 249, C. A.

*Annotation:—Mentd.* Matthews *v.* Usher (1899), 68 L. J. Q. B. 988.

**386. Judgment in personam — Suit for foreclosure.**—A. mtgee. of part of an estate in Ireland, filed his bill of foreclosure in the Ct. of Ch. in England, & obtained the usual decree. A mtgee. of other part of the same estate filed his bill of foreclosure in the Ct. of Ch. in Ireland; & on hearing this cause, deft.'s counsel desired that the decree of the Ct. of Ch. in England might be read, to the intent that the decree of the Ct. of Ch. in Ireland might be made agreeable thereto:—*Held*: this request would be refused, because present pltf., though deft. in the former cause, was not brought to hearing in that cause, & was, consequently, no party to the decree.—EVERARD *v.* ASTON (1717), 3 Bro. Parl. Cas. 561; 1 E. R. 1498, H. L.

**387.** —.]—Pltf. produced the record of the verdict & judgment in the former cause to show his exclusive right. The evidence was objected to because the former action & this were not causes between the same parties:—*Held*: the record in the former cause though admissible evidence, was not conclusive.—KINNERSLEY *v.* ORPE (1780), 2 Doug. K. B. 517; 99 E. R. 330.

*Annotations:—Expld.* Outram *v.* Morewood (1803), 3 East, 346. *Refd.* Doe *d.* Foster *v.* Derby (1834), 1 Ad. & El. 783; Simpson *v.* Pickering (1834), 1 Cr. M. & R. 527; Weinman *v.* Mackenzie (1855), 5 E. & B. 447.

**388.** — **That money in hands of A. belonged to B.—Action by C. claiming same money.**—The judgment of one ct. of law, deciding that money in the hands of A., is the property of B., is no bar to an action in another ct. by C., against A., claiming the same money as C.'s property.—NATHAN *v.* GILES (1811), 5 Taunt. 558; 128 E. R. 808; *sub nom.* GILES *v.* NATHAN, 1 Marsh. 226.

*Annotations:—Mentd.* Smidt *v.* Ogle (1815), 6 Taunt. Giles *v.* Hutt (1848), 7 J. 4 Exch. 82.

**389.** — **Proceedings in Exchequer for breach of revenue laws—Conviction for penalties.**—HART *v.* M'NAMARA, No. 150, *ante*.

**390.** — **In action of trespass for taking ship—Action for tolls—Admissibility of judgment to**

**prove existence of port.**—Pltf. claimed tolls throughout the port of Padstow:—*Held*: (1) a record of K. B. of 7 Ric. 2, of a cause removed by *certiorari* from the maritime ct. of Aldestowe, would be receivable in evidence for pltf., although that cause was trespass for taking a ship, & the present pltf. & deft. did not claim under either of the parties to it; (2) evidence would be allowed to be given by the witness who produced it, that he had ascertained from records that Aldestowe & Padstow were different names for the same place.—BRUNE *v.* THOMPSON (1841), Car. & M. 34, N. P.

**391.** — **That land disgavelled.**—(1) In ejectment for lands in Kent, pltf.'s case depended upon showing that the lands in question had been disgavelled by a private Act, which was alleged to have been passed in 2 & 3 Edw. 6. The Act, after proper search, could not be found. As secondary evidence of its contents, there was produced an office copy of a special verdict returned upon the trial of a feigned issue in 13 & 14 Car. 2, wherein the jury found that at a Parliament, etc., holden, etc., it was enacted, etc., in these words following to wit, etc.; the Act was then set out, whereby certain lands in Kent, including some held by one W. were disgavelled. There was evidence to identify the lands in question with those held by a person of that name at the time the Act was stated to have passed:—*Held*: the special verdict, being *res inter alios acta*, was not admissible *per se*, & it was not receivable as containing an authenticated copy of the Act, inasmuch as it was strictly the finding of a matter of fact, not professing to set forth a copy of the Act accordingly to its tenor, nor stating the title of the Act, so as to identify it with the lost Act.

(2) In order to show that the Act in question had been passed, a calendar was put in, purporting to contain sixty titles of Acts passed in 2 & 3 Edw. 6, of which that which was number 40, purported to be "An Act for disgavelling lands in Kent." It was proved to be the practice to enter upon this calendar, Acts of Parliament with their respective numbers, as soon as they received the royal assent. The earlier part of this calendar was made in 1610:—*Qu.*: whether this calendar was admissible.—DOE *d.* BACON *v.* BRYDGES (LADY) (1843), 6 Man. & G. 282; 7 Scott, N. R. 333; 13 L. J. C. P. 209; 1 L. T. O. S. 338; 7 J. P. 724; 134 E. R. 900.

**392.** — **Contract of indemnity.**—A. had guaranteed the payment to B. of two bills of exchange accepted by C. C. afterwards handed over the amount of the bills to B. A fiat having issued against C., his assignee, in an action for money had & received, recovered the money back from B., as having been paid by way of fraudulent preference. In an action by B. against A. upon the guarantee, A. pleaded that C. had paid, & B. had received, the money in satisfaction of the bills, which allegation was traversed by the replication:—*Held*: (1) the payment did not amount to a payment in satisfaction; (2) B. might prove the facts under the above replication; (3) the verdict & judgment in the action by the assignees against B., although evidence to explain the transaction, was not conclusive against A., that the money had been received by B. to the use of the assignees.—PRITCHARD *v.* HITCHCOCK (1843), 6 Man. & G. 151; 6 Scott, N. R. 851; 12 L. J. C. P. 322; 134 E. R. 844.

—*As to* (1) *Refd.* Petty *v.* Cooke (1871), L. R. 6 Q. B. 790. *As to* (3) *Refd.* Newington *v.* Levy (1870), L. R. 5 C. P. 607. *Generally, Mentd.* Aiken *v.* Short (1856), 1 H. & N. 210.

**393.** — —.]—In debt, by A. against B.

on a bond entered into jointly & severally by B. & C. to A. in the penal sum of £5,000, the condition, set out on *oyer*, after reciting that C. had been appointed collector of taxes, & that A. had consented to become one of his sureties, was stated to be that B. & C. should keep harmless & indemnify A. from & against all costs, charges, etc., which he should incur in consequence of his becoming such surety. B. pleaded, that A. had not, at any time since the making of the bond, been in anywise damnified by reason or means of any matter, cause, or thing in the condition mentioned. To this plea A. replied, that C. continued collector until, etc.; that, during the said time that C. continued such collector, & after the making of the bond, etc., there came to the hands of C., as such collector, "divers large sums of money, amounting in the whole to a large sum of money, exceeding £500, to wit, £2,006 7s. 10d."; & that C. did not pay over the same, or any part thereof to the receiver-general: & A., for assigning a breach of the condition of the bond, said, that, by reason of such default, he was called upon by the receiver-general, & forced & compelled to pay, & did pay to the receiver-general a large sum of money, to wit, £500, parcel of the moneys so received by C. as such collector, etc. To this B. rejoined, that A. was not forced or obliged to pay the said sum of money in the replication in that behalf mentioned, or any part thereof, in manner & form as alleged:—*Held*: (1) by this rejoinder, the receipt of £500 by C. was not admitted, & in the absence of evidence to show that some money had been received by C., nominal damages only could be assessed on the breach assigned; (2) the mere production of a judgment signed against A., under a judge's order, for £500. at the suit of the receiver-general, was not evidence of the amount of the damage sustained by A. in consequence of his suretyship.—*KING v. NORMAN* (1847), 4 C. B. 884; 17 L. J. C. P. 23; 9 L. T. O. S. 433; 11 Jur. 824; 136 E. R. 757.

*Annotation*:—*Generally*, *Mentd.* *Harcourt v. Wyman* (1849), 3 Exch. 817.

**394.** —.]—In a suit, etc., by a husband for a divorce by reason of adultery the husband pleaded & proved that he had obtained a verdict for £500 damages for criminal conversation against the co-respondent:—*Held*: such verdict could not be considered to furnish any confirmation or corroboration of the charge of adultery as the wife was no party to the proceedings at common law, which were, as regarded the suit for divorce, *res inter alios acta*.—*EVANS v. EVANS* (1844), 1 Rob. Eccl. 165; 3 Notes of Cases, 416; 8 Jur. 1055; 163 E. R. 1000.

*Annotations*:—*Refd.* *Jenkyn v. Jenkyn* (1856); *Dea. & Sw.* 268. *Mentd.* *Curtis v. Curtis* (1846), 5 Moo. P. C. C. 252; *Simmons v. Simmons* (1848), 1 Rob. Eccl. 566; *Taylor v. Taylor* (1848), 6 Notes of Cases, 558; *Hart v. Hart* (1855), 2 Ecc. & Ad. 193; *Davidson v. Davidson* (1856), *Dea. & Sw.* 132; *Burder v. O'Neill* (1863), 2 New Rep. 551.

**395.** —.]—Testator, in 1807, executed a deed of tailzie of his Scottish estates, limiting the same to various relatives, with clauses rendering the estates of the successive heirs substitute inalienable. In 1808, testator devised his English estates to three trustees in strict settlement, & gave them his residuary personal estate in trust, to lay out the same in the purchase of estates in England or Scotland, & to settle the purchased English estates to the uses contained in his will, & the purchased Scottish estates to the uses expressed in the deed of tailzie. By the will, power was given to the person entitled to the actual possession of the devised estates to appoint new

trustees, on any of the trustees dying or declining to act. Testator died in 1812. On the death of D. the first party beneficially interested in the estates, there was a very large residuary personal estate, & he was succeeded in the estates by his son J., the heir substitute in possession under the deed, & tenant in tail under the will. A very considerable part of the residuary personal estate was invested by the trustees in the purchase of Scottish estates, & a small part only in the purchase of English estates, & these estates were respectively settled to the uses expressed in the deed & will. The trustees having died, & the representative of the last surviving trustee desiring to be discharged, a bill was filed in 1833 by the next friend of J., an infant, complaining that the trusts had not been properly executed, & amongst other things, seeking the appointment of new trustees, & a declaration of the ct. that the residue of the personal estate ought to be invested in the purchase of real estates in England. The earliest of the heirs substitute after J. interested in the estates were not parties to the suit, though others more remotely interested therein were, as also the representative of the last surviving trustee. A decree was made in 1833, whereby a reference was directed for the appointment of new trustees, & it was declared that the personal estate remaining uninvested ought to be invested in the purchase of real estates in England. J., having attained his majority in 1836, executed a disentailing deed, & shortly afterwards the uninvested personal estate was ordered to be transferred to him. He died in 1840 without issue. In 1841, a bill was filed by F., the next substitute heir in possession under the Scotch deed of tailzie, praying that the decrees & proceedings in the suit instituted on behalf of J. might be declared irregular, & that pltf. might be relieved therefrom:—*Held*: F. was not bound by the decree in the suit of J.—*FORDYCE v. BRIDGES* (1848), 2 Ph. 497; 2 Coop. temp. Cott. 324; 17 L. J. Ch. 185; 41 E. R. 1035.

*Annotations*:—*Mentd.* *Brassey v. Chalmers*, *Seacome v. Holme* (1853), 4 De G. M. & G. 528; *Watlington v. Waldron* (1853), 4 De G. M. & G. 259; *Fletcher v. Moore* (1857), 29 L. T. O. S. 173; *Salisbury v. Denton* (1857), 3 K. & J. 529.

**396.** — *Salvage award by cinque port salvage commissioners—Action in Admiralty Court.*—Salvage services had been rendered to a vessel by several sets of salvors off Ramsgate. The owners of the vessel summoned a meeting of the comrs. of salvage for the cinque ports to adjudicate the matter. No notice of the intended meeting was given to any of the salvors, & it was proved that it was not usual to give any such notice. At the meeting of the comrs. one set of salvors was unrepresented, but it was proved that they were aware of the meeting, & were at hand. The comrs. made an award upon the whole matter. The salvors so unrepresented refused to accept their share of the money awarded, & brought their action in the Admlty. Ct.:—*Held*: the award was no bar to the action, pltf. not having been parties to the first decision.—*THE ELISE* (1859), Sw. 436.

**397.** — *Obtained by pulsne incumbrancer—Action by prior incumbrancer.*—(1) A mtgee. of a devisee filed a bill to enforce his security, & obtained a decree containing an inquiry as to the incumbrances on the estate. Immediately afterwards a legatee, whose legacy was charged on the estate & had priority over the mtge., filed his bill to have the legacy raised:—*Held*: the decree in the other suit was no bar to his proceeding with his suit, for a prior incumbrancer was not bound



*Sect. 3.—Effect of res judicata: Sub-sect. 1, C. (g), D. & E.]*

to go in under a decree obtained by a puisne incumbrancer, but was at liberty to institute a suit of his own.

(2) Testator in 1815 devised an estate to A. for life, remainder to his sons successively in tail, remainder to B. in tail, & in 1818 made another will, devising the estate to A. for life, remainder to his sons successively in tail, remainder to C. in tail:—*Held*: a decree establishing the will of 1818, made in a suit to which B. was not a party, but A. & his first son were parties, as representing the inheritance, was not binding as between B. & C.—*ARNOLD v. BAINBRIGGE* (1860), 2 De G. F. & J. 92; 45 E. R. 557, L. J.J.

**398. — Subsequent petition under Legitimacy Declaration Act, 1858 (c. 93)—Attorney-General necessary respondent.]**—(1) In a petition under the above Act, the citation of parties, between whom & petitioner there already exists a judgment of a ct. of competent jurisdiction upon the subject now in suit, does not afford ground for a plea of *res judicata*. The A.-G. is by the Act a necessary resp.; the ct. is bound therefore to decide the personal question of status as between the Crown & petitioner. The intention of sect. 10 is not to prevent the ct. pronouncing a decree which may militate against former judgments, but to protect former judgments against its operation.

(2) The commencement of the controversy, & not of the situation from which it springs, is the commencement of the *lis mota*, & terminates the admissibility of family declarations. A declaration made expressly with a view to a probable future contest is admissible *quantum valeat*. Not so, however, when made in a prior cause on the same subject matter. A prior cause carried on between the same parties will not be a *lis* so as to exclude declarations, unless the very point subsequently in dispute upon which it is sought to bring such declaration to bar, was then in litigation.

(3) It is of the very nature & essence of all estoppels that they should be reciprocal (*WILLIAMS, J.*).—*SHEDDEN v. A.-G.* (1860), 2 Sw. & Tr. 170; 30 L. J. P. M. & A. 217; 3 L. T. 592; 6 Jur. N. S. 1163; 9 W. R. 285; 161 E. R. 958.

**399. —]**—By the law prevailing in Natal, the registered title of an innocent purchaser clothed with the legal estate, prevails over the title of a claimant of a mere equitable estate, although such equitable estate may be of priority of time. A. purchased from B. lands in the Colony of Natal, & registered same. A. afterwards mortgaged the lands to C., & delivered to him the *grosse*, or copy, of his registered title deed. This mtge. was also registered. Default having been made in payment of the principal & interest of the mtge. money, C. brought a suit in the nature of a foreclosure suit, & obtained a provisional sentence, by which the same was declared executable in satisfaction of the mtge. debt, & the lands attached for the amount due upon the mtge. Before any sale took place under such attachment, D. & E. obtained an interdict from the Supreme Ct. against the transfer, on the allegation that previously to the sale to A., B. had sold the lands to them, & that A. had notice of such previous sale. D. & E. afterwards instituted a suit against A., without making C., the mtgee., a party. The object of the suit was to set aside the original sale from B. on the ground that the sale & registration was a fraudulent transaction between A. & B., & D. & E. obtained a judgment, whereby the Supreme Ct. adjudged the transfer to A. to be cancelled &

set aside. In consequence of the interdict restraining the sale, C. instituted a suit against D. & E. & A. to set aside the interdict & enforce the provisional sentence obtained by him. In this suit the only evidence of the alleged fraud between A. & B. was the judgment in the suit by D. & E. against A. The Supreme Ct. at Natal, acting upon that judgment, decreed in favour of D. & E. Upon appeal to the Judicial Committee:—*Held*: such judgment would be reversed on the ground that the judgment in the suit by D. & E. against A. was not admissible in evidence, being, so far as respected C., *res inter alios acta*, & binding only on the parties to that suit, & in the absence of any evidence of fraud in the original transfer between A. & B., the interdict obtained by D. & E. could not be sustained.—*NATAL LAND, ETC., CO. v. GOOD* (1868), L. R. 2 P. C. 121; 5 Moo. P. C. C. N. S. 132; 16 W. R. 1086; 16 E. R. 465, P. C.

**400. — County court order for delivery of possession.]**—*HODSON v. WALKER*, No. 352, *ante*.

**401. — Obtained by plaintiff's predecessor in title.]**—In an action for an injunction to restrain a nuisance caused by a poultry farm & cock-crowing, defts. pleaded a previous action against them by pltf.'s predecessor in title which was compromised & stayed:—*Held*: (1) there was no privity of estate & the action could be maintained; (2) on the facts, there was no actionable nuisance.—*HUNT v. COOK (W. H.), LTD.* (1922), 66 Sol. Jo. 557.

**402. — Negating public right of way.]**—A verdict against one deft. in trespass upon an issue of a justification of a public right of way, negating such right is evidence in trespass for breaking & entering the same close against another deft. who justified under the same right, & the latter cannot show that such verdict was entered upon that particular plea by mistake of the officer, there having been no evidence given on either side in respect of that issue on the former trial, the record being conclusive as to the fact of such a finding, though not as to the truth of it between other parties.—*REED v. JACKSON* (1801), 1 East, 355; 102 E. R. 137.

*Annotations:—**Refd.* *Richards v. Bassett* (1830), 10 B. & C. 657; *Brisco v. Lomax* (1838), 8 Ad. & El. 198; *Magrath v. Hardy* (1838), 4 Bing. N. C. 782; *Evans v. Rees* (1839), 10 Ad. & El. 151; *Preston v. Peeke* (1858), 27 L. J. Q. B. 424. *Mentd.* *Davies v. Morgan* (1831), 1 Tyr. 457; *Neill v. Devonshire* (1882), 8 App. Cas. 135.

**403. — Indictment for obstructing public highway.]**—A verdict of guilty, & judgment thereon, in an indictment for obstructing a public highway, cannot be pleaded as an estoppel in an action brought by the party convicted against a third person for using the way.—*PETRIE v. NUTTALL* (1856), 11 Exch. 569; 25 L. J. Ex. 200; 26 L. T. O. S. 204; 20 J. P. 439; 4 W. R. 234; 156 E. R. 957.

*Annotation:—**Refd.* *Caine v. Palace Steam Shipping Co.*, [1907] 1 K. B. 670.

**404. — Proceedings in Court of Probate as to validity of will—Stranger cognisant of proceedings having right to intervene.]**—A person who is not a party to proceedings in the Probate Division in which the validity of a will is questioned is bound by the result only if he was cognisant of the proceedings, & had a right to intervene.—*YOUNG v. HOLLOWAY*, [1895] P. 87; 64 L. J. P. 55; 72 L. T. 118; 43 W. R. 429; 11 T. L. R. 128; 11 R. 596.

*Annotation:—**Refd.* *Re Lart, Wilkinson v. Blades*, [1896] 2 Ch. 788.

**405. Proceedings under Workmen's Compensation Act, 1906 (c. 58)—Claim by workman—Subsequent claim by dependants.]**—The claim of a



dependant of a workman who died from injury by accident is not *res judicata*, &, therefore, is not barred by the fact that a claim by the workman in his lifetime had been dismissed on the ground that the accident did not arise out of & in the course of the employment within above Act, sect. 1, sub-sect. 1, inasmuch as the dependant has an independent right of action under Sched. I. —*HARPER v. DICK, KERR & Co.* (1921), 90 L. J. K. B. 1313; 124 L. T. 438; 13 B. W. C. C. 250, C. A.

—*Generally.*]—See MASTER & SERVANT.

#### D. In What Proceedings Available.

**406. Testamentary causes.**]—A verdict in an action of ejectment cannot be pleaded in a testamentary cause.—*PRICE v. CLARK & PUGH* (1795), 3 Hag. Ecc. 265; 162 E. R. 1153.

—*See, generally, EXECUTORS.*

**Bankruptcy proceedings.**]—See BANKRUPTCY, Vol. IV., pp. 98, 155, 323–327, 344, Nos. 882, 1457, 1458, 3034–3066, 3230.

**Matrimonial causes.**]—See HUSBAND & WIFE.

**407. Proceedings in Prize.**]—The plea of *res judicata* is available in prize cases if the necessary conditions exist; but it cannot be entertained unless the record of the act of the ct. on which it is founded is forthcoming, or some valid reason is given why it cannot be produced.—*LARUE (G.) & Co. v. PROCURATOR-GENERAL, THE ANNIE JOHNSON* (1921), 91 L. J. P. 64; 126 L. T. 614; 15 Asp. M. L. C. 443, P. C.

—*See, further, PRIZE LAW.*

#### E. Convictions and Orders in Criminal and Quasi-Criminal Proceedings.

**408. General rule—Whether conviction or order conclusive—Conviction for bigamy.**]—If a man libel in the Spiritual Ct. *pro jactitatione maritaglii* after he has been convicted of bigamy in marrying the woman against whom he libels, a prohibition shall go; for a conviction in a ct. of criminal jurisdiction is conclusive evidence of the fact.—*BOYLE v. BOYLE* (1688), Comb. 72; 3 Mod. Rep. 164; 90 E. R. 350.

*Annotations*:—*Consd. Wilkinson v. Gordon* (1824), 2 Add. 152. *Refd. Crosby v. Leng* (1810), 12 East, 409.

**409.** ———— *Qu.*: whether if A. be convicted of bigamy as by reason of his marriage with C., living B. his first wife, it is still not competent to A. on C.'s death to propound his interest as the lawful husband of C. in a suit touching the administration of her effects; & to succeed in such suit on proof shown, notwithstanding his conviction for bigamy.

A record of conviction is evidence of the same fact in a civil cause, only it is not conclusive evidence (*per CUR.*).—*WILKINSON v. GORDON* (1824), 2 Add. 152; 162 E. R. 250.

*Annotation*:—*Refd. In the Estate of Crippen*, [1911] P. 108.

**410.** ———— **Order in affiliation proceedings.**]—An indictment for conspiring to charge a man with being the reputed father of a bastard child, need not aver that the person charged was not the father; but the order of affiliation while unreversed is conclusive evidence of his being the reputed

father.—*R. v. BEST* (1704), as reported in 6 Mod. Rep. 185; 2 Ld. Raym. 1167; 87 E. R. 941.

*Annotations*:—*Mentd. R. v. Kinnersley & Moore* (1719), 1 Stra. 193; *R. v. Seward* (1834), 1 Ad. & El. 706; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *Boots v. Grundy* (1900), 82 L. T. 769.

**411.** ———— *—*]—In affiliation proceedings against deft. he appealed to quarter sessions against an order of justices adjudging him to be the father of A.'s illegitimate child & the ct. of quarter sessions quashed the order on the ground that he was not the father. Subsequently an action for damages for the seduction of A. was brought by her mother against deft.:—*Held*: pltf. in an action was not estopped by the decision of the ct. of quarter sessions from alleging that deft. was the father of the child.—*ANDERSON v. COLLINSON*, [1901] 2 K. B. 107; 70 L. J. K. B. 620; 84 L. T. 465; 49 W. R. 623; 17 T. L. R. 425; 45 Sol. Jo. 447, D. C.

Affiliation proceedings generally, see *BASTARDY*, Vol. III., pp. 387–407, Nos. 253–405.

**412.** ———— **Condemnation of vessel.**]—In trespass against magistrates for taking & detaining a vessel, a conviction by defts., under 2 Geo. 3, c. 28, no defect appearing on the face of the conviction, is conclusive evidence that the vessel in question is a boat within the meaning of the Act, & properly condemned.—*BRITAIN v. KINNAIRD* (1819), 1 Brod. & Bing. 432; 4 Moore, C. P. 50; 129 E. R. 789.

*Annotations*:—*Appld. R. v. Bolton* (1841), 1 Q. B. 66; *Re Clarke* (1842), 2 Q. B. 619; *Mould v. Williams* (1844), 5 Q. B. 469; *R. v. Hickling* (1845), 7 Q. B. 880; *R. v. Brakenridge* (1884), 48 J. P. 293. *Refd. Cloud v. Turfery* (1824), 9 Moore, C. P. 595; *Basten v. Carow* (1825), 5 Dow. & Ry. K. B. 558; *R. v. Buckinghamshire JJ.* (1843), 3 Q. B. 800; *Allen v. Sharp* (1848), 2 Exch. 352; *Lindsay v. Leigh* (1848), 12 Jur. 286; *Ayrton v. Abbott* (1849), 14 Q. B. 1; *Re Baker* (1857), 2 H. & N. 219; *Foster v. Dodd* (1867), L. R. 3 Q. B. 67; *R. v. Farmer*, [1892] 1 Q. B. 637; *Bache v. Billingham* (1893), 63 L. J. M. C. 1; *R. v. Nat Bell Liquors*, [1922] 2 A. C. 128. *Mentd. Wickes v. Clutterbuck* (1825), 2 Bing. 483; *Thompson v. Ingham* (1850), 14 Q. B. 710; *Usill v. Hales* (1878), 3 C. P. D. 319; *Huxley v. West London Extension Ry.*, *Hughes v. Merrett*, *Wood v. Madge* (1886), 17 Q. B. D. 373; *Livingstone v. Westminster Corpn.*, [1904] 2 K. B. 109.

**413.** ———— **Conviction under 2 Geo. 3, c. 28.**]—*BRITAIN v. KINNAIRD*, No. 412, *ante*.

**414.** ———— **Prison escape.**]—Indictment under Prison Escape Act, 1742 (c. 31), for delivering instruments to a prisoner to facilitate his escape from gaol:—*Held*: (1) if the record of the conviction of the prisoner, whose escape was to have been effected, was produced by the proper officer, no evidence was admissible to dispute what it stated, or to show that it had never been filed amongst the other records of the county, though the indictment referred to it with a *prout patet* as remaining amongst those records; (2) the delivering was within the Act, though the prisoner had been pardoned of the offence of which he was convicted, on condition of transportation, & a party might be convicted though there was no evidence that he knew of what specific offence the person he assisted had been convicted.—*SHAW'S CASE* (1823), 1 Lew. C. C. 280; *Russ. & Ry.* 526.

**415.** ———— **Custody of prisoner.**]—Return to a *habeas corpus*, by the warden of the Fleet, stating that a prisoner was committed to his

#### PART II. SECT. 3, SUB-SECT. 1.—E.

**h. General rule—Whether conviction or order conclusive—Conviction for obstructing highway.**]—Where deft. had been convicted of a nuisance in obstructing a certain highway by a fence, &, after removal of such fence by the sheriff under process,

replaced it upon the same highway, though not in precisely the same line as before:—*Held*: the former conviction was conclusive against deft. as to the existence of the alleged highway, & that he could not again raise the question of this indictment for obstructing the same highway.—*R. v. JACKSON* (1876), 40 U. C. R.

#### 290.—CAN.

**k. Acquittal on charge of fraudulent conversion of money—Subsequent action by Crown—For recovery of same money.**]—In an action by the Crown to recover money received by deft. to the use of pltf., a previous acquittal of the deft. on a charge of fraudulent

*Sect. 3.—Effect of res judicata: Sub-sect. 1, E.]*

custody "upon the following order," & then setting out an order purporting to be made by the Master of the Rolls. The return, being amended, stated that the committal was "by an order of the Ct. of Ch., made by H. Lord L., Master of the Rolls, of which the following is a copy," setting it out as before. The order stated that, prisoner being brought to the bar of the ct. under a commission of rebellion for not putting in an answer, & persisting in his contempt, it was ordered, on motion by counsel, that he be turned over to the Fleet prison, & remain there till he had answered, & cleared his contempt, & the ct. made further order:—*Held*: the order appearing by this statement of the Master of the Rolls to be made in due exercise of his jurisdiction, this ct. would not receive affidavits to show that the order was made in a private room & not in ct.

When the Master of the Rolls pronounces the place at which prisoner comes before him to be the bar of his ct., that is an adjudication which we must credit, & hold conclusive (LORD DENMAN, C.J.).—*Re CLARKE* (1842), 2 Q. B. 619; 2 Gal. & Dav. 780; 11 L. J. Q. B. 75; 6 Jur. 757; 114 E. R. 243.

*Annotations*:—*Mentd.* Carus Wilson's Case (1845), 7 Q. B. 984; Watson v. Bodell (1845), 14 L. J. Ex. 281; Bowdler's Case (1848), 12 Q. B. 612; *Re Crawford* (1849), 13 Jur. 955; *Re Dimes* (1850), 19 L. J. Q. B. 158.

**416. ——— Boundary of highway.]**—By 34 Geo. 3, c. 64, when the boundary of two parishes lay along the centre of a highway, justices were empowered, on information of the fact, to summon the surveyors of the respective parishes, near the parties & their witnesses, & finally determine the matter by order, apportioning the highway between the parishes for the purpose of repair. Forms of information, summons & order were given. By an order under this Act, the justices recited an information laid before them that one side of a certain highway was in, & repairable by, parish H. & the other side in, & repairable by, parish W., paying an apportionment; that they had summoned the surveyors, who attended, & that they had examined witnesses; & they ordered that the highway should be apportioned between H. & W., dividing it by a transverse line. The order contained no direct finding that the sides of the highway were respectively in H. & W.; but the statute form was correctly followed. On indictment for non-repair of the part allotted to H.:—*Held*: the justices must be taken to have considered the question, whether or not part of the highway was in H., & to have decided by their order that it was; & the fact could not be questioned on trial of an indictment, the subject matter being within the jurisdiction of the justices, & their finding of the fact conclusive.—*R. v. HICKLING* (INHABITANTS) (1845), 7 Q. B. 880; 2 New Sess. Cas. 117; 14 L. J. M. C. 177; 5 L. T. O. S. 285; 9 J. P. 820; 9 Jur. 1075; 1 Cox, C. C. 243; 115 E. R. 719.

*Annotations*:—*Mentd.* *R. v. Perkins* (1849), 14 Q. B. 229; *R. v. Heytesbury* (1863), 8 L. T. 315.

**417. ——— Non-repair of highway.]**—*Semble*: judgment by default upon an indictment

conversion of the same money does not afford a defence of *res judicata*.—*R. v. SEERY* (1914), 19 C. L. R. 15.—**AUS.**

**1. Acquittal on charge of manslaughter — Subsequent action for damages against party acquitted.]**—The acquittal of a locomotive driver on a train upon a charge of man-

slaughter for the death of a party, on account of whose death an action for damages is brought by his administratrix, does not constitute any answer to the action.—*HAM v. GRAND TRUNK RY. CO.* (1862), 11 C. P. 86.—**CAN.**

**m. Conviction & fine for assault — Subsequent action for damages.]**—Action

for non-repair of a highway is not conclusive evidence against the parish of a liability on their part to repair such highway.—*R. v. WHITNEY* (INHABITANTS) (1835), 3 Ad. & El. 69; 4 Nev. & M. K. B. 594; 1 Har. & W. 147; 111 E. R. 339; *previous proceedings*, 7 C. & P. 208, N. P.

*Annotations*:—*Refd.* *R. v. Haughton* (1853), 1 E. & B. 501. *Mentd.* *Cornwell v. Metropolitan Sewers Comrs.* (1855), 10 Exch. 771; *R. v. Lancaster (County)* (1868), 32 J. P. 711.

**418. ———.]**—Indictment for non-repair of a highway, against the inhabitants of the township of H. averring them to be liable by prescription to repair such highways in the township as the inhabitants of the parish, but for the prescription, would have been liable to repair, with averment that the highway was in the township. Plea: not guilty. The prosecutors gave in evidence a record of a presentment by a justice, under 13 Geo. 3, c. 78, on his own view, that the road in question was out of repair; averring that it was in the township of H., & that the inhabitants of that township ought to repair it; the record showed a plea of guilty by two inhabitants of the township of H., a conviction before the sessions, & a sentence of fine:—*Held*: (1) this conviction was conclusive evidence against H., that the road was in that township, & though the presentment might be bad on error, for not showing how the township was liable, the conviction, before a competent tribunal & being unreversed, was not the less an estoppel; conviction not being impeached on the ground of fraud or collusion.

(2) By a local & personal Act it was recited that the highway in question was in the township of D.:—*Held*: the recital in the Act was not conclusive & did not open the estoppel.—*R. v. HAUGHTON* (INHABITANTS) (1853), 1 E. & B. 501; 22 L. J. M. C. 89; 20 L. T. O. S. 247; 17 J. P. 585; 17 Jur. 455; 1 W. R. 164; 6 Cox, C. C. 101; 118 E. R. 523.

*Annotations*:—*As to* (1) *Folld.* *R. v. Maybury* (1864), 4 F. & F. 90. *Refd.* *Faversham v. Emerson* (1855), 11 Exch. 385; *Petrie v. Nuttall* (1856), 25 L. J. Ex. 200; *R. v. Hutchings* (1881), 6 Q. B. D. 300; *Wakefield Corp'n. v. Cooke*, [1882] 1 W. R. 117. *As to* (2) *Appl.* *Morison v. Hill*, [1901] 1 Ch. 842. *Refd.* *Mersey Docks & Harbour Board v. Cameron, Jones v. Mersey Docks & Harbour Board* (1865), 20 C. B. N. S. 56; *Great Torrington Commons Conservators v. Moore Stevens* (1903), 73 L. J. Ch. 124.

**419. ——— Encroachment on carriage way.]**—Trespass for pulling down a cottage. Plea: Not guilty, by statute. Pltf. was convicted by three justices under Highway Act, 1835 (c. 50), for an encroachment on a highway. Deft., who was surveyor of the highways, pulled down pltf.'s cottage, which was what the conviction referred to, but which was not in fact an encroachment within the Act. No warrant issued directing deft. to do the act:—*Held*: above Act, sect. 69, required the surveyor to execute a conviction under that Act, by pulling down the encroachment though there was no warrant, & consequently, the conviction, though not itself correct, was a defence to this action, as deft. was shown to be in the position of a person bound to execute the judgment of a tribunal of competent jurisdiction.—*KEANE v. REYNOLDS* (1853), 2 E. & B. 748; 2 C. L. R. 245; 18 Jur. 242; 118

of damages for an assault & battery committed by deft. upon pltf. Plea that there had been complaint made against him for the offence, & he had been convicted & fined, & had complied with the terms of the conviction:—*Held*: in cases of common assault deft. was released from all further proceedings for the assault.—



E. R. 947; *sub nom.* KEEN v. REYNOLDS, 17 J. P. Jo. 729.

*Annotations*:—**Refd.** Mill v. Hawker (1874), L. R. 11 Exch. 309; Denny v. Thwaites (1876), 2 Ex. D. 21.

**420.** ——— **Jurisdiction of court.]**—Upon an indictment charging felony committed within the jurisdiction of the Central Criminal Ct., plea not guilty, a prisoner, was tried, convicted, & sentenced to imprisonment. After sentence application was made to this Ct. for a writ of *habeas corpus* for his discharge upon an affidavit showing that the offence was not committed within the jurisdiction as alleged:—**Held**: the record was an estoppel, & the writ would be refused.—**Ex p.** NEWTON (1855), 24 L. J. C. P. 148; 3 C. L. R. 1122; 25 L. T. O. S. 99; 19 J. P. 312; 3 W. R. 419.

**421.** ——— **Indictment for nuisance.]**—On the trial of an indictment for continuance of a nuisance, found at the quarter sessions, & removed into the Ct. of Q. B. by *certiorari* & tried at the assizes, a plea of *autrefois convict* on a former indictment for the same nuisance was not allowed to be added, even by consent, the judge having no jurisdiction to receive it. The nuisance being a wall, was proved to be still standing:—**Held**: the judgment on the former indictment was conclusive.—**R. v. MAYBURY** (1864), 4 F. & F. 90.

**422.** ——— **Conviction for forgery.]**—A judgment in an English ct. is not conclusive as to anything but the point decided, & therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged (BLACKBURN, J.).—**CASTRIQUE v. IMRIE** (1870), L. R. 4 H. L. 414; 39 L. J. C. P. 350; 23 L. T. 48; 19 W. R. 1; 3 Mar. L. C. 454, H. L.; *affg.* (1861), 8 C. B. N. S. 405, Ex. Ch.

*Annotations*:—**Consd.** Yates v. Kyffin-Taylor & Wark, [1899] W. N. 141; *In the Estate of Crippen*, [1911] P. 108. **Refd.** Ellis v. M'Henry (1871), L. R. 6 C. P. 228; Taylor v. Ford (1873), 22 W. R. 47; Ballantyne v. Mackinnon, [1896] 2 Q. B. 455; Caine v. Palace Steam Shipping Co., [1907] 1 K. B. 670. **Mentd.** De Cosse Brissac v. Rathbone (1861), 6 H. & N. 301; The Justyn (1862), 6 L. T. 553; Simpson v. Fogo (1863), 1 Hem. & M. 195; Godard v. Gray (1870), L. R. 6 Q. B. 139; Messina v. Petrocchino (1872), L. R. 4 P. C. 144; Meyer v. Ralli (1876), 1 C. P. D. 358; The City of Mecca (1879), 5 P. D. 28; De Mora v. Concha (1885), 29 Ch. D. 268; *Re* Trufort, Trafford v. Blanc (1887), 36 Ch. D. 600; *Re* Queensland Mercantile & Agency Co., *Ex p.* Australasian Investment Co., *Ex p.* Union Bank of Australia (1891), 61 L. J. Ch. 145; Alcock v. Smith, [1892] 1 Ch. 238; The Dictator, [1892] P. 304; The Nautik, [1895] P. 121; Minna Craig S.S. Co. v. Chartered Mercantile Bank of India, London & China, [1897] 1 Q. B. 55; Pemberton v. Hughes, [1899] 1 Ch. 781; Francis, Times v. Carr (1900), 82 L. T. 698.

**423.** ——— **Conviction under Metropolis Streets Act, 1867 (c. 134).]**—In the metropolis, a tenant of D. left a package on a pavement of a court, in the city, 141 feet long & 25 feet wide, with two foot-pavements, & was charged under above Act, sect. 6, with leaving the package longer than necessary. D., the freeholder, contended that the court was private property for the sole use of the tenants, & was not a street. On the tenant being convicted:—**Held**: D. was not a "person aggrieved," & was not entitled to have a special case stated under Summary Jurisdiction Act, 1879 (c. 49), s. 33.

PINJAULT & SYMMES (1883), 7 L. N. 3. —CAN.

n. ———.]—Where a person has been arrested on a charge of assault, & being summarily convicted by a justice, has paid the whole amount of the fine imposed on him, he is not

liable to a civil action of damages for the same assault.—**HARDIGAN v. GRAHAM** (1897), Q. R. 12 S. C. 177.—CAN.

o. **Conviction & forfeiture of fishing nets under Fisheries Act—Subsequent suit for illegal seizure of the**

The conviction of Wilson could not be treated as any estoppel against applts. (BRUCE, J.).—**DRAPERS' CO. v. HADDER** (1892), 57 J. P. 200; 9 T. L. R. 36, D. C.

*Annotation*:—**Mentd.** Foss v. Best (1906), 75 L. J. K. B. 575.

**424.** ——— **Criminal & civil proceedings.]**—**WILKINSON v. GORDON**, No. 409, *ante*.

**425.** ———.]—A certificate of a conviction upon an indictment for felony is in a civil proceeding *res inter alios acta*, & is not admissible as evidence of the fact that the person charged committed the felony in respect of which he was convicted.—**YATES v. KYFFIN-TAYLOR & WARK**, [1899] W. N. 141.

*Annotation*:—**N.F.** *In the Estate of Crippen*, [1911] P. 108.

**426.** ———.]—**CAINE v. PALACE STEAM SHIPPING Co.**, No. 692, *post*.

**427.** ———.]—(1) A certificated copy of the conviction of a husband for the murder of his wife is admissible in evidence against him in a civil proceeding *inter alios acta*, & is admissible not merely as proof of the conviction, but also as *prima facie* evidence of the commission of the crime.

(2) Where a husband was convicted of the murder of his wife:—**Held**: this was a "special circumstance" within Ct. of Probate Act, 1857 (c. 77), s. 73, & the ct. would pass over the legal personal representative of the husband & grant administration to the estate of the intestate wife, upon the application of one of her next of kin.—*In the Estate of CRIPPEN*, [1911] P. 108; 80 L. J. P. 47; 104 L. T. 224; 55 Sol. Jo. 273; *sub nom.* *In the Estate of CUNIGUNDA (OTHERWISE CRIPPEN DECEASED)*, 27 T. L. R. 258.

*Annotations*:—**As to** (1) **Appld.** Mash v. Darley, [1914] 1 K. B. 1. **As to** (2) **Refd.** *In the Estate of Hall*, Hall v. Knight & Baxter, [1914] P. 1. **Generally, Mentd.** Gayer v. Gayer (1917), 116 L. T. 322.

**On application for writ of certiorari.]**—*See* CROWN PRACTICE, Vol. XVI., pp. 418 *et seq.*

**428. Order for removal of timber under Highway Act, 1835 (c. 50)—Subsequent action of trespass against magistrate.]**—Under sect. 73 of the above Act, a justice, on information, summons & hearing, made an order in writing for the removal of pltf.'s timber, recited in such order to be laid upon a highway; & the timber was, accordingly, removed. In an action of trespass against the magistrate:—**Held**: pltf. could not give evidence, in contradiction to the order, that the *locus in quo* was not a highway.—**MOULD v. WILLIAMS** (1844), 5 Q. B. 469; 1 Dav. & Mer. 631; 2 L. T. O. S. 369; 114 E. R. 1326.

*Annotations*:—**Refd.** R. v. Hickling (1845), 7 Q. B. 880; Revell v. Blake (1872), L. R. 7 C. P. 300. **Mentd.** Lindsay v. Leigh (1848), 12 Jur. 286; Newbould v. Coltman (1851), 16 L. T. O. S. 488; *Re* Baker (1857), 2 H. & N. 219; Dixon v. Chester (1906), 70 J. P. 380.

**429. Acquittal on charge of murder—Subsequent action by accused for libel.]**—In an action for a libel charging a person with a legal crime, *e.g.* murder, with circumstances of aggravation if the additional circumstances would be in themselves libellous, they must be justified, as well as the bare legal offence. Declaration set out a libel, alleging that pltf. had shot one C. in a duel, & that, on his trial, it was understood that the counsel for the prosecution were in possession of a damning piece of evidence, viz. that he had

*nets.*]—Two fishermen in Sept. 1889, raised an action against a proprietor to have certain fishing nets, alleged to have been illegally seized by him, delivered up to them, or failing delivery, for the value of the nets & for damages. On Sept. 28, 1889, the



**Sect. 3.—Effect of *res judicata*: Sub-sect. 1, E.; sub-sect. 2, A.]**

spent nearly all the previous night in pistol practice. Plea that pltf. had murdered the said O. by shooting him. Replication, by way of estoppel, that pltf. was acquitted on his trial:—*Held*: the plea was bad as an insufficient justification.

*Semble*: the replication was also bad, the trial & acquittal being no estoppel on defts.—**HELISHAM v. BLACKWOOD** (1851), 11 C. B. 111; 20 L. J. C. P. 187; 17 L. T. O. S. 166; 15 Jur. 861; 138 E. R. 412.

*Annotation*:—**Refd.** *In the Estate of Crippen*, [1911] P. 108.

**430. Conviction of clerk of peace under 1 Will. & Mar. c. 21—& dismissal from office—Subsequent action by dismissed clerk of peace—To try successor's right to fees of office.**—A clerk of the peace having received fees to which the justices thought he was not entitled, they withheld a portion of his salary, & upon a *mandamus* unsuccessfully resisted his claim, & thereby incurred costs, for the payment of which the quarter sessions made an order, which it was the duty of the clerk of the peace to enter on the records of the ct. & certify to the county treasurer for settlement. The clerk of the peace, conceiving that the order was illegal, because no full bill of costs had been brought before the ct., & also because he thought the costs were not such as ought properly to be charged upon the county rate, but should have been paid by the justices who by disputing his claim had improperly incurred them, declined to record the order or to give the necessary certificate. The quarter sessions, thereupon, referred it to the finance committee, to consider & report what ought to be done under the circumstances: & upon their report a charge was preferred against the clerk of the peace, in the name of the county treasurer, under 1 Will. & Mar., c. 21, s. 6, of having "mis-demeaned himself in the execution of his office." The matter was heard before the justices at the next ct. of quarter sessions, & they unanimously found that the clerk of the peace had been guilty of the offence charged against him, & adjudged him to be dismissed from his office, & appointed deft. to succeed him. In an action by the clerk of the peace, for money had & received, to try deft.'s right to the fees of the office:—*Held*: the justices in quarter sessions, being a competent tribunal to hear & determine the charge, & having determined it, this ct. could not question the propriety of their decision, & no such interest appeared in the justices, or in any of them, as to disqualify them from acting as judges in the matter.—

proprietor lodged a summary complaint in a sheriff ct. charging pursuers with an offence under Salmon Fisheries Act, 1844, on the occasion on which the nets in question were seized. The sheriff substitute convicted pursuers of the offence charged, imposed a penalty & declared the nets to be forfeited. No appeal was taken against his judgment. The ct. assailed the defender from the conclusions of the action.—**KENNEDY v. WISE** (1890), 17 R. (Ct. of Sess.) 1036.—**SCOT**.

**PART II. SECT. 3, SUB-SECT. 2.—A.**

**434 i. General rule.**—A wife's petition for dissolution of marriage on the ground of repeated acts of adultery by the husband was dismissed because the evidence was inconclusive:—*Held*: on a subsequent petition by the wife for dissolution, on the same ground of adultery & on the ground of desertion, that the dismissal of the

first suit operated as an estoppel between the parties as to the adultery.—**KELLY v. KELLY** (1899), 25 V. L. R. 174.—**AUS**.

**434 ii.** —.]—Where a pltf. goes to a jury upon certain items of account & fails in recovering those items, he is concluded by the verdict, & cannot bring a second action for the same demand.—**PROUDFOOT v. LAWRENCE** (1851), 8 U. C. R. 269.—**CAN**.

**434 iii.** —.]—*Semble*: a recovery on the common counts for work & labour, or for any part of the value of the work, would be taken to preclude any other action for the same work.—**TURLEY v. GRAFTON ROAD CO.** (1853), 8 U. C. R. 579.—**CAN**.

**434 iv.** —.]—Action on a bond from one C., deft., to S., sheriff, indemnifying him, etc., by reason of his paying over to C. \$390, alleged to be due to deft. for rent of the premises on which the

**WILDES v. RUSSELL** (1866), L. R. 1 C. P. 722; Har. & Ruth. 689; 35 L. J. M. C. 241; 12 Jur. N. S. 645; 14 W. R. 796.

*Annotation*:—**Refd.** *R. v. Russell* (1869), 10 B. & S. 91.

**431. Conviction of crime—Action by party convicted against witness—For negligently giving false evidence causing conviction.**—A person, who has been convicted of a crime, & against whom the conviction stands unreversed, cannot maintain an action against a witness for negligently giving false evidence which caused him to be wrongfully so convicted.

There is one broad principle lying at the root of the whole matter . . . namely, that as long as a conviction stands, no one against whom it is producible shall be permitted to aver against it (**COLLINS, M.R.**).—**BYNOE v. BANK OF ENGLAND**, [1902] 1 K. B. 467; 71 L. J. K. B. 208; 86 L. T. 140; 50 W. R. 359; 18 T. L. R. 276, C. A.

*Annotations*:—**Apld.** *Turley v. Daw* (1906), 94 L. T. 216.

**Consd.** *Norman v. Mathews* (1916), 85 L. J. K. B. 857.

**432. Conviction for infringing building line—Subsequent action for injunction to pull down building.**—The penalty prescribed by sect. 3 of the above Act, for a breach of the prohibition against infringing the building line is not the only remedy for the offence. It is a public general Act, & an injunction will lie at the suit of the A.-G. on behalf of the public to restrain the infringement of the building line, & in a proper case a mandatory order to pull down will be made, even although the offender has been previously convicted & fined under the sect. for the offence by a ct. of summary jurisdiction.—**A.-G. v. WIMBLEDON HOUSE ESTATE CO., LTD.**, [1904] 2 Ch. 34; 73 L. J. Ch. 593; 91 L. T. 163; 68 J. P. 311; 20 T. L. R. 489; 2 L. G. R. 826.

*Annotation*:—**Mentd.** *A.-G. v. Birmingham, Tame, & Rea Drainage Board*, [1910] 1 Ch. 48.

**Plea of autrefois acquit & autrefois convict.**—*See CRIMINAL LAW*, Vol. XIV., p. 338.

**433. Decision on information under Collecting Societies & Industrial Insurance Companies Act, 1896 (c. 26)—Finding not necessary to respondent's case.**—**PEARL LIFE ASSURANCE CO. v. JOHNSON**, **PEARL LIFE ASSURANCE CO. v. GREENHALGH**, No. 830, *post*.

**Judgment as bar to subsequent proceedings by plaintiff.**—*See Sub-sect. 2, F., post*.

**SUB-SECT. 2.—AS BAR TO SUBSEQUENT PROCEEDINGS BY PLAINTIFF.**

**A. In General.**

**434. General rule.**—**KINGSTON'S (DUCHESS) CASE**, No. 213, *ante*.

goods out of which the money was made were seised, the rent not having accrued due at the time of seizure, assigning as a breach that deft. did not indemnify, etc., but permitted J., an execution creditor, whose writ of *fi. fa.* was in S.'s hands at the time of the seizure, to recover a judgment against him S., which he had to pay, for not paying over the amount paid to deft. for rent:—*Held*: J.'s judgment, of which an exemplification was put in, was an estoppel upon defts., & defts. were rightly prohibited at the trial from giving evidence of the time at which the rent accrued due.—**SMITH v. CLEGHORN** (1861), 10 C. P. 520.—**CAN**.

**434 v.** —.]—Deft. pleaded, by way of estoppel, that previous to an action on deft.'s covenant as surety of a lessee, the lessee & the lessor in the county ct., alleging that by the lease, in the event of the total destruction of

435. —.]—In 1842 a suit for declarator of marriage was brought against a lady, but after trial was dismissed in 1846. In 1875, after the lady's death, a second suit was brought for declarator of the same marriage, & for reduction of the former decree. In 1876 the second suit was held to have been barred by the plea of *res judicata*. On appeal:—*Held*: this decision would be affirmed.

Appl't. has not alleged any new matter whatever coming to his knowledge, which should entitle him to get rid of the former proceedings (LORD CAIRNS, C.).

I do not apprehend that we need go further than to say that this gentleman—who had the opportunity of having his case fairly heard thirty years ago—cannot now, after the death of the person principally concerned, be in a position to ask that the principle of *res judicata* shall not be pressed to its fullest & furthest results (LORD HATHERLEY).

When there is *res judicata* the original cause of

action is gone; & it would be destructive of all certainty in the administration of law, in the status of families, & in the enjoyment of rights, if it were not held incumbent on any one attempting to get rid of a solemn judgment to show that he comes forward to do so with a reasonable promptitude & diligence (LORD SELBORNE).

The object of the rule of *res judicata* is always put upon two grounds: the one, public policy, that there should be an end to litigation; the other the hardship on the individual that he should be vexed twice for the same cause. It seems to me that nothing is here alleged that would have been ground for a new trial before, & *a multo fortiori* there is nothing alleged that would be ground for a new trial after judgment pronounced thirty years ago (LORD BLACKBURN).

It would be lamentable for the law of Scotland, especially with reference to the marriage law, if it were competent for parties to come forward again after a lapse of thirty years, & ask for a new trial with reference to matters which must have

a mill by accidental fire, the term should cease, & the rent be apportioned; that upon such destruction on Oct. 30, 1869, the term ceased, & the lessor became liable to refund to the lessee such part of the rent paid in advance as on a just apportionment should be found due, & the lessee alleged in such action that \$137.50 thus became due to him, for which he sued therein; that the lessor, the now pl'tf., pleaded in such action that the lease was not his deed, & issue being joined thereon the lessee recovered judgment for the sum of \$137.50. The plea then alleged that the judgment remained in force, & that the rent sued for in this action was rent accruing due after Oct. 30, 1869:—*Held*: such judgment was a bar, for though the plea of *non est factum* did not put in issue the destruction of the mill & consequent determination of the term, yet these facts being necessarily averred in that action, & not denied, the lessor was now estopped from disputing them.—TAYLOR v. HORTON (1872), 22 C. P. 542.—CAN.

434 vi. —.]—Deft., a bailiff of a division ct., under an execution against pl'tf.'s father, seized two horses, waggon, etc., which, on an interpleader proceeding were decided to be the goods of pl'tf., who at the end of three weeks obtained possession of them from the bailiff. In an action brought by pl'tf. against deft. for damage done to the horses during the time they were in his possession, the jury, under the direction of the judge, found a verdict for pl'tf. & \$80 damages, which verdict the judge subsequently refused to set aside:—*Held*: the finding of the judge on the interpleader proceedings formed no ground of defence to the suit for damages for the alleged injury to the property.—FARROW v. TOBIN (1884), 10 A. R. 69.—CAN.

434 vii. —.]—Pl'tf. sued deft. to enforce the performance of an alleged agreement to transfer a portion of deft.'s interest in a mine, but failed on the ground that the promise was not made in compliance with the Statute of Frauds. Subsequently, the mine having been sold in the meantime, pl'tf. brought a second action, claiming a share of the proceeds, relying upon an admission made by deft. in the previous action:—*Held*: the matter was *res judicata*.—STUART v. MOTT (1892), 24 N. S. R. 526; *reversd.* 23 S. C. R. 153, 384.—CAN.

434 viii. —.]—In an action upon a promissory note against M. I. & Co., as makers, & J. I. as indorser, judgment was rendered by default against the firm, & a verdict was found in favour of J. I.:—*Held*: in a subsequent action on the judgment to recover

from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favour.—ISBESTER v. RAY, STREET & Co. (1896), 26 S. C. R. 79.—CAN.

434 ix. —.]—In 1910 pl'tf. brought an action against the city of H. for withholding & permanently depriving pl'tf. of water to which he claimed to be entitled, derived from lakes from which deft. obtained its water supply. The action was tried & judgment given in favour of deft. In 1911 pl'tf. brought a second action in which the statement of claim was similar to that in the previous action:—*Held*: the doctrine of *res judicata* applied.—FENERTY v. HALIFAX CITY (1920), 52 N. S. R. 457; 50 D. L. R. 435.—CAN.

434 x. —.]—SHUNGUNY MENON v. KALAMPULLY VALIA NAIR (1870), 6 Mad. 117.—IND.

434 xi. —.]—The doctrine of *res judicata* so far as it relates to prohibiting the re-trial of an issue, refers, not to the date of the commencement of the litigation, but to the time when the judge is called upon to decide the issue.—GURURAJAMMAH v. VENKATKRISHNAMA CHETTI (1901), 1. L. R. 24 Mad. 350.—IND.

434 xii. —.]—A decision in a prior suit bars a subsequent suit on the same cause of action, though the reliefs claimed in the two suits may be different.—RAMASAMI AIYAR v. VEERAPPA CHETTI (1910), 1. L. R. 33 Mad. 423.—IND.

434 xiii. —.]—The judgment of a ct. of concurrent jurisdiction is a bar to an action between the same parties upon the same subject-matter, however erroneous such judgment may have been; but where a new action is brought including some matter which had been adjudged on the former trial, & some which had not, & the jury assess the damages separately, the ct. will give judgment for that part which was not decided in the first action.—JENNINGS & LONG v. HUNT & BEARD (1820), 1 Nfld. L. R. 220.—NFLD.

434 xiv. —.]—Judgment of ct. of sessions a bar to a further action in the Supreme Ct. between the same parties.—PHELAN v. O'DONNELL & THOMPSON (1829), 2 Nfld. L. R. 4.—NFLD.

434 xv. —.]—Testator devised & bequeathed all his property to his wife "for her & his four children's maintenance" with the option of leasing or keeping the same for the said purpose. He further directed that when his children had attained 21 the whole property should be equally divided between the wife & the children. He appointed defts.

exors. An originating summons was taken out by pl'tf. to interpret the will & to determine the rights of pl'tf. & her children. At the hearing pl'tf. did not claim to be entitled as trustee, nor did she assert any right to care for a transfer of the estate:—*Held*: although pl'tf. would have been entitled to ask that an estate in the freehold & leasehold property should be vested in her for her life until the youngest child attained 21, yet the matter had been before the ct. on a previous originating summons, & then no application having been made to establish the rights now claimed, pl'tf.'s claim must be treated as being covered by the previous judgment, & was *res judicata*.—RE REAL, McDOWELL v. REAL (1914), 33 N. Z. L. R. 1342.—N.Z.

434 xvi. —.]—The holder of a bill having been absconded from an action concluding for restitution of the bill, on the ground of having obtained it without value & in collusion with bankrupts to defraud their creditors, was entitled to plead *res judicata* against an action of reduction on the same grounds, & containing the same conclusions.—PATTON v. CAMPBELL (1827), 5 Sh. (Ct. of Sess.) 193.—SCOT.

434 xvii. —.]—YOUNG v. MITCHELLS (1874), 1 R. (Ct. of Sess.) 1011; 11 Sc. L. R. 582.—SCOT.

434 xviii. —.]—A person who had been confined in a lunatic asylum raised an action of damages against the medical men who granted the certificate on which the warrant for his confinement proceeded. Upon the issue the jury found that pursuer was insane at the date in question & that he was justifiably sent to & confined in an asylum. Subsequently he brought an action against one of the medical men, founded on the granting of the certificate, & concluding for damages for slander:—*Held*: the action was excluded *exceptione rei judicate*.—MACKINTOSH v. WEIR (1875), 2 R. (Ct. of Sess.) 877.—SCOT.

p. Judgment on defect in pleading.]—A judgment recovered for a defect in pleading, & not on the merits, is no bar to another action.—BAKER v. BOOTH (1832), 2 O. S. 407.—CAN.

q. Award of arbitrator—Respecting real property—Subsequent action in ejectment.]—An award upon a question respecting real property, expressly referred, is binding upon the parties, so far as respects the rights of either to bring or defend an ejectment against the other.—DORR v. McDONALD v. LONG (1847), 4 U. C. R. 146.—CAN.

r. Dismissal of action—On technical grounds.]—A former suit had been



*Sect. 3.—Effect of res judicata: Sub-sect. 2, A. & B. (a) i. & ii.]*

been within their own knowledge when the cause was originally tried (LORD GORDON).—LOCKYER v. FERRYMAN (1877), 2 App. Cas. 519, H. L.

**436.** —.]—Estoppel by record operates as an estoppel in respect of the whole right claimed & not merely in respect of the particular relief unsuccessfully asked for. The owner of a water-mill brought an action to restrain the riparian owner of land higher up the river from obstructing his access to that land along the north bank of the river for the purposes of repairing the bank & cutting weeds, & based his claim to relief on the allegation in his statement of claim that he had a prescriptive right to an easement to pass along both banks of the river for these purposes. The action was dismissed:—*Held*: his failure in that action operated as an estoppel to prevent his setting up in subsequent proceedings brought by the riparian owner's successor in title a prescriptive right to pass along either bank for these purposes.—LONG v. GOWLETT, [1923] 2 Ch. 177; 92 L. J. Ch. 530; 130 L. T. 83; 22 L. G. R. 214.

As regards what judgment.]—See Sect. 2, sub-sect. 1.

Effect of judgment as estoppel.]—See Sub-sect. 1, ante.

*B. In respect of What Matters.*

*(a) Cause of Action.*

*i. In General.*

**437. General rule.]**—(1) Resolutions & differences when a bar in one action, shall be a bar in another.

(2) One barred in any action real or personal, by judgment on demurrer, confession, verdict, etc., is barred as to that, or the like action of the like nature, of the same thing, for ever.—FERRER'S CASE (1599), 6 Co. Rep. 7 a; 77 E. R. 263; *sub nom.* FERRERS v. ARDEN, Cro. Eliz. 668.

*Annotations:—Expld. & Apprvd.* Putt v. Royston (1682), 2 Show. 211. *Consd.* Outram v. Morewood (1803), 3 East, 346. *Refd.* Holford v. Platt (1618), Cro. Jac. 464; Rawlinson v. Oriet (1688), 1 Show. 75; Hustler v. Raines

instituted by pltf. which had been dismissed, as pltf. had not acquired the legal estate until after the bill was filed:—*Held*: in such circumstances the question was not *res judicata*.—ADAMSON v. ADAMSON (1880), 28 Gr. 221; *affd.* 7 A. R. 592; 12 S. C. R. 563.—CAN.

**s.** —.]—The dismissal of an action on the ground that it was prematurely brought is no bar to another action on the same demand after time has removed the objection.—BARBER v. MCCUAIG (2) (1900), 31 O. R. 593.—CAN.

**t.** —.]—The judgment that rejects an action for the non-observance of precedent formalities does not supply the basis of *res judicata* in a second action entered after observance of them.—COMMISSAIRES D'ÉCOLE DE LA PAROISSE DE ST. BONIFACE DE SHAWINIGAN v. SHAW-

**a.** —.]—Where a demand by pltf. on deft. is a condition precedent to the former's right of action, & no demand has been made before action brought, the dismissal of the action because of lack of demand is no bar to recovery in a second action brought after the making of a demand, because until a demand is made no cause of action exists, & therefore any action brought before demand is made is brought prematurely.—ANGLO-CANADIAN MORTGAGE INVESTMENT CORPN. v. SHAW, [1921] 2 W. W. R. 124; 14

Sask. L. R. 209; 59 D. L. R. 152.—CAN.

**b.** — For failure to comply with order for security for costs.]—The dismissal of an action for failure to comply with an order for security for costs is not a bar to another action for the same cause; but the ct. has inherent power to stay the second action till the costs of the first are paid.—SMITH v. MERCHANTS BANK OF CANADA (1917), 40 O. L. R. 309; 38 D. L. R. 321.—CAN.

**c.** —.]—LOWERY v. LASKIN, [1922] 1 W. W. R. 214; 15 Sask. L. R. 131.—CAN.

**d.** — Sale of property in execution—Reversal of decree on appeal—Suit for recovery of mesne profits of property sold.]—A. brought a suit against B. for compensation, but it was struck off, & B. obtained a decree for costs. A. appealed, but pending the appeal B. executed his decree, & in execution thereof, purchased a certain immovable property of A. & took delivery of possession. The Appellate Ct. remanded the case for re-trial on the merits, & a decree was passed in A.'s favour, & he got back his property. A. then brought a suit for the value of crops wrongfully appropriated by B. during the period he was in possession:—*Held*: the question to be decided did not relate to the execution, discharge, or satisfaction of the original decree within Civil Procedure Code, s. 244, because it did not arise at all until that decree had ceased to exist,

(1695), 2 Lut. 1414; Hitchin v. Campbell (1772), 2 Wm. Bl. 827; Buckland v. Johnson (1854), 15 C. B. 145. *Mentd.* Wigon v. Garret (1675), 3 Keb. 572; Lechmere v. Toplady (1690), 2 Vent. 169; Brunson v. Humphrey (1884), 14 Q. B. D. 141.

**438.** —.]—If A. is voted elected, B. cannot bring an action & say that he was duly elected & returned because his name does not appear upon record; & he is estopped to say that A. was not duly elected & returned (HOLT, C.J.).—PRIDEAUX v. MORRIS (1703), Holt, K. B. 523; 1 Lut. 82; 7 Mod. Rep. 13; 2 Salk. 502; 125 E. R. 43.

*Annotations:—Refd.* Kendall v. John (1707), Fortes. Rep. 104. *Mentd.* Phillips v. Smith (1717), 1 Com. 279; Myddelton v. Wynn (1746), Willes, 597.

**439.** —.]—A plea of decree dismissing a former bill was overruled, on the ground that although the new bill in part prayed the same relief, yet its main object must be taken to be different.—RATTENBURY v. FENTON (1833), Coop. temp. Brough. 60; 47 E. R. 22, L. C.; *subsequent proceedings* (1834), 3 My. & K. 505.

**440.** —.]—A plea of proceedings in another ct. of competent jurisdiction, must show not only that the same issue was joined as in the suit in this ct., but that the subject-matter was the same, & that the proceedings in the other ct. were taken for the same purpose.—BEHRENS v. SIEVEKING (1837), 2 My. & Cr. 602; 40 E. R. 769; *sub nom.* SIEVEKING v. BEHRENS & VON MELLE, 1 Jur. 329, L. C.

*Annotations:—Refd.* Bainbrigge v. Baddeley (1847), 3 Ph. 705; Osborne v. Eales (1864), 2 Moo. P. C. C. N. S. 125.

**441.** —.]—A general demurrer, on the ground of the subject-matter of the suit being *res judicata*, was allowed to a suit brought in the Supreme Ct. of Bombay, by a party claiming certain property, which appeared by the statement in the bill to have been the subject of a previous suit in the same Ct., in which pltf. had intervened by petition, & obtained some order, the nature or effect of which was not stated, & did not appear upon the record then before the Ct.—MUSHADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALLY MAHOMED SHOOSTRY (1851), 7 Moo. P. C. C. 382; 5 Moo. Ind. App. 187; 13 E. R. 927, P. C.

& such a suit was not barred by that section.—COFFIN v. KARBARI AWAT (1895), 1 L. R. 22 Calc. 501.—IND.

**e.** — Reserving to plaintiff right to sue again.]—In a former suit between the same parties, in which the same claim upon title was made, a decree dismissed the suit. But the judgment in the former suit stated that it was left open to pltf. to sue again, & that no matters affecting the rights of the parties were decided between them:—*Held*: the prior decree was not a final decision within Code of Civil Procedure, s. 13, & the defence of *res judicata* was not maintained.—PARSOTAM GIR v. NARBADA GIR (1899), 1 L. R. 21 All. 505; 1 L. R. 26 Ind. App. 175; 3 C. W. N. 517.—IND.

**f.** Necessity for enrolment.]—A former decree dismissing a bill if not enrolled & pleaded is not an absolute bar to another suit for the same demand.—JOLY v. SWIFT (1847), 11 L. Eq. R. 410.—IR.

**PART II. SECT. 3, SUB-SECT. 2.—B. (a) i.**

**437 i. General rule.]**—Recovery against the sheriff for a false return of *nulla bona* after money made:—*Held*: a bar to an action against the sheriff & his sureties on their covenant, for not paying over such money.—MILLER v. CORBETT (1867), 26 U. C. R. 478.—CAN.

**g.** — Same action brought in different form.]—A new action, although



**442.** —.]—The defence of *res judicata* cannot be sustained where the grounds of relief alleged by the bills in the two suits are different.—**HUNTER v. STEWART** (1861), 4 De G. F. & J. 168; 31 L. J. Ch. 346; 5 L. T. 471; 8 Jur. N. S. 317; 10 W. R. 176; 45 E. R. 1148, L. C.

**Annotations:**—**Expld.** **Simpson v. Fogo** (1863), 1 Hem. & M. 195. **Consd.** **Srimut Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar** (1866), 11 Moo. Ind. App. 50; **Ord v. Ord**, [1923] 2 K. B. 432. **Refd.** **Caird v. Moss** (1886), 33 Ch. D. 22. **Mentd.** **Re Agra & Masterman's Bank, Ex p. Asiatic Banking Corpn.** (1867), 36 L. J. Ch. 222; **Wilson v. Church** (1879), 13 Ch. D. 1; **Re Hilton, Ex p. March** (1892), 67 L. T. 594.

**443.** —.]—(1) To constitute a good plea of *res judicata*, it must be shown that the former suit was one in which pltf. might have recovered precisely that which he seeks to recover in the second.

(2) Where pltf. had, under a decree of the Admlty. Ct. in a suit for collision, obtained the whole proceeds of the sale of deft.'s vessel:—**Held:** Such recovery was no bar to a subsequent action in a ct. of common law, the amount so recovered in the Admlty. Ct. being insufficient to cover the damage which pltf. had sustained.—**NELSON v. COUCH** (1863), 15 C. B. N. S. 99; 2 New Rep. 395; 33 L. J. C. P. 46; 8 L. T. 577; 10 Jur. N. S. 366; 11 W. R. 964; 1 Mar. L. C. 348; 143 E. R. 721.

**Annotations:**—**As to (1)** **Expld.** **Gibbs v. Cruikshank** (1873), L. R. 8 C. P. 454. **Consd.** **Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London**, [1918] 1 K. B. 180. **Refd.** **Brunsdon v. Humphrey** (1884), 14 Q. B. D. 141; **Birmingham Corpn. v. Allsopp** (1918), 88 L. J. K. B. 549; **The Joannis Vatis** (No. 2), [1922] P. 213. **As to (2)** **Appld.** **Mid. Ry. v. Martin**, [1893] 2 Q. B. 172. **Refd.** **The Sylph** (1867), L. R. 2 A. & E. 24; **Gibbs v. Cruikshank** (1873), L. R. 8 C. P. 454; **Brunsdon v. Humphrey** (1884), 14 Q. B. D. 141; **Serrao v. Noel** (1885), 15 Q. B. D. 549; **The Joannis Vatis** (No. 2), [1922] P. 213; **Ord v. Ord**, [1923] 2 K. B. 432.

**444.** —.]—Demurrer will not lie to a bill on the ground of *res judicata*, unless it avers that everything in controversy as the foundation of relief was also in controversy in the former suit.—**MOSS v. ANGLO-EGYPTIAN NAVIGATION CO.** (1865), 1 Ch. App. 108; 35 L. J. Ch. 179; 12 Jur. N. S. 13; 14 W. R. 150, L. C.

**Annotations:**—**Refd.** **Tredeggar v. Windus** (1875), L. R. 19 Eq. 607; **Houstoun v. Sligo** (1885), 29 Ch. D. 448.

**445.** —.]—That an enrolled decree in a

called "an action in damages," & for a different amount by reason of the addition of certain accessory sums (costs, etc.), is, under this disguise, an action for the same cause as that already decided, & ought to be rejected as *res judicata*.—**DUSSAULT v. TANGUAY** (1907), Q. R. 17 K. B. 97.—**CAN.**

**h.** — **Judgment against one of several persons—Liable for same cause of action.**—Where two or more persons are liable for the same cause of action, a judgment against one of them, even where obtained on consent, is a bar to an action against the others.—**BLACK v. DOMINION FIRE PROOFING CO.** (1915), 31 W. L. R. 352; 8 W. W. R. 823; 23 D. L. R. 161.—**CAN.**

**k.** **Judgment in action for ejectment based on lease—Subsequent suit to eject tenant as trespasser.**—Pltf. in 1896 sued defts. to eject the latter from a certain piece of land, alleging that defts. held it under certain leases dated July, 1864. The genuineness of the alleged leases was decided in favour of defts. In 1874 pltf. brought the present suit to eject defts. In this suit pltf. sued simply as owners, & alleged that defts. were in occupation as tenants paying rent to pltf., & that defts. had refused to give up possession:—**Held:** pltf. were not barred by the judgment in the former suit.—**GURDHAR MANORDAS v. DAYABHAI KALABHAI** (1882), I. L. R. 8 Bom. 174.—**IND.**

**l.** **Action for redemption by purchaser of mortgaged land against mortgagee—Second suit against vendor & mortgagee for recovery of possession.**—In 1879 pltf. purchased from B. the land in question in the suit, which was then in the possession of R. as mtgee. B. undertook to pay off the mtge., but failed to do so. In 1881 pltf. brought a suit for redemption against R. which was dismissed for non-appearance of pltf. He subsequently filed the present suit against B. & R. to recover possession of the land:—**Held:** the cause of action in the two suits was different, & the present suit was not barred.—**RAMCHANDRA JIVAJI TILVE v. KHATAL MAHOMED GORI** (1885), I. L. R. 10 Bom. 28.—**IND.**

**m.** **Judgment not open to second appeal—Subsequent suit not subject to same restriction.**—A decision in a previous suit of a small cause nature, in which no second appeal is allowed by law, is no bar to a subsequent suit in the same ct. which not being of a small cause nature is open to second appeal.—**AVANASI GOUNDEN v. NACHAMMAL** (1905), I. L. R. 29 Mad. 195.—**IND.**

**n.** **Dismissal of mortgage action—Subsequent suit on another mortgage—In respect of same properties.**—A suit brought by A. against B. on an alleged mtge. which was dismissed, is no bar to another suit by A. against B. on another

former suit may be a bar to the relief sought by a second suit, the objects & purposes of the two suits must be identical, & in that case, before the ct. has jurisdiction over the second suit, the enrolment of the decree must be vacated; but where the objects are not the same, there is no such necessity. Where in a creditor's suit for the administration of the estate of J. a decree was made in the presence of A. declaring that certain property belonged to J. beneficially, & that decree was enrolled:—**Held:** such enrolment did not render it incumbent on A. to file a bill of review & get the enrolment vacated, before instituting a suit to set aside the sale by which J. purported to have become the beneficial owner of the property.—**TURNER v. TEPPER** (1877), as reported in 46 L. J. Ch. 703; **affd. sub nom. WIDGERY v. TEPPER**, 7 Ch. D. 423, C. A.

**446.** — **Application to counterclaim.**—A counterclaim can be made only where an action can be brought, therefore, a deft. is estopped from counterclaiming for that in respect of which he has already obtained judgment.—**BIRMINGHAM ESTATES CO. v. SMITH** (1880), 13 Ch. D. 506; 49 L. J. Ch. 251; 42 L. T. 111; 28 W. R. 666.

**447.** —.]—**LONG v. GOWLETT**, No. 436, *ante*.

**As regards what judgments.**—See Sect. 2, sub-sect. 1, *ante*.

**Effect of judgment as estoppel.**—See Sub-sect. 1, B. (c), *ante*.

## ii. Arising out of Contract.

**448.** **Bond—With double condition—Judgment in action for non-performance of one condition—Action on whole bond.**—In an action for the non-performance of one condition on a bond with a double condition, if the verdict be for deft., it is a bar to the whole bond.—**ANON.** (1579), 3 Dyer, 371 b; 73 E. R. 832.

**449.** — **Unsuccessful action for money lent—Failure to prove consideration—Action on bond as voluntary bond.**—Where a bond is sued on as for money lent & pltf. fails in proving the consideration, he cannot afterwards set it up as a voluntary bond.—**RICHARDSON v. JACKSON** (1737), West temp. Hard. 237; 25 E. R. 915, L. C.

**450.** — **Judgment in action on bond—Action**

mtge. in respect of the same properties.—**THIRIKAIKAT MADATHIL RAMAN v. THIRUTHIYIL KRISHNEN NAIR** (1905), I. L. R. 29 Mad. 153.—**IND.**

## PART II. SECT. 3, SUB-SECT. 2.—B. (a) ii.

**o.** **Sale of goods—Action dismissed as premature—Second suit claiming same relief.**—Pltf. having failed upon a trial for a portion of his claim for goods sold because the term of credit had not expired when he sued:—**Held:** the judgment recovered in the suit was no bar to a subsequent action for the same goods.—**CHISHOLM v. MORSE** (1863), 11 C. P. 589.—**CAN.**

**p.** **Contract of employment—Judgment for wages—Subsequent action for damages for breach of contract.**—On Feb. 1, 1912, deft. hired pltf. for one year from that date "at the rate of \$900 per year, wages payable monthly." Pltf. entered upon his employment, performed the duties until Oct. 11, 1912, & was paid \$75 at the end of each month, the last payment being made at the end of Sept. On Oct. 11, 1912, deft. dismissed pltf., alleging the improper discharge of pltf.'s duty; but the dismissal was in fact without cause. On Nov. 7, pltf. sued in a division ct. for his wages for Oct., & recovered judgment for \$75, which deft. paid. On Dec. 27, pltf. began a new action

*Sect. 3.—Effect of res judicata: Sub-sect. 2, B. (a) ii.]*

for further breaches.]—8 & 9 Will. 3, c. 11, does not apply to cases where the damages assessed are calculated by the jury to meet & satisfy the entire condition of a bond, etc.: as where pltf., having recovered a verdict in action on a bond for replacing stock & paying dividends, etc. in the meantime, & the jury assess damages for the stock not having been transferred, & for the accruing dividends, etc., & pltf., long subsequently, obtains judgment & satisfaction for the whole by an action of debt on the judgment, he cannot afterwards sue by *sci. fa.* as for further breaches so to obtain satisfaction for the loss of the dividends, etc., sustained by the delay of satisfaction during the interval between the two judgments.—*SAVILLE v. JACKSON* (1824), M'Cle, 377; 13 Price, 715; 147 E. R. 1131.

**451. Judgment in assumpsit—Action on bond.]**—If one be bound in an obligation, & afterwards promises to pay the money, *assumpsit* lies upon this promise; & if he recover all in damages, this shall be a bar in debt upon the obligation.—*ASHBROOKE v. SNAPE* (1591), Cro. Eliz. 240; 78 E. R. 496.

*Annotation:—Refd. Stewart v. Todd* (1846), 9 Q. B. 767.

**452. Judgment on simple contract—Action on specialty.]**—To debt upon a specialty against an exor., it is a good bar, that judgment has been had against him on a simple contract, *ultra, etc.*—*DAVIES v. MONKHOUSE* (1729), Fitz-G. 76; 94 E. R. 660.

*Annotation:—Refd. Hawkins v. Day* (1753), Amb. 160.

**453. — Action on covenant in deed.]**—To a count in covenant on an annuity deed, with a breach for non-payment of the annuity on June 15, 1834, deft. pleaded a judgment recovered against him by pltf. in an action of debt, for the sum of £2,000, of Easter term, 1832, concluding with an averment, that the causes of action in the two suits were identical. On general demurrer:—*Held*: a bad plea.—*FEW v. BACKHOUSE* (1838), 8 Ad. & El. 789; 1 Per. & Dav. 34; 1 Will. Woll. & H. 658; 8 L. J. Q. B. 30; 112 E. R. 1037.

*Annotation:—Refd. Todd v. Stewart* (1846), 9 Q. B. 759.

**454. Judgment on plea of set-off—Action for sum claimed by set-off.]**—When a verdict is found against deft. on a plea of set-off he is estopped from suing pltf. for the demand specified in the plea of set-off.—*EASTMURE v. LAWS* (1839), 5 Bing. N. C. 444; 7 Dowl. 431; 2 Arn. 54; 7 Scott, 461; 8 L. J. C. P. 236; 3 Jur. 460; 132 E. R. 1170.

*Annotation:—Mentd. Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151.

**455. — — —.]**—B., to an action by A., pleaded a set-off exceeding A.'s claim; an award under 9 & 10 Vict., c. 95, s. 77, awarded to B. the amount of excess. B. sued A. for this; A. pleaded judgment recovered:—*Held*: (1) the plea was no answer; (2) the judgment in the first action was no bar to an action by B. for the balance of his claim against A., either on the count.—*JONES v.*

**456. Agreement for sale of land—Unsuccessful action to recover deposit before contract rescinded—Action to recover deposit after contract rescinded.]**

—(1) Where A. agreed to demise a house to B. for a term, in consideration of £3,000 then paid "by way of deposit, & in part of £5,500," the whole purchase-money, possession to be delivered & accepted on a day named, & B. agreed to accept such demise, but, on the day, refused to accept, & A., afterwards, disposed of the house to a third party:—*Qu.*: whether, in the absence of any provision that the deposit should be forfeited, or of any clause in the agreement, except as above, showing the intention of the parties in this respect, B. could recover the deposit from A.

(2) The intention may be collected from other parts of the agreement. Thus, where there was a distinct clause providing that either party making default should forfeit £1,000:—*Held*: the deposit was not to be forfeited, & might be recovered back on A.'s disposing of the house as above, but it could not be recovered back before A. disposed of the house.

(3) Under the above circumstances, an action brought for the deposit after the day named in the agreement, but before A. had disposed of the house, having failed:—*Held*: it was no estoppel to an action brought after A. had disposed of the house, & the facts negated a plea that the causes of the two actions were identical.—*PALMER v. TEMPLE* (1839), 9 Ad. & El. 508; 1 Per. & Dav. 379; 8 L. J. Q. B. 179; 112 E. R. 1304; *previous proceedings* (1836), 6 Nev. & M. K. B. 159.

*Annotations:—As to* (1) *Consd. Casson v. Roberts* (1862), 32 L. J. Ch. 105. *Refd. Hinton v. Sparkes* (1868), L. R. 3 C. P. 161; *Howe v. Smith* (1884), 27 Ch. D. 89; *Harrison v. Holland, Hannon & Cubitts* (1921), 91 L. J. K. B. 337. *As to* (2) *Consd. Hinton v. Sparkes* (1868), L. R. 3 C. P. 161; *Howe v. Smith* (1884), 27 Ch. D. 89. *Refd. Ocken-den v. Henly* (1858), 27 L. J. Q. B. 361; *Depree v. Bedborough* (1863), 4 Giff. 479; *Bishop v. Taylor* (1891), 60 L. J. Q. B. 556; *Cornwall v. Henson*, [1899] 1 Ch. 710; *Chillingworth v. Esche*, [1924] 1 Ch. 97.

**457. Agreement to give promissory note & provide mortgage—Judgment in action for non-delivery of note—Action for failure to provide mortgage.]**—Pltf. & deft. agreed that the former should give up to the latter a business which they had carried on in partnership, in consideration of pltf.'s receiving from deft. a promissory note for £730, payable by instalments; & it was further agreed that in case a certain mtge. of £2,000 on pltf.'s property should be called in before the note should be paid off, deft. should immediately pay the balance remaining due on the note, or find a like mtge., free of expense to pltf. Pltf., after the mtgees. had called in the mtge., but before the same was paid off, brought an action in the Exchequer on the agreement, alleging for breach the non-delivery of the note, which action terminated under a judge's order, by deft.'s giving pltf., among other things, a note for £505. Pltf. having brought a second action in this ct. upon the agreement, in which the breach assigned was, that although the mtge. money had been called in, deft. had neither paid the balance due to him nor provided a fresh mtge., whereby pltf. had been put to great expense in procuring the loan from other parties:—*Held*: a plea which set up

in the division ct. for the Nov. wages, to which deft. entered a special dispute, denying pltf.'s claim & setting up the recovery of judgment in the

bar. Thereupon action; & in Apr. 1913, began this action, in a county ct., claiming \$225 damages for breach of contract:—*Held*: pltf.'s claim was not barred by the judgment in the first division ct. action, & he was

entitled to recover in this action.—*HAYES v. HARSHAW* (1913), 5 O. W. N. 571; 30 O. L. R. 157.—*CAN.*

*q. — Unsuccessful action on contract—Subsequent action for work & materials.]*—Resp. contractors having agreed to do all work necessary to put down a well & erect a pump until a supply of water was obtained for the applt. council, & having been

directed to stop boring by the engineer, put in a pump & brought an action upon the contract, in which they failed for want of the engineer's certificate. They subsequently offered to do what was necessary under the contract to complete the contract as being at an end. Resps. brought a second action for work & materials:—*Held*: the first action had not put an end to the contract, & resps.



the recovery in the former action afforded no answer to the declaration, the former action having been brought for a different breach of the agreement.—*BRISTOWE v. FAIRCLOUGH* (1840), 1 Man. & G. 143; 1 Scott, N. R. 161; 9 L. J. C. P. 245; 133 E. R. 281.

**458. Sale of goods—Judgment in action for price of goods—Action for balance.]—**Debt for £400. First plea, as to £43 6s. 9d., payment; third plea, as to the residue, £356 13s. 3d., that pltf. impleaded deft. for the residue of the said cause of action, & that such proceedings were had that pltf. recovered in the said action £314 8s. as well for their damages in the said action, & in respect whereof pltf. had impleaded defts., as for their costs. Replication, that the residue of the causes of action in the declaration mentioned were not the causes of action in the third plea mentioned in respect of which the judgment was recovered. The jury found, that the residue of the causes of action in the declaration mentioned, were the residue of the causes of action in the said plea mentioned, & for & in respect of which the judgment was recovered. On motion for judgment *non obstante Veredicto*:—*Held*: (1) the plea must be taken to mean that pltf. had a judgment of the ct. in respect of all the damages which he sued for; that was, the same causes of action as constituted the residue of the causes of action, & which was the same as the ordinary plea of judgment recovered; (2) the plea was good in substance, whether the true meaning of it was, that, as to part, pltf. recovered, & as to the residue, it was found that no more was due, the omission to plead the latter part of the judgment by way of estoppel being matter of form, or pltf., having once sued for the same debt, & having had the amount assessed & adjudicated on, could not sue again for the same debt.—*STEWART v. TODD* (1846), 9 Q. B. 767; 16 L. J. Q. B. 327; 8 L. T. O. S. 414; 11 Jur. 560; 115 E. R. 1471, Ex. Ch.; *revsg.* S. C. *sub nom.* *TODD v. STEWART*, 9 Q. B. 759.

*Annotations*:—As to (2) *Refd.* *Buckland v. Johnson* (1854), 2 C. L. R. 784. *Generally*, *Mentd.* *Stevens v. Tillet* (1870), L. R. 6 C. P. 147.

**459. Contract of employment—Recovery of damages for non-performance—Action on quantum meruit.]—**Pltf. was hired by deft. at a year's salary, payable quarterly, & was wrongfully dismissed by deft. in the middle of a quarter. He then brought an action against deft., declaring in a special count for breach of the agreement, & *indebitatus assumpsit* for the wages due for the year during which he had actually served. Pltf. in this action recovered the wages for the year, & also on the special count damages for the dismissal, but the jury expressly omitted to give any damages for the broken quarter. He afterwards brought *indebitatus assumpsit* for work & labour to recover a proportional part of the quarter's salary up to the day of dismissal:—*Held*: (1) the second action could not be sustained, as he had by the previous action elected to treat the contract as existing, & had recovered damages for its non-performance, & could not, afterwards, treat it as rescinded, & recover on a *quantum meruit*; (2) this defence was open under *non assumpsit*, as,

under the circumstances, no debt had accrued; (3) the damages in the former action should have been calculated to include the wages for the broken quarter.—*GOODMAN v. POCOCK* (1850), 15 Q. B. 576; 19 L. J. Q. B. 410; 14 Jur. 1042; 117 E. R. 577.

*Annotation*:—As to (1) *Refd.* *Taylor v. Laird* (1856), 25 L. J. Ex. 329.

—*See, further*, MASTER &

SERVANT.

**460. — Judgment at common law for master's wages—Judgment unsatisfied—Action against ship in admiralty.]—**A master having sued for his wages at common law & recovered judgment, which judgment remained unsatisfied in consequence of deft.'s bkpcy., & having further proved his debt under deft.'s bkpcy.:—*Held*: he was entitled to sue the ship in the Admlty. Ct., notwithstanding the ship had changed hands.

The question then is whether this master, having by law a twofold security for his wages, may avail himself of the second, the first which he tried, the personal action, having practically failed to give relief (*DR. LUSHINGTON*).—*THE BENGAL* (1859), Sw. 468; 5 Jur. N. S. 1085; 166 E. R. 1220.

*Annotations*:—*Refd.* *Nelson v. Couch* (1863), 15 C. B. N. S. 99; *The Mali Ivo* (1869), L. R. 4 A. & E. 356; *The Cella* (1888), 57 L. J. P. 43; *The Joannis Vatis* (No. 2), [1922] P. 213.

**461. Negotiable instrument—Settlement of action on cheque—Subsequent action for breach of agreement under which judge's order drawn up.]—**An action by A. against B., to recover the amount of two cheques & interest, & the trial appointed for Dec. 7, a negotiation took place between the attorneys on Dec. 6, when it was arranged that the record should be withdrawn, & that B. should submit a judge's order for payment of the amount claimed on Dec. 14, otherwise judgment, & that certain proceedings in Chancery taken by B. against A. should be withdrawn. An order was accordingly drawn up & served. B. subsequently discovering evidence that he conceived would enable him to substantiate his defence to the action, obtained a rule to set aside the judge's order, upon payment of costs. These costs were taxed & paid to A., who afterwards brought an action in the ct. against B. for breach of the agreement under which the judge's order was drawn up. The ct. refused to stay the proceedings in the second action, it being considered that it was not founded upon the same cause of action as the first.—*WADE v. SIMEON* (1845), 1 C. B. 610; 3 Dow. & L. 27; 14 L. J. C. P. 188; 5 L. T. O. S. 95; 9 Jur. 472; 135 E. R. 680.

*Annotation*:—*Refd.* *Chambers v. Mason* (1858), 5 C. B. N. S. 59.

**462. — Unsuccessful action on bill of exchange—On ground of agreement by plaintiff to give time to defendant—Action on same bill.]—**In *assumpsit* by indorsees against the acceptor of a bill of exchange, deft. pleaded, that pltf. had brought a former action against him upon the same bill, setting out the declaration in such former action, that deft. pleaded to the count on the bill, that, after the acceptance & indorsement thereof, & whilst pltf. were the holders, & before it became

were entitled to judgment.—*ATHLONE RURAL DISTRICT COUNCIL v. CAMPBELL & SONS* (1913), 47 L. L. T. 142.—*IR.*

*r.* **Negotiable instrument—Judgment against one of two parties jointly & severally liable—Subsequent action against other party.]—**Defts. G. & N. were sued jointly as makers of a joint & several note. N. appeared & pleaded, but, by arrangement, nothing was

done in relation to the claim against G. N. withdrew his defence, & confessed the action, & final judgment was entered against him, on which some payments were made. Pltf. afterwards commenced proceedings against G. who, under an agreement reserving his rights, appeared & pleaded:—*Held*: the judgment entered on confession against N., was an answer to the claim subsequently made against G.—*MCDONALD*

*v. GILLIS* (1900), 33 N. S. R. 244.—*CAN.*

*s.* — **Dismissal of action on promissory note—Second suit on basis of entries in account.]—**Defts. borrowed money from pltf. & executed a promissory note therefor in his favour. Pltf. sued upon the note; but the suit was dismissed, not on account of any defect in the promissory note, but



*Sect. 3.—Effect of res judicata: Sub-sect. 2, B. (a) ii. & iii.]*

due, it was agreed between pltf. & deft., that, in the event of the bill being dishonoured, pltf. should receive from deft. a warrant of attorney for the amount of the bill, with interest & expenses, & that judgment should be entered up thereon, but that no execution should issue upon such judgment until Dec. 25, 1848, & that the time for payment of the bill should be extended until that day; that the bill became due on Sept. 22, 1847, & that deft. was ready & willing to give & execute, & then tendered & offered to pltf., his warrant of attorney, pursuant to the agreement, & requested them to accept the same, & to extend the time of payment of the bill until Dec. 25, 1848, but that pltf. refused & neglected so to do, & in violation of the agreement, sought to enforce payment of the bill; that pltf. replied *de injuria* to such plea; & that deft. obtained judgment in the said action. The plea then proceeded to aver the identity of the bill & the causes of action in both cases; to this plea, pltf. replied, that they did extend the time for payment of the bill until & after the said Dec. 25, 1848, & that they had not, since the said recovery in the said plea mentioned, sought to enforce the payment of the bill, which still remained unpaid, & that deft. had not given or executed to pltf. a warrant of attorney:—On demurrer to the replication:—*Held*: the plea, though containing unnecessary details of the pleadings in the former action, was a good answer to this action, & the replication was bad.—*OVERTON v. HARVEY* (1850), 9 C. B. 324; 1 L. M. & P. 233; 19 L. J. C. P. 256; 14 L. T. O. S. 466; 14 Jur. 902; 137 E. R. 918.

*Annotation*:—*Reid*. *Belshaw v. Bush* (1851), 11 C. B. 191.

**463. — Judgment for interest—Action for principal secured by instrument.]—**Defts., exors. of R., were sued upon a promissory note made by him more than six years before action whereby R. promised "to pay to pltf., £32 with interest thereon at the rate of 5 per cent. *per annum*." To take the case out of Stat. Limitations, pltf. relied upon a payment of interest upon the note made by defts. two years before in obedience to a county ct. judgment:—*Held*: a promise to pay the debt could not be inferred from a payment of interest made under legal process, & the debt was not taken out of the operation of Stat. Limitations.

*Semble*: pltf.'s right of suing for the principal secured by the note was not barred by the judgment for interest recovered in the county ct.—*MORGAN v. ROWLANDS* (1872), L. R. 7 Q. B. 493; 41 L. J. Q. B. 187; 26 L. T. 855; 20 W. R. 726.

*Annotations*:—*Consd.* *Firth v. Slingsby* (1888), 58 L. T. 481. *Reid*. *Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231; *Re Fountaine, Fountaine v. Amherst* (1909), 78 L. J. Ch. 648. *Mentd.* *Green v. Humphreys* (1884), 26 Ch. D. 474; *Fettes v. Robertson* (1921), 37 T. L. R. 581; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

**464. Agreement not to enforce covenants of deed—Judgment in action on agreement—Action to enforce covenants of deed.]—**An agreement between the administrator of the covenantor & the covenantor, not to enforce performance of the

covenants in the deed provided the latter would pay certain rent, may be a good consideration, for a parol promise to pay such rent; & the enforcement of such promise is not open to the objection that it is seeking to vary by parol the terms of an instrument under seal.

*Semble*: a recovery in such an action would afford a good equitable plea in bar to an action on the deed for the same rent.—*NASH v. ARMSTRONG* (1861), 10 C. B. N. S. 259; 30 L. J. C. P. 286; 7 Jur. N. S. 1060; 9 W. R. 782; 142 E. R. 451.

*Annotation*:—*Reid*. *Parker v. Briggs* (1893), 37 Sol. Jo. 452.

**465. Lease—Unsuccessful suit for relief—Second suit claiming same relief—But adding allegations of fraud.]—**Pltf., on Nov. 3, 1860, filed a bill praying relief in respect of a lease dated in Apr., 1856, & other matters. A demurrer by deft. for want of equity was, on Dec. 6, 1860, allowed, & fourteen days given to amend, or the bill to be dismissed, with costs. The bill was not amended, & the order made was signed & enrolled. In Mar., 1861, pltf. filed another bill in this ct., setting forth the same documents, & praying for relief in the same terms as in the former bill; but the bill contained allegations of actual fraud in addition to those in the former bill. Deft. pleaded the whole of the former bill & the subsequent proceedings; that the ct., upon the demurrer, clearly decided upon the merits of the question between pltf. & himself, & determined the rights of pltf. & himself in respect of the matter; that this bill was for the same matter, & that the documents set forth in both bills were the same; but the plea did not aver that the allegations in support of the relief prayed by this bill were the same as the allegations in the former bill:—*Held*: the plea was bad in point of form, & it must be overruled, with costs.—*LONDONDERRY (MARCHIONESS) v. BAKER* (1861), 3 De G. F. & J. 701; 30 L. J. Ch. 895; 4 L. T. 538; 7 Jur. N. S. 811; 9 W. R. 763; 45 E. R. 1050, L. JJ.

**466. — Judgment in action for breaches of covenants—Action to recover amount necessary to put premises in repair—On expiry of sub-lease.]—**Certain premises were demised to the predecessors in title of pltf. for 61 years from Michaelmas, 1837, subject to covenants to repair & deliver up in repair. The premises were sub-demised to the predecessors in title of deft. subject to the same covenants. On Apr. 4, 1894, an action was commenced by pltf. against deft. for damages for the breaches of the covenants, & £1,305 was recovered, none of which was expended in repairing the premises. On Sept. 19, 1898, the term of the underlease expired, & pltf. claimed the sum that it would cost to put the premises into such state of repair as deft. would be bound to leave them at the end of the term, making due allowance for the sum of £1,305 they had received:—*Held*: the previous action was no estoppel, & the true measure of damages of the breaches of covenant was the cost of putting the premises into the state of repair in which the tenant was bound to leave them at the expiration of the said term, less the

owing to pltf.'s personal default, & the order of dismissal became final:—*Held*: pltf. could not thereafter sue deft. on the basis of entries in pltf.'s books of account to recover the same money.—*MUNDAR BIBI v. BAIJ NATH PRASAD* (1919), I. L. R. 42 All. 193.—*IND.*

**t. Judgment against one of several joint owners—Property in possession of mortgagee.]—**The owners of a vessel mtged., & in the possession of & navi-

gated by the mtgee., are not liable for the loss of goods shipped on her; & if they were liable, although sued in case, yet, as their liability would be founded on contract, & not custom, the acquittal of one would discharge the rest.—*WILKES v. FLINT, WOODRUFF v. CLEMENT* (1835), 4 O. S. 19.—*CAN.*

**a. Choice of one of two statutory remedies—Subsequent suit to enforce the other.]—**Where a workman has

recovered part of his wages by seizure & sale in a joint action with other workmen against his employer under Woodman's Lien for Wages Act, he is estopped from proceeding under Mechanics' Lien Act, s. 27, for the balance of his wages.—*WAKE v. CANADIAN PACIFIC LUMBER CO., LTD.* (1901), 8 B. C. R. 358.—*CAN.*

**b. Mortgage—Action on covenant—Subsequent suit for damages.]—**An action on the covenant in mtge. cannot

sum of £1,305 & interest.—**EBBETTS v. CONQUEST** (1900), 82 L. T. 560; 16 T. L. R. 320; 44 Sol. Jo. 378, D. C.

*Annotation*:—**Mentd.** *Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516.

**467. Promise to make settlement on marriage—Decree in administration suit on death of promisor—Suit for specific performance of promise.**—On Apr. 1, 1845, J. wrote as follows to H.: "I will still adhere to my last proposition, viz., to allow Elizabeth, J.'s daughter, £100 *per annum*; & if you like the situation, one of my houses to reside in; & that at my decease she shall be entitled to her share in whatever property I may die possessed of." H. married the daughter, & received the £100 *per annum* during the life of J., who died in 1859, leaving his widow, one son & the daughter surviving. By his will he devised & bequeathed certain real & personal property upon trusts giving his daughter a life interest in one-third of all the property, & a contingent interest only in the other two-thirds. By a codicil he bequeathed her an annuity, but less than those which he gave to his son & widow. A bill was filed by the daughter & her husband, praying a declaration that, by virtue of the letter of Apr. 1, 1845, she was entitled to one equal third of testator's real & personal estate:—*Held*: inasmuch as testator had used a *videlicet* in the letter, parol evidence as to it was inadmissible; the words "her share" meant "her legal share," & all she was thereby entitled to was one-third of testator's personal estate, after payment of his debts & funeral & testamentary expenses, & costs of an administration suit.

A bill for specific performance was filed after the suit had been instituted between the same parties for the administration of testator's estate. The usual administration decree had been made, but no certificate issued in it:—*Held*: plffs. in the specific performance suit were not precluded from instituting it by reason of the decree in the administration suit & there had not been any acquiescence on their part.—**LAVER v. FIELDER** (1862), 32 Beav. 1; 1 New Rep. 188; 32 L. J. Ch. 365; 7 L. T. 602; 9 Jur. N. S. 190; 11 W. R. 245; 55 E. R. 1.

*Annotations*:—**Mentd.** *Keays v. Gilmore* (1874), 22 W. R. 465; *Re Allen, Hincks v. Allen* (1880), 49 L. J. Ch. 553; *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331.

**468. Mortgage—Judgment for principal & interest—Action on covenant to pay future interest.**—A mtgor. covenanted to pay principal & interest on a day certain, & after that day to pay interest so long as any part of the principal remained due on the security:—*Held*: the liability on the covenant to pay future interest was not destroyed by a judgment for the principal sum & interest.—**POPPLE v. SYLVESTER** (1882), 22 Ch. D. 98; 52 L. J. Ch. 54; 47 L. T. 329; 31 W. R. 116.

*Annotations*:—**Consd.** *Economic Life Assco. Soc. v. Osborne*, [1902] A. C. 147. **Refd.** *Re Sneyd, Ex p. Fewings* (1883), 25 Ch. D. 338; *Arbuthnot v. Bunsilall* (1890), 62 L. T. 234. **Mentd.** *Faber v. Lathom* (1897), 77 L. T. 168.

**469. — Judgment in action on series of charges—Action on charge not included in first action.**—Deft. charged her property with repayment of £100 & interest to pltf., & subsequently

gave him four supplementary charges to secure further advances. She then gave him another supplementary charge to secure a further advance & his professional costs. Pltf. brought an action on the first five charges, omitting the sixth, which was mislaid, & obtained an order for foreclosure *nisi*. He afterwards found the sixth charge, & applied for an order extending the relief to that charge, but his application was dismissed with costs. He then brought a fresh action for foreclosure on all the six charges. Deft. took out a summons asking that the proceedings might be stayed on the ground that pltf. was estopped by the foreclosure order:—*Held*: the subject-matter of the fresh action was not the same as that in the first action, & in the circumstances pltf. was not estopped from setting up his present case, & deft.'s application must be dismissed with costs.—**BAKE v. FRENCH**, [1907] 1 Ch. 428; 76 L. J. Ch. 299; 97 L. T. 131.

*Annotations*:—**Mentd.** *Reid v. Cupper*, [1915] 2 K. B. 147; *Puddephatt v. Leith* (No. 2), [1916] 2 Ch. 168.

**470. Articles of association of company—Unsuccessful action in respect of mode of ascertaining "net profits"—Action by another shareholder for declaration that no "net profits" earned available for dividend.**—**LEE v. NEUCHATEL ASPHALTE Co.** (1886), 3 T. L. R. 103.

**471. Agreement for assignment of patent—Judgment in action for specific performance—Action for damages for breach of warranty.**—**NATIONAL CO. FOR DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS, LTD. v. GIBBS** (1901), 18 R. P. C. 393; *previous proceedings*, [1900] 2 Ch. 280, C. A.

### iii. Arising out of Tort.

**472. Defamation—Judgment in action for words imputing felony—Second action for words slandering plaintiff in way of trade.**—The declaration in an action for slander alleged pltf. to be a trader, & that the words were spoken of him as a trader. The words were "He cheated me," meaning that pltf. in the way of his trade was dishonest, "He is a thief & robbed me of £100," meaning that pltf. in the way of his trade had contracted a debt with deft., & in a dishonest manner avoided paying part of it. There were other similar words similarly explained in other counts. There was then an averment of special damage. Plea, judgment recovered for the same grievances. Replication *nul tiel* record. On the trial by the record, a record of a previous action for slander by pltf. against deft. was produced, in which the words were, "that thief is a villain, a scoundrel & a rascal, & I can prove him a thief any moment." In that action there was no inducement that the words were spoken of pltf. as a trader & no averment of special damage:—*Held*: the record produced did not support the plea that the grievances for which the judgment had been recovered were the same.—**WADSWORTH v. BENTLEY** (1853), Bail Ct. Cas. 203; 2 C. L. R. 127; 23 L. J. Q. B. 3; 22 L. T. O. S. 106; 17 Jur. 1077; 2 W. R. 56.

**473. — Unsuccessful action for libel in pamphlet—Action for libel in other passages in**

be treated as an action for damages, but does not bar one from being subsequently brought.—**SETTER v. REGISTRAR** (1914), 30 W. L. R. 256; 7 W. W. R. 901; 20 D. L. R. 166; 8 Alta. L. R. 191.—**CAN.**

c. *Judgment against party as principal—Subsequent suit against same party as agent—On same contract.*—A previous suit in which pltf. elected

to sue defts. as principals bars a second suit on the same contract in which defts. are charged as responsible agents under a trade usage.—**DEVRAV KRISHNA v. HALAMBHAI** (1876), 1 L. R. 1 Bom. 87.—**IND.**

PART II. SECT. 3, SUB-SECT. 2.—**B. (a) iii.**

d. *Defamation—Recovery of amount*

*of verdict—Subsequent action against others for same libel.*—A recovery of a verdict in an action for libel against some of several persons concerned in the libel, & payment of the amount of verdict & all costs without judgment being entered, is a bar to an action against others for the same libel.—**WILLCOCKS v. HOWELL** (1885), 8 O. R. 576.—**CAN.**



*Sect. 3.—Effect of res judicata: Sub-sect. 2, B. (a) iii.]*

**same pamphlet.]**—Deft. published, in the form of a pamphlet, a report of the judgment delivered in a former action which pltf. had brought against him. The pamphlet contained no report of the evidence given at the trial, & there were passages in the judgment reflecting on pltf.'s conduct. Pltf. brought an action for libel in respect of such publication, & the jury found that the pamphlet was a fair, accurate, & honest report of the judgment, & was published without malice, & returned a verdict for deft. Pltf., thereupon, brought another action for libel in respect of the same publication, but he relied on other defamatory statements in the pamphlet than those set out in the statement of claim in the former action for libel. On an application to dismiss this action as frivolous & vexatious:—*Held*: (1) the questions for the jury in the second action for libel being identical with those decided in the first, a plea of *res judicata* must succeed, & the action ought to be stayed as frivolous & vexatious; (2) even if pltf. could rely in one action on one part of the pamphlet, & in another action on another part, such a course was an abuse of the process of the ct., & the second action should be stayed.

(3) The rule of law is, that the publication, without malice, of an accurate report of what has been said or done in a judicial proceeding in a ct. of justice, is a privileged publication, although what is said or done would, but for the privilege, be libellous against an individual, & actionable at his suit, & this is true, although what is published purports to be & is a report, not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report thereof, & published without malice.—*MACDOUGALL v. KNIGHT* (1890), 25 Q. B. D. 1; 59 L. J. Q. B. 517; 63 L. T. 43; 54 J. P. 788; 38 W. R. 553; 6 T. L. R. 276, C. A.

*Annotation*:—*Refd.* *Stephenson v. Garnett*, [1898] 1 Q. B. 677.

**474. Fraud—Unsuccessful suit in equity for relief against misrepresentation—Action at law for damages for misrepresentation.]**—In an action to recover damages for a fraudulent representation, deft., having obtained leave to demur, & also to plead several legal defences, asked leave to plead, for defence on equitable grounds, under Common Law Procedure Act, 1854 (c. 125), s. 83, that pltf. had filed a bill in Chancery for the very same alleged grievances & causes of action, which Ct. gave judgment in favour of deft., & that pltf. had no right to maintain that suit against him:—*Held*: this decision in Chancery was no estoppel, & the plea would not be allowed, unless all the rest were abandoned.—*COLLINS v. CAVE* (1858), 27 L. J. Ex. 146; 4 Jur. N. S. 31.

**475. — Unsuccessful suit for relief on ground of fraud—Suit for relief for breach of contract.]**—

(1) Where a pltf. seeks relief on the ground of personal fraud, he cannot convert his bill into a title for relief on the ground of breach of contract. Consequently, where pltf. who had entered into an agreement with one of two defts. for the purchase of a business, filed his bill for relief on the ground that the fact of deft. & co-deft. being in partnership in the business was fraudulently concealed from him; & it appeared, as the result of evidence that the agent of pltf. was aware of the fact of the partnership & of a power which deft. possessed under the partnership deed, of buying up the acquiescence of his co-partner & further, that pltf. was contracting on behalf of

himself & other persons, the latter of whom were fully aware of the state of the partnership:—*Held*: the bill should be dismissed, with costs.

(2) Where a pltf. having filed his bill for relief on the ground of fraud, fails, the dismissal of his bill does not prejudice his right to make application for relief on another & a different ground, as, for example, that of contract.—*BURDETT v. HAY* (1863), 11 L. T. 259, L. C.

*Annotation*:—*Generally*, *Mentd.* *Rothwell v. King* (No. 2) (1887), 4 R. P. C. 76.

**476. — Judgment in action for misrepresentation—Action for further damages accrued since judgment.]**—Pltf., the lessee of a farm, brought an action in the county ct. against deft., the lessor, for damages for the loss sustained by reason of the fraudulent representation of deft. that the farm was thoroughly drained; & in July, 1880, obtained judgment for £50 & costs. In Mar. 1881, pltf. brought this action against deft. for damages for the loss sustained since the commencement of the county ct. action by reason of such fraudulent representation:—*Held*: pltf.'s cause of action was completely exhausted by the judgment of July, 1880, & the action would be dismissed with costs.—*CLARKE v. YORKE* (1882), 52 L. J. Ch. 32; 47 L. T. 381; 31 W. R. 62.

**477. Negligence—Collision—Judgment at common law for damages for collision—Action against ship in Admiralty Court.]**—(1) A pltf., having sued in a cause of collision at common law & recovered a verdict, is entitled, if deft. proves insolvent, to sue the ship in the Ct. of Admlty., even after the ship has been transferred to a third party.

(2) *Seemle*: a party, having commenced proceedings, at common law in respect of a collision, will not be allowed, in the first instance, to sue the ship in the Admlty. Ct. for the same cause.—*THE JOHN & MARY* (1859), Sw. 471; 3 L. T. 123; 5 Jur. N. S. 1085; 166 E. R. 1221.

*Annotations*:—*As to* (1) *Refd.* *Nelson v. Couch* (1863), 15 C. B. N. S. 99; *The Mali Ivo* (1869), L. R. 2 A. & E. 356; *The Joannis Vatis* (No. 2), [1922] P. 213.

**478. — Judgment in limitation action—Action for non-delivery of cargo.]**—A cargo was shipped by pltf. on defts.' vessel under a charter-party & bill of lading, not excepting the negligence of the master & crew. During the voyage, & through the negligence of the masters & crews of both ships, the vessel came into collision with another, & was so much damaged as to render it necessary to discharge her cargo at a port of refuge, & after temporary repairs, to complete the voyage in ballast. The master transhipped the cargo with the knowledge but without the assent or dissent of pltf., into three other vessels, under bills of lading excepting the negligence of the masters & crews. Two of these vessels with their cargoes were, through the negligence of their masters & crews lost before reaching the port of discharge. Defts. obtained a decree limiting their liability arising out of the collision to £8 per ton, & the proceeds were distributed to claimants, of whom pltf. was not one. In an action for non-delivery of the portion of the cargo lost:—*Held*: (1) defts. were liable; for the loss did not arise from an excepted peril, & the transhipment, though justifiable, was for the purpose of earning the freight under the charterparty; (2) judgment in the limitation action was no bar to the present claim, as the loss of the portion of the cargo, the subject of this action, was not caused by the collision in respect of which defts. had limited their liability.—*THE BERNINA* (1886), 12 P. D. 36; 56 L. J. P. 38; 56



L. T. 450 ; 35 W. R. 214 ; 3 T. L. R. 175 ; 1 Asp. M. L. C. 112.

**479. — Judgment in action under Fatal Accidents Act, 1846 (c. 93).—Action for damage to personal estate of deceased.]—**Claim, stating that pltf. was administratrix of her husband L., who, being a season-ticket holder was received by defts., a railway co., at their station to be conveyed as a passenger & by their negligence was injured, & in consequence unable to attend to his business from that day to the day of his death, & incurred expense, etc. Defence, first, denying specifically all allegations in the statement relating to the injury to deceased & the damage arising from it. Secondly, that after the death of L., pltf., as his administratrix for the benefit of herself as his wife ; & of his children, sued defts. in respect of the injury caused to them by his death, & recovered damages. Reply, that defts. were estopped from denying the facts relating to the accident as in the previous action they had pleaded not guilty & that L. was not received by them as a passenger, & those issues were found by the jury in pltf.'s favour :—*Held* : (1) the second action was not barred by the judgment & satisfaction under the first ; (2) there was no estoppel of which either party could take advantage as pltf. sued in a different right in either action.—*LEGGOTT v. GREAT NORTHERN RY. CO.* (1876), 1 Q. B. D. 599 ; 45 L. J. Q. B. 557 ; 35 L. T. 334 ; 24 W. R. 784.

*Annotations* :—*Generally*, *Mentd.* Griffiths v. Dudley (1882), 47 L. T. 10 ; Pulling v. G. E. Ry. (1882), 9 Q. B. D. 110 ; Quirk v. Thomas, [1916] 1 K. B. 516.

**480. — Judgment in action for damage to goods—Action for damages for injury to person.]—**Damage to goods & injury to the person, although they have been occasioned by one & the same wrongful act, are infringements of different rights, & give rise to distinct causes of action ; & therefore, the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person. Pltf. brought an action in a county ct. for damage to his cab occasioned by the negligence of deft.'s servant, & having recovered the amount claimed, afterwards brought an action in the High Ct. of Justice against deft., claiming damages for personal injury sustained by pltf. through the same negligence :—*Held* : the action in the High Ct. was maintainable, & was not barred by the previous proceedings in the county ct.—*BRUNSDEN v. HUMPHREY* (1884), 14 Q. B. D. 141 ; 53 L. J. Q. B. 476 ; 51 L. T. 529 ; 49 J. P. 4 ; 32 W. R. 944, C. A.

*Annotations* :—*Consd.* Macdougall v. Knight (1890), 25 Q. B. D. 1. *Appld.* Furness, Withy v. Hall (1909), 25 T. L. R. 233. *Consd.* Wilson v. United Counties Bank, [1920] A. C. 102 ; The Kursk, [1924] P. 140. *Refd.* Edmonds v. Robinson (1885), 29 Ch. D. 170 ; Serras v. Noel (1885), 15 Q. B. D. 549 ; Darley Main Colliery Co. v. Mitchell (1886), 11 App. Cas. 127 ; Mid. Ry. v. Martin (1893), 62 L. J. Q. B. 517 ; James v. Evans, Joseph (1897), 77 L. T. 78 ; Isaacs v. Salbstein, [1916] 2 K. B. 139 ; Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180. *Mentd.* London v. London Road Car Co. (1888), 4 T. L. R. 448 ; Rose v. Buckett (1901), 84 L. T. 670.

**481. Trespass to goods—Judgment in replevin—Action under 52 Hen. 3, c. 21.]—***PRUDE v. BEKE* (1300), Sel. Soc. Y. B. Vol. VI., p. 111.

**479 i. Negligence — Judgment in action under Fatal Accidents Act, 1846 (c. 93).—Action for damage to personal estate of deceased.]—**A passenger on a railway was injured by an accident, & after an interval died in consequence. The extrix. brought an action under Lord Campbell's Act for his death, which suit was settled. The extrix. now sued for damage to his personal estate caused during his lifetime by

medical expenses & loss from inability to attend to business :—*Held* : the former action was no bar to the present one.—*DALY v. DUBLIN, WICKLOW & WEXFORD RY. CO.* (1892), 30 L. R. Ir. 514.—*IR.*

*e.* — *Judgment or award discharging one of two joint trespassers—Subsequent action against the other.]—*Where pltf. by his own act, as by a reference & an award, has knowingly

**482. — — — Action for wrongful distress.]—**Justices are not liable to an action if they honestly, though erroneously, decided that an objection to the validity of a church rate made at the hearing of a complaint for non-payment of arrears is not made *bond fide*, & proceed to adjudicate & issue their warrant to enforce payment. In an action against the justices for so proceeding & making an order & issuing their warrant, under which pltf.'s goods were seized, it was held that the proper question for the jury were : first, whether pltf. *bond fide* disputed the rate when before the justices, & gave notice thereof at the time ; secondly, whether there was reasonable & proper cause for the justices determining that the rate was not *bond fide* disputed, & whether the justices acted without malice. After the seizure of pltf.'s goods they instituted a replevin suit in the county ct., & recovered damages & costs :—*Held* : the judgment in the county ct. was a bar to recovery of damages for the seizure in this action.—*PEASE v. CHAYTOR* (1863), 3 B. & S. 620 ; 32 L. J. M. C. 121 ; 8 L. T. 613 ; 27 J. P. 309 ; 9 Jur. N. S. 664 ; 11 W. R. 563 ; 122 E. R. 233.

*Annotations* :—*Refd.* Gibbs v. Cruikshank (1873), 28 L. T. 735 ; Colonial Bank of Australasia v. Willan (1874), L. R. 5 P. C. 417. *Mentd.* R. v. Huntsworth (1864), 13 W. R. 7 ; Polley v. Fordham (No. 2) (1904), 91 L. T. 525 ; R. v. Woodhouse, [1906] 2 K. B. 501 ; May v. Mills (1914), 30 T. L. R. 287.

**483. — — — — —.]—**Certain premises were let to pltf. by P., who had previously mortgaged them to defts., the trustees of a benefit building society, to secure payment of subscriptions, etc., which might become due from him to the society. The mtge. deed gave power to defts. to distrain the goods of P., on the premises for arrears of subscriptions due to the society, as for rent due on a demise. Defts. distrained on the premises for subscriptions due from P., & seized pltf.'s goods. Pltf. replevied the goods, & recovered in the action of replevin, in the county ct., as damages, the amount of the expenses of the replevin bond. Having sustained further consequential damages by reason of the seizure of his goods, he subsequently brought an action of trespass in the Superior Ct., to recover these damages, & also in respect of the trespass to the land :—*Held* : the judgment in replevin was a bar to the action in respect of trespass to the goods, inasmuch as the special damage was recoverable in the action of replevin.—*GIBBS v. CRUIKSHANK* (1873), L. R. 8 C. P. 454 ; 42 L. J. C. P. 273 ; 28 L. T. 104, 735 ; 37 J. P. 744 ; 21 W. R. 734.

*Annotations* :—*Refd.* Dover v. Child (1876), 34 L. T. 737. *Mentd.* Smith v. Euright (1893), 63 L. J. Q. B. 220.

**484. — Judgment in action for trespass—Action of debt.]—***FERRES v. WIGNOLL* (1596), Noy, 58 ; 74 E. R. 1027.

*Annotation* :—*Refd.* Foot v. Rastall (1682), Skin. 48.

**485. — — — Action of trover.]—**A recovery in trespass for taking & driving away a flock of sheep, & small damages given, is no bar to trover for the same sheep, if pltf. reply that the recovery was only for the taking & not for the value.—*LACON v. BARNARD* (1626), Cro. Car. 35 ;

discharged one of two joint trespassers, he cannot bring an action against the other.—*ADAMS v. HAM* (1849), 5 U. C. R. 292.—*CAN.*

*1. Trespass to person—Judgment in action for damages for bodily injuries—Action for subsequent sufferings.]—*When damages have been once recovered in an action for bodily injuries, no new action can be maintained for sufferings afterwards endured from the

**Sect. 3.—Effect of res judicata: Sub-sect. 2, B. (a) iii. & (b).]**

79 E. R. 635; *sub nom.* LAICON v. BARNARD, Hut. 81.

**Annotations:—***Consd.* Watson v. Norbury (1649), Sty. 201; Putt v. Royston (1682), 2 Show. 211. *Refd.* Buckland v. Johnson (1854), 15 C. B. 145.

**486. ————]**—A recovery in an action of trespass cannot be pleaded in bar to an action of trover though for the same taking, except the property was determined in the action of trespass.—PUTT v. ROYSTON (1682), 2 Show. 211; T. Raym. 472; Poll. 634; 2 Mod. Rep. 318; 3 Mod. Rep. 1; 89 E. R. 896; *sub nom.* FOOT v. RASTALL, Skin. 48, 57.

**Annotations:—***Consd.* Lechmore v. Toplady (1690), 1 Show. 146. *Refd.* Hitchin v. Campbell (1772), 2 Wm. Bl. 827; Lechmere v. Fletcher (1833), 3 Tyr. 450; Buckland v. Johnson (1854), 15 C. B. 145. *Mentd.* Anon. (1704), 2 Salk. 655; Lloyd v. Mason (1845), 4 Hare, 132.

**487. ———— Judgment for defendant in first action.]**—Judgment for deft. in trespass on a special verdict is a good plea in bar to trover for the same goods.—LECHMORE v. TOPLADY (1690), 1 Show. 146; 2 Vent. 169; 89 E. R. 502.

**Annotations:—***Mentd.* Uppom v. Sumner (1779), 2 Wm. Bl. 1294; Balme v. Hutton (1833), 9 Bing. 471.

**488. ———— Judgment in action for trover—Action for money had & received.]**—A judgment for deft. in trover, is not a bar to an action against him for money had & received for pltf.'s use.—*v.* CAMPBELL (1771), 3 Wils. 240; 95 E. R. 1034.

**489. ———— Action for value of goods.]**—Pltfs. having brought trover in this ct. against the sheriff & the now deft. to recover the value of the goods of the bkpt. taken in execution, have made their election & there being a verdict & judgment upon record in that action against pltf., they are barred for ever from having the present or any other action (*per CUR.*).—KITCHEN v. CAMPBELL (1772), 3 Wils. 304; 95 E. R. 1069; *sub nom.* HITCHIN v. CAMPBELL, 2 Wm. Bl. 779.

**Annotations:—***Apld.* Seddon v. Tutop (1796), 6 Term Rep. 607. *Consd.* Buckland v. Johnson (1854), 15 C. B. 145; Brunsden v. Humphrey (1884), 14 Q. B. D. 141. *Refd.* Phillips v. Berryman (1783), 3 Doug. K. B. 286; Martin v. Kennedy (1800), 2 Bos. & P. 69; Richardson v. Tomkies (1832), 9 Bing. 51; Furness, Withy v. Hall (1909), 25 T. L. R. 233; Ord v. Ord, [1923] 2 K. B. 432. *Mentd.* Feltham v. Terry (1773), Loft, 207; King v. Leith (1787), 2 Term Rep. 141; Smith v. Hodson (1791), 4 Term Rep. 211; Balme v. Hutton (1833), 9 Bing. 471; Garland v. Carlisle (1837), 11 Bli. 421; Follett v. Hoppe (1847), 10 L. T. O. S. 205; Ward v. Fry (1901), 85 L. T. 394.

*Compare No. 480, ante.*

**490. Trespass to land—Judgment in ejectment—Action of trespass.]**—In an action of trespass deft. pleaded that at another time before the trespass he did recover against the same pltf. in an ejection:—*Held:* a good plea.—ANON. (1586), Godb. 109; 78 E. R. 67.

**491. ———— Judgment in action for trespass—Subsequent action for same trespass.]**—HUSTLER v. RAINES (1695), 2 Lut. 1414; 125 E. R. 780.

**Annotation:—***Mentd.* Lambert v. Stroother (1740), Willes, 218.

**492. ———— Unsuccessful suit in respect of injury to reversion—Right to proceed at law reserved to**

unforeseen effects of the original injury.—MONTREAL CORPN. v. MCGEE (1889), 30 S. C. R. 582.—CAN.

**g. Judgment awarding damages for injury—Subsequent action for compensation under statute—For same injury.]**—*Held:* after 18 Vict. c. 176, pltf. could not maintain an action against defts. for unlawfully & wrongfully erecting a bridge across the Twenty Mile Creek, & impeding the navigation, for the statute expressly authorises such erection, & gives only

a right to compensation for damages sustained. A prior recovery for injury sustained by the erection of the bridge was a bar to this action.—WISMER v. CANADIAN WESTERN RY. CO. (1859), 17 C. R. 510.—CAN.

**h. Judgment against bailiff for wrongful sale in execution—Subsequent action on covenant.]**—Pltf. sued C., a division ct. bailiff, & his sureties, on their covenant; alleging a judgment recovered by himself against C., for his goods under execution,

**plaintiff—Action at law for damages for injury to reversion.]**—(1) It is competent to the Ct. of Ch., notwithstanding the provisions in Chancery Amendment Act, 1858 (c. 27), & Chancery Regulation Act, 1862 (c. 42), in refusing an injunction, to reserve to pltf. the right of proceeding at law. To a declaration for an injury to pltf.'s reversion, by building upon & against certain walls of pltf., deft. pleaded that pltf. ought not to be permitted to implead him in respect of those causes of action, because, after accrual, & after the passing of the latter Act pltf. commenced his suit & filed his bill in Chancery against him & impleaded him therein for the very same rights, claims, & causes of action as in the declaration alleged; & that such proceedings were thereupon had that the Ct. of Ch. determined the same alleged causes of action in favour of deft., & gave judgment & decreed in respect thereof in favour of deft.; & that the said judgment & decree still remained in force:—*Held:* a good plea by way of estoppel.

(2) Pltf. replied that he ought to be permitted to implead deft. in respect of the causes of action in the declaration alleged, because he said that the Ct. of Ch., in dismissing his bill, reserved to him the right of proceeding at law for the causes of action in the declaration alleged, & ordered his bill to be dismissed, without prejudice to such right:—*Held:* a good replication.—LANGMEAD v. MAPLE (1865), 18 C. B. N. S. 255; 5 New Rep. 277; 12 L. T. 143; 13 W. R. 469; 144 E. R. 441; *sub nom.* LONGMEAD v. MAPLES, 11 Jur. N. S.

**Annotations:—***As to (1)* *Consd.* Tredegar v. Windus (1875), L. R. 19 Eq. 607. *Refd.* Newington v. Levy (1870), L. R. 6 C. P. 180; *Re* Adams, *Ex p.* Greenway (1873), 21 W. R. 866; *Re* May (1883), 32 W. R. 337; *R. v.* Banks (1911), 6 Cr. App. Rep. 276. *As to (2)* *Refd.* *Re* May (1883), 32 W. R. 337.

**493. Trespass to person—Judgment in action for assault—Action for subsequent loss.]**—It is a good plea in bar to an appeal of maihem that applt. had recovered damages in an action of trespass brought for the same assault, battery & wounding.—HUDSON v. LEE (1589), 4 Co. Rep. 43 a; 1 Leon. 318; Moore, K. B. 268; 76 E. R. 989.

**Annotations:—***Refd.* Ferrer v. Beale (1701), 1 Ld. Raym. 692; Brunsden v. Humphrey (1884), 14 Q. B. D. 141. *Mentd.* Midland Insee. v. Smith (1881), 6 Q. B. D. 561.

**494. ————]**—After a recovery in an action for an injurious act, no action can be maintained on account of any consequences occasioned by that act. Therefore, a recovery in an action for an assault & battery is a bar to an action for a subsequent loss in consequence of the battery of a part of the skull.—FERRER v. BEALE (1701), 1 Ld. Raym. 692; 91 E. R. 1361; *sub nom.* FETTER v. BEALE, Holt, K. B. 12; 1 Salk. 11; *sub nom.* FITTER v. VEAL, 12 Mod. Rep. 542.

**Annotations:—***Consd.* Howell v. Young (1826), 2 C. & P. 238; Brunsden v. Humphrey (1884), 14 Q. B. D. 141. *Refd.* Rosewell v. Prior (1701), 1 Ld. Raym. 713; Bonomi v. Backhouse (1858), E. B. & E. 622; Whitehouse v. Fellowes (1861), 10 C. B. N. S. 765; Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth (1890), 63 L. T. 546.

contrary to the orders of pltf. in the suit:—*Held:* pltf., having recovered judgment against C. for the tort, could not afterwards sue upon the covenant for the same cause.—SLOAN v. CREASOR (1862), 22 U. C. R. 127.—CAN.

**k. Judgment granting indemnity in case of death—Subsequent action by other person entitled to indemnity.]**—In case of death caused by a tort, an action brought by one of those entitled to indemnity, even though the



**495. — Judgment in action for false imprisonment—Action for malicious prosecution.]—**To an action for a malicious prosecution on a charge of felony without any reasonable or probable cause, whereby deft. had falsely, etc., caused pltf. to be imprisoned & indicted & tried on the said charge; deft. pleaded, that, before this action pltf. had brought an action of trespass against deft. for assault & false imprisonment upon a false assertion, that pltf. had committed felony, to which action deft. had pleaded, first, not guilty; & secondly, a plea justifying such assertion as true; & that; thereupon, deft. committed the said supposed trespass, by giving pltf. into the custody of a police officer; to which pleas pltf. had replied, by joining issue on the first, & by replying *de injuria*, to the second, etc.; that that cause was tried before a judge & jury; & that the learned judge then directed the jury to take into their consideration, whether deft. had accused pltf. with having committed the said felony, & whether he had made the said charge falsely, etc., & without any probable, etc., cause, & whether he had so falsely & maliciously, etc., committed the said grievances complained of in this action; that the jury found a verdict for pltf., & they assessed the damages at £125, for which judgment was signed. The plea then proceeded to state, that the several imprisonments in this action were the same as those in the former action; & that all the said grievances in this action were directed by the judge to be taken into consideration by the jury in the first action; & that they were taken into their consideration; & that they were the same damages in respect of which & on occasion whereof the said damages were given by the jury in the first action:—*Held*: the causes of action were perfectly distinct & different, & the plea was bad.—*GUEST v. WARREN* (1854), 9 Exch. 379; 2 C. L. R. 979; 23 L. J. Ex. 121; 18 Jur. 133; 2 W. R. 159; 156 E. R. 161.

Compare No. 480, *ante*.

(b) *Matters in Issue.*

**496. General rule.] — KINGSTON'S (DUCHESS) CASE, No. 213, *ante*.**

**497. —.]—(1)** An infant is bound by a decree in a cause where he is pltf., as much as a person of full age.

judgment rendered therein does not determine the proportion of the indemnity which the others are to receive, is a bar to a subsequent action brought by one of the latter.—*BOUTILLIER v. CENTRAL VERMONT RY. CO.* (1905), Q. R. 28 S. C. 472.—*CAN.*

**1. Dismissal of action against two of three tortfeasors—Subsequent action against all three.]—**In an action against three persons as joint tortfeasors, a former action against two of them having been dismissed on the merits, these two can have the benefit of the estoppel.—*YOUNG v. HARPER* (1889), 7 N. Z. L. R. 419.—*N.Z.*

**PART II. SECT. 3, SUB-SECT. 2.—**  
**B. (b).**

**496 i. General rule.]—**Where a breach of warranty has been set up in diminution of price of goods & a decision given that there was no breach of warranty, the buyer is estopped from claiming damages, whether general or special, for the same breach in a subsequent action.—*CREAVEN v. MILLER* (1899), 18 N. Z. L. R. 65.—*N.Z.*

**496 ii. —.]—**A party having raised an action, partly criminal & partly civil, before a sheriff & decree being pronounced both for fine & damages, & the decree having been reversed in

respect of irregularities:—*Held*: this afforded to defenders a sufficient defence against a new action of damages.—*M'DONALD v. STUART* (1825), 4 Sh. (Ct. of Sess.) 276; 1 Fac. Coll. 91.—*SCOT.*

**m. — Arbitrator's award.]—**Terms of reference by mutual memorial of parties & of opinion expressed upon it by the referee held to be sufficient, whereon to support a plea of *res judicata*, in respect of matters made the subject of a subsequent action.—*FRASER v. LOVAT (LORD)* (1850), 7 Bell, Sc. App. 171.—*SCOT.*

**n. Judgment for interest due on mortgage—Subsequent suit to recover principal & interest.]—**Certain immovable property was mtgd. to R. & then sold to N. It was then brought to sale in execution of a decree against N. & was purchased by H. The balance of the sale proceeds after satisfaction of that decree was paid to N. Under the terms of the mtge. to R., interest on the principal amount was payable annually & its payment was charged on the property as well as the payment of the principal amount. R. in 1875 sued the mtgors. & N. & H. to recover interest due. It was decided in that suit that N. was primarily & personally liable for the interest then due on the

(2) If an action be brought for several demands, & judgment be had for one only, it is as much a judgment as if there had been a particular determination upon each.

(3) An infant, after being of age, will not be allowed by a new bill to dispute anything that was done during his minority with regard to maintenance, education, etc.

(4) The rule of law is, that an infant is as much bound by a judgment in his own action as if of full age.—*GREGORY v. MOLESWORTH* (1747), 3 Atk. 626; 26 E. R. 1160, L. C.

*Annotations:—As to (1) Refd. Morison v. Morison* (1838), 4 My. & Cr. 215. *As to (2) Consd. Stainton v. Carron Co.* (1864), 11 L. T. 1. *Refd. Tekait Doorga Persad Singh v. Tekaitni Doorga Konwari* (1878), L. R. 5 Ind. App. 149.

**498. —.]—(1)** On an issue directed at the hearing of a cause, deft. obtained a verdict, & a motion by pltf. for a new trial having been refused, the bill was, on further directions, dismissed. Pltf. afterwards gave notice of an appeal motion for a new trial, & also presented a petition of appeal from the final order of dismissal; but on the appeal motion coming on to be heard first, the ct. refused to hear it separately, being, as matters then stood, a motion in a dismissed suit. On the two proceedings afterwards coming on to be heard together, it appearing that pltf.'s title to equitable relief depended on a legal right, & that that right depended more on questions of legal presumption than on any disputed fact, the ct. not being perfectly satisfied with the result of the trial, discharged both the orders appealed from, & made an order retaining the bill for a twelvemonth, with liberty to pltf. to bring an action, although the original decree, directing the issue, was not appealed from.

(2) When a bill is dismissed on the merits, the insertion of a clause that the dismissal shall be without prejudice to any question, but that specifically put in issue by the pleadings, is superfluous; for the dismissal of the bill without such reservation would only be a bar as to matters in issue in that suit between the same parties, & the ct. has not power to interfere with the effect which such a decree may have, as a matter of evidence, in any future proceeding in which it might, without such reservation, be legitimately used as evidence.—*ROCHESTER CORPN. v. LEE* (1849), 1 Mac. & G. 467; 14 J. P. 21; 41 E. R.

mtge. N. subsequently paid into ct. the sale proceeds he had received, & R. was paid the same. In 1878 R. again sued same persons for interest, & again N. was declared primarily & personally liable. In 1880 R. sued the same persons to recover the principal amount & interest due on the mtge., by the sale of the mtged. property:—*Held*: the decisions in the suits of 1875 & 1878 did not preclude R. from bringing a suit to recover the principal & interest due on his mtge. from the mtged. property.—*RATAN RAI v. HANUMANDAS* (1882), I. L. R. 5 All. 118.—*IND.*

**o. Decree granting perpetual injunction—Subsequent action for similar relief.]—**Where pltf. has once sued for & obtained a perpetual injunction directing deft. to refrain from certain acts, it is not necessary for pltf., if in future deft. ignores such injunction, to sue again, for a similar relief; such suit would be barred by the principle of *res judicata*.—*RAM SARAN v. CHATAR SINGH* (1901), I. L. R. 23 All. 465.—*IND.*

**p. Order dismissing application for execution—Not appealed from—Further application to execute same decree.]—**No appeal was preferred against an order dismissing an appln.



**Sect. 3.—Effect of *res judicata*: Sub-sect. 2, B. (b),**

1346, L. C.; *subsequent proceedings* (1852), 2 De G. M. & G. 427, L. C.

*Annotations*:—Generally, *Mentd.* Smith v. Cartwright (1851), 6 Exch. 927; Hoskins v. Holland (1875), 44 L. J. Ch. 273.

**499. Writ of right decided against plaintiff—Suit for discovery of matter relative to title.]—**Plea that a writ of right has been tried & determined against pltf., a good plea to a bill for discovery of matter relative to the title.—LEICESTER (EARL) v. PERRY (1782), 1 Bro. C. C. 305; 28 E. R. 1148.

**500. Decree dividing income between beneficiaries in specified proportions—Claim to increased share.]—**Testator devised his real estates to trustees, in trust to dispose of the rents for the benefit of the poor of the city of R. & the limits & precincts thereof. The trustees having applied rents for the benefit of the poor of one only of the parishes in the city, an information was filed on behalf of two other parishes, claiming to participate in the charity, & a decree was made in 1680, directing that the rents, should, for ever thereafter, be divided amongst the three parishes in certain proportions. In 1808 an information was filed on behalf of a fourth parish, for a similar purpose; & that parish was decreed to be entitled to a share of the rents, in the proportion of its extent & population to the extent & population of the three other parishes; but the proportions, as between those parishes, were not to be altered. An information was afterwards filed on behalf of one of those three parishes, claiming an increased share of the rents, on account of its population having increased more than the population of the other parishes. But the information was dismissed, the decree of 1680 being final.—A.-G. v. ROCHESTER CORPN. (1833), 6 Sim. 273, 322; 58 E. R. 596, 615.

**501. Unsuccessful action for infringement of patent—Disconformity between specifications—Subsequent action for infringement.]—**An action was brought by H. against S. for infringement of a patent. During the course of the trial H. stated that he would be content with the decision of the judge on the question of disconformity between the provisional & the complete specifications. The action was dismissed on the ground that the patent was invalid for want of novelty in the invention, & also on the ground that there was disconformity between the specifications.

for execution, & the order became final:—*Held*: a further appln. by the same decree holder in the same ct. to execute the same decree against the same judgment-debtor was barred.—NABI MUHAMMAD v. JWALA PRASAD (1905), 1 L. R. 27 All. 148.—IND.

**q. Matter in issue not decided by decree—Presumed to have been waived or refused.]—**Where a case is made by the bill for specific relief, & proof gone into by the parties in respect of it, & the right to it is a question which is fairly raised & may be properly decided at the hearing, & if a decree is pronounced in which no notice is taken of this particular portion of the case, while relief is given in respect of other matters in controversy, then, in a suit afterwards instituted to obtain the relief so omitted, it must be assumed that the claim to it, in the former suit, was either waived by the pltf. at the hearing or refused by the ct.—BLAKE v. O'KELLY (1874), 9 I. R. Eq. 54.—IR.

**PART II. SECT. 3, SUB-SECT. 2.—B. (c).**

**r. General rule.]—**Prior to Dec. 1889, pltf. was entitled to receive from

deft. a tithe rentcharge of £4 1s. 5d. per annum out of the lands of B., in the county of L. By order of quarter sessions, dated Dec. 30, 1889, it was reduced to £1 19s. 1d. Pltf. then obtained from the Q. B. Div. a conditional order for a writ of *certiorari* to quash the order of the quarter sessions; but on May 15, 1890, the conditional order was discharged. From May, 1890, until Jan. 28, 1898, deft. paid to pltf. tithe rentcharge at the rate of £1 19s. 1d. Pltf. sued deft. to recover the difference between £4 1s. 5d. & £1 19s. 1d., for the years from 1890 to 1898. On a case stated:—*Held*: pltf. was not estopped by the order of the Q. B. Div. of May 15, 1890, from alleging that the order of Dec. 30, 1889, was bad.—O'GRADY v. SYNAN, [1900] 2 I. R. 602, 610; 34 I. L. T. 129, 130.—IR.

**s. —.]—**KALI KRISHNA TAGORE v. SECRETARY OF STATE FOR INDIA (1888), 1 L. R. 16 Calc. 173; L. R. 15 Ind. App. 186.—IND.

**t. —.]—**HEDDLE v. BAIKIE (1846), 8 Dunl. (Ct. of Sess.) 376; 18 Sc. Jur. 170.—SCOT.

**u. —.]—**For want of facts relevant & sufficient to support the

Thereupon H. amended his complete specification to meet the objection of want of novelty, but not that of disconformity. Several years afterwards H. commenced a fresh action against S. for infringement of the patent as amended. S. then moved to dismiss the action as being frivolous & vexatious & an abuse of the process of the ct. The ct. dismissed the action on the ground that the question of the validity of the patent was *res judicata* by reason of the judgment in the former action. Pltf. appealed:—*Held*: (1) what took place at the trial of the former action amounted to an undertaking on the part of H. that, as between himself & S., the decision of the judge on the question of disconformity should be treated as final; therefore, on that ground, the action should be dismissed as a vexatious proceeding.

(2) *Semble*: the decision on the point of *res judicata* was right.—HORROCKS v. STUBBS (1896), 74 L. T. 58, C. A.

**Effect of judgment as estoppel.]—**See Sect. 3, sub-sect. 1, B. (d), *ante*.

**(c) Matters not in Issue.**

**502. Proceedings in respect of tithes—Judgment for payment of tithes—Suit to establish modus—Issue as to modus not raised in former suit.]—**The plea of a former decree for the payment of tithes, where a modus & the lands alleged to be covered by it were imperfectly stated, so that the ct. could not direct an issue, is not a good bar to a bill brought for establishing the modus.—COLLINS v. GOUGH (1785), 7 Bro. Parl. Cas. 94; 3 E. R. 62, H. L.

*Annotations*:—*Refd.* St. Paul's Minor Canons v. Crickett (1810), Wight. 30. *Mentd.* Foxcroft v. Parris (1800), 5 Ves. 221.

**503. ——— Suit for tithes in subsequent year.]—**A decree in a former suit cannot be pleaded in bar to a bill for the tithes of any subsequent year.—ST. PAUL'S (MINOR CANONS) v. CRICKETT (1810), Wight. 30; 145 E. R. 1163; *previous proceedings* (1795), 2 Ves. 563, L. C.; *subsequent proceedings* (1817), Dan. 37.

*Annotations*:—*Refd.* Bainbrigge v. Baddeley (1847), 2 Ph. 705. *Mentd.* Vivian v. Cochrane (1855), 4 De G. M. & G. 818.

**504. ——— Unsuccessful claim of modus—Claim to different modus on same land.]—***Held*: where a claim of a modus or other exemption from tithe is preferred before the Tithe Comrs., appointed under Tithe Act, 1836 (c. 71), who decide

conclusions of the libel the ct. had assoltized defenders from the first action "as laid," but without pronouncing any final determination on the merits of the cause:—*Held*: this decision was no bar to a second action for redress in the same matter, but proceeding upon new allegations.—GILLESPIE v. RUSSEL, RUSSEL v. GILLESPIE (1859), 21 Dunl. (Ct. of Sess.) 13; 3 Macq. 757; 31 Sc. Jur. 641.—SCOT.

**b. —.]—**SCOTT v. MACDONALD, ETC. (1885), 12 R. (Ct. of Sess.) 1123; 22 Sc. L. R. 666.—SCOT.

**c. Successful claim to property taken in execution—Subsequent action for damages.]—**If a party claiming property taken in execution makes no claim for damages, but only claims the goods on an interpleader summons under Local Ct. Act, 1861, s. 44, & recovers judgment, he is not estopped from claiming damages in another action.—HOOPER v. HOLDEN, [1885] S. A. L. R. 100.—AUS.

**d. Judgment on construction of deed—Suit to reform deed.]—**In an action relating to the construction of a deed pltf. claimed the benefit of a reservation contained in a prior agree-

against the claim set up, the party is not precluded from setting up another claim to a different modus on the same lands, unless the comrs. have made their final award under the act; even though a feigned issue, delivered under sect. 46, be pending to try the validity of the first modus.—**BARKER v. ENGLAND & WALES TITHE COMRS.** (1843), 11 M. & W. 320; 12 L. J. Ex. 496; 7 Jur. 180; 152 E. R. 825, Ex. Ch.

*Annotations*:—**Refd.** *Stamford & Warrington v. Dunbar* (1844), 13 L. J. Ex. 329; *Re Crosby-upon-Eden Tithes* (1849), 13 Q. B. 761.

—.]—*Compare* No. 242, *ante*.

Tithe generally, see **ECCLESIASTICAL LAW**, Vol. XIX., p. 476.

**505. Action on promissory note & for goods sold—No evidence given on count for goods sold—Subsequent action for goods sold.**—Pltf. in a former action declared on a promissory note, & for goods sold, but upon executing a writ of inquiry after judgment by default gave no evidence on the count for goods sold, & took his damages for the amount of the promissory note only:—**Held**: the judgment thereupon was no bar to his recovering in a subsequent action for the goods sold.—**SEDDON v. TUTOP** (1796), 6 Term Rep. 607; 101 E. R. 729; *previous proceedings* (1795), 1 Esp. 401, N. P.

*Annotations*:—**Consd.** *Godson v. Smith* (1818), 2 Moore, C. P. 157. **Distd.** *Bagot v. Williams* (1824), 3 B. & C. 235. **Consd.** *Eastmure v. Laws* (1839), 5 Bing. N. C. 444; *Srinut Rajak Mootoo Vijaya Raganadha Bodha Gooroo Sawmy Periya O-daya Taver v. Katama Natchiar* (1866), 11 Moo. Ind. App. 50. **Refd.** *Stafford v. Clark* (1824), 9 Moore, C. P. 724; *Hadley v. Green* (1832), 2 Cr. & J. 374; *Stewart v. Todd* (1846), 9 Q. B. 767; *Stevens v. Tillett* (1870), L. R. 6 C. P. 147; *Jones v. Brassey & Ballard* (1871), 24 L. T. 947; *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141. **Mentd.** *Thorpe v. Cooper* (1828), 5 Bing. 116; *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151; *Ord v. Ord* (1923), 92 L. J. K. B. 559.

ment, but judgment was given against him on the ground that the agreement was superseded by the deed. He then brought an action to reform the deed by inserting the reservation therein:—**Held**: the subject-matter of the second action was not *res judicata* by the previous judgment.—**CARROLL v. ERIE COUNTY NATURAL GAS & FUEL CO.** (1899), 29 S. C. R. 591.—**CAN.**

**e. Judgment against agent on promissory notes—Subsequent action against principal on implied covenant.**—D. exchanged his farm for two lots owned by S. L. & two notes of W. M. L. (the husband of S. L.) for \$1,000 each. He dealt with W. M. L. as a principal, but it subsequently appeared that he was agent for S. L. to whom D.'s farm was transferred. The notes were dishonoured & D. obtained judgment against W. M. L.:—**Held**: the taking of judgment against W. M. L. on the notes constituted no bar to an action against S. L. for a personal judgment on her implied covenant.—**DICK v. LAMBERT** (1916), 34 W. L. R. 1156; 9 Sask. L. R. 355; 29 D. L. R. 42.—**CAN.**

**f. Action by mortgagee for rent—Due on part of land mortgaged—Subsequent mortgage action.**—The obligee under an instrument by which certain land was usufructually mtgd. & other land merely hypothecated to him, having obtained against the mtgors. decrees for rent due on part of the land under the terms of pattamchits executed by them on the date of the mtge., now sued to recover the principal & interest due under that instrument:—**Held**: he was not precluded from obtaining a decree by reason of his previous suits.—**NANU v. RAMAN** (1892), 1 L. R. 16 Mad. 335.—**IND.**

**g. Action for possession of land—Subsequent suit for mesne profits—Accruing prior to institution of former**

*suit.*—A suit for possession of lands is no bar to a subsequent suit for mesne profits of such land accruing prior to the institution of the former suit.—**GUTTA SARAMMA v. MAGANTI RAMINEDU** (1908), 1 L. R. 31 Mad. 405.—**IND.**

**h. — Subsequent suit to recover arrears of rent.**—A suit to eject a tenant holding under a lease is not a bar to a subsequent suit to recover arrears of rent under the terms of the lease.—**SUBRAYA CHETTI v. RATHNAVELU CHETTI** (1908), 1 L. R. 32 Mad. 330.—**IND.**

**k. Dismissal of bill seeking equitable relief—Action at law on same instrument.**—The dismissal of a bill seeking equitable relief in respect of an instrument on which a party can sue at law, is no bar to an action at law upon the same instrument, although the decree do not state the dismissal to have been without prejudice.—**BEERE v. FLEMING** (1862), 13 I. C. L. R. 5.—**IR.**

**l. Proceedings under Workmen's Compensation Act, 1897—Failure on technical ground—Subsequent proceedings instituted independently of the Act.**—When a workman has proceeded to have compensation for his injuries assessed under Workmen's Compensation Act, 1897, & is defeated by reason of a ruling that his case does not come within the Act, he is not thereby prevented from instituting subsequent proceedings independently of the Act, to enforce any previously existing remedy to which he may have been entitled.—**BECKLEY v. SCOTT & Co.**, [1902] 2 I. R. 504.—**IR.**

**PART II. SECT. 3, SUB-SECT. 2.—B. (d).**

**507 i. General rule.**—Where the cause of action is the same & pltf. has an opportunity in the former suit of

**506. Separate claims in contract & tort—Judgment in action in contract—Subsequent claim in tort.**—Pltf. having a claim against deft. for rent, & also for stone taken from a quarry, declared against him in debt for use & occupation, with a count for money had & received. By the particulars delivered it appeared that pltf. sought to recover a stated sum for the value of certain described quantities of stone. Before the trial pltf. commenced another action against deft. in case for improperly quarrying stone, with a count in trover for stone, & delivered particulars claiming the same sum as before for similar quantities of stone. At the first trial pltf. confined his evidence to the claim for rent, & obtained a general verdict. At the second trial he had a verdict for the value of the stone taken away:—**Held**: pltf. having distinct demands against deft., one of which was not advanced by him at the trial of the first action, the tort was not thereby waived, & the second action was not barred by any former recovery.—**HADLEY v. GREEN** (1832), 2 Cr. & J. 374; 2 Tyr. 390; 1 L. J. Ex. 137; 149 E. R. 159.

**Effect of judgment as estoppel.**—See Sect. 3, sub-sect. 1, B. (e), *ante*.

(d) *Matters Available in Former Proceedings.*

**507. General rule.**—**GREATHEAD v. BROMLEY**, No. 282, *ante*.

**508. —.**—**HENDERSON v. HENDERSON**, No. 276, *ante*.

**509. Facts—Unsuccessful claim based on fraud—Subsequent claim founded on additional evidence of fraud.**—For the purpose of having a contract of sale of a concession set aside on the ground of fraud, & repayment of the purchase-

recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action. To constitute such former recovery a bar, however, it must be shown that pltf. had an opportunity of recovery, & but for his own fault might have recovered in the former suit that which he seeks to recover in the second action.—**DAVIDSON v. BELLEVILLE & NORTH HASTINGS RY. CO.** (1880), 5 A. R. 315.—**CAN.**

**507 ii. —.**—Estoppel by judgment cannot be avoided by suing on a new form of claim or on a ground of relief which might have been but was not raised in the former suit, if such claim or ground arises out of & depends on the same right or title as that which was directly in question in the former suit.—**PARAMBATH MANAKKAL v. PUTHENGHATIL MUSAMUT** (1905), 1 L. R. 28 Mad. 406.—**IND.**

**507 iii. —.**—**RUSSELL v. WATERFORD & LIMERICK RY. CO.** (1885), 16 L. R. Ir. 314.—**IR.**

**507 iv. —.**—Every remedy which can be claimed in respect of the same cause of action must be claimed in the one action, & if a pltf. chooses to limit his claim for relief in one action he cannot afterwards take a second proceeding claiming another remedy in respect of the same cause of action.—**DILLON v. MACDONALD** (1902), 21 N. Z. L. R. 375.—**N.Z.**

**507 v. —.**—A party raised a second action which rested substantially on the same *medium concludendi* with a first, in which defender had been assolized, but under a reservation by agreement of parties, of pursuer's right to prove a single specific fact:—**Held**: in the second action pursuer was not entitled to go into proof of a different fact, which he might & should have stated in the first action.—**STEWART v. STEWART**



*Sect. 3.—Effect of res judicata: Sub-sect. 2, B. (d)*

money £65,000, with interest, a co. filed a bill of complaint in the English Ct. of Chancery. At the same time they lodged a claim to be ranked, for the same sum, upon the estates of a firm carrying on business in Edinburgh & London, which had been sequestrated in Scotland. In the claim, the co. described the debt as owing under the circumstances set out at length in the bill in Chancery "produced & held as repeated *brevitatis causa*." To the Chancery suit the trustee of the sequestrated estates was a party. The trustee having rejected the claim, the Lord Ordinary ordered a condescendence & proof. The proof was adduced on June 16, 1874. The Ct. of Session, & ultimately the House of Lords, held that the claimants were not entitled to the debt claimed against the sequestrated estates; & refused to sist the proceedings in the sequestration, pending the issue of the Chancery suit. The bill in Chancery as filed alleged certain *indicia* of fraud; afterwards additional evidence of fraud was discovered, in time to have it inserted by way of amendment. The bill was finally amended on Mar. 3, 1874. Subsequently a decree was made by the Vice-Chancellor & affirmed by the Ct. of Appeal, rescinding the contract, & ordering repayment of the £65,000; & a declaration was added, that pltf. co. should be at liberty to prove in the sequestration suit in Scotland for the £65,000. Founding on this decree the co. lodged another claim with the trustee in Scotland. Again the trustee rejected the claim, & again a condescendence was made up. The co. this time put their claim upon the allegations contained in the bill in Chancery as finally amended on Mar. 3, 1874. The trustee relied on the plea of *res judicata*:—*Held*: (1) the plea of *res judicata* prevailed because (a) the new allegations of fraud in the amended bill in Chancery did not constitute a new *medium concludendi*; (b) the alleged facts were within the knowledge of claimants before the proof was adduced in the former action, & might have been inserted by amendment in their closed record in Scotland; (2) no question arose as to the validity, or examinability, of the foreign judgment.

(3) A party who has been unsuccessful cannot be allowed to reopen the litigation merely by saying

(1838), 16 Sh. (Ct. of Sess.) 632.—SCOT.

**m. Claim—Action in ejectment—No claim for damages—Subsequent action for damages.**—*Semble*: pltf. in ejectment, under 14 & 15 Vict. c. 114, not having proceeded for substantial damages, is precluded from recovering them in a subsequent action.—HAMER v. LAING (1856), 13 U. C. R. 233.—CAN.

**n. — Action on promissory note—Subsequent action to recover interest on same note at higher rate.**—Pltf. sued deft. as maker & A. as indorser of two notes, adding a count for interest; & he offered in evidence a written undertaking signed by deft., & a similar one by A., to allow him interest at the rate of thirty per cent. until payment. Pltf. took a verdict against both defts. for the amount of the notes & interest at six per cent. After judgment had been entered upon this & satisfied, he sued deft. on his undertaking, to recover twenty-four per cent., the balance of interest agreed to be paid by him:—*Held*: the judgment recovered was a bar to any further claim for interest upon the same notes.—MCKAY v. FEE (1860), 20 U. C. R. 268.—CAN.

**o. — Reservation of right to**

*sue for future damages.*—A lessee of premises used as an ice-house recovered indemnity from the city for injuries suffered in consequence of the expropriation of part of the leased premises, & in his statement of claim, had specially reserved the right of further recourse for damages resulting from the expropriation. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice-house during the unexpired term of the lease:—*Held*: the reservation in the first action did not preserve any further right of action in consequence of expropriation.—ANCTIL v. QUEBEC CITY (1903), 33 S. C. R. 347.—CAN.

**p. — Action under agreement for sale of land—Subsequent action for recovery of chattels included in agreement.**—Under an agreement for the sale of land, purchaser was to get title upon payment of purchase price. At time of sale, there were on the land agricultural implements, horses, etc., which were included in the agreement by a special clause. Upon purchaser making default in his payments, vendor brought an action for balance of purchase-money without making reference to the chattels in his state-

since the former litigation there is another fact, going exactly in the same direction with the facts stated before, & leading up to the same relief asked for before, but it being in addition to those facts, it ought now to be allowed to be the foundation of a new litigation, & he should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way on which that could possibly be admitted would be if the litigant were prepared to say—I will show you that this is a fact which entirely changes the aspect of the case, & further I will show you that it was not & could not by reasonable diligence be obtained by me before (LORD CAIRNS, C.).—PHOSPHATE SEWAGE CO. v. MOLLESON (1879), 4 App. Cas. 801, H. L.

*Annotations*:—As to (1) *Expld.* *Houstoun v. Sligo* (1885), 29 Ch. D. 448. *Consd.* *Re Low, Bland v. Low*, [1894] 1 Ch. 147. As to (2) *Refd.* *Re Low, Bland v. Low*, [1894] 1 Ch. 147. As to (3) *Apld.* *Goring v. Lloyd* (1887), 3 T. L. R. 455. *Refd.* *Bruce v. Ailesbury* (1892), 36 Sol. Jo. 865.

**510. Claim—Judgment on interpleader summons—No claim for damages—Action for special damages.**—Pltf. having claimed goods, seized under an execution from a county ct., an interpleader summons issued under County Courts Act, 1867 (c. 142), s. 31, & pltf. gave particulars, but did not therein claim damages as directed by Rule 175. His claim to the goods was adjudicated upon by the county ct. judge, who made an order which was in pltf.'s favour with respect to part of the goods. An action being subsequently brought by pltf. in the Ct. of Exchequer against the execution creditor for special damages resulting from the seizure of the goods:—*Held*: the claim of damages should have been made at the time & in the manner prescribed by the above Act, & Rule, & the order of the county ct. judge being "final & conclusive," the action could not be maintained.—DEATH v. HARRISON (1870), L. R. 6 Exch. 15; 40 L. J. Ex. 26; 23 L. T. 495.

*Annotations*:—*Refd.* *Hills v. Renny* (1880), 5 Ex. D. 313. *Mentd.* *Cramer v. Matthews* (1881), 7 Q. B. D. 425.

**Judgment in action to restrain defendant from parting with chattels—Action for damages for detention of same chattels.**—(1) In Mar. 1881, pltf. handed to one B., a broker, shares in a mining co., with a transfer signed (a blank being left for the name of the transferee), for the purpose of sale. B. died; & it was then discovered that he had, without the knowledge or authority of

ment of claim which was framed as if the agreement dealt solely with land. Purchaser pursuant to a judgment in the vendor's favour gave up possession of the premises, but refused on demand to give up possession of the chattels. Vendor brought a second action for the recovery of the chattels:—*Held*: the claim for the recovery of the chattels should have been made in the first action & not having been made, was *res judicata*.—CHURCHILL v. MURRAY & COWIE (1915), 30 W. L. R. 945; 8 W. W. R. 394; 8 Sask. L. R. 105; 22 D. L. R. 99.—CAN.

**q. — Judgment in mortgage action—Subsequent action on collateral agreement.**—The claim of a mtgee. based upon an extension agreement between himself & mtgor. definitely stating the debt & the standing of the account between the parties as of a certain date & providing for interest thereon at an increased rate from that date, should be made in the action on the mortgage, & where, although he has the opportunity to so raise it, he does not do so, & judgment is given in the mortgage action, the matter is *res judicata*.—CALDER v. INTERNATIONAL HARVESTER CO. OF AMERICA & INTERNATIONAL HARVESTER CO. OF



pltf., lodged the shares with deft.'s firm as security for an advance. Having received notice from the co. that they were about to register the shares in the name of deft., pltf. commenced an action in Ch. Div. of the High Ct. to restrain deft.'s firm & the co. from parting with the shares or registering deft. as transferee, concluding with the usual prayer for "such further or other relief as the nature of the case might require." On Feb. 23, 1882, defts. in that action consented to an order for the delivery up of the shares to pltf. forthwith. The order directed that "upon delivery of the deed or form of transfer & the securities representing the same, & upon payment of costs to pltf. & the mining co., all proceedings in the Chancery action should be stayed." The shares were not delivered up to pltf. until Apr. 28, 1882, when they were sold at a considerable loss. In an action against deft. in Q. B. Div. to recover damages for this detention, the jury found that pltf. did not authorise B. to pledge the shares for his own debt, or lend them to him for that purpose :—*Held* : pltf. was estopped by the consent order made in the Chancery action on Feb. 23, 1882, from recovering in this action damages for such detention, & the deft. was not responsible for the detention of the shares by the mining co. after the order had been made in the suit in Ch. Div.

(2) The principle is that where there is but one cause of action, damages must be assessed once for all (BOWEN, L.J.).—SERRAO v. NOEL (1885), 15 Q. B. D. 549 ; 1 T. L. R. 581, C. A.

*Annotation* :—As to (1) *Consd.* Worman v. Worman (1889), 43 Ch. D. 296.

512. — Mistake in amount claimed—Too little claimed—Second action for balance.]—Pltfs. signed judgment under Ord. 14 for an amount which, owing to a mistake, was less than the actual amount of their claim :—*Held* : a second action could be brought for the balance.—DEWAR & SONS, LTD. v. WINDER (1895), 12 T. L. R. 54.

*Annotation* :—*Consd.* Sanders v. Hamilton (1907), 96 L. T. 679.

— — — — —.]—In an action in detinue in the county ct. pltf. by mistake claimed too small a sum. Deft. paid into ct. the amount claimed without denial of liability, & it was taken out by pltf. Upon discovering his mistake pltf. asked leave to amend his particulars, which was refused, & judgment was given in the action for deft. Pltf. then began a new action for the larger amount, giving credit to deft. for the sum previously paid into ct. :—*Held* : the matter was

*res judicata*, & the action was not maintainable.—SANDERS v. HAMILTON (1907), 96 L. T. 679 ; 23 T. L. R. 389, D. C.

514. — Action for penalties—Subsequent action for indemnity for costs.]—H. Bros. sent a vessel to pltfs. to be overhauled. As the vessel's refrigerating machinery was out of order, pltfs. employed defts. to do the necessary work upon it. Under their contract with H. Bros. pltfs. were liable to a penalty in the event of the work not being completed within a specified time. Owing to an accident, due to the negligence of defts.' workmen, the work was not completed within the time specified. In 1906 defts. sued pltfs. for work done & materials supplied in respect of the refrigerating machinery of the vessel in question, & pltfs. in turn sued H. Bros. for the balance of their account for work done. H. Bros. admitted the claim for work done but counterclaimed from pltfs. £618 for penalties for the work not being completed within the specified time. Pltfs. in their action with defts. counterclaimed the sum of £618 for penalties alleged to be due to H. Bros. At the trial of these actions judgment was given for H. Bros. for £500, & for pltfs. against defts. for the same amount. In their action against H. Bros. pltfs. incurred costs to the amount of £525 6s. 11d., but pltfs. did not put forward any claim in their action in 1906 with defts. in respect of these costs. Pltfs. now sought to recover the amount of these costs from defts. :—*Held* : the action failed inasmuch as the matter was *res judicata*.—FURNESS, WITBY & CO., LTD. v. HALL (J. & E.), LTD. (1909), 25 T. L. R. 233.

*Effect of judgment as estoppel.*]—See Sect. 3, sub-sect. 1, B. (g), *ante*.

(c) *Matters not Available in Former Proceedings.*

515. *General rule.*]—The dismissal of a bill does not prejudice the right to file another for the same purpose under a different state of circumstances.—LIVERPOOL CORPN. v. CHORLEY WATERWORKS CO. (1852), 2 De G. M. & G. 852 ; 42 E. R. 1105, L. J.J.

*Annotations* :—*Refd.* A.-G. v. Sheffield Gas Consumers' Co. (1853), 3 De G. M. & G. 304. *Mentd.* Cromford & High Peak Ry. v. Stockport, Disley & Whaley Bridge Ry. (1857), 24 Beav. 74 ; McCormac v. Queen's University (1867), 15 W. R. 733 ; Boyce v. Paddington B. C. & Abbot (1902), 1 L. G. R. 98 ; Marriott v. East Grinstead Gas & Water Co., [1909] 1 Ch. 70.

516. *Fresh circumstances—Action on solicitor's bill before delivery of bill—Judgment for small sum for money lent—Second action on bill after*

CANADA, LTD., [1918] 2 W. W. R. 905 ; 11 Sask. L. R. 244.—CAN.

r. — Suit to set aside consent decree—Subsequent suit for same relief on technical ground.]—A suit instituted in 1879 against a minor was compromised by pltf. & the guardian *ad litem*, & a decree for pltf. was passed by consent. In 1882 the minor sued by his next friend to have the consent decree set aside on the ground that it had been obtained by fraud practised on the guardian *ad litem*. That suit was dismissed. The minor, having attained majority, sued to have the consent decree set aside on the ground that it had not been sanctioned by the ct. under Civil Procedure Code, s. 462 :—*Held* : the suit was barred by the decree in the suit of 1882 for the reason that the want of sanction might & ought to have been made a ground of attack in that suit.—ARUNACHALAM CHETTY v. MEYYAPPA CHETTY (1897), 1 L. R. 21 Mad. 91.—IND.

s. — Judgment in redemption action—Subsequent suit for recovery of

damages.]—A. executed a usufructuary mtge. in favour of B., & undertook to redeem the mtge. on a certain date. On the day fixed for repayment a valid tender of what was due, made by A., was improperly refused by B. A suit was brought for redemption by A. which was decreed on condition of payment within six months of what was due on the date of tender. The amount was deposited in ct., & A. was put in possession of the property. Subsequently A. brought a suit for recovery of damages on account of wrongful detention of the property by B. between the date of tender & the date of delivery of possession :—*Held* : inasmuch as the claim now set up might & ought to have been put forward in the redemption suit, & the mtgee. might & ought to have been called upon to account for the profits, which he has received from the mtged. premises, up to the date fixed in the redemption decree, the subsequent action for recovery of damages was barred.—SATYABADI BEHARA v. HARABATI (1907), 1 L. R. 34 Cal. 223.—IND.

PART II. SECT. 3, SUB-SECT. 2.—B. (e).

t. *Fresh circumstances—Proof of claim by creditor—Order discharging receiver without providing for payment of creditors—Subsequent action by creditor to recover debt.*]—A receiver was appointed under the decree to collect revenue, & after paying expenses, to pay the balances into ct., which were to be paid out on the report of the master to the parties entitled as found by him. S. pursuant to advertisement for creditors, proved his claim. The master had not made his report. By 44 Vict. c. 61 (O), defts. were authorised to pledge the bonds or debenture stock, & the proceeds were to be paid out on the order of C. & F., who were appointed creditors' trustees, in payment of all money necessary to be paid for the discharge of the receiver. An order of ct. was made on the appln. of defts., discharging the receiver without providing for the payment of claimants who had proved under the decree. The Act directed that all who came under it should take fifty

*Sect. 3.—Effect of res judicata: Sub-sect. 2, B. (e),*

delivery.]—A. brought an action for an attorney's bill against B., but only recovered a small sum for money lent, as there had been no bill delivered:—*Held*: A. might recover the amount of the attorney's bill in another action, brought after the bill was delivered, although this was a part of his demand in the first action; & it was not necessary that he should have been nonsuited in the first action to entitle him to bring the second.—*HEMING v. WILTON* (1832), 5 C. & P. 54, N. P.

*Annotation*:—*Refd.* *Todd v. Stewart, Emly & Hastings* (1845), 14 L. J. Q. B. 150.

517. — **Order in administration suit finding plaintiff entitled to residue—Action against executor for breach of trust.**—Under a decree in a legatee's suit to take the usual accounts, A. went in & claimed the residue, which the master found him entitled to; but the residue was not then ascertained, & no order was made in respect of it:—*Held*: A. was not precluded from afterwards asking relief against the exor., in respect of an alleged breach of trust, in a suit of his own, he not having, in the first suit, been in a situation to investigate the accounts of the exor., or to claim the relief which he asked in the second.—*GUIDICI v. KINTON* (1843), 6 Beav. 517; 1 L. T. O. S. 409; 49 E. R. 926.

518. — **Unsuccessful action on bill of exchange by reason of execution of composition deed—Subsequent default in payment of instalment under deed.**—To a declaration on a bill of exchange by pltf., as indorsee, deft., the acceptor, pleaded by way of estoppel, setting out the proceedings in a former action by pltf. upon the same bill of exchange, in which former action deft. had pleaded to the further maintenance a composition deed executed after action, by which deft.'s creditors, including pltf., agreed to release him from their debts in consideration of his agreement to pay a composition by two instalments, with a proviso that, on default in payment of the composition, the release was to become null & void. The plea then set forth that pltf. had replied to such plea in the first action the non-payment of the first instalment under the deed, & that deft. had rejoined, on equitable grounds, a mistake in non-payment on the proper day & a subsequent tender; that, thereupon, pltf. struck out the replication, confessed the plea, & taxed his costs under the rule of Trinity Term, 1853, which were paid, & that such determination of the first action estopped pltf. from bringing the present action. Replication that after the proceedings in the first action, & before the present action, a second

instalment under the deed became payable; that deft. had made default in payment of it, & that thereby the release in the deed became null & void:—*Held*: the replication was good.—*HALL v. LEVY* (1875), L. R. 10 C. P. 154; 44 L. J. C. P. 89; 31 L. T. 727; 23 W. R. 393.

— **Review of weekly payments—Workmen's Compensation Acts.**—*See* MASTER & SERVANT.

519. **Fresh evidence.**—A. filed his bill in the Ct. of Chancery in Ireland, to be relieved against a long lease granted by his ancestors, on the foot of fraud; but not giving sufficient evidence of fraud, his bill was dismissed with costs. Some years after, A. filed a new bill for the same purpose, charging fresh proofs of the fraud, which were not discovered pending the former suit. Upon hearing this second cause, the lease was set aside; & on an appeal, this decree was affirmed, but varied by consent.—*COTTER v. BARRYMORE (EARL)* (1733), 4 Bro. Parl. Cas. 203; 2 E. R. 138, H. L.

520. —.]—The jurisdiction given to the ct. by National Debt Act, 1870 (c. 71), s. 55, to decide upon petition as to the validity of a claim for the re-transfer of stock, which has been transferred to the National Debt Comrs. under the provisions of s. 51, is to be exercised in the mode in which the ordinary jurisdiction of the ct. is exercised. Therefore, if a petition for the re-transfer of stock is heard on its merits, & is dismissed on the ground that petitioner has failed to make out his title, he cannot, on the subsequent discovery of fresh evidence in support of his title, present a fresh petition for the same object, without leave of the ct. previously obtained.—*Re MAY* (1885), 28 Ch. D. 516; 33 W. R. 917; *sub nom. Re MAY, Ex p. HOUSE*, 54 L. J. Ch. 338; 52 L. T. 78; 1 T. L. R. 220, C. A.

*Annotation*:—*Refd.* *Bruce v. Ailesbury* (1892), 36 Sol. Jo. 865.

Evidence generally, *see* EVIDENCE.

521. **Set-off raised in former action — But not heard for non-compliance with formalities—Action in respect of claim made in set-off.**—To a declaration in debt deft. pleaded, by way of estoppel, that he, deft., had sued pltf. in the county ct. for a debt, & pltf. had then attempted to establish as a set-off, the claim for which he now sued, & judgment was given against the now pltf. as to that set-off. Pltf. replied that he had not given any notice of his intention to rely on the set-off, in accordance with County Courts Act, 1846 (c. 95), s. 76, & Rule 17, & that deft. did not consent to his setting off the debt:—*Held*: the replication was a good answer to the plea of estoppel, since it showed that there had been no decision in the county ct. by which pltf. was concluded.—*STANTON v. STYLES* (1850), 5 Exch. 578; 1

cents on the dollar:—*Held*: the position of affairs having altered since the time at which S. had proved his claim, he was not bound thereby, & should not be restrained from prosecuting an action for his debt to recover the full amount.—*LEE v. CREDIT VALLEY RY. CO.* (1882), 29 Gr. 480.—*CAN.*

u. — **Action to complete purchase of insolvent estate—Special damages—Not ascertainable until after judgment.**—A merchant in Ottawa, Ont., purchased the assets of an insolvent trader in Hull, Que., but refused to accept delivery of the same. The curator of the estate brought an action in Quebec to compel him to do so & obtained judgment, whereupon he accepted delivery & paid the purchase money. The curator subsequently brought another action

to have been incurred in the care & preservation of the assets from the time of the purchase until the delivery:—*Held*: these special damages, most of which could not be ascertained until after the purchase was completed, could not have been included in the action brought in the Quebec cts., & the right to recover them was not *res judicata* by the judgment in that action.—*HYDE v. LINDSAY* (1899), 29 S. C. R. 595.—*CAN.*

a. — **Action of ejectment—Subsequent action for occupation rent accrued after expiry of term.**—In a former action of ejectment brought by pltf. against defts., mesne profits were claimed, but no evidence was given in regard to them:—*Held*: pltf. was not estopped from recovering in this action occupation rent for the premises since the expiry of the term.—*ELLIOTT*

b. — **Suit to compel account—Second suit for money due on account.**—In the *mofussil*, if a principal, in a suit against his agent, prays merely that deft. be ordered to render accounts to pltf., a second suit brought by him for the recovery of the money found due by deft. on examining the accounts will not be barred as *res judicata*.—*GOBIND MOHUN CHUCKERBUTTY v. SHERIFF* (1881), 1 L. R. 7 Calc. 169; 8 C. L. R. 357.—*IND.*

c. — **Action on adjusted account—Subsequent suit on mortgage.**—Pltf. omitted to claim relief in a suit on an adjusted account, which he subsequently claimed in a suit based upon a mtge.:—*Held*: the causes of action for the two suits being distinct, the omission to claim the relief in the earlier suit did not operate as a bar



L. M. & P. 575 ; 19 L. J. Ex. 336 ; 14 J. P. 640 ; 155 E. R. 253.

**Effect of judgment as estoppel.]—**See Sect. 3, sub-sect. 1, B. (h), *ante*.

(f) *Continuing Causes of Action.*

**522. Judgment in proceedings for obstruction—Subsequent proceedings for continuance of obstruction—Civil proceedings.]—**After a reversioner has recovered in an action for an obstruction, to the injury of his reversionary interest, he may yet, if the obstruction be continued, maintain another action for continuing the obstruction.—SHADWELL v. HUTCHINSON (1831), 2 B. & Ad. 97 ; 4 C. & P. 333 ; 9 L. J. O. S. K. B. 142 ; 109 E. R. 1079.

**Annotations:—**Mentd. Baxter v. Taylor (1832), 1 Nev. & M. K. B. 11 ; Battishill v. Reed (1856), 18 C. B. 696 ; Johnstone v. Hall (1856), 20 J. P. 579 ; Metropolitan Assn. for improving the dwellings of the Industrious Classes v. Petch (1858), 5 C. B. N. S. 504.

**523. ——— Proceedings criminal in form—For assertion of civil rights.]—**(1) After verdict on an indictment where the proceedings though in form criminal are in substance for the asserting of civil rights of the parties, even when the verdict is due to a misdirection by the judge on a point of law, the ct. will not stay entry of judgment unless the judgment would alter the rights of the parties by operating as an estoppel to a second trial of the matters in issue.

(2) The N. E. Ry. Co. were indicted for obstruction of a highway. At the trial the judge directed the jury to acquit them on one of the counts on the ground that they were justified under their special Act in doing what was alleged in such count to be an obstruction. The jury found a verdict for defts. Prosecutors obtained a rule *nisi* to stay entry of judgment for defts. on the ground that such direction was wrong in law:—**Held:** such rule must be discharged, since, whether the direction was wrong or not, the entry of the judgment would not prevent prosecutors from bringing a second indictment for the continuance of the alleged obstruction, & therefore their rights would not be altered by it.—R. v. NORTH EASTERN RY. Co. (1901), 70 L. J. K. B. 548 ; 84 L. T. 502 ; 49 W. R. 524 ; 19 Cox, C. C. 682, D. C.

**Assessment of continuing damage.]—**See DAMAGES, Vol. XVII., pp. 90, 91, Nos. 76–82.

**Effect of judgment as estoppel.]—**See Sect. 3, sub-sect. 1 B. (j), *ante*.

(g) *Election of Remedy.*

**524. Judgment in action for trespass—For coal raised within six months before intestate's death—**

LAKHMIDAS v. LALJI ANANDJI (1904), I. L. R. 28 Bom. 447.—IND.

PART II. SECT. 3, SUB-SECT. 2.—  
B. (f).

**d. Award of damages for injury—Subsequent proceedings for compensation for further injury.]—**Where arbitrators, to whom disputes arising from the overflowing of three acres of pltf.'s land by water thrown back by deft.'s mill were referred, awarded damages to pltf. for the injury, & that defts. should have a full fall of nine feet, & no more, for their mill-dam, provided that the water on pltf.'s land was not raised thereby; & defts. raised their dam to nine feet, & overflowed five acres more of pltf.'s land:—**Held:** the award did not prevent his recovery of compensation for such further injury.—CASLER v. RANSOM (1837), 5 O. S. 513.—CAN.

**e. Breach of covenant—Recovery a bar to future actions.]—**A covenant to erect a crossing over a railway for use of pltf. will not sustain several

successive actions, the breach being entire & perfect in the first instance, & a recovery for such breach being a bar to a future action.—SMITH v. GREAT WESTERN RY. Co. (1856), 6 C. P. 151.—CAN.

**f. Continuing trespass.]—**In 1887, defts. entered upon the bed of a stream between pltf.'s & an adjoining owner's lands & deepened it. In consequence of deft.'s acts the water flowed more rapidly & at less depth so that pltf.'s land was liable to trespass from cattle. Pltf. brought an action against defts. for trespass, & in Mar. 1892, judgment was entered. No further acts of trespass had since been committed by defts. The present action was brought in Nov. 1892, for a continuing lowering of the stream & interference with its natural flow: **Held:** pltf. was entitled to judgment.—CLARKE v. MIDLAND & GREAT WESTERN RY. Co., [1895] 1 I. R. 294.—IR.

**g. Unsuccessful action against surety for arrears of maintenance—**

**Action for money had & received for coal raised more than six months before intestate's death.]—**

(1) A party who had worked into his neighbour's land, & dug coal, which he had sold, retaining the proceeds, died intestate:—**Held:** an action for money had & received by intestate was maintainable against his administratrix for the value of the coal so disposed of, such remedy being independent of Civil Procedure Act, 1833 (c. 42), s. 2, & not affected thereby.

(2) An action of trespass had also been brought under that statute for the trespasses during the six months prior to the decease of the intestate, in which a verdict had been obtained:—**Held:** pltf. had not thereby precluded himself from the action for money had & received in respect to the previous working.—POWELL v. REES (1837), 7 Ad. & El. 426 ; 2 Nev. & P. K. B. 571 ; Will. Woll. & Dav. 680 ; 8 L. J. Q. B. 47 ; 112 E. R. 530.

**Annotations:—**As to (1) **Refd.** Phillips v. Homfray, [1892] 1 Ch. 465. **Generally, Mentd.** Bittleston v. Cooper (1845), 14 M. & W. 399.

**525. Application for punishment of gaoler—Under Debtors Imprisonment Act, 1759, c. 28, s. 11—Subsequent action for same cause.]—**The above sect. which gives to prisoners in custody on civil process a right of applying to cts. of record for the punishment of gaolers who have abused their powers, & for reparation to the party aggrieved, does not take away from such prisoners the common law remedy of action. But if the prisoner after availing himself of the summary remedy, should bring an action for the same cause:—**Semble:** the ct. would stay the proceedings.—YORKE v. CHAPMAN (1839), 10 Ad. & El. 207 ; 2 Per. & Dav. 493 ; 8 L. J. Q. B. 282 ; 3 Jur. 1147 ; 113 E. R. 80.

**526. Judgment in action of debt for principal sum—Action of covenant for interest.]—**An action of debt & an action of covenant were brought by same pltf. against same deft. for same cause. A judge ordered pltf. to elect with which he would proceed. He proceeded with the action of debt, & recovered the principal sum & the full amount of damages laid in the declaration. He then proceeded in the action of covenant for the purpose of recovering some interest which he still claimed to be due:—**Held:** the effect of the order was to prevent him from doing so.—JACKSON v. CHARING CROSS BRIDGE Co. (1851), 17 L. T. O. S. 141.

**527. Action against sheriff for parting with goods—Debtor becoming bankrupt—Subsequent application in bankruptcy—Same issue.]—**A judgment

*Second action for subsequent arrears.*

By a settlement executed in 1896, first deft. agreed to pay maintenance to pltf. (his wife) at the rate of R91 per annum. Second deft. signed the deed as surety. In 1898 pltf. sued both defts. to enforce her rights under the settlement & for arrears of maintenance, & obtained a decree against both defts., but, as to the payment of arrears of maintenance, the decree was against first deft. only. In 1901 pltf. filed this suit against both defts. to recover subsequent arrears of maintenance:—**Held:** pltf.'s claim against second deft. was not *res judicata*.—BHIKABHAI RATANOHAND v. BAI BHURI (1903), I. L. R. 27 Bom. 418.—IND.

PART II. SECT. 3, SUB-SECT. 2.—  
B. (g).

**h. Injunction on breach of agreement—Action for damages for subsequent breach—Duty of party to elect.]—**The existence of an injunction against further breaches of an agreement is not of itself a bar to the right of the



*Sect. 3.—Effect of res judicata: Sub-sect. 2, B. (g)*

creditor levied execution against his debtor, & the sheriff took possession of debtor's goods; but before the sale took place debtor filed a petition for liquidation, & a receiver was appointed, who obtained an injunction restraining the sale on giving the usual undertaking to abide by any order as to damages. The liquidation proceedings became abortive, & a petition for adjudication was presented, under which debtor was adjudicated bkpt., & the sheriff gave up the goods to the trustee. The execution creditor then brought an action against the sheriff for damages sustained by his parting with the goods. The action was determined in the sheriff's favour, on the ground that debtor was a trader, & had committed an act of bkpcy. by suffering the execution. Afterwards, the execution creditor made an application in bkpcy. for damages under the undertaking given by the receiver, in which he relied on the same point as in the action, namely, that debtor was not a trader:—*Held*: the matter was *res judicata*, & as the creditor had elected to take his remedy at law against the sheriff, the Ct. of Bkpcy. could not entertain the question.—*Re BREMNER, Ex p. HARPER* (1875), 10 Ch. App. 379; 44 L. J. Bcy. 57; 32 L. T. 317; 23 W. R. 433, L. JJ.

**528. Conviction of friendly society officer for misappropriation—Order for repayment—Subsequent action to recover same money.**—Where a friendly society avail themselves of their statutory remedy against a defaulting officer, under Friendly Societies Act, 1875 (c. 60), s. 16, & the officer is convicted & punished under the proceedings so taken, & ordered to repay the moneys received by him for the society, the society's remedy by action is barred.—*VERNON v. WATSON*, [1891] 2 Q. B. 288; 60 L. J. Q. B. 472; 64 L. T. 728; 56 J. P. 85; 39 W. R. 519; 7 T. L. R. 534, C. A.

**529. Judgment for full sum recoverable under Gas Works Clauses Act, 1847 (c. 15)—Action for further damages for same injury.**—Damage to the extent of £29 11s. 1d. was done by a motor driver of defts. to an electric standard belonging to pltf., the B. Corpn., who thereupon issued a summons under sect. 20 of above Act, charging defts. with carelessly or accidentally causing the damage. The justices awarded ptfs. the full sum given by way of satisfaction in the sect., viz. £5. Ptfs., then brought an action in the county ct. for £24 11s. 1d., being the balance of £29 11s. 1d., less the £5 awarded summarily before the justices:—*Held*: the action in the county ct. for the balance could not be maintained. It was essential to give full effect to the words of sect. 20, "by way of satisfaction," which meant full satisfaction.—*BIRMINGHAM CORPN. v. ALLSOPP (S.) & SONS, LTD.* (1918), 88 L. J. K. B. 549; 119 L. T. 775; 35 T. L. R. 24; 16 L. G. R. 862, D. C.

**Trover or value of goods.**—See Nos. 488, 489, *ante*.

**Unsuccessful action by workman against employer—Application for compensation under Workmen's Compensation Acts.**—See MASTER & SERVANT.

**Effect of judgment as estoppel.**—See Sect. 3, sub-sect. 1, B. (l), *ante*.

*(h) Where Money paid into Court.*

**530. In action to recover against executor's money due on accounts—Subsequent suit for payment of legacy—Power of court to inquire on what account money paid into court in first action.**

—H. died in 1811, having bequeathed a legacy to a woman who afterwards married pltf. In Dec. 1825, the two exors. of H. gave pltf. a written acknowledgment whereby they separately & jointly acknowledged that they owed pltf. £150 for the legacy, & £50 for interest. In 1835, pltf.'s wife died. Matters of business having occurred between pltf. & the exors., in which mutual demands & accounts arose, pltf., in Sept. 1839, brought his action against the exors. to recover what he alleged to be due on those accounts, including the £200 mentioned in the memorandum, & interest thereon. In this action defts. pleaded separately, & one of them paid £46 into ct., which pltf. received, & abandoned the action as to him. Pltf. then filed his bill against both defts. for payment of the legacy, & in defence to the bill defts., amongst other things, insisted by their answers on Stat. Limitations, & that the action was a bar to the demand in equity:—*Held*: (1) the written memorandum amounted to an acknowledgment taking the claim to the legacy out of the operation of the statute; (2) whether it amounted to an admission of assets or not, it gave pltf. no right of action; (3) unless equivalent to an admission of assets, it did not create a personal demand against defts., enforceable in a Ct. of Equity; (4) it had not the effect of barring or prejudicing the right of pltf.'s wife in the legacy, or his title in right of his wife as legatee; (5) the proceedings in the action did not necessarily amount to an estoppel of the suit in equity, but, in order to determine the efficacy of the suit, it was competent for this ct. to inquire on what account the £46 was paid into ct., in the action.—*HOLLAND v. CLARK* (1842), 1 Y. & C. Ch. Cas. 151; 62 E. R. 831.

**531. In part satisfaction of claim—Plea of set-off as to balance—Right to bring action in respect of set-off.**—Deft. who pays money into ct. in part satisfaction of the demand for which he is sued, & pleads set-off as to the remainder, does not admit the debt so as to estop him from suing pltf. in respect of the set-off so pleaded.—*WILLIAMS v. STEAR* (1867), 16 L. T. 397.

**532. By claimant on interpleader summons—Money paid out to judgment creditor—Subsequent interpleader summons between same parties.**—Goods, which had been taken in execution of the judgment of a county ct., were claimed by a person who, under the provisions of County Cts. Act, 1888 (c. 43), s. 156, deposited the value of the goods with the bailiff to abide the decision of the judge upon the claim. On the trial of an interpleader issue the claim was not established, & the money deposited was paid out to the judgment creditor. The money so paid out being insufficient to satisfy the judgment, the judgment creditor caused the goods to be seized again for the purpose of realising the balance of his judgment. Claimant again claimed them & deposited their value with the bailiff. Upon a second interpleader issue between the same parties:—*Held*: by taking out of ct. the money deposited by claimant on the first occasion, the judgment creditor accepted the money in lieu of the goods, & thereby estopped himself in

injured party to sue for damages if a subsequent breach should occur. In the latter event the party may elect whether he will sue for damages or

proceed for breach of the injunction, but if he should elect to sue for damages he can no longer rely upon the injunction so far as the particular

breach is concerned.—*ANDERSON v. MILL* (1912), 14 W. A. L. R. 184.—*AUS.*

respect of the same judgment from denying that as against himself claimant was the owner of the goods; & therefore claimant was entitled to judgment on the issue.—*HADDOW v. MORTON*, [1894] 1 Q. B. 565; 63 L. J. Q. B. 431; 70 L. T. 470; 9 R. 215, C. A.

*Annotation*:—*Refd.* *Kotchle v. Golden Sovereigns*, [1898] 2 Q. B. 164.

**533. Payment in of amount claimed—Too little claimed by mistake—Subsequent action for balance.**—*SANDERS v. HAMILTON*, No. 513, *ante*.

*Compare* Nos. 286, 328, *ante*.

**Effect of payment into court generally.**—*See* COUNTY COURTS, Vol. XIII., pp. 498, 499; PRACTICE.

*C. As regards What Parties.*

(a) *Parties suing in Different Right.*

**534. General rule.**—A plea of a bill for the same matter overruled, where the last was brought in a different right.—*HUGGINS v. YORK-BUILDINGS Co.* (1740), 2 Atk. 44; Barn. Ch. 83; 2 Eq. Cas. Abr. 3; 1 De G. M. & G. 496, n.; 26 E. R. 423, L. C.

*Annotations*:—*Consd.* *Bainbrigge v. Baddeley* (1847), 2 Ph. 705. *Refd.* *Holland v. Prior* (1834), Coop. temp. Brough. 426. *Mentd.* *Blenkinsopp v. Blenkinsopp* (1852), 1 De G. M. & G. 495.

#### PART II. SECT. 3, SUB-SECT. 2.— C. (a).

**534 i. General rule.**—Upon an action by the indorsee against the third indorser of a bill:—*Held*: final judgment in a previous action on the same bill, in which all parties thereon were sued & served, & judgment of *non pros.* not signed, or a discontinuance entered as to any, but in which the special indorsement & judgment only showed a cause of action against the drawer & acceptor, did not prevent a separate action against the indorser.—*BANK OF UPPER CANADA v. LIZARS* (1862), 11 C. P. 176.—*CAN.*

**534 ii.** —.—*]*—The pursuer of a steam-boat had been summoned by pltf. before a magistrate for an assault, & a fine was imposed, which he paid. This under 32 & 33 Vict. c. 20, s. 45 (D.), though a release to the pursor, did not constitute any bar to a civil action against the co.—*EMERSON v. NIAGARA NAVIGATION CO.* (1883), 11 O. R. 528.—*CAN.*

**534 iii.** —.—*]*—Letters of administration to an infant as administrator, were revoked after the judgment against him in an action brought by him to recover assets of the estate, & new letters were granted to P., who obtained an order of revivor, directing the further proceedings to be carried on by P. as administrator & pltf. Before P. could move against the judgment the order of revivor was rescinded. P. in this administration action attacked the validity of the securities which the former administrator had impeached in the action referred to, whereupon pltf. (who had been defts. in that action) applied to have it ruled that the judgment in such other action was *res judicata* against P. in this administration proceeding:—*Held*: by the discharge of the order of revivor in the action, in which pltf. by revivor was suing in *autre droit*, such action was left without a pltf. & the judgment recovered was not under the circumstances an estoppel against P.—*MERCHANTS BANK v. MONTEITH* (1885), 10 P. R. 467.—*CAN.*

**534 iv.** —.—*]*—Where services have been performed by one person for the benefit & at the request of another, & have been charged to the latter, the fact that a third person has subsequently agreed to pay for such services,

& has had judgment recovered against him therefor, by the person rendering them, will not prevent the latter recovering in an action against the person liable in the first instance, unless the subsequent agreement amounts to a novation.—*HEROD v. FERGUSON* (1894), 25 O. R. 565.—*CAN.*

**534 v.** —.—*]*—On the question whether a person, who sued to recover property as the reversionary heir of deceased on an alleged relationship to deceased is, when such suit is dismissed, debarred from bringing another suit for the same property as reversionary heir under a different kind of relationship:—*Held*: such subsequent suit was barred.—*MASILAMANIA PILLAI TIRUVENGADAM PILLAI* (1908), 1 L. R. 31 Mad. 385.—*IND.*

**534 vi.** —.—*]*—A judgment recovered by a widow, as administratrix of her husband, for damages for the death of her husband through the negligence or breach of duty of defts.:—*Held*: to be no bar to a subsequent action brought by her, as administratrix of her husband, to recover damages for injuries arising from the same cause, to his personal property.—*BARNETT v. LUCAS* (1870), 1 R. 5 C. L. 140; 6 I. C. L. R. 247.—*IR.*

**534 vii.** —.—*]*—A party who was appointed an exor., & had intrusions in Jamaica, obtained, after the estate was thrown into the Ct. of Ch. in Jamaica, a power of attorney from a residuary legatee, in a process of accounting in that Ct. as to his intrusions he caused appearance to be made for the residuary legatee, & obtained decree of exoneration; & on his return to Scotland the legatee raised an action of count & reckoning against him:—*Held*: as the exor. was not entitled to use his power of attorney, to the effect of making the legatee a party to these proceedings, seeing that their interests were directly opposed, the legatee was not barred by the decree from calling him to account, nor bound to sue him in the Jamaica Cts.—*ANDERSON v. SHAND* (1833), 11 Sh. (Ct. of Sess.) 688.—*SCOT.*

**534 viii.** —.—*]*—A marriage was contracted in England between a domiciled Scotsman & an Englishwoman. After several years cohabitation in Scotland, the wife abandoned her husband &

**535. Parties.**—(1) A bill of review, or a supplemental bill in the nature of a bill of review, is necessary where the title or subject-matter of the claim has been directly adjudicated upon in a former suit by a decree declaring or assuming a right, or, in the case of a dismissal of a bill, negating it: but an order of dismissal is a bar only when the Ct. has thereby determined that pltf. had no title to the relief sought by his bill, & therefore, the dismissal of so much of a bill as relates to an issue raised by it which is irrelevant to the relief prayed, is no bar to a new bill by the same party for a different object depending upon the same issue.

(2) The proper test by which to try whether a bill, which recites a decree & proceedings in a former suit, is, in reference to such decree, to be considered a supplemental bill in the nature of a bill of review, is to see whether, if such decree & proceedings were omitted from the bill, they could be effectually pleaded in bar to it: for which purpose it is not sufficient that pltf.'s claim in the second suit depends upon a determination of some issue at variance with the determination of the same issue in the former suit, unless such issue be relevant to the objects of both suits, & be raised between the parties in the same rights & in reference to the same subject-matter of claim.

went to reside with her relatives in England. The husband raised a suit in the Arches Ct. of Canterbury for restitution of conjugal rights, which was met by a responsive allegation by the wife, praying for divorce *a mensa et toro*, on the ground of cruelty & adultery committed in Scotland. She obtained sentence of divorce. The wife now raised an action of divorce in the Scottish Cts.:—*Held*: as she was not the mover in the English suit, but had come into Ct. as deft. in that suit, she was not barred from seeking the more extensive remedies open to her by the law of Scotland.—*GEILS v. GEILS* (1850), 13 Dunl. (Ct. of Sess.) 321; 23 Sc. Jur. 137; (1851), 23 Sc. Jur. 435.—*SCOT.*

**534 ix.** —.—*]*—One of the original trustees acting under a trust, disposition & settlement died in 1857, & in the same year two new trustees were assumed, one of whom was also a beneficiary under the trust. In 1909 these new trustees suing in their capacity as trustees, brought an action against the representatives of deceased trustee for recovery of funds which they alleged had been lost to the trust estate through his negligence. Defendants pleaded that the pursuers were barred by *mora*, & by the fact that they had themselves been guilty of negligence which had contributed to the loss:—*Held*: as the pursuers were suing as trustees for behoof of the beneficiaries whom they represented, the plea of bar stated against them was unavailing.—*SCHUBZ v. DUN*, [1912] S. C. 50; *affd.*, [1913] S. C. (H. L.) 12.—*SCOT.*

**534 x.** —.—*]*—A workman, employed by a colliery co., as brakesman on a branch line of railway belonging to his employers was incapacitated for work as the result of an accident, & received from his employers compensation under Workmen's Compensation Act, 1906 (c. 58), for three years, until he died from his injuries. His father thereupon brought an action of damages in respect of his son's death against a ry. co., owing to whose fault, he averred, the accident had happened:—*Held*: pursuer's claim was excluded by sect. 11 of the Act, on account of his son having recovered compensation from his employers.—*GRAY v. NORTH BRITISH RY. CO.*, [1915] S. C. 211.—*SCOT.*



**Sect. 3.—Effect of res judicata: Sub-sect. 2, C. (a) & (b) i.]**

(3) A purchaser, from the trustees under a will of 1818, of part of the devised estates, filed a bill against the trustees & the parties beneficially interested, suggesting that the will had been obtained by fraud, & was invalid, but praying no relief on that supposition, but only that the validity of the will might be inquired into, & that, if it should be found to be valid, the contract might be specifically performed. At the hearing, the bill was dismissed as against all defts., except the trustees, & that part of it which went to impeach the will was dismissed as against the trustees also, & the usual reference was directed as to title, & the Master having reported in favour of the title, a decree was ultimately made for specific performance. Some years after, same pltf. filed another bill against the parties in possession of the rest of the estates under the will of 1818, reciting the former decree & proceedings; but charging that the will of 1818 had been obtained by fraud & when testator was incompetent, & praying that it might be set aside, & that pltf. might be declared entitled to the estates under a limitation in a prior will of 1815, under which, supposing the will of 1818 to be invalid, his title had just accrued:—*Held*: the decree & proceedings in the former suit were no bar to the institution of the second, on the ground: (a) the issue raised by the first suit as to the validity of the will of 1818 was not relevant to the object of that suit; (b) the two suits were not brought by pltf. in the same right; (c) or for the same subject-matter of claim.—*BAINBRIGGE v. BADDELEY* (1847), 2 Ph. 705; 41 E. R. 1115, L. C.

(1848), 2 Ph. 711; *Taylor v. Taylor* (1849), 1 Mac. & G. 397. *Refd.* *Spread v. Morgan* (1865), 11 H. L. Cas. 588. *Generally, Mntd.* *Henderson v. Cook* (1858), 4 Drew. 306; *Turner v. Tepper* (1877), 46 L. J. Ch. 703.

**536. — Judgment for widow in action under Fatal Accidents Act, 1846 (c. 93) — Action by widow suing as administratrix.]—***LEGGOTT v. GREAT NORTHERN RY. CO.*, No. 479, *ante*.

**537. Privies—In law—Judgment against one suing as administrator—Action as executor.]—**To an action of debt on bond brought by several, as exors. of J., it is no plea that before the writ purchased one of pltf., as administrator of J. brought an action of debt on the same bond against deft., who pleaded that J. made exors. who administered, & upon which plea judgment was given for deft.—*ROBINSON'S CASE* (1603), 5 Co. Rep. 32 b; 77 E. R. 103; *sub nom.* *ROBINSON v. ROBINSON*, Cro. Jac. 14.

*Annotations*:—*Consd.* *Ferrer's Case* (1599), 6 Co. Rep. 7 a. *Refd.* *Slingsby v. Lambert* (1616), Cro. Jac. 394; *Hustler v. Raines* (1695), 2 Lut. 1414; *Kitchen v. Campbell* (1772), 3 Wils. 304; *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151; *Overton v. Harvey* (1850), 11 C. B. 324.

**(b) Joint Parties.**

**i. Joint Contractors.**

**538. Judgment against one joint contractor on joint contract—Whether proceedings maintainable**

**PART II. SECT. 3, SUB-SECT. 2.—C.**

**538 i. Judgment against one joint contractor on joint contract—Whether proceedings maintainable against other contractors on joint contract—Unsatisfied judgment.]—**Three defts. were in partnership in a business which had two branches. Deft. E., who was in charge of one branch, borrowed money from pltf. for the purposes of the business, & gave pltf. a promissory note therefor, signed by E. in the firm's name. The money actually

went into the business. Deft. G. set up that he retired from the partnership six months before the note was made. In fact, McN., the third partner, had, about that time, bought G.'s interest in the business; but E. was not aware of it:—*Held*: the fact that judgment had been entered by default against deft. E. did not prevent recovery against the others, it not being a case of election; & therefore pltf. should have judgment against defts. McN. & G. for the balance due on the note.—*THOMAS v. MCNAUGHTON* (1912), 21 W. L. R. 267; 2 W. W. R. 381; 2

**against other contractors—Unsatisfied judgment.]—**To debt for goods sold to deft. pleaded in bar that the goods were sold to him jointly with one S., & not to deft. alone; that pltf. sued S. for the same debt, & recovered judgment:—*Held*: (1) a judgment recovered against one of two joint contractors is a good bar to an action against the other, though no execution has issued; (2) it sufficiently appeared that the debt was not joint & several; the matter was properly pleaded in bar, & not in abatement.—*KING v. HOARE* (1844), 13 M. & W. 491; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L. J. Ex. 29; 4 L. T. O. S. 174; 8 Jur. 1127; 153 E. R. 206.

*Annotations*:—*As to* (1) *Expld. & Distd.* *Henry v. Goldney* (1846), 15 M. & W. 494. *Distd.* *Re Morrison, Ex p. Waterfall* (1851), 4 De G. & Sm. 199. *Expld.* *Buckland v. Johnson* (1854), 15 C. B. 145; *Baker v. Sayers & Foster* (1868), 17 L. T. 579. *Apld.* *Brinsmead v. Harrison* (1872), L. R. 7 C. P. 547. *Expld.* *Kendall v. Hamilton* (1879), 4 App. Cas. 504; *Re Hodgson, Beckott v. Ramsdale* (1885), 31 Ch. D. 177. *Apld.* *Cambefort v. Chapman* (1887), 19 Q. B. D. 229. *Distd.* *Beck v. Pierce* (1889), 23 Q. B. D. 316. *Consd.* *Re King & Beesley, Ex p. Harner* (1894), 1 Mans. 505. *Extd.* *McLeod v. Power*, [1898] 2 Ch. 295. *Expld. & Distd.* *Isaacs v. Salbstein*, [1916] 2 K. B. 139. *Expld.* *Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London*, [1918] 1 K. B. 180. *Consd.* *The Koursk*, [1924] P. 140. *Refd.* *Newton v. Blunt* (1846), 3 C. B. 675; *Roddam v. Morley* (1857), 1 De G. & J. 1; *Phillips v. Ward* (1863), 3 New Rep. 92; *Re Wheal Ludcott & Wrey Consols Mines Co., Ex p. Jackson* (1869), 21 L. T. 67; *Bermondsey Vestry v. Ramsey* (1871), L. R. 6 C. P. 247; *Wemyss v. Hopkins* (1875), 44 L. J. M. C. 101; *Re Davison, Ex p. Chandler* (1884), 13 Q. B. D. 50; *Munster v. Cox* (1885), 10 App. Cas. 680; *Odell v. Cormack* (1887), 19 Q. B. D. 223; *Pilley v. Robinson* (1887), 20 Q. B. D. 155; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Re Crook, Ex p. Collins* (1891), 66 L. T. 29; *Hammond v. Schofield*, [1891] 1 Q. B. 453; *Westmoreland Green & Blue Slate Co. v. Feilden*, [1891] 3 Ch. 15; *Chamberlyn v. Allen* (1892), 36 Sol. Jo. 348; *Midgley v. Midgley*, [1893] 3 Ch. 282; *Wegg-Prosser v. Evans* (1894), 64 L. J. Q. B. 1; *Penny v. Wimbledon U. D. C.* (1899), 80 L. T. 615; *Morel v. Westmoreland* (1902), 87 L. T. 635; *London Assocn. for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15; *Moore v. Flanagan*, [1920] 1 K. B. 919; *Parr v. Snell*, [1923] 1 K. B. 1. *As to* (2) *Consd.* *Kendall v. Hamilton* (1879), 4 App. Cas. 504. *Expld.* *Pilley v. Robinson* (1887), 20 Q. B. D. 155. *Consd.* *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602. *Refd.* *Henry v. Goldney* (1846), 15 M. & W. 494; *Owen v. Wilkinson* (1858), 5 C. B. N. S. 526; *Re Davison, Ex p. Chandler* (1884), 13 Q. B. D. 50.

**539. — — — — —.]—**Two partners, acting by one of them, bought goods, & afterwards the vendor, with notice of the partnership, brought an action & recovered judgment against the one partner alone, & issued execution, which was, however, defeated by an adjudication of bkpcy. against him, followed by an adjudication against his partner:—*Held*: the original debt was merged in the judgment, & there could be no proof upon it against the joint estate.—*Re TYLER, Ex p. HIGGINS* (1858), 3 De G. & J. 33; 27 L. J. Bcy. 27; 31 L. T. O. S. 47; 4 Jur. N. S. 595; 6 W. R. 406; 44 E. R. 1181, L. J.

*Annotations*:—*Refd.* *Re Wheal Ludcott & Wrey Consols Mines Co., Ex p. Jackson* (1869), 21 L. T. 67; *Re Davison, Ex p. Chandler* (1884), 13 Q. B. D. 50.

**540. — — — — —.]—**An action, & a judgment against two persons who had borrowed money from pltf., though the judgment is unsatisfied, constitute a bar to another action brought by same

D. L. R. 211.—CAN.

**538 ii. — — — — —.]—**Where a creditor accepts from one of two joint contractors a promissory note as conditional payment & sues thereon to judgment, such judgment, if unsatisfied, is no answer to an action on the original consideration against the other contractor.—*ROYOROFF v. UGLUM & STEPHANSON*, [1922] 1 W. W. R. 1091; 65 D. L. R. 47; 15 Sask. L. R. 251.—CAN.

having sued one of two joint contractors, the



pltf. against a third person, who is afterwards discovered to have been really interested, as a partner, with the two debtors in the business for the purposes of which the money had been borrowed. This result did not depend on the doctrine of election.—**KENDALL v. HAMILTON** (1879), 4 App. Cas. 504; 48 L. J. Q. B. 705; 41 L. T. 418; 28 W. R. 97, H. L.

**Annotations**:—**Consd.** *Re Hodgson, Beckett v. Ramsdale* (1885), 31 Ch. 177; *Leduc v. Ward* (1886), 54 L. T. 214. **Distd.** *Badeley v. Consolidated Bank* (1886), 34 Ch. D. 536. **Appld.** *Cambeport v. Chapman* (1887), 19 Q. B. D. 229. **Consd.** *Pilley v. Robinson* (1887), 20 Q. B. D. 155. **Distd.** *Beck v. Pierce* (1889), 23 Q. B. D. 316. **Consd.** *Re Crook, Ex p. Collins* (1891), 66 L. T. 29; *Weall v. James* (1893), 68 L. T. 515. **Expld. & Distd.** *Wegg Prosser v. Evans*, [1895] 1 Q. B. 108. **Distd.** *Isaacs v. Salbstein*, [1916] 2 K. B. 139; *Duffner v. Bowyer* (1924), 40 T. L. R. 700. **Refd.** *Odell v. Cormack* (1887), 19 Q. B. D. 223; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Hammond v. Schofield*, [1891] 1 Q. B. 453; *Hoare v. Niblett*, [1891] 1 Q. B. 781; *Westmoreland Green & Blue Slate Co. v. Feilden*, [1891] 3 Ch. 15; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *McLeod v. Power*, [1898] 2 Ch. 295; *Morel v. Westmorland* (1902), 87 L. T. 635; *Codling v. Mowlem*, [1914] 2 K. B. 61; *Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London*, [1918] 1 K. B. 180; *Clarkson v. Davies*, [1923] A. C. 100; *Parr v. Snell*, [1923] 1 K. B. 1; *The Koursk*, [1924] P. 140. **Mentd.** *Re McRae, Forster v. Davis, Norden v. McRae* (1883), 25 Ch. D. 16; *Re Davison, Ex p. Chandler* (1884), 13 Q. B. D. 50; *Munster v. Cox* (1885), 10 App. Cas. 680; *Re Outram, Ex p. Ashworth & Outram* (1893), 63 L. J. Q. B. 308; *Wilson, Sons v. Balcarres Brook S.S. Co.*, [1893] 1 Q. B. 422; *Re Errington, Ex p. Mason*, [1894] 1 Q. B. 11; *Hall v. Sim* (1894), 10 T. L. R. 463; *Robinson v. Geisel* (1894), 64 L. J. Q. B. 52; *Wigram v. Cox, Sons, Buckley*, [1894] 1 Q. B. 792; *Re Ritson, Ritson v. Ritson* (1898), 67 L. J. Ch. 365; *Eccle. Comrs. v. Pinney*, [1899] 2 Ch. 729; *McCheane v. Gyles* (No. 2), [1902] 1 Ch. 911; *Norbury Natzio v. Griffiths*, [1918] 2 K. B. 369; *Rodriguez v. Speyer*, [1919] A. C. 59; *Moore v. Flanagan*, [1920] 1 K. B. 919.

541. ————.]—A creditor who has recovered judgment against one partner cannot sue another partner, but that rule does not take away the rights of a surety for one partner as against another partner.—**BADELEY v. CONSOLIDATED BANK** (1886), 34 Ch. D. 536; 57 L. J. Ch. 468; 55 L. T. 635; 35 W. R. 106; 3 T. L. R. 60; on appeal (1888), 38 Ch. D. 238, C. A.

**Annotations**:—**Mentd.** *Davis v. Freethy* (1890), 24 Q. B. D. 519; *Re Whiteley, Ex p. Smith* (1892), 66 L. T. 291; *Gray v. Stone & Funnell* (1893), 69 L. T. 282; *Cole v. Eley* (1894), 70 L. T. 892; *Davis v. Davis*, [1894] 1 Ch. 393; *King v. Whichelow* (1895), 64 L. J. Q. B. 801; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727; *Norton v. Yates*, [1906] 1 K. B. 112; *Vacuum Oil Co. v. Ellis*, [1914] 1 K. B. 693; *Re Beard, Ex p. Trustee*, [1915] H. B. R. 191.

Rights of sureties generally, see **GUARANTEE**.

542. ———— Judgment must be obtained on ground common to all joint contractors.]—Where the defence, raised by a plea, was, that the debt was a joint one, & that an action had already been brought by pltf. against another joint-debtor, in which judgment was given for debt:—**Held**: the plea was defended on grounds common to all the co-debtors.—**PHILLIPS v. WARD** (1863), 2 H. & C. 717; 3 New Rep. 92; 33 L. J. Ex. 7; 9 L. T. 345; 9 Jur. N. S. 1182; 12 W. R. 106; 159 E. R. 297.

**Annotations**:—**Refd.** *Midgley v. Midgley*, [1893] 3 Ch. 282; *Isaacs v. Salbstein*, [1916] 2 K. B. 139.

543. ———— Liability of other joint contractors not known.]—**MUNSTER v. COX**, No. 560, post.

544. ———— Claim against estate of deceased partner—Rule in equity.]—(1) The creditor of a partnership firm, although not strictly a joint

& several creditor, has concurrent remedies against the estate of a deceased partner & the surviving partner; & it makes no difference which remedy he pursues first. But it is necessary that the surviving partner should be present at taking the accounts of the estate of the deceased partner, & that the partnership creditor should not come into competition with the separate creditors of the deceased partner.

(2) A father & son being in partnership became indebted to pltf. who were bankers. The son died, & the father brought an action, & obtained judgment for the administration of his son's estate. Pltf. carried on a claim for the debt against the separate estate, being at that time unable to prove the existence of a partnership, & were declared entitled to a dividend. Afterwards the father died, & pltf. having obtained proof of the partnership, brought an action to make his estate liable for the partnership debt:—**Held**: the proceedings in the previous action did not constitute a *res judicata* or estoppel so as to prevent pltf. from recovering the debt; but they were put under an undertaking to postpone their dividend on the son's separate estate to the claims of his separate creditors.

(3) In order to protect each of the joint-debtors, the law treats the cause of action as being a joint one, & as capable of being merged, whenever it is pursued to a judgment. It is absorbed & merged in the judgment, which is recovered against one of the debtors, not only as against him but as against all the rest (**BOWEN, L.J.**).—**Re HODGSON, BECKETT v. RAMSDALE** (1885), 31 Ch. D. 177; 55 L. J. Ch. 241; 54 L. T. 222; 34 W. R. 127; 2 T. L. R. 73, C. A.

**Annotations**:—**As to** (1) **Refd.** *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Moore v. Knight*, [1891] 1 Ch. 547. **As to** (2) **Consd.** *McLeod v. Power*, [1898] 2 Ch. 295. **Refd.** *Wegg Prosser v. Evans* (1894), 64 L. J. Q. B. 1; *Isaacs v. Salbstein*, [1916] 2 K. B. 139. **As to** (3) **Refd.** *McLeod v. Power*, [1898] 2 Ch. 295. **Generally, Mentd.** *Re Farman, Farman v. Smith* (1887), 57 L. J. Ch. 637; *Wildish v. Fowler* (1888), 5 T. L. R. 113; *Rawlinson v. Scholes* (1898), 79 L. T. 350.

545. ———— One joint contractor a married woman—Contract in respect of separate estate.]—The rule that judgment recovered against one of two joint contractors is a bar to an action against the other applies equally when one of the joint contractors is a married woman contracting in respect of her separate property.—**HOARE v. NIBLETT**, [1891] 1 Q. B. 781; 60 L. J. Q. B. 565; 64 L. T. 659; 55 J. P. 664; 39 W. R. 491; 7 T. L. R. 468, D. C.

546. ———— Judgment set aside.]—Pltf. obtained a judgment by consent against S. They afterwards discovered that another person was a partner with him, & they applied, with the consent of the judgment debtor, to have the judgment set aside & the writ amended:—**Held**: when once judgment was signed against the one partner, pltf.'s remedy against the other was extinguished, & could not be revived by consent.—**HAMMOND v. SCHOFIELD**, [1891] 1 Q. B. 453; 60 L. J. Q. B. 539; 7 T. L. R. 300, D. C.

**Annotations**:—**Consd.** *Cross v. Matthews & Wallace* (1904), 91 L. T. 500; *Moore v. Flanagan*, [1920] 1 K. B. 919. **Refd.** *Hoare v. Niblett*, [1891] 1 Q. B. 781; *Parr v. Snell*, [1923] 1 K. B. 1.

Effect of setting aside judgment, compare, Nos. 574, 575, post.

other being out of the jurisdiction, & having recovered judgment against the one cannot afterwards sue the other.—**HARRIS v. DUNN** (1859), 18 U. C. R. 352.—**CAN.**

1. ————.]—In an action

commenced against several joint debtors, judgment recovered against one of them who admits the claim does not bar the further prosecution of the suit against the others.—**DICK v. DHUNJI JAITA** (1901), 1 L. R. 25 Bom, 378.—**IND.**

m. ————.]—Pltf., by entering judgment in default of appearance against one of two joint defts., does not abandon his right to proceed to judgment against the other deft.—**PIM v. COYLE**, [1903] 2 I. R. 457.—**IR.**

*Sect. 3.—Effect of res judicata: Sub-sect. 2, C. (b) i. & ii.]*

**547. — Judgment in action against all contractors—Effect of R. S. C. Ord. 14, r. 5.]**—In an action by a firm of solrs. against E. & J., two partners, for a bill of costs incurred by the firm, on application under Ord. 14, r. 1, E. consented that judgment should be entered against him, J. obtained leave to defend. "All matters in difference in the action" were afterwards referred to a Master. J. raised a counter-claim. The Master found in favour of J. in the original action, & awarded him £230 on the counter-claim:—*Held*: the judgment against E. did not prevent J. from recovering a balance due to the partnership; under the terms of the reference, "all matters in difference in the action" included the counter-claim, so that, as well as the original action, was properly before the Master.—*WEALL v. JAMES* (1893), 68 L. T. 54; 37 Sol. Jo. 194; 5 R. 157; *subsequent proceedings*, 68 L. T. 515, C. A. *Annotations*:—*Refd.* *McLeod v. Power* (1898), 67 L. J. Ch. 551; *Morel v. Westmorland* (1902), 87 L. T. 635.

—*]*—A. took out a summons under Ord. 14, r. 2, against B., C., & D., who were alleged to be jointly indebted to him. B. took no further part in the proceedings, but C. & D. showed cause by filing affidavits. On the hearing of the summons leave was given to sign judgment against B., & liberty to C. & D. to defend. A. signed judgment against B.:—*Held*: although B., C., & D. were sued as jointly liable, & judgment was signed against B., yet that was not a bar to further proceedings against C. & D., the general rule of law being no longer applicable to cases falling under Ord. 14, r. 5.—*WALTON (FRANCIS) & CO. v. TOPAKYAN, KEVORKIAN & MARLER* (1905), 53 W. R. 657; 49 Sol. Jo. 650, C. A.

**549. — — — — —.]**—(1) The rule that a judgment against one of two joint debtors is a bar to proceedings against the other, applies where both joint debtors are originally made defts. to & enter appearance in the same action, & judgment by consent has been obtained against one of them in that action.

(2) Where one joint debtor has consented to judgment, the other, if he wishes to avail himself of the judgment as a defence, should plead it. A debtor not so pleading was ordered to pay costs up to the time of the consent judgment.—*MCLEOD v. POWER*, [1898] 2 Ch. 295; 67 L. J. Ch. 551; 79 L. T. 67; 47 W. R. 74; 42 Sol. Jo. 634.

*Annotations*:—*As to (1) Consd.* *Morel v. Westmorland* (1902), 87 L. T. 635. *Refd.* *Walton v. Topakyan, Kevorkian & Marler* (1905), 53 W. R. 657.

**550. — — — — —.]**—In an action against three joint contractors, for damages for breach of an agreement, pltf. obtained an interlocutory judgment for damages, to be assessed, against two of defts. in default of defence. He then procured an assessment of damages & signed final judgment for the assessed amount against the two defts. who were in default:—*Held*: under the rule established in *King v. Hoare*, No. 538, *ante*, *Kendall v. Hamilton*, No. 540, *ante*, & *Brinsmead v. Harrison*, No. 556, *post*, pltf. was precluded from proceeding with the action against the third deft. There was no statute or rule of ct. which took the case of the law as laid down in those authorities.—*PARR v. SNELL*, [1923] 1 K. B. 1; 91 L. J. K. B. 865; 128 L. T. 106, C. A.

*Annotation*:—*Refd.* *The Koursk*, [1924] P. 140.

**551. — Whether action maintainable against other contractors on collateral agreement.]**—(1) A promise in writing, signed by the party chargeable

thereby, to pay his proportion of a joint debt more than six years old, is a sufficient compliance with Statute of Frauds Amendment Act, 1828 (c. 14), s. 1, to take the case out of Stat. Limitations, though no amount is specified in the promise, & a pltf. suing on such promise is not confined to nominal damages, but may recover the whole of such proportion upon proving the amount by extrinsic evidence.

(2) A. & B. were jointly indebted to C. After more than six years had elapsed since the debt accrued, A. promised in writing signed by him to pay his proportion when applied to. Afterwards, C. sued A. & B. jointly, in *indebitatus assumpsit*, on the original joint cause of action. B. pleaded the general issue, & A. pleaded the general issue & Stat. Limitations. A verdict passed against B. on the general issue, & for A. upon the general issue & upon the issue on Stat. Limitations, & judgment was entered for C. against B., & for A. against C. C. afterwards brought a fresh action against A. & declared specially on the new promise to pay his proportion:—*Held*: neither the recovery against B. nor the verdict & judgment for A. were any answer to the action against A. on the new promise.—*LECHMERE v. FLETCHER* (1833), 1 Cr. & M. 623; 3 Tyr. 450; 2 L. J. Ex. 219; 149 E. R. 549.

*Annotations*:—*As to (1) Consd.* *Hooper v. Stephens* (1835), 7 C. & P. 260; *Cheslyn v. Dalby* (1840), 4 Y. & C. Ex. 238; *Hartley v. Wharton* (1840), 3 Per. & Dav. 529. *Refd.* *Edmunds v. Downes* (1834), 2 Cr. & M. 459; *Bird v. Gammon* (1837), 3 Bing. N. C. 883; *Johnson v. Dodgson* (1837), 2 M. & W. 653; *Routledge v. Ramsay* (1838), 3 Nev. & P. K. B. 319; *Waller v. Lacy* (1840), 1 Man. & G. 54; *Baker v. Walker* (1845), 14 M. & W. 465; *Williams v. Griffith* (1849), 3 Exch. 335; *Deacon v. Gridley* (1854), 24 L. J. C. P. 17; *Walker v. Butler* (1856), 6 E. & B. 506; *Curlew v. Mornington* (1857), 5 W. R. 491. *As to (2) Refd.* *King v. Hoare* (1844), 2 Dow. & L. 382; *Blyth v. Fladgate*, *Morgan v. Blyth*, *Smith v. Blyth*, [1891] 1 Ch. 337; *Isaacs v. Salbstein*, [1916] 2 K. B. 139. *Generally, Mentd.* *Courtenay v. Williams* (1844), 3 Hare, 539.

*Compare Nos. 342, 343, ante.*

**552. Judgment against one joint contractor on collateral agreement or security—Judgment on negotiable instrument—Whether action maintainable against other contractors on original contract.]**—One of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, on which bill judgment was recovered:—*Held*: such judgment was no bar to an action of covenant against the three; such bill, though stated to have been given for the payment & in satisfaction of the debt, not being averred to have been accepted as satisfaction, nor to have produced it in fact.—*DRAKE v. MITCHELL* (1803), 3 East, 251; 102 E. R. 594.

*Annotations*:—*Consd.* *Bell v. Banks* (1841), 3 Man. & G. 258; *Bermondsey Vestry v. Ramsey* (1871), L. R. 6 C. P. 247; *Re Davison, Ex p. Chandler* (1884), 13 Q. B. D. 50. *Distd.* *Cambefort v. Chapman* (1887), 19 Q. B. D. 229. *Foll.* *Wegg Prosser v. Evans*, [1895] 1 Q. B. 108. *Refd.* *Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London*, [1918] 1 K. B. 180.

**553. — — — — —.]**—(1) An unsatisfied judgment against one joint contractor on a bill of exchange, given by him alone for the joint debt, is a bar to an action against the other joint contractor on the original contract.

(2) Pltfs. sold goods to a partnership consisting of deft. & W. After the sale the partnership was dissolved. Pltfs., who were not aware of the dissolution, drew bills for the price of the goods, which were accepted by W. in the partnership name. Pltfs. sued W. in the partnership name on the bills, & recovered judgment, which was not satisfied. Pltfs. afterwards sued deft. for the price of the goods:—*Held*: the case was within the principle of *Kendall v. Hamilton*, No. 540,



anle; the judgment against W. on the bills was an answer to the action.—**CAMBEFORT v. CHAPMAN** (1887), 19 Q. B. D. 229; 56 L. J. Q. B. 639; 57 L. T. 625; 51 J. P. 455; 35 W. R. 838; 3 T. L. R. 738, D. C.

—As to (1) & (2) **N.F. Wegg Prosser v. Evans, Consd. Isaacs v. Salbstein**, [1916] 1 Wigram v. Cox, Sons, Buckley.

**554.** — — — — —.] — (1) An unsatisfied judgment against one joint contractor, on a cheque given by him alone for the joint debt, is not a bar to an action against the other joint contractor on the original contract.

(2) Deft. & T. jointly guaranteed to pltf. the payment of rent by a tenant of pltf.'s. A half-year's rent being in arrear T. gave pltf. his cheque for the amount. Pltf. sued T. on the cheque, & recovered judgment, but such judgment was not satisfied. Pltf. then sued deft. on the guarantee:—**Held**: the causes of action upon the cheque & upon the guarantee not being the same, the judgment against T. afforded no defence to the action.—**WEGG PROSSER v. EVANS**, [1895] 1 Q. B. 108; 64 L. J. Q. B. 1; 72 L. T. 8; 43 W. R. 66; 11 T. L. R. 12; 39 Sol. Jo. 26; 9 R. 830, C. A.

**Bankruptcy proceedings.**—See **BANKRUPTCY**, Vol. IV., p. 433, Nos. 3906, 3907.

#### ii. Joint Tortfeasors.

**Liability of joint tortfeasors generally.**—See **NEGLIGENCE**; **NUISANCE**; **TORT**.

**555. General rule.**—Judgment recovered in trover may be pleaded in bar to a second action against a different person for the same cause without averring satisfaction.—**BROWN v. WOOTTON** (1605), Cro. Jac. 73; Moore, K. B. 762; 79 E. R. 62; *sub nom.* **BROOME v. WOOTTON**, Yelv. 67.

**Annotations**:—**Consd.** **Lechmere v. Fletcher** (1833), 1 Cr. & M. 623; **King v. Hoare** (1844), 2 Dow. & L. 382. **Expld.** **Buckland v. Johnson** (1854), 15 C. B. 145. **Follid.** **Brinsmead v. Harrison** (1872), L. R. 7 C. P. 547. **Refd.** **Greenlands v. Wilmhurst & London Asscn. for Protection of Trade**, [1913] 3 K. B. 507; **The Koursk**, [1924] P. 140.

**556.** — — — — —.] — (1) A judgment in an action against one of two joint tortfeasors is a bar to an action against the other for the same cause, although such judgment be unsatisfied.

(2) A judgment against deft. in trover without satisfaction does not vest the property in the goods in deft.—**BRINSMEAD v. HARRISON** (1872), L. R. 7 C. P. 547; 41 L. J. C. P. 190; 27 L. T. 99; 20 W. R. 784, Ex. Ch.

**Annotations**:—As to (1) **Consd.** **Howe v. Oliver** (1908), 24 T. L. R. 781. **Distd.** **Bradley & Cohn v. Ramsay** (1912), 106 L. T. 771. **Consd.** **Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London**, [1918] 1 K. B. 180. **Refd.** **Re Crook, Ex p. Collins** (1891), 66 L. T. 29; **Re London & General Bank, Ex p. Theobald** (1895), 73 L. T. 304; **Penny v. Wimbledon U. D. C.** (1899), 80 L. T. 615; **London Asscn. for Protection of Trade v. Greenlands**, [1916] 2 A. C. 15; **Parr v. Snell**, [1923] 1 K. B. 1; **The Koursk**, [1924] P. 140. As to (2) **Consd.** **Re Ware, Ex p. Drake** (1877), 5 Ch. D. 866. **Refd.** **Bradley & Cohn v. Ramsay** (1912), 106 L. T. 771; **London Asscn. for Protection of Trade v. Greenlands**, [1916] 2 A. C. 15; **Re Gunsbourg**, [1920] 2 K. B. 426.

**557.** — — — — —.] — (1) Where several defts. are sued on a joint cause of action, & one of them pays

money into ct. in satisfaction of the claim, pltf., if he takes out the money, there & then puts an end to the whole action, & other defts. who were not responsible for the payment in are entitled to their costs.

(2) The cause of action against the various defts. was a joint one for conspiracy to break up the contract; consequently the taking of money out of ct. stayed all further proceedings in respect of the only cause of action which was alleged against all of them (**LUSH, J.**).—**BEADON v. CAPITAL SYNDICATE, LTD.** (1912), 28 T. L. R. 394; *affd.*, 28 T. L. R. 427, C. A.

**558.** — — — — —.] — **Effect of R. S. C., Ord. 27.**—**GOLDREI, FOUCARD & SON v. SINCLAIR & RUSSIAN CHAMBER OF COMMERCE IN LONDON**, No. 568, *post*.

**559.** — — — — —.] — **What constitutes joint tort.**—(1) The test of whether damage which flows from the negligent navigation of two ships constitutes a joint tort, so that recovery of judgment against one joint tortfeasor would at common law prevent a later recovery of judgment against the other, is whether the wrongdoing ships were participating in one act of negligence or whether they were by separate acts of negligence combining to produce the same damage. To constitute a joint tort there must be one *damnum* & one *injuria*.

(2) **Qu.**: whether the common law rule as to joint tortfeasors applies in Admiralty.—**THE KOURSK**, [1923] P. 206; 92 L. J. P. 125; 39 T. L. R. 611; *affd.*, [1924] P. 140, C. A.

See, further, **TORT**.

**560. Defamation**—Judgment against A. sued “as A. & Co.”—Application to issue execution against stranger discovered to be partner.]—To a writ issued against R. & Co., & claiming damages for libel, an appearance was entered for “R. trading as R. & Co., deft. in this action.” The statement of claim was delivered against “R. sued as R. & Co.” & the proceedings continued in that form down to judgment. At the trial, by consent, a verdict was found for pltf. for 40s. & judgment entered accordingly. After issuing execution against R., pltf., under the Rules in force before 1883, took out a summons for liberty to amend the judgment (& the pleadings if necessary) by striking the words “R. sued as” from the title of the action; to enter judgment against R. & Co. so as to correspond with the writ, to issue execution against C., on the ground that C. had been since discovered to be a partner in the firm:—**Held**: (1) that the proceedings having been conducted against R. only, & judgment having been signed by consent against him alone, the judgment could not be converted into a judgment against the firm.

(2) Where there is a dormant & concealed partner, your getting judgment for a joint debt against the other partners will bar you from commencing an action against the concealed principal (**LORD BLACKBURN**).—**MUNSTER v. COX** (1885), 10 App. Cas. 680; 55 L. J. Q. B. 108; 53 L. T. 474; 31 W. R. 461; 1 T. L. R. 542, H. L.:

43 S. C. R. 640; 31 C. L. T. 197.—**CAN.**

**555 iii.** — — — — —.] — **RAHMUBHOY HUBBHOY v. TURNER** (1890), 1 L. R. 14 Bom. 408.—**IND.**

**555 iv.** — — — — —.] — Pltf. sued several defts. jointly to recover damages in respect of an alleged assault committed on him by defts., but entered into a compromise with one of defts.:—**Held**: the existence of this compromise did not preclude pltf. from recovering damages against the remaining defts.—**RAM KUMAR SINGH v. ALI HUSSAIN** (1909), 1 L. R. 31 All. 173.—**IND.**

#### PART II. SECT. 3, SUB-SECT. 2.— C. (b) ii.

**555 i. General rule.**—In an action against several tortfeasors, recovery of interlocutory judgment “for the value of the goods or damages to be assessed” against one of defts. is no bar to the recovery in the same action of judgment against the other wrongdoers.—**SLY v. CAMPBELL** (1887), 2 Q. L. J. 192.—**AUS.**

**555 ii.** — — — — —.] — A proprietor or principal contractor undertaking works in

the circumstances inherently dangerous cannot delegate the duty of providing against such danger so as to escape personal responsibility if that duty be neglected. Failure to discharge such duty makes the proprietor & his contractor, or the contractor & his sub-contractor, as the case may be, equally liable as joint tortfeasors for resultant injury. A judgment for damages sustained in consequence of any such injury against one of such joint tortfeasors is a bar to a subsequent action therefor against another.—**LONGMORE v. MCARTHUR & CO.** (1910),



*Sect. 3.—Effect of res judicata: Sub-sect. 2, C. (b) ii., (c) & (d) i.]*

*affg. S. C. sub nom., MUNSTER v. RAILTON (1883),*

*The Duke of Buccleuch, |*

[1892] P. 201.

**Fraud.]—***See No. 568, post.*

**561. Negligence—Judgment against one partner—Action against other partners.]—**Pltf., who had been advised by one partner in a firm of solrs., brought an action against him to recover damages for his alleged negligence in giving her advice, & this action was settled on the terms of an agreement under which she received £95 in full satisfaction & discharge of all claims & disputes between the parties. Subsequently pltf. sued the other partner in respect of the same matter:—*Held*: pltf. was precluded from maintaining the action.—*HOWE v. OLIVER (1908), 24 T. L. R. 781.*

**562. Trespass to land.]—**In trespass, two broke the close & entered & did the trespass. The owner of the land brought an action of trespass against one of them & had judgment & execution & afterwards brought trespass against the other, & declared upon the same trespass:—*Held*: a good bar; the ct. compared it to the case of a release to one trespasser which discharges both.—*LENDALL & PINFOLD'S CASE (1584), 1 Leon. 19; 74 E. R. 18.*

**563. —.]—**In trespass debt. pleaded that the trespass was due by debt. & one J., against which J., pltf. at another time had brought an action of trespass, & recovered, & had execution of the damages:—*Held*: a good bar, for that all is but one trespass, & satisfaction by one of the trespassers is satisfaction for the other.—*ANON. (1585), 3 Leon. 122; 74 E. R. 580.*

**564. Trespass to person.]—**A battery committed by several & a recovery against one, in an action afterwards against the other for the same battery, the first recovery is a bar.—*HICKMAN v. POYNS (1605), Yelv. 68; 80 E. R. 47.*

**565. —.]—**Where several actions are brought against two for the same battery, & a recovery is had against the one & an action is brought against the other & that found also, the ct. can never intend that to be the same battery. But if he may take advantage of the first recovery it ought to be shown in pleading.—*WATSON'S CASE (1628), Het. 20; 124 E. R. 308.*

**566. Trover—Unsatisfied judgment—Second action framed in contract.]—**If A. & B. jointly convert the goods of C. by selling them, A. alone receiving the proceeds of the sale, & C. brings trover against B. & recovers judgment, but get no fruits of his judgment. C. cannot afterwards recover against A. for money had & received to C.'s use, the judgment in trover being a good bar to the second action, although the proceeds of the sale received by A. amount to more than the sum recovered in the action in trover.—*BUCKLAND v. JOHNSON (1854), 15 C. B. 145; 2 C. L. R. 784; 23 L. J. C. P. 204; 23 L. T. O. S. 190; 18 Jur. 775; 2 W. R. 565; 139 E. R. 375.*

*Annotations:—*Consd. *St. Losky v. Green (1860), 9 C. B. N. S. 370. Expld. Marston v. Phillips (1863), 3 New Rep. 35. Consd. Brinsmead v. Harrison (1871), L. R. 6 C. P. 584; Flitters v. Allfrey (1874), L. R. 10 C. P. 29. Distd. Wegg Prosser v. Evans, [1894] 2 Q. B. 101; Isaacs v. Salbstein, [1916] 2 K. B. 139. Repld. Routledge v. Hislop (1860), 2 E. & E. 549; Phillips v. Ward (1863), 2 H. & C. 717; Smith v. Baker (1873), L. R. 8 C. P. 350; Cambeport v. Chapman (1887), 19 Q. B. D. 229; Rice v. Reed, [1900] 1 Q. B. 54.*

**567. — Judgment not in ordinary form—Second action of trover.]—**Pltfs. received from a firm abroad a parcel of precious stones to be placed

on view at a certain exhibition. The owners instructed pltfs. to sell the stones if not less than the sum of £750 could be obtained for them, but otherwise the same were to be returned to the owners. While at the exhibition the stones were not sold, & therefore were restored to pltfs. Shortly afterwards pltfs. were prevailed upon to allow B., who was a jeweller, to have the stones on approval. B. offered £300 for the stones, but declined to give £750 for them. That offer was communicated to the owners, B. retaining the stones pending the receipt of the owners' instructions concerning them. B.'s offer was refused by the owners, but before their instructions were received B. had sold the stones to defts., who acted *bonâ fide* in the transaction, for the sum of £300. On pltfs. demanding an immediate return of the stones they discovered that B. had parted with them. Thereupon pltfs. brought an action against B. for £750 or alternatively for the return of the stones & damages. Ultimately judgment for £750 & costs against B. was consented to, but subsequently B. was adjudicated bkpt. Pltfs. consequently brought an action against defts. to recover possession of the stones or £750, their value, or damages, £750, for their detention:—*Held*: pltfs. were debarred from recovering in their action against defts. by reason of the form of procedure in their action against B., the judgment consented to by them not being an ordinary judgment in detinue, but one that effected a legal transfer of the stones to B.—*BRADLEY & COHN, LTD. v. RAMSAY & CO. (1912), 106 L. T. 771; 28 T. L. R. 388, C. A.*

*See, further, TROVER & DETINUE.*

**568. Two causes of action—Judgment in action for rescission of contract—Claim for damages for fraud.]—**(1) Pltfs. in their statement of claim alleged that they were induced by false & fraudulent misrepresentations, made to them by the first debt. acting as the agent & with the knowledge & approval of second defts., the co., to enter into an agreement to become one of the founders of the co., & for that purpose to pay to the co. the sum of £105, & they claimed against both defts. damages for the fraud; & alternatively they alleged that by reason of the false & fraudulent misrepresentations they were entitled to rescind the agreement, & they claimed against the co., rescission of the agreement, & the repayment of the £105 with interest. The co. made default in delivering a defence & upon motion for judgment against the co., on the statement of claim pltfs. recovered final judgment against them on the claim for rescission & the payment of the £105. The co. did not repay the £105. The first debt. delivered a defence & the action proceeded against him. At the trial the jury found a verdict for pltfs. against him for £105 damages. He appealed & contended that, defts. being joint tortfeasors, pltfs. by recovering judgment against the co. were debarred from proceeding with the action against him:—*Held*: pltfs. were entitled to recover, as there were two causes of action, one against the co. for rescission of the agreement, & the repayment of the £105, in respect of which fraud was not a necessary element, & the other against both defts. to recover damages for fraud; & the judgment against the co. on the claim for rescission was no bar to the claim against the first debt. for damages for fraud.

(2) Pltfs.' claims were in respect of the same object matter, & having recovered judgment against the co., for the repayment of the £105, they could not afterwards recover judgment for

the same sum against the first debt. in respect of the same misrepresentation (BANKES, L.J.).

(3) The rule laid down in *Brinsmead v. Harrison*, No. 556, *ante*, as to joint tortfeasors has not been altered by any of the rules of Order 27.—*GOLDREI, FOUCARD & SON v. SINCLAIR & RUSSIAN CHAMBER OF COMMERCE IN LONDON*, [1918] 1 K. B. 180; 87 L. J. K. B. 261; 118 L. T. 147; 34 T. L. R. 74, C. A.

*Annotation*:—As to (1) & (2) *Refd. Parr v. Snell* (1922), 91 L. J. K. B. 865.

**Proceedings against tortfeasors other than joint tortfeasors.]—***Sec Sect. 3, sub-sect. 2, C. (d), ii., post.*

(c) *Joint and Several Parties.*

**569. General rule.]—***KING v. HOARE*, No. 538, *ante*.

**570. —.]—**Funds, subject to the trusts of a settlement, were invested in Exchequer bills, on the sale of which the proceeds were paid to the account of a firm of solrs., F., S., & F., at their bankers. The funds were afterwards advanced on a mtge. of house property in a new neighbourhood, & of inadequate value. At that date there were no trustees of the settlement, & the mtge. was taken in the names of S. & two other persons who were then proposed, & shortly afterwards appointed new trustees, & never repudiated the transaction. S. was the member of his firm who acted for them in all the matters, & for the work which he did the firm, by arrangement, received, at the time when the money was advanced, payment for their bill of costs out of the funds. The mtge. proved to be an insufficient security, & in an action against the trustees it was held that they were jointly & severally liable to make good the loss sustained. The property not having been sold, or the trust funds replaced, beneficiaries sought to make the firm of solrs. liable for the loss of the funds on the ground of negligence, though S.'s partners had not had any personal knowledge of the property at the time when the mtge. transaction was completed:—*Held*: (1) in all that S. had done in the matter of the mtge., he acted within the scope of his authority as a partner, & his firm must be taken to have had knowledge that the security was, for trustees, improper, & consequently, they were implicated in, & jointly & severally liable for the breach of trust; & further, the judgment which had been recovered against S., as one of the trustees, had not discharged his partners from liability; (2) though there had not been an express retainer, the relation of solr. & client might be inferred from the acts of the parties; it subsisted between the firm & the trustees, & the firm were liable in damages for the negligence of S. for failure in discharge of the duty which had been undertaken to the clients; (3) the liability extended to the estate of a member of the firm since deceased.—*BLYTH v. FLADGATE, MORGAN v. BLYTH, SMITH v. BLYTH*, [1891] 1 Ch. 337; 60 L. J. Ch. 66; 63 L. T. 546; 39 W. R. 422; 7 T. L. R. 29.

*Annotations*:—As to (1) *Refd. Mara v. Browne*, [1895] 2 Ch. 69; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536.

**571. Judgment by confession.]—**(1) The judgment-book is not evidence of the judgment entered therein, though the record has not been made up, &

though the person interested in proving the judgment be no party to the action.

*Semble*: (2) the person so interested may compel the party to enter up his judgment.

*Semble*: (3) if the holder of a joint & several promissory note enter up judgment by *cognovit* against one of the makers, & levy part under a *fi. fa.*, this is no discharge of the other.—*AYREY v. DAVENPORT* (1807), 2 Bos. & P. N. R. 474; 127 E. R. 714.

**572. Unsatisfied judgment.]—**Action on a joint & several promissory note. Plea; that pltf. instituted proceedings against B., one of the makers, in a ct. in Scotland, & obtained recovery & satisfaction on the note. A summons was taken out to set aside or amend the plea, as calculated to embarrass. Debt. offered particulars. The ct. refused to make any order.

Although the plea is very bare, when the whole is put in issue, debt. will be bound to prove what will be a defence,—that there was a judgment, & that the judgment was satisfied (*ERLE, J.*).—*LAWLER v. ROBERTSON* (1858), 1 F. & F. 307.

(d) *Alternative Parties.*

i. *Actions of Contract.*

**573. Principal & agent — Judgment against agent—Action against principal—Unsatisfied judgment.]—**The master of a vessel who as such had signed a bill of lading, was sued upon it to judgment; he was afterwards arrested thereon under a *ca. sa.*, & subsequently obtained his discharge as a bkpt. The owner of the vessel was then sued in respect of the same cause of action:—*Held*: (1) the second action was not maintainable; the liability of the master of a ship acting for his owners, & their liability where he acts for them, is not different from the liabilities in ordinary cases of principal & agent.

(2) Where an agent having made a contract in his own name has been sued on it to judgment, no second action is maintainable against the principal.—*PRIESTLY v. FERNIE* (1865), 3 H. & C. 977; 34 L. J. Ex. 172; 13 L. T. 208; 11 Jur. N. S. 813; 13 W. R. 1089; 2 Mar. L. C. 281; 159 E. R. 820.

*Annotations*:—As to (1) *Consd. Curtis v. Williamson* (1874), L. R. 10 Q. B. 57. As to (2) *Refd. Kendall v. Hamilton* (1879), 4 App. Cas. 504.

*Compare* No. 576, *post*.

**574. — — — — — Judgment set aside.]—**P. had supplied goods, on K.'s order, to the Princess's Theatre, for payment of which P. brought an action against K. & obtained judgment. Subsequently P., while the judgment against K. was still subsisting, issued a writ against H., the lessee of the theatre, for payment of the same goods. H. objected that the matter was *res judicata*. The judgment against K. was set aside two days before this motion in the action against H. came on for argument in the Divisional Ct.:—*Held*: inasmuch as the judgment against K. had now been set aside, the action was rightly brought against H.—*PARTINGTON v. HAWTHORNE* (1888), 52 J. P. 807, D. C.

**575. — — — — —.]—**Two debts., M. & W., having been sued in the High Ct. for goods sold & delivered, judgment was entered against M., & the action as against W. was remitted for trial to the county ct. At the trial it

pltf. from proceeding in the same action to judgment against the other debts.—*DUEBER WATCH CASE MANUFACTURING CO. v. TAGGART* (1899), 26 A. R. 295; *affd.*, 30 S. C. R. 373.—*CAN.*

**o. Husband & wife — Judgment against wife.]—**Where a divorce suit

PART II. SECT. 3, SUB-SECT. 2.—  
C. (c).

**569 i. General rule.]—**A judgment against a contractor & his surety may be pleaded, as an estoppel against the contractor alone in an action by him against the other parties to the contract & their sureties.—*SMITH v.*

*STRANGE* (1884), 2 Man. L. R. 101.—*CAN.*

PART II. SECT. 3, SUB-SECT. 2.—  
C. (d) i.

**n. Partnership.]—**A judgment recovered against one or more partners or other joint debtors does not prevent



**Sect. 3.—Effect of res judicata: Sub-sect. 2, C. (d) i. & ii. & (e).]**

was found that debt was contracted by W. alone, & that M. had merely acted as his agent. Judgment was postponed, & the judgment against M. was set aside. The county ct. judge then entered judgment against W.:—*Held*: the judgment against W. was wrong, as pltf. had conclusively elected to enforce their remedy against M.—*CROSS & CO. v. MATTHEWS & WALLACE* (1904), 91 L. T. 500; 20 T. L. R. 603, D. C.

**Effect of setting aside judgment.]—Compare No. 546, ante.**

**576. — Judgment against principal—Action against agent—Unsatisfied judgment.]—A person making a contract with an agent, who is acting on behalf of an undisclosed principal, cannot sue the agent on the contract after having obtained judgment upon it against the undisclosed principal, even though such judgment is still unsatisfied.—*LONDON GENERAL OMNIBUS CO., LTD. v. POPE* (1922), 38 T. L. R. 270.**

*Compare No. 573, ante.*

**577. Partnership—Dissolution—Action against new firm—Subsequent action against late partner.]**

—A firm of two partners dissolved; one retired & the other carried on the business with a new partner under the same style. A customer of the old firm sold & delivered goods to the new firm after the change but without notice of it. After receiving notice he sued the new firm for the price of the goods & upon their bkptcy. proved against their estate; & afterwards brought an action for the price against the late partner:—*Held*: the liability of the late partner was a liability by estoppel only & not jointly with the members of the new firm; the customer might at his option have sued the late partner or the members of the new firm but could not sue all three together; having elected to sue the new firm he could not afterwards sue the late partner.—*SCARF v. JARDINE* (1882), 7 App. Cas. 345; 51 L. J. Q. B. 612; 47 L. T. 258; 30 W. R. 893, H. L.

**Annotations:—***Fold. Fell v. Parkin* (1882), 52 L. J. Q. B. 99. *Consd. Griffith v. Pound* (1890), 45 Ch. D. 553; *Longman v. Hill* (1891), 7 T. L. R. 639; *French v. Howie* (1905), 93 L. T. 202 (*See* (1906), 95 L. T. 274). *Refd. Jones v. Ashwin & Ivory* (1883), Cab. & El. 159; *Re Crook, Ex p. Collins* (1891), 66 L. T. 29; *Re Snyder Dynamite Projectile Co., Skelton's Case* (1893), 68 L. T. 210; *British Homes Assoc. Corp. v. Paterson*, [1902] 2 Ch. 404; *Re Law, Law v. Law* (1904), 92 L. T. 1; *Morel v. Westmorland*, [1904] A. C. 11; *Codling v. Mowlem* (1913), 83 L. J. K. B. 445; *Re Gunsbourg*, [1920] 2 K. B. 426; *Moore v. Flanagan*, [1920] 1 K. B. 919. *Mentd. Re Davison, Ex p. Chandler* (1884), 13 Q. B. D. 50; *James v. Young* (1884), 27 Ch. D. 652; *Burgess v. Morton* (1894), 10 T. L. R. 339; *Re West Coast Gold Fields, Ex p. Salaman* (1905), 75 L. J. Ch. 23; *Moel Tryvan Ship Co. v. Weir*, [1910] 2 K. B. 844; *Willis, Faber v. Joyce* (1911), 104 L. T. 576; *Harrisons & Crossfield v. L. & N. W. Ry.*, [1917] 2 K. B. 755; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833; *R. v. Paulson*, [1921] 1 A. C. 271.

**578. Husband & wife—Judgment against wife—Action against husband—Unsatisfied judgment for debt incurred before marriage.]—A judgment having been recovered by pltf. in an action brought against a married woman under Married Women's Property Act, 1882 (c. 75), s. 13, for a debt incurred by her before marriage, but such judgment remaining unsatisfied because she had no separate estate, an action for the debt was afterwards brought by pltf. against the husband who had acquired property from his wife to an amount exceeding the debt:—*Held*: (1) the judgment recovered against the wife was no defence to the action against the husband.**

in which the wife was petitioner was settled without notice to her solrs., who thereupon brought an action against her in which they recovered

judgment on which nothing was realised, & they afterwards applied for an order that the husband should pay them the wife's costs:—*Held*:

(2) A husband cannot be made liable under the provisions of above Act, ss. 14, 15, for an antenuptial debt of the wife which accrued due against the wife more than six years before the commencement of the action.—*BECK v. PIERCE* (1889), 23 Q. B. D. 316; 58 L. J. Q. B. 516; 61 L. T. 448; 54 J. P. 198; 38 W. R. 29; 5 T. L. R. 672, C. A. *Annotation:—As to* (1) *Refd. Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510.

**579. — Wife with separate property.]—(1) The facts that a husband & his wife, each having property, have been living together, & that necessaries have been supplied for the household on the orders of the wife, afford no evidence of a joint liability on the part of the husband & wife to pay for the necessaries so supplied. The presumption *prima facie* arises in such a case of an actual authority impliedly given to the wife by the husband to pledge his credit for necessaries for the household, but that presumption may be rebutted by proof of an arrangement under which a substantial allowance has been made by the husband to the wife for household expenses on the understanding that she was not to pledge his credit.**

(2) Where a claim was made in an action for the price of goods against a husband or wife alternatively, & pltf. under Ord. 14, obtained leave to sign, & signed judgment for the amount claimed against the wife, who had separate property:—*Held*: the signing of judgment against the wife was a conclusive election by pltf. to rely on her liability, & they could not afterwards insist on the liability of the husband.

(3) R. 5 of Ord. 14, does not apply where the right of action can only be in the alternative against one or other of two defts.—*MOREL BROTHERS & CO. v. WESTMORLAND (EARL)*, [1904] A. C. 11; 73 L. J. K. B. 93; 89 L. T. 702; 52 W. R. 353; 20 T. L. R. 38, H. L.

**Annotations:—***As to* (1) *Refd. Slater v. Parker* (1908), 24 T. L. R. 621; *Isaacs v. Salbstein*, [1916] 2 K. B. 139; *Miss Gray, Ltd. v. Cathcart* (1922), 38 T. L. R. 562. *As to* (2) *Apld. French v. Howie*, [1906] 2 K. B. 674; *Moore v. Flanagan*, [1920] 1 K. B. 919. *Consd. Duffner v. Bowyer* (1924), 40 T. L. R. 700. *Refd. London General Omnibus Co. v. Pope* (1922), 38 T. L. R. 270. *As to* (3) *Refd. Cross v. Matthews & Wallace* (1904), 91 L. T. 500; *Walton v. Topakyan, Kevorkian & Marler* (1905), 53 W. R. 657; *Moore v. Flanagan*, [1920] 1 K. B. 919.

**580. — Judgment for only part of claim.]—An action was brought against a husband & wife, who were living together, for the balance of an account for groceries supplied by pltf. to defts. upon the order of the wife. Upon an application for judgment under Ord. 14, against both defts., the husband denied all liability, while the wife admitted indebtedness for the greater part of the claim, & in view of this admission by the wife the Master gave judgment against the wife for a part of the sum claimed, with leave to her to defend as to the balance & with leave to the husband to defend the action. Afterwards a jury found that there was no joint liability of husband & wife, & that pltf. had given credit to the husband only. Judgment having been given against the husband for the balance of the amount:—*Held*: the taking of the judgment against the wife for part of the claim was an election by pltf. to accept the liability of the wife for the whole amount & prevented pltf. from afterwards proceeding against the husband for any part of the claim.—*FRENCH v. HOWIE*, [1906] 2 K. B. 674; 75 L. J. K. B. 980; 95 L. T. 274, C. A.**

the judgment obtained against the wife was a bar to any claim against the husband.—*SULLIVAN v. SULLIVAN*, [1912] 2 I. R. 116.—*IR.*



581. ———.] — Pltf., who was a milliner & dressmaker, brought an action by a specially indorsed writ against a husband & wife claiming against them jointly to recover the price of goods supplied to the wife. Upon an application under Ord. 14, r. 1, for leave to sign final judgment against both husband & wife for the amount claimed, the Master gave leave, & pltf. signed judgment against both. The husband alone appealed. The Judge in Chambers set aside the judgment against the husband & gave him leave to defend. At the trial the judge found that there was no joint liability in the husband & wife, that the goods being *prima facie* necessities for the wife, the husband *prima facie* was the principal & the wife the agent, & he held that pltf. had not, by the judgment against the wife, elected to treat her as principal, & was entitled to recover against the husband:—*Held*: as the remedy was an alternative one, pltf., having signed judgment against the agent, could not afterwards recover judgment against the principal in respect of the same debt, & therefore, the husband was not liable.—*MOORE v. FLANAGAN*, [1920] 1 K. B. 919; 89 L. J. K. B. 417; 122 L. T. 739, C. A.

*Annotations*:—*Expld.* *Parr v. Snell*, [1923] 1 K. B. 1. *Consd.* *Duffner v. Bowyer* (1924), 40 T. L. R. 700.

.]—*See, generally*, HUSBAND & WIFE.

*Negotiable instruments.*—*See* BILLS OF EXCHANGE, Vol. VI., p. 387, Nos. 2541, 2542.

## ii. Actions of Tort.

582. Trover—Judgment against one tortfeasor—Action against another tortfeasor.]—In trover deft. was discharged on common bail, pltf. having recovered in another action of trover for the same goods against another person; for that judgment altered the property of the goods.—*ADAMS v. BROUGHTON* (1737), 2 Stra. 1078; Andr. 18; 93 E. R. 1043.

*Annotations*:—*Consd.* *Brinsmead v. Harrison* (1871), L. R. 1 C. P. 584. *Refd.* *Robinson v. Searson* (1843), 6 Man. & G. 762; *Buckland v. Johnson* (1854), 15 C. B. 145; *Marston v. Phillips* (1863), 3 New Rep. 35. *Mentd.* *Cooper v. Shepherd* (1846), 3 C. B. 266.

583. ———.] — (1) In trover for a bedstead deft. pleaded a former recovery by pltf. for the same bedstead against C., averring that the conversion by C. for which that action was brought was a conversion not later in point of time than the conversion alleged against deft., & that before the alleged conversion, C. being possessed of the bedstead, sold it to deft., who paid for it & received it under such sale, & that the taking under such sale was the conversion alleged:—*Held*: this plea was a good answer to the action.

(2) The damage to pltf. is the cause of the action & the loss of the chattel is that damage. Though the conversion by deft. is different from the conversion by C. & may make either the one or the other liable to pltf. at his election, yet satisfaction from one is a defence for the other (*TINDAL, C.J.*).—*COOPER v. SHEPHERD* (1846), 3 C. B. 266; 15

L. J. C. P. 237; 7 L. T. O. S. 282; 10 Jur. 758; 136 E. R. 107.

*Annotations*:—*As to* (1) *Refd.* *Buckland v. Johnson* (1854), 15 C. B. 145; *Salmon v. Horwitz* (1854), 23 L. T. O. S. 77; *Brinsmead v. Harrison* (1871), L. R. 1 C. P. 584.

584. ———.] — Unsatisfied judgment.]—

(1) Although, in an action of trover, if pltf. obtains satisfaction, he cannot afterwards bring trover in respect of the same chattel against a party to whom deft. has transferred it; yet, if he has not obtained satisfaction, he may do so.

(2) A. sued B. in trover for a chattel, & signed interlocutory judgment, but proceeded no further. B. then sold the chattel to C., whereupon A. waived his interlocutory judgment, & brought trover against C. for the chattel:—*Held*: he had a right to do so.—*MARSTON v. PHILLIPS* (1863), 3 New Rep. 35; 9 L. T. 289; 12 W. R. 8.

*Annotation*:—*As to* (2) *Refd.* *Brinsmead v. Harrison* (1871), 40 L. J. C. P. 281.

585. ———.]—On Sept. 20, 1917, a debtor transferred his assets, including certain furniture, to a co. formed by him. On Sept. 27 he committed an act of bkptcy. upon which a petition was presented on Oct. 8, & a receiving order was made against him on Oct. 24, followed by an adjudication on Dec. 12. After the date of the receiving order part of the furniture was sold by the co. to a *bona fide* purchaser for value without notice, by whom it was resold to another purchaser in the same position. On Feb. 3, 1919, the transfer of Sept. 20, 1917 was held to be fraudulent & void & an act of bkptcy, & the co. was ordered to deliver to the trustee all the property comprised in that sale. The value of the property having been found by the registrar, a further order was made against the co. to pay the amount of that value to the trustee. No payment having been made under that order the trustee claimed to recover the furniture or its value from the ultimate purchaser:—*Held*: (1) on the authority of *Brinsmead v. Harrison*, No. 556, *ante*, the judgment against the co. being unsatisfied, the trustee was not precluded from proceeding against the purchaser to recover the furniture; (2) the title of the trustee related back to the act of bkptcy. of Sept. 20, 1917, & neither the original nor any subsequent transferee could establish any title as against the trustee.—*Re GUNSBURG*, [1920] 2 K. B. 426; *sub nom.* *Re GUNSBURG, Ex p. TRUSTEE*, 89 L. J. K. B. 725; *sub nom.* *Re GUNSBURG, Ex p. COOK*, 123 L. T. 353; 36 T. L. R. 485; 64 Sol. Jo. 498; [1920] B. & C. R. 50, C. A.

*Annotations*:—*As to* (2) *Refd.* *Re Wigzell, Ex p. Hart*, [1921] 2 K. B. 835; *Re Dombrowski, Ex p. Trustee* (1923), 92 L. J. Ch. 415.

*Proceedings against joint tortfeasors.*—*See* Sect. 3, sub-sect. 2, C. (b), ii., *ante*.

## (e) Strangers.

586. General rule.]—When there is no joint contract or relation of principal & agent, an unsatisfied judgment against one person for the price

## PART II. SECT. 3, SUB-SECT. 2.—C. (e).

586 i. General rule.]—Three out of six decree-holders sold their share in the decree to A., who thereafter made an application to the ct. under Code of Civil Procedure, s. 232. This application was dismissed on the ground that A.'s purchase was made *benami* for some of the judgment-debtors. In a subsequent suit brought by A. & the persons who were said to be the real purchasers, it was contended that a separate suit was barred under Code of Civil Procedure, s. 244, (cl. c.):—*Held*: A. was not a party

to the suit in which the decree was passed, nor the representative of any such party, & the suit was not barred.—*HALODHAR SHAHA v. HAROGOBIND DAS KOIBURTO* (1886), 1 L. R. 12 Cal. 105.—IND.

586 ii. ———.]—An auctioneer misrepresented to a purchaser certain bogus bids as genuine, whereby the purchaser was induced to give an inflated price for a farm. Shortly after the sale the purchaser suspected the fraud & refused to complete, whereupon the vendor sued him for specific performance. The purchaser having no proof of the fraud entered

into a consent settling the action by which the price of the farm was reduced by £55, & each party bore his own costs of the action. The purchaser subsequently repudiated the consent on another ground, but took no further step in regard to the farm. He then sued the auctioneer in deceit, & the auctioneer admitted the fraudulent bids:—*Held*: as the auctioneer was no party to the former action, the consent furnished no defence as regards him.—*INGRAM v. GILLEN* (1910), 44 L. L. T. 103.—IR.

586 iii. ———.]—Creditors having been assoldied from an action at the

**Sect. 3.—Effect of *res judicata*: Sub-sect. 2, C. (e), D. & E.]**

of goods sold is not a bar to a subsequent action against another person for the price of the same goods.—ISAACS & SONS v. SALBSTEIN, [1916] 2 K. B. 139; 85 L. J. K. B. 1433; 114 L. T. 924; 32 T. L. R. 370; 60 Sol. Jo. 444, C. A.

—Where joint contract.]—See Sect. 3, sub-sect. 2, C. (b), i., *ante*.

—Where alternative liability.]—See Sect. 3, sub-sect. 2, C. (d), *ante*.

**587. Judgment on information for being concerned in unshipping—Subsequent information against another.]**—One in execution upon a judgment on an information for being concerned in unshipping, etc., is no bar to an information against another for the very same thing.—A.-G. v. POPPLESTONE (1731), Bunb. 311; 145 E. R. 684.

**588. Judgment in action for criminal conversation with plaintiff's wife—Similar action against another.]**—It is no bar to an action against A., for criminal conversation with pltf.'s wife, that pltf. had brought another action of the same kind against B., & having obtained a verdict & judgment, had charged B., in execution, although the cause of action in both suits accrued during the same period.—GREGSON v. McTAGGART (1808), 1 Camp. 415, N. P.

*Annotation*:—*Refd.* Stocker v. Stocker, Brice & Patterson, [1917] P. 264.

**589. Judgment against shipowner for not delivering cargo—Action against purchaser of cargo.]**—Where the master of a ship on a voyage from Calcutta to London, laden with indigo, was obliged to put into Mauritius from unseaworthiness, & there abandoned ship & cargo, which were *bonâ fide* sold by public auction under the orders of the Vice-Admiralty Ct.:—*Held*: (1) there being no pressing necessity for the sale, the master could confer no title upon the vendee; (2) a judgment in tort against the owner of the vessel for not delivering the cargo, pursuant to the bill of lading, was no bar to this action; (3) an unavailing demand of the proceeds in the Vice-Admiralty, did not prevent pltf. from recovering the full value of the indigo from deft.—MORRIS v. ROBINSON (1824), 3 B. & C. 196; 5 Dow. & Ry. K. B. 34; 107 E. R. 706.

*Annotations*:—*As to* (2) *Refd.* Knight v. Legh (1828), 1 Moo. & P. 528. *As to* (3) *Expld.* Rice v. Reed, [1900] 1 Q. B. 54. *Refd.* Valpy v. Sanders (1848), 5 C. B. 886; Brinsmead v. Harrison (1871), L. R. 6 C. P. 584. *Generally*, *Mentd.* Cammell v. Sewell (1860), 6 Jur. N. S. 918.

**590. Judgment against former owner of premises for paving expenses—Action for same expenses against tenant to succeeding owner.]**—Metropolis Management Amdt. Act, 1862 (c. 102), ss. 77 & 96, make certain paving expenses recoverable by the vestry of action from the present or any future owner of premises, or from any person who then or thereafter occupies the premises. The vestry had recovered a judgment against a former owner of certain premises in respect of such expenses, which remained unsatisfied:—*Held*: such judgment was no bar to a subsequent action for the same expenses against deft., who occupied

instance of the trustee under a disposition *omnium bonorum* for expenses:—*Held*: this did not bar an action against them by the agent to whom the expenses were incurred, & who was not a party to the former action.—LAIDLAW v. BLACKWOOD (1843), 15 Sc. Jur. 484.—SCOT.

*p.* Judgment on claim for several claim by an individual to a several fishery in non-tidal waters

is not a question of public interest on which a judgment which does not work an estoppel is admissible against

*q.* Judgment dismissing petition for dissolution of marriage—On ground of petitioner's misconduct—Subsequent suit citing another co-respondent.—At the hearing of a petition for dissolution of marriage it appeared that

the premises as tenant to a succeeding owner.—BERMONDSEY VESTRY v. RAMSEY (1871), L. R. 6 C. P. 247; 40 L. J. C. P. 206; 24 L. T. 429; 35 J. P. 567; 19 W. R. 774.

*Annotations*:—*Refd.* Plumstead District Board of Works v. Planet Bldg. Soc. (1872), 27 L. T. 656. *Mentd.* Egg v. Blayney (1888), 59 L. T. 65.

**591. Recovery of penalty against printer & publisher — Illegal advertisement — Action for penalty against others in respect of same advertisement.]**—Pltf. having already recovered judgment against the printer & publisher was estopped from suing defts.—NUTT v. SOL SYNDICATE, LTD. (1902), 19 T. L. R. 27.

**592. Order for restitution of plaintiff's goods—Application by police & not by plaintiff—Action of detinue against pawnbroker.]**—Pltfs., a firm of jewellers, employed a traveller for the disposal of their goods, some of which he pawned. Upon his conviction for larceny before a ct. of summary jurisdiction, an order was made by the justices, not upon pltfs.' application, under Pawnbrokers Act, 1872 (c. 93), s. 30, for the restitution of the goods to pltfs. upon the payment by them to the pawnbroker of the amount advanced on the goods. Pltfs. did not take advantage of this order, but brought an action of detinue against the pawnbroker for the return of the goods:—*Held*: they were not estopped by the order of the justices from so doing.—LEICESTER & CO. v. CHERRYMAN, [1907] 2 K. B. 101; 76 L. J. K. B. 678; 96 L. T. 784; 71 J. P. 301; 23 T. L. R. 444; 51 Sol. Jo. 429, D. C.

**593. Judgment against purchaser for price of goods—Action against forwarding agent for negligence & breach of duty—Instructions to forwarding agents not to deliver goods.]**—Goods were delivered by the owners to forwarding agents to be carried by sea to Hull & thence forwarded to a customer in Manchester. When the goods arrived at Hull the owners instructed the forwarding agents not to deliver to the customer, but the goods were nevertheless delivered to him. The owners thereupon invoiced the goods to the customer & sued him & recovered judgment for the price of goods sold & delivered, & then, failing to get satisfaction, took proceedings in bkpcy. against him:—*Held*: they could not afterwards sue the forwarding agents for negligence & breach of duty.—VERSCHURES CREAMERIES v. HULL & NETHERLANDS S.S. Co., [1921] 2 K. B. 608; 91 L. J. K. B. 39; 125 L. T. 165, C. A.

**D. To What Proceedings Applicable.**

**Bankruptcy proceedings.]**—See BANKRUPTCY, Vol. IV., pp. 132, 133, 155, Nos. 1207–1211, 1218, 1457, 1458.

**Matrimonial causes.]**—See HUSBAND & WIFE.

**Offences against military law.]**—See Part III., Sect. 1, sub-sect. 4, *post*.

**E. Convictions and Orders in Criminal and Quasi-Criminal Proceedings.**

**Autrefols acquit & autrefols convlct.]**—See, generally, CRIMINAL LAW, Vol. XIV., pp. 338–348.

**594. Summons for assault—Dismissal—Subsequent action for same assault.]**—A party having

in a previous suit instituted by petr., in which another party had been cited as co-resp., the petition had been dismissed in consequence of alleged misconduct on petr.'s part:—*Held*: the ct. should not take cognisance of what might have been alleged at the former trial, & the judgment given on that occasion was no bar to the granting of a decree.—BANNISTER v. BANNISTER (1893), 12 N. Z. L. R. 355.—N.Z.



been summoned before two justices, under Offences Against the Person Act, 1828 (c. 31), s. 27, for an assault, & having appeared & pleaded not guilty, complainant declined to proceed, stating that he meant to bring an action. The justices thereupon dismissed the complaint, & gave deft. a certificate as follows: "We deemed the offence not proved, inasmuch as complainant did not offer any evidence in support of the information; & have accordingly dismissed the complaint"—*Held*: what passed before the justices constituted a "hearing" within sect. 27; & the certificate was a complete bar to an action for the same assault, under sect. 28.—*TUNNICLIFFE v. TEDD* (1848), 5 C. B. 553; 17 L. J. M. C. 67; 10 L. T. O. S. 347; 12 J. P. 249; 136 E. R. 995.

*Annotations*:—*Consd.* *Reed v. Nutt* (1890), 24 Q. B. D. 669. *Mentd.* *Vaughton v. Bradshaw* (1860), 9 C. B. N. S. 103; *Galliard v. Laxton* (1862), 2 B. & S. 363.

595. ————.]—Where a summons for an assault is dismissed by the magistrate on one of the grounds mentioned in Offences Against the Person Act, 1828 (c. 31), s. 27, the granting the certificate mentioned in that sect. is not discretionary, or a judicial act, but is ministerial only; & the certificate will be a valid bar to an action for the assault under s. 28, although not applied for when the summons was heard, & not drawn up till after the parties had left the ct.—*HANCOCK v. SOMES* (1859), 1 E. & E. 795; 28 L. J. M. C. 196; 33 L. T. O. S. 105; 23 J. P. 662; 5 Jur. N. S. 983; 7 W. R. 422; 8 Cox, C. C. 172; 120 E. R. 1108.

*Annotation*:—*Mentd.* *Costar v. Hetherington* (1859), 1 E. & E. 802.

596. ————.]—Pltf. laid an information against deft. under Offences Against the Person Act, 1828 (c. 31), & took out & served a summons requiring him to appear before the justices at petty sessions. Afterwards, & before the day of hearing, pltf. gave notice both to deft. not to attend & to the magistrate's clerk that he had withdrawn the summons. Notwithstanding this, deft. appeared at the petty sessions in obedience to the summons & requested that pltf. might be called to support his complaint. Pltf. was called but did not appear; whereupon deft. applied to the justices for a certificate of dismissal under sect. 27 of above Act, which provides that "if the justices on the hearing of any case of assault shall deem the offence not proven, or the assault to have been justified, or so trifling as not to merit punishment, they shall forthwith make out a certificate stating such dismissal, & shall deliver it to deft." The justices gave a certificate reciting the circumstances & stating that they dismissed the complaint:—*Held*: the certificate operated as a bar to pltf.'s right of action for the same assault

under above statute.—*VAUGHTON v. BRADSHAW* (1860), 9 C. B. N. S. 103; 7 Jur. N. S. 468; 142 E. R. 40; *sub nom.* *BRADSHAW v. VAUGHTON*, 30 L. J. C. P. 93; 3 L. T. 373; 25 J. P. 102; 9 W. R. 120.

*Annotations*:—*Consd.* *Masper v. Brown* (1876), 45 L. J. Q. B. 203; *Reed v. Nutt* (1890), 24 Q. B. D. 669.

597. ————.]—No hearing of summons on merits.]—*REED v. NUTT*, No. 633, *post*.

598. ————.]—Conviction—Subsequent action for same assault.]—Deft. was convicted on indictment of unlawfully wounding pltf., & was thereupon sentenced to be imprisoned, & also to pay a sum of money to pltf., the then prosecutor of the indictment, for his reasonable & necessary costs of the prosecution, & a moderate allowance for his loss of time, under Offences Against the Person Act, 1861 (c. 100), ss. 74 & 75:—*Held*: this was no bar to a subsequent action in which pltf. sued deft. for damages for bodily suffering, permanent injury, & medical expenses, incurred through the same assault.—*LOWE v. HORWARTH* (1865), 13 L. T. 297; 29 J. P. 792.

599. ————.]—Offences Against the Person Act, 1861 (c. 100), s. 45, renders a conviction before two justices of an assault, & payment of the fine imposed by them, a release "from all further or other proceedings, civil or criminal, for the same cause."—*Held*: these words included all proceedings against deft. arising out of the same assault, whether taken by prosecutor or by any other person consequentially aggrieved thereby.—*MASPER v. BROWN* (1876), 1 C. P. D. 97; 45 L. J. Q. B. 203; 34 L. T. 254; 40 J. P. 265; 24 W. R. 369.

*Annotations*:—*Foll.* *Holden v. King* (1876), 46 L. J. Q. B. 75. *Reid.* *Dyer v. Munday* (1895), 72 L. T. 448.

600. ————.]—For common assault—Subsequent action for damages for aggravated assault.]—Deft. was summoned before justices for assaulting & beating pltf.'s wife, & was duly convicted & punished. Pltf. subsequently brought an action against deft., claiming damages for an aggravated assault on his wife:—*Held*: the action was barred by Offences Against the Person Act, 1861 (c. 100), s. 45, as the justices could deal, & must be taken to have dealt with the case, not only under sect. 42 of the Act, but also under sect. 43 which refers to aggravated assaults.—*HOLDEN v. KING* (1876), 46 L. J. Q. B. 75; 35 L. T. 479; 41 J. P. 25; 25 W. R. 62.

*Annotations*:—*Reid.* *Crocker v. Raymond* (1886), 3 T. L. R. 181. *Mentd.* *Dyer v. Munday* (1895), 72 L. T. 448.

601. Refusal of justices to order payment of money—Under order made under Poor Law Payment of Debts Act, 1859 (c. 49)—Subsequent proceedings to enforce order.]—Sect. 6 of above Act is retrospective in its operation. The guardians

## PART II. SECT. 3, SUB-SECT. 2.—E.

598 i. Summons for assault—Conviction—Subsequent action for same assault.]—An order of justices that deft. should enter into a recognisance to keep the peace towards complainant on a complaint of an assault is not a bar in a civil action by the complainant as pltf. for damages for the same assault.—*MURRAY v. FITZPATRICK* (1914), 48 L. L. T. Jo. 305.—IR.

598 ii. ————.]—*WILSON v. BENNETT* (1903), 6 F. (Ct. of Sess.) 269; 41 Sc. L. R. 216; 11 S. L. T. 580.—SCOT.

r. Dismissal of summons—No certificate granted.]—If in a summary proceeding the magistrate dismiss the case *à l'enue* & mark the summons "dismissed" that is a bar to further prosecution for the same offence not withstanding that no certificate of

dismissal under 11 & 12 Vict. c. 43 has been granted. The magistrate is not bound to grant such certificate unless the case has been decided on its merits, but the dismissal of a case on a point of law deciding that deft. has in law committed no offence, is an adjudication on the merits & not in the nature of a nonsuit.—*LENTHALL v. GAZZARD* (1895), 16 N. S. W. L. R. 22; 11 N. S. W. W. N. 118.—AUS.

s. ————.]—Upon the hearing before a ct. of petty sessions of a complaint, complainant failed to appear, whereupon the complaint was dismissed. Subsequently complainant brought an action against deft. for the same subject-matter:—*Held*: there being no adjudication upon the merits, it was necessary, in order to constitute the dismissal of the complaint a bar to the action under Justices Act, 1890,

s. 77 (17), that a certificate of dismissal should be produced.—*FOREMAN v. MCNAMARA* (1897), 23 V. L. R. 501.—AUS.

t. ————.]—The magistrate after hearing a case under Deserted Wives & Children Act, endorsed the papers "no order made":—*Held*: making no order was equivalent to a dismissal, & though no certificate was given, complainant could not again proceed for the same cause of complaint.—*Ex p. TOOMEY* (1901), 1 S. R. N. S. W. 24.—AUS.

u. Withdrawal of first information—Whether bar to second information—Licensing offence.]—A licensed publican was charged under Liquor Act, s. 57, with allowing liquor to be consumed by Y. on his premises on Sunday. The information was withdrawn & another laid charging him



. 3.—*Effect of res judicata: Sub-sect. 2, E. Sect. 4: Sub-sect. 1.]*

of the London Union made an order on one of the parishes comprised therein for payment of a sum which included a balance due from the parish at the preceding half-year, which balance was made up of the accumulated balances of several successive years:—*Held*: (1) the order was rendered invalid by above sect.; (2) a refusal of justices to order payment of money under such an order was no bar to future proceedings to enforce it; (3) such refusal was a ground of appeal to one of the superior cts. under Summary Jurisdiction Act, 1857 (c. 43).—*LONDON UNION GUARDIANS v. ACOCKS* (1860), 8 C. B. N. S. 760; 24 J. P. 502; 8 W. R. 608; 141 E. R. 1364.

*Annotations*:—*As to* (1) *Reid*. *Saul v. Wigton R. S. A. & Bowness-on-Solway Churchwardens & Overseers* (1886), 56 L. T. 438; *Calstoe Union Grdns. v. North Kelsey Overseers* (1890), 59 L. J. M. C. 102. *As to* (3) *Reid*. *Townsend v. Read* (1861), 10 C. B. N. S. 308.

**602. Application under Metropolitan Police Courts Act, 1839 (c. 71) for delivery up of goods—Refusal of order—Subsequent action for trover.]—**

A person who has applied to a magistrate within Metropolitan Police District for an order under sect. 40 of above Act, for the delivery up of goods not exceeding £15 in value, which order is, after inquiry, refused, is not precluded, by having taken these proceedings, from bringing an action of trover for the goods.—*DOVER v. CHILD* (1876), 1 Ex. D. 172; 45 L. J. Q. B. 462; 34 L. T. 737; 40 J. P. 296; 24 W. R. 537.

*Annotations*:—*Reid*. *Leicester v. Cherryman* (1907), 96 L. T. 784. *Mentd*. *R. v. Slade* (1888), 21 Q. B. D. 433.

**603. — Order made—Subsequent action for damages for detention.]—**A magistrate's order, under sect. 40 of above Act, for the delivery of goods detained is no bar to an action for special damage arising out of the same detention.—*MIDLAND RY. CO. v. MARTIN & Co.*, [1893] 2 Q. B. 172; 62 L. J. Q. B. 517; 69 L. T. 353; 58 J. P. 39; 17 Cox, C. C. 687; 5 R. 489; *sub nom.* *MARTIN & Co. v. MIDLAND RY. CO.*, 9 T. L. R. 514, D. C.

*Annotations*:—*Reid*. *Leicester v. Cherryman* (1907), 76 L. J. K. B. 678; *Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London*, [1918] 1 K. B. 180.

**604. Award of compensation by magistrate under Metropolitan Hackney Carriages Act, 1843 (c. 86)—Against driver of vehicle for furious driving—Subsequent action for damages against driver's employers.]—**An award of compensation by a magistrate against the driver of a hackney or metropolitan stage carriage upon an information for furious driving under sect. 28 of above Act, is

under sect. 64 (3) with being the licensee of premises on which Y. was found when they should not be open for the sale of liquors. The evidence given on the second charge was the same on which the first was founded:—*Held*: the withdrawal of the first information was no bar to the conviction of appet. on the second, & the evidence necessary to support the conviction on the second charge would not have been sufficient to procure a conviction on the first.—*Ex p. MEERS* (1913), 13 S. R. N. S. W. 453; 30 N. S. W. W. N. 111.—AUS.

**b. — — — Desertion.]—**A complaint was made by a wife against her husband for leaving her without means of support. At the close of complainant's case application for a dismissal was made, on the ground that there was no evidence that complainant was left without means of support, & the magistrate refused to make any order on the complaint. A second complaint was made by com-

plainant, charging her husband with leaving her without means of support, on a day subsequent to the hearing of the first complaint. The case came on before another magistrate. His attention was directed to the previous case, &, by consent, he read the depositions & record in the case, & he declined to hear the second complaint on the ground that the matter was *res judicata*:—*Held*: the case should be remitted to the magistrate, with a direction to hear & determine.—*R. v. BRISBANE POLICE MAGISTRATE, Ex p. JEFFS*, [1915] St. R. Qd. 69. AUS

**c. — — — — —.]—**The rule of *res judicata* does not apply to a subsequent application by a wife against her husband for a maintenance order, a previous application having been dismissed.—*Ex p. JEFFS*, [1915] St. R. Qd. 69. [1920] V. L. R. 439.—AUS.

**d. Action for damages—Acquittal for offence—Whether bar to action.]**

a bar to a subsequent action against such driver's employers by the party injured in respect of his injuries. If the party injured accepts such compensation he is barred from further proceedings even where he did not lay the information or, in the first instance, request the magistrate to award compensation.—*WRIGHT v. LONDON GENERAL OMNIBUS CO.* (1877), 2 Q. B. D. 271; 46 L. J. Q. B. 429; 36 L. T. 590; 41 J. P. 486; 25 W. R. 647.

*Annotations*:—*Distd.* *Vallance v. Falle* (1884), 53 L. J. Q. B. 459. *Folld.* *Birmingham Corpn. v. Allsopp* (1918), 88 L. J. K. B. 549.

**605. Dismissal of summons for exposing food unfit for human food—Subsequent summons for same offence.]—**B. was charged with exposing on his premises certain meat unfit for human food, & the summons was dismissed on proof that he was not aware of the meat being there, as what occurred was done during his absence. A second summons charging the same facts, & offence, was heard, & B. was convicted, though he produced a certificate of dismissal of the previous summons:—*Held*: as B. might have been convicted of the same offence under the first summons, the second charge & conviction were bad, & conviction quashed accordingly.—*R. v. BLOUNT* (1879), 43 J. P. 383, D. C.

**606. Acquittal on charge of night poaching—Subsequent summons for same offence.]—**L. was charged with night poaching under Night Poaching Act, 1828 (c. 69), &, in the course of cross-examination of prosecutor's witnesses, the justices considered he had been illegally arrested, & discharged him. L. was again summoned for the same offence on the same facts, when the justices held that they had no jurisdiction, as the former discharge was *res judicata*:—*Held*: the justices were right, & moreover that they had heard the case on the second occasion also.—*R. v. BRAKENRIDGE* (1884), 48 J. P. 293, D. C.

**607. Acquittal on charge of trespassing in pursuit of game—Subsequent charge of using dog for taking game without licence.]—**On Mar. 5, B. was charged under Game Act, 1831 (c. 32), s. 30, with trespass in pursuit of game, but acquitted for want of corroboration of a witness. On May 14, B. was charged under sect. 23, with unlawfully using a dog for taking game, he having no licence. The facts were precisely the same, but on second occasion the witness was corroborated, & the justices were satisfied, but B. was discharged on the ground of *res judicata*:—*Held*: the justices were wrong, & there was no *res judicata*, as the offences were not inconsistent.—*BOLLARD v. SPRING* (1887), 51 J. P. 501, D. C.

—Pltfs. trustees of a common, prosecuted deft. for rescue of horses seized for the purpose of being impounded. The complaint was dismissed. Pltfs. then brought an action for rescue & trespass:—*Held*: the cause of action was *res judicata*.—*BARCLAY v. WHYTE TE HONG* (1882), 3 N. S. W. L. R. 119. —AUS.

—*]*—A workman having taken proceedings under Masters & Servants Act, 1895, in a police ct. against the agent of his alleged employer for wages claimed to be due to him by the employer, & having failed, thereupon sued the employer for a sum which it appeared by his admissions was the same sum which he had claimed in the police ct.:—*Held*: the claim was *res judicata*.—*SOUTH BRITISH FIRE & MARINE INSURANCE CO. v. ACKHOONZADA* (1909), 11 W. A. L. R. 47.—AUS.

—*]*—A proceeding under Masters & Servants

**608. Refusal to order restitution of stolen goods under Pawnbroker's Act, 1872 (c. 93)—Subsequent application against pawnbroker under Metropolitan Police Courts Act, 1839 (c. 71).—**The refusal of the ct., before which a thief has been convicted, to make an order for restitution of pawned stolen goods under sect. 30 of 1872 Act, is no bar to the exercise in the metropolis of the summary jurisdiction under sect. 40 of 1839 Act.—*Ex p. DAVISON* (1896), 60 J. P. 808; 13 T. L. R. 93, D. C.

*Annotation:—*Refd. *Leicester v. Cherryman* (1907), 96 L. T. 784.

**609. Dismissal of summons under Public Health (Building in Streets) Act, 1888 (c. 52)—Subsequent summons on same facts—First summons dismissed because justices equally divided.]—***R. v. HASTINGS JJ., Ex p. KINNIS* (1897), 61 J. P. Jo. 740, D. C.; *subsequent proceedings, sub nom. KINNIS v. GRAVES* (1898), 67 L. J. Q. B. 583, D. C.

**610. ————.]—**A. was summoned for an offence, under sect. 3 of above Act, in building a house, the front wall of which projected beyond the building line. At the hearing the justices were equally divided in opinion, & on the advice of their clerk the chairman dismissed the information. A second information was subsequently laid in precisely the same terms, save that the period for which penalties were claimed was different from that in the first. The justices convicted:—*Held*: (1) the dismissal of the first information was a good dismissal, although the justices were equally divided; (2) such dismissal decided that the erection of the house was not an offence under sect. 3, & the continuing of that erection could therefore not be an offence.—*KINNIS v. GRAVES* (1898), 67 L. J. Q. B. 583; 78 L. T. 502; 46 W. R. 480; 42 Sol. Jo. 512; 19 Cox, C. C. 42, D. C.; *previous proceedings, sub nom. R. v. HASTINGS JJ., Ex p. KINNIS* (1897), 61 J. P. Jo. 740, D. C.

*Annotation:—*Generally, *Mentd. Bagg v. Colquhoun*, [1904] 1 K. B. 554.

**611. ———— First summons dismissed on technical objection.]—**An urban district council served a summons on J. under sect. 3 of above Act. No previous notice had been given to J. by the urban authority as required by the section, & the

Ordinance, before a magistrate, to recover damages for the wrongful dismissal of pltf. from the service of deft., having been dismissed by the magistrate, pltf. sought to recover damages for the same dismissal:—*Held*: deft. was entitled to succeed upon the defence of *res judicata*.—*CHEKALUK v. WEBSTER* (1912), 21 W. L. R. 159; 7 D. L. R. 866.—CAN.

**g. ————.]—**Where a magistrate has dismissed a complaint made under Impounding Act, 1908, ss. 9 & 10, asking for damages for illegal impounding of cattle the person complaining is estopped, on the ground of *res judicata*, from suing civilly for such damages.—*BANKS v. WILSON* (1910), 29 N. Z. L. R. 832.—N.Z.

**h. Summons for impounding sheep —Conviction—Subsequent action for damages.]—**Justices convicted P. on a summons by C. for having impounded C.'s sheep in a pound which was not the nearest pound to the place where the sheep were found trespassing:—*Held*: the conviction was not a bar to a civil action for injury which the sheep sustained in being driven to a more distant pound.—*CARROLL v. PARKS* (1913), 47 I. L. T. 88.—IR.

**k. Summons for breach of peace—Conviction—Subsequent action by defendant for assault & illegal arrest.]—**A person who had been convicted on a summary complaint of breach of the peace brought an action of damages

for assault & illegal arrest alleging that the railway constables who made the arrest had, in doing so, assaulted him & further, that they had acted illegally & oppressively in arresting him they having no warrant to arrest him, & he being a cabman whose name & number they could have taken:—*Held*: the conviction did not bar pursuer from proceeding with the action.—*WOOD v. NORTH BRITISH RY. CO.* (1899), 1 F. (Ct. of Sess.) 562; 36 Sc. L. R. 407; 6 S. L. T. 323.—SCOT.

**l. Summons for wages—Acquittal—Subsequent action for wage.]—**Where criminal proceedings for recovery of wages by a servant against his master had been dismissed on the ground that the master had been furnished with no statement of account, & the servant thereafter had instituted an action for the recovery of the same wages:—*Held*: a plea of *res judicata* was bad.—*SCHLAPILIS v. MISSEWITZ* (1904), T. S. 174.—S. AF.

#### PART II. SECT. 4, SUB-SECT. 1.

**613 i. General rule.]—**As between parties to the judgment, plea of *res judicata* is not conclusive in a case of fraud properly alleged &, if necessary, proved.—*SPIERS v. R.* (1896), 4 B. C. R. 388.—CAN.

**613 ii. ———.]—**When a claim is once compromised, & a new contract entered into, the promiser is estopped from pleading illegality or absence of consideration for the new contract, the

stipendiary magistrate dismissed the summons upon the ground that it was defective in that no offence to which a penalty was attached was set out. Notice was then served on J., & a second summons taken out, under which the magistrate convicted. J. appealed upon the plea that, as the first summons had been dismissed, the matter was *res judicata*:—*Held*: as the matter had not been decided at all on the first summons, it was not *res judicata*, & therefore the magistrate was entitled to convict.—*JENKINS v. MERTHYR TYDVIL URBAN DISTRICT COUNCIL* (1899), 80 L. T. 600, D. C.

**612. Dismissal of summons for deviating from building plan—Subsequent summons for similar deviations.]—**Resp., the owner of a building estate, deposited a specimen plan in accordance with the byelaws of certain types of houses intended to be erected. Subsequently resp. was summoned for deviating from such plan in regard to one of the houses in four respects. The justices dismissed the summons on the ground that these were not substantial deviations from the plan deposited by resp. Subsequently resp. was summoned for deviation from the deposited specimen plan in regard to two other houses in the same row, on the ground as found by the justices of similar deviations. The justices dismissed the summons on the ground that the matter was *res judicata*:—*Held*: the justices were bound to hear the summons on its merits, & the matter was not *res judicata*.—*BALBY-WITH-HEXTHORPE DISTRICT COUNCIL v. MILLARD* (1903), 68 J. P. 81; 2 L. G. R. 330, D. C.

**Affiliation summons—Several applications.]—**See *BASTARDY*, Vol. III., pp. 389, 390, 398–400, Nos. 275, 281–288, 331–335.

**Issue of several summonses.]—**See *BASTARDY*, Vol. III., pp. 391, 392, 401, Nos. 293–298, 347.

#### SECT. 4.—MATTERS PRECLUDING ESTOPPEL.

##### SUB-SECT. 1.—FRAUD OR COLLUSION.

**613. General rule.]—***STYLE v. MARTIN*, No. 331, ante.

real consideration for it being the withdrawal of the claim itself, irrespective of the possibility of its being prosecuted to a successful issue. The new contract can only be questioned on the ground of fraud, such as want of good faith in making the claim compromised.—*VARAJLAL SHIVLAL v. DAISUKH VARAJLAL* (1875), 12 Bom. 196.—IND.

**613 iii. ———.]—**Where a decree has been obtained by the fraud & collusion of both the parties to the suit, it is binding upon the parties. It is also binding upon the privies of the parties, except probably where the collusive fraud has been on a provision of the law enacted for the benefit of such privies. But persons represented by, but not claiming through, the parties to the suit may, in any subsequent proceeding, whether as pltf. or deft., treat the previous judgment so obtained by fraud & collusion as a mere nullity, provided the fraud & collusion be clearly established. The same rule applies with regard to strangers where the previous judgment is a judgment *in rem*.—*AHMEDBOHY HUBIBBOHY v. VULLEBOHY CASSUMBOHY* (1882), 1 L. R. 6 Bom. 703.—IND.

**613 iv. ———.]—**A. mtged. certain property to B., who instituted a suit on his mtge. & obtained a decree therein. Subsequently to such decree, A. sold the property to a third party, C. B. having attempted to execute his decree against the property in the hands of C.



**Sect. 4.—Matters precluding estoppel: Sub-sects. 1, 2 & 3.]**

—.]—On suggestion of a gross fraud, the ct. will, upon an original bill, overrule a plea of a decree, & a report made & confirmed thereon, if the suggestion of fraud be not denied.—*LOYD v. MANSELL* (1722), 2 P. Wms. 73; 24 E. R. 645, L. C.

**Annotations:—***Consd.* *Manaton v. Molesworth*, *Wortley v. Molesworth* (1757), 1 Eden, 19. *Refd.* *Palmer v. Mure* (1773), 2 Dick. 489; *Henderson v. Cook* (1858), 4 Drew. 306.

**615. — Judgment obtained by collusion.]—***KINGSTON'S (DUCHESS) CASE*, No. 213, *ante*.

**616. — —.]—**(1) Though the Ct. of Ch. cannot review or correct a decree of the Ct. of Exch., yet where such decree has been obtained collusively & fraudulently, a party whose interests are affected by it, may raise, in the Ct. of Ch., either as actor or defender, a question as to its validity.

(2) Where sales of estates had fraudulently taken place under decrees of the Ct. of Exch. in Ireland, obtained by collusion between the tenant for life, mtgee., the person in whose favour a charge had been created, & the purchaser, & where the interests of the tenant in remainder had not been protected in such suits, the Ct. of Ch. in Ireland, on his coming into possession, granted him relief on a bill filed to redeem. That decree was affirmed by the Lords. The fraudulent sales had been made by the first tenant for life; his son died in his lifetime; the tenancy for life continued to exist for above 35 years after these fraudulent sales. On the tenant in remainder becoming entitled, he filed a bill to redeem:—*Held*: he was not barred by the lapse of time.—*BANDON (EARL) v. BECHER* (1835), 3 Cl. & Fin. 479; 9 Bli. N. S. 532; 6 E. R. 1517, H. L.

**Annotations:—***As to* (1) *Refd.* *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 404; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228.

**617. — —.]—**(1) Where a judgment has been obtained by fraud, & more especially by the collusion of both parties, such judgment, although confirmed by the House of Lords, may, even in an inferior tribunal, be treated at a nullity.

(2) But the allegations of fraud & collusion must be specific, pointed, & relevant; otherwise they cannot be admitted to proof.

the latter instituted a suit against A. & B. for the purpose of having it declared that the property was not liable to satisfy the decree because the mtge. transaction was a fraudulent one & the decree had been obtained by fraud & collusion. In such suit B. contended that C., having purchased subsequently to the decree, was absolutely bound by it:—*Held*: it was perfectly open to C. to prove that the decree had been obtained by fraud & collusion.—*NILMONY MOOKHOPADHYA v. AIMUNISSA BIBEE* (1886), I. L. R. 12 Calc. 156.—IND.

**613 v. —.]—**A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud.—*MANOHARAM v. KALIDAS* (1895), I. L. R. 19 Bom. 821.—IND.

**613 vi. —.]—***BANSI LAL v. DHAPO* (1902), I. L. R. 24 All. 242.—IND.

**613 vii. —.]—**Where by means of a fraud practised on the ct. the owner of considerable property, both movable & immovable, caused a decree to be passed against himself as deft. in a collusive suit upholding a fictitious *waqf-namah*, by which it was intended to tie up the property in perpetuity for the benefit of the direct descendants of the *waqf* to the exclusion of his

collateral heirs:—*Held*: a ct. which was otherwise competent to entertain the suit had jurisdiction, on the finding that it had been obtained by means of fraud, to treat the previous decree as a nullity, & plffs. were not prevented from setting up the plea that the previous decree had been obtained by fraud by the fact that the person, who practised such fraud, was their predecessor in title.—*BARKAT-UN-NISSA v. FAZL HAQ* (1904), I. L. R. 26 All. 272.—IND.

**613 viii. —.]—***MINALAL SHADIRAM v. KHARSETJI* (1906), I. L. R. 30 Bom. 395.—IND.

**613 ix. —.]—**When the decree of a ct. has been passed upholding a certain transaction between the parties to a suit, neither plff. nor deft. will be allowed afterwards to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud & that it should therefore be treated as a nullity, & the state of things, which existed previously to the passing of such decree, be restored. The decree is regarded as a subsisting & effectual decree so that the question covered by it is treated as *res judicata*.—*KONDETI KAMA ROW v. NUKAMMA* (1908), I. L. R. 31 Mad. 485.—IND.

(3) To set aside a judgment had by fraud, the proper course, when such judgment has been confirmed by the House of Lords, is to apply to the House for direction. Hence it is wrong to ask the ct. below, upon proof of the fraud or collusion, to set aside a judgment confirmed by the House.

(4) *Qu.*: whether the House in such a case can direct an issue.—*SHEDDEN v. PATRICK* (1854), 23 L. T. O. S. 194; 1 Macq. 585, H. L.

**Annotations:—***As to* (1) *Refd.* *Shedden v. Patrick* (1860), 2 Sw. & Tr. 170; *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 404. *Generally, Mentd.* *Re Wright's Trust* (1856), 2 K. & J. 595; *Edwards v. Kilkenny & G. S. & W. Ry.* (1857), 2 C. B. N. S. 397; *Shedden v. Patrick & A.-G.* (1869), L. R. 1 Sc. & Div. 470; *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Re Grove, Vancher v. Treasury Solicitor* (1888), 40 Ch. D. 216.

**618. —.]—**So much does the law of England abhor fraud that even the maxim that you can never aver against the record is not allowed to prevail if fraud can be shown (*POLLOCK, C.B.*).—*ROGERS v. HADLEY* (1863), 2 H. & C. 227; 32 L. J. Ex. 241; 9 L. T. 292; 9 Jur. N. S. 898; 11 W. R. 1074; 159 E. R. 91.

**Annotations:—***Mentd.* *Bolckow v. Seymour* (1864), 17 C. B. N. S. 106; *Kempson v. Boyle* (1865), 3 H. & C. 763; *Clover v. Kirkman* (1875), 33 L. T. 672.

**619. — Judgment in action in which party both plaintiff & defendant.]—**Defts. pleaded in bar to an action to recover a penalty for breach of 21 Geo. 3, c. 49, a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced in the name of R., with his consent, while plff.'s action was pending, & was carried through to judgment by the intervention of a solr. employed by defts. & without the interference of R.: it was commenced for the protection of defts. from any action brought or to be brought in respect of the penalty claimed in it; & also for the purpose of taking the Home Secretary's opinion whether he would remit the penalty:—*Held*: the judgment recovered was no bar to an action for the same offence by a different plff., on the grounds that the judgment had been recovered in an action in which present defts. were, in truth, both plffs. & defts., & that the judgment had been obtained by covin & collusion.—*GIRDLESTONE v. BRIGHTON AQUARIUM CO.* (1879), 4 Ex. D. 107; 48 L. J. Q. B. 373; 40 L. T. 473; 43 J. P. 428; 27 W. R. 523, C. A.

**Annotations:—***Consd.* *Forbes v. Samuel*, [1913] 3 K. B. 706. *Mentd.* *Todd v. Robinson* (1884), 50 L. T. 298.

**613 x. —.]—**In the case of a contract where both the parties were in *pari delicto* plff. was not entitled to estop deft. from showing the illegality of his title.—*SHRIDHAR BALKRISHNA v. BABAJI MULA* (1914), I. L. R. 38 Bom. 709.—IND.

**613 xi. —.]—**A prior judgment cannot be upset on a mere general allegation of fraud or collusion; it must be shown how, when, where & in what way the fraud was committed.—*NANDA KUMAR HOWLADAR v. RAM JIBAN HOWLADAR* (1914), I. L. R. 41 Calc. 990.—IND.

**m. Mortgage obtained by fraud.]—**In ejectment plff. claimed under a mtge. made by deft. & deft. under a deed from plff., the mtge. having been given to secure part of the purchase-money. Deft. proved a judgment in an action of covenant brought by plff. against deft. on this mtge. to recover the money secured thereby, in which deft. pleaded that the mtge. had been obtained by fraud, & judgment was given in his favour on that issue:—*Held*: deft. could not set up the judgment as a defence to this action not having placed plff. *in statu quo* by restoring to him possession of the premises.—*PUERTELL v. BOILAN* (1873), 23 C. P. 175.—CAN.



Judgments of courts not of record.]—See Part III., Sect. 1, *post*.

Foreign judgments.]—See CONFLICT OF LAWS, Vol. XI., pp. 456, 457.

Action to set aside judgments obtained by fraud.]—See JUDGMENTS.

#### SUB-SECT. 2.—MISTAKE.

620. In recitals of judgment.]—Upon a rehearing a party is not bound by untrue recitals, inserted by mistake in the former decree.—SHEEHY v. MUSKERRY (LORD) (1839), 7 Cl. & Fin. 1; MacL. & Rob. 493; 7 E. R. 965, H. L. Annotations:—Mentd. Sheehy v. Muskerrey (1848), 1 H. L. Cas. 576; King v. Bird (1909), 100 L. T. 478.

621. — As to agreement approved by judgment.]—An agreement was entered into between deft. & the trustee of a bkpt. for the purchase of the property of the bkpt. at a price which would pay the creditors 15s. in the pound, on the condition that the bkptcy. should be annulled. The agreement was accepted by the statutory majority of the creditors, but the resolution accepting it contained a provision that deft. should enter into a bond to secure the purchase-money. The agreement was approved by the ct.; the order approving it contained no reference to the clause with respect to the bond. In an action for specific performance by the trustee against deft.:—Held: (1) the agreement was entered into subject to the approval of the ct.; (2) the acceptance of the agreement by the creditors was a condition precedent to obtaining the approval of the ct.; (3) the agreement accepted by the creditors provided that deft. should give a bond; (4) that was the agreement approved by the ct., & the agreement between deft. & the trustees had not been approved by the ct., & could not be enforced; (5) deft. was not estopped by the order approving the agreement from proving that the agreement sought to be enforced was not the agreement approved by the ct.—LUCAS v. MARTIN (1888), 37 Ch. D. 597; 57 L. J. Ch. 261; 58 L. T. 862; 36 W. R. 627, C. A.

622. In judgment roll—As to findings of jury.]—WANT v. MOSS, No. 326, *ante*.

Judgments of courts not of record.]—See Part III., Sect. 1, *post*.

Setting aside judgments on ground of mistake.]—See JUDGMENTS.

#### PART II. SECT. 4, SUB-SECT. 2.

n. General rule.]—Pltf., having bought a lot of land from deft., agreed to pay him \$1,000 on a certain day, & to give a mtge. on the lot for the balance of the purchase-money, deft. agreeing to accept in part payment of the latter an assignment of a mtge. held by pltf. for \$1,600, bearing 6 per cent. interest, which was to be sold to deft. at such a reduction as would pay him 8 per cent. On a calculation made as to what this reduction would be, pltf. objected that it was too great, but deft. replied that if it turned out that there had been a mistake he would rectify it. Deft. then credited pltf. on his mtge. with the amount at which the other had been taken. It was subsequently ascertained that an error had been made in the calculation, to the extent of some \$200. Deft. sued pltf. on his mtge. for the balance of the purchase-money, less the sum for which he had given him credit, & though admitting there had been a mistake in arriving at that sum, he refused to correct it, & pltf. paid him in full under pressure of the suit, but also under protest:—Held: pltf. was en-

titled to recover back the \$200, for it could not be considered a payment for the recovery of which he was estopped by what took place when he was sued.—CARSCADEN v. SHORE (1868), 17 C. P. 493.—CAN.

#### PART II. SECT. 4, SUB-SECT. 3.

625 i. Judgment of inferior court.]—Where, in an action of trespass for pulling down fences & for mesne profits, pltf. alleged his title at the time from which he claimed to recover mesne profits: & deft., in his statement of defence, denied that he committed any of the wrongs in pltf.'s statement of claim mentioned, & denied that he was liable in damages or otherwise on the alleged causes of action:—Held: on these pleadings the title to land was expressly brought in question, & the jurisdiction of the county ct. ousted, & deft. was not estopped from raising the question of jurisdiction at the trial, because of his omission to file an affidavit & his pleading was not vexatious, or for the mere purpose of excluding jurisdiction; such an omission being a mere irregularity, for which the plea might have been set aside, but not

#### SUB-SECT. 3.—LACK OF JURISDICTION.

623. General rule.]—The local Ordinances 4 of 1889 & 11 of 1891, not having the effect of erecting the stipendiary magistrate into a tribunal competent to decide title:—Held: in an action by the Crown to try title, that an order of the Supreme Ct. quashing such magistrate's conviction of defts. for trespass on the lands in suit would not sustain a plea of *res judicata*. Such magistrate had no jurisdiction to decide an issue of title, & the Supreme Ct. sitting in appeal from him could not exercise a jurisdiction which he did not possess.

The magistrate is not a ct. of competent jurisdiction to decide the question of title; & the Supreme Ct., sitting in appeal from him, has still only the criminal charge before it to hear & determine, & has no greater jurisdiction than the magistrate himself (*per CUR.*).

In order to establish the plea of *res judicata* the judgment relied on must have been pronounced by a ct. having concurrent or exclusive jurisdiction directly upon the point (*per CUR.*).—A.-G. FOR TRINIDAD & TOBAGO v. ERICHÉ, [1893] A. C. 518; 63 L. J. P. C. 6; 69 L. T. 505; 1 R. 440, P. C.

Annotation:—Refd. Wakefield Corpn. v. Cooke, [1903] 1 K. B. 417.

624. —.]—Under Revised Statutes of Ontario, 1897 (c. 224), the personal property of applt. railway co. is exempt from assessment (s. 39 (2)), while its real estate (s. 2 (9)) includes everything affixed to the land, & all machinery or other things so fixed to any building as to form in law part of the realty:—Held: a decision between the same parties by the Ct. of Revision, established under sect. 62 of above Act, & of the cts. in appeal therefrom, to the effect that the electric cars were assessable, was not *res judicata*. By sect. 68 the jurisdiction of those cts. is confined to the amount of assessment, & does not extend to validate an assessment unauthorised by the statute.

The order of the Ct. of Appeal of June 28, 1902, was not the decision of a ct. having competent jurisdiction to decide the question in issue in this action, & it cannot be pleaded as an estoppel (*per CUR.*).—TORONTO RY. CO. v. TORONTO CORPN., [1904] A. C. 809; 73 L. J. P. C. 120; 91 L. T. 541; 20 T. L. R. 774, P. C.

625. Judgment of inferior court.]—ATKINSON v. WOODBURN, No. 147, *ante*.

operating to confer jurisdiction where the defence in fact raised the question of title.—SEABROOK v. YOUNG (1887), 14 A. R. 97.—CAN.

625 ii. —.]—Where an action was brought in the Supreme Ct. against bail given in a cause, which had been commenced & tried in the City Ct. of St. John, & deft. by plea denied the jurisdiction of that ct., & at the trial gave evidence in support of his plea:—Held: deft. was not estopped by the judgment of the city ct. from offering such proof, & as pltf. had chosen to rely entirely upon the estoppel he must fail, & the fact that the judgment relied upon by way of estoppel had been affirmed upon review by a county ct. judge made no difference.—JACK v. BONNELL (1901), 35 N. B. R. 323.—CAN.

625 iii. —.]—There was a radical defect in the assessment of pltf.'s farm. Pltf. appealed to the Assessment Ct. of Appeal, which reduced the amount of the assessment. Pltf. subsequently brought an action against the town corpn. for taking & selling his horse under warrant for the tax fixed by the Appeal Ct.:—Held: as the Assessment Ct. had no jurisdiction,

. 4.—*Matters precluding estoppel: Sub-sects. 3, 4, 5, 6, 7 & 8.*

**626. — Appearance by defendant.]—**The party to a suit in an inferior ct. cannot justify under a recovery there & process of execution, if the cause of action in fact arose out of its jurisdiction, although the deft. below appeared & pleaded to the merits. But the officer of the ct. may justify, if the declaration below alleged a cause of action arising within its jurisdiction; otherwise not. The admission of the party cannot give jurisdiction to an inferior ct., nor estop him from afterwards denying it.—**HIGGINSON v. MARTIN & HADLEY** (1877), *Freem. K. B.* 322; *2 Mod. Rep.* 195; *89 E. R.* 239.

*Annotations:—***Consd.** *Moravia v. Sloper* (1737), *Willes*, 30. **Refd.** *Rowland v. Veale* (1774), *1 Cowp.* 18; *Herbert v. Cook* (1782), *3 Doug. K. B.* 101. **Mentd.** *Ricketts v. Bodenham* (1836), *4 Ad. & El.* 433.

**627. —.]—**Judgment in inferior ct. for a matter out of their jurisdiction is void.—**MICO v. MORRIS** (1885), *3 Lev.* 234; *83 E. R.* 666.

*Annotation:—***Consd.** *Briscoe v. Stephens* (1824), *2 Bing.* 213.

**628. — On whom onus of proving want of jurisdiction.]—**Deft. in an action in an inferior ct. may avail himself of the judgment of that ct., without showing that the ct. was rightly held, or had jurisdiction.—**MURRAY v. WILSON** (1752), *Say.* 17; *1 Wils.* 316; *96 E. R.* 788.

*Annotation:—***Refd.** *Read v. Pope* (1834), *1 Cr. M. & R.* 302.

**629. —.]—**Plea to a declaration in *assumpsit*, that pltf. had sued in an inferior ct., in which judgment had been given against him, for the same cause of action (not stating that the consideration arose within the jurisdiction of the inferior ct.). Replication, that pltf. & deft. both resided out of the jurisdiction, & that the cause of action arose out of the jurisdiction:—**Held**: sufficient on demurrer.—**BRISCOE v. STEPHENS** (1824), *2 Bing.* 213; *9 Moore, C. P.* 413; *3 L. J. O. S. C. P.* 257; *130 E. R.* 288.

*Annotation:—***Consd.** *London Corpn. v. Cox* (1867), *L. R.* 2 *H. L.* 239.

**630. Judgment of court not known to law.]—**Upon the trial of an issue in prohibition, whether the usurpation of office in a *quo warranto* information mentioned was committed out of the jurisdiction of the county palatine, & within that of

the city of Chester, a document from the remembrancer's office of the Ct. Exch. was produced, purporting to be a decree made after hearing of a complaint against the citizens of Chester, & their answer, by the Lord High Treasurer of England, the Chancellor of the Exchequer, the Under-Treasurer, & the Chief Baron, with the advice & assent of a Queen's Attorney & Solicitor-General, & others of the same ct.:—**Held**: this document was not admissible in evidence as a decree, because it was not a decree of the Ct. of Exch. nor of any ct. known to the law at the time when it purported to have been made; not as an award, because there appeared no voluntary submission of parties; nor as evidence of reputation, because the parties making the decree had no knowledge of the subject, except that which they derived in the course of the proceeding.—**ROGERS v. WOOD** (1831), *2 B. & Ad.* 245; *109 E. R.* 1134.

*Annotations:—***Mentd.** *Crease v. Barrett* (1835), *1 Cr. M. & R.* 919; *Evans v. Rees* (1839), *10 Ad. & El.* 152.

**631. Decision of magistrates—As to status of street—Summons to recover expenses in respect of street.]—**(1) An application to justices by a Local Board under Public Health Act, 1875 (c. 55), for recovery of proportion of expenses of sewerage a street from the owner of premises abutting thereon was dismissed by the justices on the ground that the street was a highway repairable by inhabitants at large. The Local Board some years afterwards made an application against the same person for the recovery of proportion of paving expenses subsequently incurred in respect of the same street, & a stipendiary magistrate made an order for the payment of such expenses:—**Held**: the adjudication of the justices that the street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, & therefore such adjudication on the first application did not estop the local board from claiming the expenses they claimed on the second application, & consequently the magistrate might make the order which he made for their payment.

(2) We have in this case nothing at all to do with any judgment *in rem*. If we had there might

the assertion of an appeal to that ct. by pltf., & its decision, did not estop him from bringing the action.—**COSSITT v. SYDNEY TOWN** (1903), *40 N. S. R.* 454.—**CAN.**

**625 iv. —.]—**A decision between the same parties by the Ct. of Revision, established under Revised Statutes of Ontario, 1897, c. 224, s. 62, & of the Cts. in appeal therefrom, to the effect that electric cars are assessable, is not *res judicata*. By sect. 68 the jurisdiction of those cts. is confined to the amount of assessment, & does not extend to validate an assessment unauthorised by the statute.—**TORONTO CORPN.**

**625 v. —.]—****GIROUARD v. GRAND TRUNK PACIFIC RY. CO.** (1909), *2*

**625 vi. —.]—**A judgment in a previous suit does not operate as *res judicata* in a subsequent suit in respect of the same subject-matter, if the value of the matter of relief in the subsequent suit is above the pecuniary limits of the jurisdiction of the ct., which decided the previous suit. In order to create an estoppel the jurisdiction of the two cts. must be concurrent as regards pecuniary limit as well as subject-matter.—**GIRIYA CHETTIAR v. SABAPATHY MUDA-**

**LIAR** (1905), *I. L. R.* 29 *Mad.* 65.—**IND.**

**625 vii. —.]—**In order to establish the plea of *res judicata* the ct., which decided the former suit, must have been such a ct. as would have been competent to try & decide not only the particular matter in issue in the subsequent suit but also the subsequent suit itself in which the issue is subsequently raised. It is the competency of the original ct. which decided the former suit that must be looked to & not that of the appellate ct. in which the suit was ultimately decided on appeal.—**SHIBU ROUT v. BABAN ROUT** (1908), *12 C. W. N.* 359; *I. L. R.* 35 *Calc.* 353.—**IND.**

**625 viii. —.]—**Pltf. filed a suit for restitution of conjugal rights against deft. & for an injunction restraining her from marrying any other person pending the disposal of the suit. Deft. raised the plea of *res judicata*, urging that pltf. had filed a previous suit against her in the High Ct. for similar relief & had failed in it. The previous suit was filed without obtaining the leave of the ct. under Letters Patent, clause 12, the residence of the parties being outside the jurisdiction of the ct. The ct., therefore, dismissed the suit for want of jurisdiction though issues on the merits were raised & decided. The first ct. disallowed the plea of *res judicata* on the ground that the judgment in the previous suit was

delivered by the ct. not competent to do so in consequence of the absence of leave. On appeal by deft., the judge dismissed the suit, holding that the absence of leave did not go to the root of the jurisdiction of the ct. & therefore the judgment of the ct. was the judgment of a ct. having jurisdiction. On second appeal by pltf.:—**Held**: the judgment in the previous suit was delivered by a ct. not competent to deliver it within the meaning of Evidence Act, s. 44 (1 of 1872), & therefore the plea of *res judicata* could not prevail.—**ABDUL KADIR v. DOOLANBIBI** (1913), *I. L. R.* 37 *Bom.* 563.—**IND.**

**625 ix. —.]—**An order of the High Ct. of Justice in England, made in proceedings in which deft. had been served & had appeared by counsel, & declaring that deft.'s father became on his death absolutely entitled to the hereditaments & premises whereof he was tenant for life in possession under a certain will, which words, taken literally, would have included certain lands in New Zealand:—**Held**: not to estop deft. from setting up that her father did not become absolutely entitled to the lands in New Zealand because the High Ct. would not have had jurisdiction to make a declaration of title as to lands in New Zealand.—**HILL v. BENTINCK** (1901), *21 N. Z. L. R.* 57.—**N.Z.**



be ground for holding that there were two cross & contradictory estoppels, one by the judgment for present debt. in 1874, & the other by the contrary judgment against C., the effect of which might have been to set the whole matter at large (LORD SELBORNE, C.).—*R. v. HUTCHINGS* (1881), 6 Q. B. D. 300; 50 L. J. M. C. 35; 44 L. T. 364; 45 J. P. 504; 29 W. R. 724, C. A.

*Annotations*:—As to (1) *Consd. Priestman v. Thomas* (1884), 9 P. D. 210; *N. E. Ry. v. Dalton Overseers*, [1898] 2 Q. B. 101; *Scott v. Lowe* (1902), 86 L. T. 421. As to (2) *Wakefield Corpn. v. Cooke*, [1904] A. C. 31. *Reid. Manchester Corpn. v. Hampson* (1886), 3 T. L. R. 466; *Re Allsop & Joy's Contract* (1889), 61 L. T. 213; *R. v. Ollis*, [1900] 2 Q. B. 758; *Bedford v. Cowtan*, [1916] 1 K. B. 980; *Ord v. Ord*, [1923] 2 K. B. 432. As to (2) *Consd. Poulton v. Adjustable Cover & Boiler Block Co.*, [1908] 1 Ch. 430.

632. ————.]—On Nov. 9, 1898, the H. Vestry resolved that R. Street be paved as a new street, & apportioned the sum of £37 16s. 8d. on resp., which he refused to pay. On Sept. 15, 1899, the H. Vestry summoned resp. for that sum, but the summons was dismissed on the ground that R. Street was not a new street within the Metropolis Management Acts. On Jun. 13, 1900, a resolution was passed by the H. Vestry rescinding the above apportionment, & on Mar. 14, 1901, the H. Borough Council resolved that R. Street be paved as a new street, & apportioned on resp. the sum of £32 16s. 1d., which he refused to pay, & thereupon the present summons was issued. The magistrate held that the adjudication of Sept. 15, 1899, was conclusive, & he dismissed the summons:—*Held*: the decision of Sept. 15, 1899, was not conclusive & the present case should be heard on its merits.—*SCOTT v. LOWE* (1902), 86 L. T. 421; 66 J. P. 520.

633. ———— **Summons for assault—Certificate of dismissal—No hearing on merits.**—A certificate under Offences Against the Person Act, 1861 (c. 100), s. 44, of the dismissal by a magistrate of a charge of assault, can only be granted where there has been a hearing "upon the merits," & both parties have attended before the magistrate, & there has been a proper inquiry into the facts of the case. Where, therefore, prosecutor gave notice to a person against whom he had obtained a summons for an assault, that he should not attend before the magistrate or offer evidence in support of the summons, & did not in fact attend or offer evidence, but the person charged attended & obtained from the magistrate a certificate of dismissal under the above section:—*Held*: (1) there had not been a hearing upon the merits; (2) the magistrate had no jurisdiction to grant certificate; (3) & the certificate was therefore no bar under sect. 45 of above Act to a subsequent action in the county ct. to recover damages in respect of the same assault.—*REED v. NUTT* (1890), 24 Q. B. D. 669; 59 L. J. Q. B. 311; 62 L. T. 635; 54 J. P. 599; 38 W. R. 621; 6 T. L. R. 266; 17 Cox, C. C. 86, D. C.

634. ———— **Non-compliance with condition precedent to jurisdiction—Failure to inform defendant of right to trial by jury.**—Applt., who was the occupier of a beerhouse, was summoned by resp. under Betting Act, 1853 (c. 119), s. 1, for using the house for betting, & during the hearing of the evidence it was discovered that through inadvertence applt. had not, before the charge was proceeded with, been informed, as is required by Summary Jurisdiction Act, 1879 (c. 49), s. 17, of his right to a trial by jury, & thereupon resp.'s solr., with the magistrates' consent, withdrew the summons. Applt. was subsequently summoned by resp. under the same sect. for using the house for receiving money for the consideration of assur-

ances to pay money on the results of horse races. The second summons was in respect of dates which had all been included in the first summons. The magistrates convicted applt. on the second summons:—*Held*: the withdrawal of the first summons in the above circumstances did not amount to a dismissal, & even if it did, it could not be pleaded in bar of the proceedings on the second summons, as the justices had no jurisdiction to adjudicate on the first summons.—*DAVIS v. MORTON*, [1913] 2 K. B. 479; 82 L. J. K. B. 665; 108 L. T. 677; 77 J. P. 223; 29 T. L. R. 466; 23 Cox, C. C. 359, D. C.

*Annotation*:—*Reid. Hopkins v. Hopkins*, [1914] P. 282.

**Judgment of foreign court.**—See CONFLICT OF LAWS, Vol. XI., pp. 365, 444 *et seq.*, Nos. 454, 1029 *et seq.*

**Judgment of court not of record.**—See Part III., Sect. 1, *post*.

#### SUB-SECT. 4.—TRUTH APPEARING IN SAME RECORD

See Part II., Sect. 1, *ante*.

#### SUB-SECT. 5.—ALLEGATION NOT INCONSISTENT WITH RECORD.

See Part II., Sect. 3, sub-sect. 1, B., *ante*.

#### SUB-SECT. 6.—RECORD UNCERTAIN.

See Nos. 22, 172, 184, *ante*.

#### SUB-SECT. 7.—MATTER NOT TRAVERSABLE OR MATERIAL.

See Nos. 224, 258, *ante*, No. 830, *post*.

#### SUB-SECT. 8.—ESTOPPEL AGAINST ESTOPPEL.

635. **Existence of doctrine.**—*R. v. HUTCHINGS*, No. 631, *ante*.

636. ————.]—*POULTON v. ADJUSTABLE COVER & BOILER BLOCK Co.*, No. 164, *ante*.

637. **Judgment against one co-defendant—By arrangement between plaintiff & other co-defendant.**—Two defts., against whom pltfs. issued a writ claiming on a joint contractual liability, by a solr. acting for both of them, entered into an arrangement with pltfs.' solrs. that, if pltfs. took judgment against the second debt. under R. S. C., Ord. 14, r. 1, & if that debt. paid, the first debt. would be relieved from liability; but that, if the second debt. did not pay, proceedings against the first debt. were not to be prejudiced. Judgment was thereupon signed against the second debt., but it was not satisfied, & the action was continued against the first debt. At the trial, the first debt. contended that, as judgment had been obtained against the second debt., pltfs. were estopped from proceeding with the action against the first debt.:—*Held*: as the first debt. by his own arrangement had induced pltfs. to alter their position, it was not now open to him to raise this defence of estoppel.—*DUFFNER v. BOWYER* (1924), 40 T. L. R. 700.



**Sect. 4.—Matters precluding estoppel: Sub-sect. 9.**  
**Sect. 5: Sub-sects. 1 & 2.]**

**SUB-SECT. 9.—WANT OF MUTUALITY.**

See Nos. 30-36, *ante*.

**SECT. 5.—PLEADING ESTOPPEL.**

**SUB-SECT. 1.—NECESSITY FOR.**

See, *now*, R. S. C. Ord. 19, rr. 4, 6, 15.

**638. Whether necessary.]—EVELYN v. HAYNES,**  
 No. 260, *ante*.

**639. —.]—**In a second action between the same parties, for obstructing a way, the record of a judgment for pltf., in the first action upon a plea of not guilty, when given in evidence under the same plea, is not conclusive as to pltf.'s right, so as to preclude deft. from going into his case.—**HOOPER v. HOOPER** (1825), M'Cle. & Yo. 509; 148 E. R. 514.

**640. — Estoppel apparent on record.]—**An administrator, sued in the manor ct. for a debt due from intestate, pleaded, no assets: replication, that he had assets; issue thereon, & verdict for pltf. Judgment was entered up, execution issued, & *nulla bona* returned. Pltf. declared in debt, setting forth these proceedings, & alleging that deft. had, at the time of the recovery, assets to be administered, & had elained & wasted them. Plea that, at the time of the recovery, deft. had fully administered, etc., without this, that he elained or wasted, etc. Issue thereon:—**Held**: on the trial of this issue, deft. could not prove that all assets which had come to his hands at the time of the former recovery had been duly administered. Pltf. might take this objection, without having replied the former recovery as an estoppel.

At trial, deft.'s counsel prepared to show that

all assets had been duly administered; but it was objected that there was no plea of *plene administravit*, & if there had been deft. would have been concluded by former judgment. Deft.'s counsel argued that, to raise this point, pltf. should have replied, an estoppel:—**Held**: it was unnecessary to reply estoppel as matter which estops is apparent on record.—**DAWSON v. GREGORY** (1845), 7 Q. B. 756; 14 L. J. Q. B. 286; 5 L. T. O. S. 241; 9 Jur. 688; 115 E. R. 673.

**641. —.]—FREEMAN v. COOKE**, No. 1019, *post*.

**642. —.]—**The attorney for the owner of houses held liable for repairs having ordered the work to be done & received, without objection, an account made out to himself, although the owner had given bills on which pltf. recovered judgment against him. On an application to stay execution on the ground that pltf. had recovered judgment against the owner on the bills:—**Held**: it should have been pleaded.—**JONES v. WINT** (1858), 1 F. & F. 281, N. P.

**643. —ASHPITEL v. BRYAN**, No. 3, *ante*.

**644. —WATSON'S CASE**, No. 565, *ante*.

**645. —**In a suit for dissolution brought by the wife, resp. made countercharges of adultery against her. On the allegation that the charges so made were identically the same as those made in a previous suit brought by the husband, in which a jury had decided that the wife had not been guilty of adultery, the ct., on motion, was asked to strike out the paragraphs containing such charges:—**Held**: in order that all the facts should appear on the pleadings, the proper course was for petitioner to file a replication, so that resp. might reply to it.—**ROBINSON v. ROBINSON** (1877), 2 P. D. 75; 46 L. J. P. 47; 36 L. T. 414; 25 W. R. 376.

Proceedings in matrimonial causes generally, see **HUSBAND & WIFE**.

**PART II. SECT. 4, SUB-SECT. 9.**

**o. General rule.]—**Estoppels must be mutual.—**SMITH v. WALLBRIDGE** (1856), 6 C. P. 324.—**CAN.**

**PART II. SECT. 5, SUB-SECT. 1.**

**638 i. Whether necessary.]—**An estoppel by record must be pleaded if there is an opportunity of doing so, otherwise the truth may be shown.—**MILLER v. WELDON** (1871), 2 Han. 188.—**CAN.**

**638 ii. —.]—**In an action upon the common counts for the price of certain timber delivered under a contract defts. objected to the non-joinder of J., pltf.'s brother, as a pltf., & attempted to prove that they contracted with them both, as "Brown Bros.," by an exemplification of a judgment recovered by defts. after issue joined in this suit, but not pleaded herein, in an action against pltf. & his brother for the non-delivery of part of the timber in question. To that action pltf. pleaded that he never was a member of the firm of "Brown Bros.," & both defts. therein, pltf. & his brother, pleaded a denial of delivery of part of the timber by them as alleged, & a denial of the contract. The jury found all the issues in favour of pltf.s.:—**Held**: the judgment was not conclusive, as it had not been pleaded by way of estoppel *puis darrein continuance*, as it might have been.—**YATES** (1877), 1

be inquired into on the evidence.—**HUGHES v. REES** (1884), 10 P. R. 301.—**CAN.**

**638 iv. —.]—DAVIES v. McMILLAN** (1893), Cout. Dig. 662; Cam. Cas. 306.—**CAN.**

**638 v. —.]—**Under Judicature Act, estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded.—**COOPER v. MOLSONS BANK** (1896), 26 S. C. R. 611; 14 T. L. R. 276; *affd.*, 30 Can. Gaz. 561.—**CAN.**

**638 vi. —.]—**A. agreed to sell land to deft. & to erect a house thereon for deft. for \$10,000, the value of the land being estimated at \$2,500 & the price of the house at \$7,500. Deft. made a payment in cash & agreed to assume a mtge., the balance of purchase-money was to be paid by instalments. Vendor afterwards, & before any instalments became due, conveyed the land, subject to the mtge. & to the agreement, to pltf.; & deft., the purchaser, admitted in writing the amount then due under it. The conveyance contained a clause assigning to pltf. all moneys due or to accrue due under the agreement, & pltf. gave deft. notice in writing of the assignment. Deft. subsequently obtained an extension of time for payment of an instalment of purchase-money, & agreed to pay on it an increased rate of interest, & also stated that she intended to look to the vendor to complete the contract or make good any default:—**Held**: to give effect to estoppel not pleaded is beyond the power of a trial judge & as estoppel had not been pleaded, deft. was entitled to set up a claim in connection with the construction of the building, as against pltf., in same manner & to

same extent as she could against A., if he were taking proceedings under the agreement.—**BRITISH PACIFIC TRUST CO. v. BAILLIE** (1914), 29 W. L. R. 232; 7 W. W. R. 17.—**CAN.**

**638 vii. —.]—**Although the plea *res judicata* may be taken at any stage of a suit, including first or second appeal, an appellate ct. is not bound to entertain the plea if it cannot be decided upon the record before that ct., & if its consideration involves the reference of fresh issues for determination by the lower ct.—**KANAHAI LAL v. SURAJ KUNWAR** (1899), I. L. R. 21 All. 466.—**IND.**

**638 viii. —.]—**A plea of *res judicata* taken on the ground that the questions in issue in the suit were formerly in issue in probate proceedings cannot be given effect to, when the said proceedings are not in evidence & there is thus no sufficient evidence to support the plea.—**MIRZA KURRATULAIN BAHADUR v. NAWAB NUZHAT-UD-DOWLA ABBAS HOSSEIN KHAN** (1905), 9 C. W. N. 938; L. R. 32 Ind. App. 244.—**IND.**

**638 ix. —.]—**Where a woman petitioned for a divorce on the ground of desertion & there was in force a separation order under Married Persons Summary Separation Act, 1896, but resp. had filed no appearance & lodged no answer to the petition, & had not paid any money under the order, & had not applied to have its terms varied:—**Held**: if the existence of the separation order were a good defence it was a plea in bar, & as resp. had not pleaded the plea in bar, the ct. must refuse to take judicial notice of the plea.—**MICHAEL v. MICHAEL** (1906), 26 N. Z. L. R. 165.—**N.Z.**

**638 iii. —.]—**Where a party does not plead a prior judgment in bar by way of estoppel before the entry of a judgment directing a reference to the Master in Ordinary, he waives it, & leaves the whole matter at large to

**646.** —.]—*Re* DEFRIES, NORTON (OR NORDON) v. LEVY, No. 379, *ante*.

**647.** —.]—An action was brought against A. & B. for wrongful removal of furniture. At the trial it appeared from the evidence of plffs. that they had recovered judgment in an action against other persons who had joined in the removal. After the evidence for plffs. & for A. had been taken, B. asked for leave to amend by pleading the judgment, & A. thereupon made the same application. The ct refused the application, & on the merits gave judgments for plffs. A. appealed:—*Held*: (1) on the pleadings as they stood A. could not avail himself of the judgment in the former action for that it ought to have been pleaded; (2) leave to amend had been rightly refused at the trial.—EDEVAIN v. COHEN (1889), 43 Ch. D. 187; 62 L. T. 17; 38 W. R. 177, C. A.

**648.** Effect of failure to plead judgment—Judgment not conclusive but merely evidence.]—A verdict obtained by deft., in a former action, & which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against pltf., but only evidence to go to the jury.—VOOGHT v. WINCH (1819), 2 B. & Ald. 662; 106 E. R. 507.

*Annotations*:—*Consd.* Stafford v. Clark (1824), 2 Bing. 377. *Apld.* Doe v. Huddart (1835), 2 Cr. M. & R. 316. *Refd.* Carpenter v. Buller (1841), 8 M. & W. 209; Young v. Raincock (1849), 7 C. B. 310; Wilkinson v. Kirby (1854), 2 C. L. R. 1387; Feversham v. Emerson (1855), 11 Exch. 385; Campbell v. Loader (1865), 11 Jur. N. S. 286. *Mentd.* Chad v. Tilsed (1821), 2 Brod. & Bing. 403; R. v. Montague (1825), 4 B. & C. 598; Todd v. Stewart, Emly & Hastings (1845), 14 L. J. Q. B. 150; Waters v. Waters (1848), 2 De G. & Sm. 591; Cammell v. Sewell (1860), 5 H. & N. 728; Freeman v. Tottenham & Hampstead Junction Ry. (1865), 11 L. T. 702.

**649.** —.]—STAFFORD v. CLARK, No. 225, *ante*.

**650.** —.]—To make a judgment in ejectment conclusive evidence in an action for mesne profits, that pltf. had title from the day of the demise laid in the declaration, it must be placed on the record by way of estoppel. Accordingly, where, to a declaration in trespass for mesne profits in the usual form, it was pleaded, that the premises mentioned in the declaration were not the premises of pltf.:—*Held*: deft. might adduce proofs of title in himself, though he had not come in to defend the ejectment, & judgment had been signed against the casual ejector.—DOE v. HUD-DART (1835), 2 Cr. M. & R. 316; 4 Dowl. 437; 1 Gale, 260; 5 Tyr. 846; 4 L. J. Ex. 316; 150 E. R. 137.

*Annotations*:—*Apld.* Matthew v. Osborne (1853), 13 C. B. 919. *Refd.* Freeman v. Cooke (1848), 2 Exch. 654; Kepp v. Wiggett (1850), 10 C. B. 35; Litchfield v. Ready (1850), 5 Exch. 939; Wilkinson v. Kirby (1854), 15 C. B. 430; Irving v. Cuthbertson (1860), 6 Jur. N. S. 1211. *Mentd.* Doe v. Filliter (1844), 13 M. & W. 47; Cammell v. Sewell (1860), 5 H. & N. 728.

**651.** —.]—In an action by debtor against the garnishee, & a plea of payment, under a judgment of the Mayor's Ct. on a foreign attachment, if the replication does not deny the custom of the city set out in the plea, an allegation that pltf. had no notice of the proceedings in the Mayor's Ct. is immaterial, & presents no defence. But an allegation that there was no execution executed, is an answer, & if issue be taken thereon, the record of the foreign attachment will not be conclusive, or preclude the jury from finding for pltf., on proof that no writs or precepts of execution were issued or executed in the cause, or served upon the then deft. or the garnishee.—MAGRATH v. HARDY (1838), 4 Bing. N. O. 782; 6 Scott, 627; 1 Arn. 352; 7 L. J. O. P. 299; 2 Jur. 594; 132

E. R. 990; *sub nom.* McGRATH v. HARDY, 6 Dowl. 749.

*Annotations*:—*Refd.* Freeman v. Cooke (1848), 2 Exch. 654; Young v. Raincock (1849), 7 C. B. 310; R. v. Blakemore (1852), 5 Cox, C. O. 513; Feversham v. Emerson (1855), 11 Exch. 385. *Mentd.* Webb v. Hurrell (1847), 4 C. B. 287; Simian v. Miller (1857), 1 C. B. N. S. 686; Newman v. Rook (1858), 4 C. B. N. S. 434; Wood v. Dunn (1866), 12 Jur. N. S. 338; Richter v. Laxton (1878), 48 L. J. Q. B. 184; London Corpn. v. London Joint Stock Bank (1881), 6 App. Cas. 393.

**652.** —.]—CARPENTER v. BULLER, No. 959, *post*.

**653.** —.]—A surrenderee for a valuable consideration of a copyhold tenement, who had never been admitted thereto, by his will devised it to A. B.:—*Held*: A. B. though admitted, gained no legal title to the premises. A judgment for lessor of pltf. in ejectment is not conclusive of pltf.'s title, in trespass for the mesne profits, with a plea of not possessed, where such judgment is not replied by way of estoppel.—MATTHEW v. OSBORNE (1853), 13 C. B. 919; 22 L. J. C. P. 241; 17 Jur. 696; 1 W. R. 151; 138 E. R. 1465.

*Annotations*:—*Refd.* Wilkinson v. Kirby (1854), 15 C. B. 430. *Mentd.* Flack v. Downing College, Cambridge (1853), 13 C. B. 945; R. v. Wanstead (1853), 22 L. T. O. S. 100; Wellesley v. Withers (1855), 25 L. T. O. S. 79; R. v. Wilberton (1857), 29 L. T. O. S. 126.

**654.** —.]—A replication by way of estoppel may be replied to a plea of *liberum tenementum* & if pltf. does not avail himself of that liberty, but merely joins issue on the plea, the matter, which might have been so replied, is not conclusive evidence in his favour, but is merely evidence to go to the jury.—FEVERSHAM v. EMERSON (1855), 11 Exch. 385; 3 C. L. R. 1379; 24 L. J. Ex. 254; 156 E. R. 881; *sub nom.* FAVERSHAM v. EMERSON, 26 L. T. O. S. 28.

*Annotations*:—*Refd.* Petrie v. Nuttall (1856), 11 Exch. 569; Whittaker v. Jackson (1864), 2 H. & C. 926.

#### SUB-SECT. 2.—MODE OF.

*See, now*, R. S. C., Ord. 19, r. 15.

In replication.]—*See* Nos. 640, 645, 653, 654, *ante*.

**655.** Sufficiency—Necessity for allegation that plaintiff in former action had priority of suit.]—JACKSON v. GISLING (1742), Bull. N. P. 7th ed. p. 197 b; 2 Stra. 1169; 93 E. R. 1105.

*Annotations*:—*Refd.* Combe v. Pitt (1762), 1 Wm. Bl. 437; Porchester v. Petrie (1783), 3 Doug. K. B. 261; Girdlestone v. Brighton Aquarium (1878), 3 Ex. D. 137; Clarke v. Bradlaugh (1881), 8 Q. B. D. 63; Forbes v. Samuel, [1913] 3 K. B. 706.

**656.** —.]—Count stated, in consideration that pltf., at the request of deft., would enter into deft.'s employ as European correspondent of a newspaper till the service should be determined by due & customary notice, at a salary, deft. promised to retain pltf. in that capacity, to pay him the salary, & continue him in such employ till the same should be determined as aforesaid: that pltf. entered into the service; yet deft. wrongfully discharged him without notice. Pleas. First: that the engagement was made upon the terms & condition that pltf. should, by every steamer, from Liverpool to New York, forward a letter containing European news; but pltf. wrongfully neglected to forward any letter containing such news by several steamers that sailed from Liverpool to New York: wherefore deft. discharged pltf. Secondly: that deft. employed pltf., & pltf. accepted such employment upon the terms & condition that pltf. might draw bills upon deft. for the amount of pltf.'s salary as the same should become due, but should not draw for any sum not due: but pltf. wrongfully drew



**Sect. 5.—Pleading estoppel: Sub-sect. 2. Part III.**  
**Sect. 1: Sub-sects. 1 & 2.]**

on debt. & negotiated bills for sums not due, which were presented to debt., & dishonoured, to the damage of debt.'s credit: wherefore debt. discharged pltf. Both pleas held bad on demurrer, as not showing a default by pltf. going to the whole condition of debt.'s contract. Similar pleas, to a count stating the service to be from year to year, held bad, on demurrer, for the same reason. Plea, to money counts, as to £50: that D. brought an action against pltf. in the Supreme Ct. of New York in the United States, for a sum exceeding £50: that such proceedings were had in that ct. that, by process duly issued out of the ct., & executed upon debt., the said £50, owing from debt. to pltf., was duly attached in debt.'s hands to satisfy the demand of D. against pltf., with costs; & such further proceedings were had that D. recovered judgment in that Ct. for the amount of his demand, with costs, & issued & delivered a writ of execution to the sheriff of New York; whereupon debt. became liable & was obliged by the laws of the State aforesaid to pay over to the sheriff under the attachment & execution the

value of the £50 due from debt. to pltf., deducting the expenses to which debt. had been put by the attachment, in part satisfaction of D.'s demand. Debt. being within the sheriff's bailiwick, paid over to the sheriff, under the attachment & execution, a sum which, with the sum so deducted, was of the value of £50: that pltf. & debt. were at the time citizens of New York, & debt. was subject to the jurisdiction of the ct.; & that, by the laws of New York, debt. was by means of the premises acquitted & discharged of the £50:—*Held*: on demurrer, a good plea, as showing a substantial defence, without a more formal or precise statement of the law of New York.—*GOULD v. WEBB* (1855), 4 E. & B. 933; 24 L. J. Q. B. 205; 25 L. T. O. S. 80; 1 Jur. N. S. 821; 3 W. R. 3119 E. R. 347.

*Annotations*:—*Mentd.* London Corpn. v. Cox (1867), L. R. 2 H. L. 239; Swiss Bank Corpn. v. Boehmische Industrial Bank, [1923] 1 K. B. 673.

Foreign judgments generally, see CONFLICT OF LAWS, Vol. XI., pp. 444 *et seq.*

**657. — Pleadings in former action need not be set out in detail.]—HOUSTOUN v. SLIGO (MARQUIS), No. 325, ante.**

## Part III.—Estoppel Quasi of Record.

### SECT. 1.—JUDGMENTS OF COURTS NOT OF RECORD.

#### SUB-SECT. 1.—ADMIRALTY COURT.

**658. Abandonment of first action.]—**Parties who have abandoned a former suit instituted by them to compel payment of certain alleged bottomry bonds, will not be permitted, unless on strong grounds shown, to carry on proceedings a second time to enforce a demand founded on the very same bonds.—*THE FORTITUDO* (1815), 2 Dods. 58; 165 E. R. 1415.

*Annotation*:—*Refd.* Nelson v. Couch (1863), 15 C. B. N. S. 99.

**Judgments on discontinuance or withdrawal of proceedings generally.]—**See Part II., Sect. 2, sub-sect. 1, B (a) i., *ante*.

**659. Judgment for bail of ship—Second action for further sum.]—**(1) When bail has once been given in an action for damage, & the ship is released, the party proceeding must be content to abide by the sum which such bail will cover; he cannot enter a fresh action for any further sum.

(2) The bail represents the ship, & when a ship is once released upon bail, she is altogether released from that action. When a party has once proceeded before the ct., & recovered judgment, he is barred from proceeding in a second action. There is no authority to show that, having obtained bail for the ship, you can afterwards proceed against the owner to make up the amount of loss (*DR. LUSHINGTON*).—*THE KALAMAZOO* (1851), 18 L. T. O. S. 66; 15 Jur. 885.

*Annotations*:—*As to* (1) *Refd.* Nelson v. Couch (1863), 33 L. J. C. P. 46. *As to* (2) *Consd.* The Joannis Vatis (No. 2), [1922] P. 213. *Refd.* The Hero (1865), Brown. & Lush. 447; The Dictator, [1892] P. 304. *Generally, Mentd.* The Senora Del Carmine (1854), 1 Ecc. & Ad. 208; The

**Judgment as bar as to subsequent proceedings generally.]—**See Part II., Sect. 3, sub-sect. 2, *ante*.

**660. Failure to bring cross action—No bar to subsequent action.]—**(1) The owners of the ship A. brought an action in a cause of damage against the owners of B. The ct. found both to blame; no cross-action had been entered pending those

proceedings. Subsequently the owners of B. entered an action in a cause of damage against the owners of A., who gave an appearance under protest:—*Held*: the owners of A. must give an absolute appearance, though a cross-action in the first instance would have been the proper course. Protest overruled, but without costs.

(2) If one party thinks fit to lie by & see the result of another action, I have no means of compelling that party to say, "I am debt., I also will become pltf." The ct. regrets that the hearing of these cases should be protracted; but at the same time it cannot act from any feeling of that kind, & do that which it is now called upon to do, & say that an action having been brought by A. B. against C. D., C. D., in consequence of anything that occurred in that trial, shall be estopped from bringing an action against A. B. I decide nothing but that the party is not estopped (*DR. LUSHINGTON*).—*THE CALYPSO* (1856), Sw. 28; 26 L. T. O. S. 206; 4 W. R. 303; 166 E. R. 1000.

*Annotation*:—*As to* (1) *Refd.* Chapman v. Royal Netherlands Steam Navigation Co. (1879), 4 P. D. 157.

**661. Judgment in collision suit for proceeds of sale of vessel—Subsequent action at common law.]—***NELSON v. COUCH*, No. 443, *ante*.

**662. Award of registrar & merchants—For disbursements for ship & wages—Action by holders of bill of lading against ship.]—**A ship A. & her cargo belonged to the same owners, & pltf. advanced £1,000 as a loan to such owners, & received as security, in conformity with the agreement made between them & the borrowers, the bill of lading, on which the master endorsed a receipt for £1,000 as advanced freight, & also a policy of insurance on advanced freight. Ship A. was lost through a collision with debt.'s vessel, whose negligence was admitted. It was proved that the difference between the value of the cargo at the port of destination & at the port of loading would have considerably exceeded £1,000. In an action by the holders of the bill of lading for £1,000 against debt.'s ship:—*Held*: (1) pltf. were entitled to recover the sum, though it was not strictly



speaking advanced freight, but a prospective increase in the value of the cargo, but that the insurers were subrogated to the rights of plffs.

(2) A sum in respect of disbursements for ship A. on her voyage & wages paid in advance had been awarded to the owners of the A. by the registrar & merchants:—*Held*: this was no bar to plffs.' right to recover in this action.—*THE THYATIRA* (1883), 8 P. D. 155; 52 L. J. P. 85; 49 L. T. 406; 32 W. R. 276; 5 Asp. M. L. C. 147.

**Judgment as bar to subsequent proceedings generally.**—See Part II., Sect. 3, sub-sect. 2, *ante*.

See, generally, ADMIRALTY, Vol. I., pp. 158 *et seq.*

#### SUB-SECT. 2.—ECCLESIASTICAL COURTS.

**663. General rule.**—Sentence of the Spiritual Ct. in a cause within their jurisdiction is conclusive evidence in the point tried; otherwise of a collateral matter.—*BLACKHAM'S CASE* (1709), 1 Salk. 290; 91 E. R. 257.

*Annotations*:—*Consd. & Expld.* *Barrs v. Jackson* (1845), 1 Ph. 582. *Consd.* *Spencer v. Williams* (1871), L. R. 2 P. & D. 230. *Refd.* *Dacosta & Villa Real* (1734), 2 Stra. 961; *Meadows v. Kingston* (1775), Amb. 756.

**664.** —.]—On plea, sentence in Ecclesiastical Ct. *ex directo* in a matter properly cognisable there, is conclusive evidence where the same matter comes in question collaterally in a ct. of law or equity.—*MEADOWS v. KINGSTON (DUCHESS)* (1775), Amb. 756; 27 E. R. 487, L. C.

*Annotation*:—*Mentd.* *Allen v. Macpherson* (1842), 1 Ph. 133.

**Grant of probate.**—See EXECUTORS.

**Grant of letters of administration.**—See EXECUTORS.

**665. Sentence in matrimonial suit.**—B. contracted himself to A. & afterwards A. was married to T. & cohabited with him. B. sued A. in the Ct. of Audience, & proved the contract; & sentence was pronounced that she should marry B. & cohabit with him, which she did, & they had issue C.; & then B., the father, died. R. B., the father of B. surrendered out of ct. by the hands of tenants, to the use of his wife M., & R. his youngest son, & died, after whose death the surrender was presented according to the custom, & the lord granted admittance to M., & R. & the heirs of R. M. died, & R. surrendered to the use of F., his wife, & died; & C. entered as heir at law of R. B.:—*Held*: though T. was not party to the suit, yet the sentence against the wife only being but declaratory was good, & bound the husband *de facto*. As the cognisance of the right of marriage belongs to the ecclesiastical ct., the cts. of law ought to give credit to their proceedings; so that C., the issue of B., was legitimate.—*BUNTING v. LEPINGWELL* (1585), 4 Co. Rep. 29 a; 76 E. R. 950.

*Annotations*:—*Refd.* *Caudrey's Case* (1591), 5 Co. Rep. 1 a; *Kenn's Case* (1606), 7 Co. Rep. 42 b; *Phillips v. Bury* (1694), Skin. 447. *Mentd.* *Westwick v. Wyer* (1591), 4 Co. Rep. 28 a; *Frosel v. Welsh* (1616), Cro. Jac. 403; *Manby v. Scott* (1662), O. Bridg. 229; *Grove v. Elliot* (1670), 2 Vent. 41; *Holder v. Dickeson* (1673), Freem. K. B. 95; *Fisher v. Wigg* (1700), 1 Ld. Raym. 622; *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54; *Doe d. Priestley v. Calloway* (1827), 5 L. J. O. S. K. B. 188; *Doe d. Winder v. Lawes* (1837), 7 Ad. & El. 195; *R. v. Millis* (1844), 10 Cl. & Fin. 534; *Coombe v. Edwards* (1878), 42 J. P. 820.

**666.** —.]—A. married B., who had issue C. In the Ct. of Audience between A., plff., & B., deft., sentence was given that at the time of the contract & solemnisation of matrimony the parties were not, or one of them was not, of an age to contract & that the marriage was a nullity, & a divorce was decreed:—*Held*: the divorce so long

as it remained in force was binding.—*KENN'S CASE* (1606), 7 Co. Rep. 42 b; *Jenk.* 289; 77 E. R. 474; *sub nom.* *ROBERTSON v. STALLAGE (LADY)*, Cro. Jac. 186.

*Annotations*:—*Refd.* *Phillips v. Bury* (1694), Holt, K. B. 715. *Mentd.* *Witherington v. Christ College, Cambridge* (1662), 1 Sid. 71; *Manby v. Scot* (1663), 1 Keb. 80; *Anon.* (1673), Freem. K. B. 122; *Hemming v. Price* (1700), 12 Mod. Rep. 432; *Combe v. Edwards* (1878), 3 P. D. 103.

**667.** —.]—Plff. was not allowed to prove a marriage, there being a sentence in the Spiritual Ct., that the parties were not married, & the temporal cts. will give credit to such sentence whilst it stands in force.—*JONES v. BOW* (1692), Carth. 225; 90 E. R. 735.

*Annotation*:—*Refd.* *Dacosta & Villa Real* (1734), 2 Stra. 961.

**668.** —.]—During the life of A. & B. there had been a proceeding against both of them in the consistory ct. for living together in fornication & sentence given against them. On the trial that sentence was offered in evidence to prove that they were not married:—*Held*: it could not be given in evidence. *Semble*: if it had been a sentence on the point of the marriage on a question of the lawfulness of the marriage, it being a sentence of a ct. having proper jurisdiction, it might have been given in evidence.—*HILLYARD v. GRANTHAM* (circa 1727), cited 2 Ves. Sen. p. 246; 28 E. R. 159.

*Annotations*:—*Refd.* *Barrs v. Jackson* (1842), 1 Y. & C. Ch. Cas. 585. *Mentd.* *Gibson v. McCarty* (1736), Lee temp. Hard. 311; *Brownson v. Edwards* (1751), 2 Ves. Sen. 243; *In the Estate of Crippen*, [1911] P. 108.

**669.** —.]—In a suit on a contract of marriage, sentence of a spiritual ct. on a question whereof it had proper jurisdiction, may be given in evidence under the general issue; & where given to the principal point, held conclusive.—*MENDEZ & VILLA REAL* (1734), Lee temp. Hard. 18; 95 E. R. 11; *sub nom.* *DACOSTA & VILLA REAL*, 2 Stra. 961.

*Annotation*:—*Refd.* *Price v. Clark & Pugh* (1795), 3 Hag. Eco. 265.

**670.** —.]—Deft. gave in evidence her marriage with A. Plff. showed a sentence in the Ecclesiastical Ct. annulling the charge, for that at the time deft. was married to B.:—*Held*: conclusive evidence of the nullity of such pretended marriage with A.—*PRUDHAM v. PHILLIPS* (circa 1747), Amb. 763; 27 E. R. 490.

*Annotation*:—*Appld.* *Meadows v. Kingston* (1775), Amb. 756.

**671.** —.]—*KINGSTON'S (DUCHESS) CASE*, No. 213, *ante*.

**672.** —.]—O. leaves her husband's, B.'s, house, commences a suit in Ecclesiastical Ct. for divorce, & files a bill in Chancery for payment of her separate annuity. All matters in difference referred to arbitration; & the award made a rule by consent. B., the husband, obtains an order of ct., which, without setting aside the award, partly does away the effect of it, by which means the records of ct. are made contradictory. B., upon this, takes possession of a house which the award had given to his wife, & she goes there to protect her property. B. then pretends a reconciliation, & takes an exception to suit in Ecclesiastical Ct. on that ground, but exception disallowed. O. files another bill, praying benefit of award: cause comes before LORD REDESDALE, who receives sentence of Ecclesiastical Ct. as admissible, but not conclusive, evidence of non-reconciliation, & decrees according to prayer of bill. Chancellor states general doctrine to be clear, that reconciliation after separation entirely does away the effects of it; but here no reconciliation. LORD REDESDALE'S decree affirmed.—

**Sect. 1.—Judgments of courts not of record: Sub-sects. 2, 3 & 4.]**

**BATEMAN v. ROSS (COUNTESS) (1813)**, 1 Dow, 235; 3 E. R. 684, H. L.

**Annotations**.—**Mentd.** *Jee v. Thurlow* (1824), 2 B. & C. 547; *Wilson v. Wilson* (1848), 1 H. L. Cas. 538; *Cartwright v. Cartwright* (1853), 3 De G. M. & G. 982; *Barrow v. Barrow* (1858), 4 K. & J. 409; *Vansittart v. Vansittart* (1858), 4 K. & J. 62; *Nicholl v. Jones* (1866), L. R. 3 Eq. 696; *Williams v. Baily* (1866), L. R. 2 Eq. 731; *Gibbs v. Harding* (1870), 5 Ch. App. 336; *Negus v. Forster* (1882), 40 L. T. 675; *Cahill v. Cahill* (1883), 8 App. Cas. 420; *Nicol v. Nicol* (1886), 31 Ch. D. 524; *Haddon v. Haddon* (1887), 18 Q. B. D. 778; *Aldridge v. Aldridge* (otherwise *Morton*) (1888), 59 L. T. 896; *Williams v. Williams*, [1904] P. 145; *Re Lovell*, *Sparks v. Southall*, [1920] 1 Ch. 122.

**SUB-SECT. 3.—FOREIGN COURTS.**

See Part II., Sect. 2, sub-sect. 1, B. (b) ii., *ante*; **CONFLICT OF LAWS**, Vol. XI., p. 467.

**SUB-SECT. 4.—OTHER COURTS AND TRIBUNALS.**

**Board of Trade—Order under Trade Marks Act, 1905 (c. 15).]**—See **TRADE MARKS**.

**673. Certifying barrister or registrar—Certificate under 4 & 5 Will. 4, c. 40.]**—A friendly society was established in 1825, & its rules enrolled under 10 Geo. 4, c. 56. In 1845 certain new rules under which pltf.s. were appointed trustees of the society were made & certified by the barrister under above Act, s. 4:—*Held*: the barrister's certificate, as between members of the society, was conclusive that the rules were regularly made.—**DEWHURST v. CLARKSON** (1854), 3 E. & B. 191; 2 C. L. R. 1143; 23 L. J. Q. B. 247; 23 L. T. O. S. 109; 18 J. P. 535; 18 Jur. 693; 2 W. R. 199; 118 E. R. 1114.

**Annotations**.—**Apld.** *Rosenberg v. Northumberland Bldg. Soc.* (1889), 22 Q. B. D. 373. **Consd.** *Osborne v. Amalgamated Soc. of Railway Servants*, [1909] 1 Ch. 163; *Re Quinn & National Catholic Benefit & Thrift Soc.'s Arbitration*, [1921] 2 Ch. 318. **Refd.** *Laing v. Reed* (1869), 39 L. J. Ch. 3, n.; *Souter v. Davies* (1895), 39 Sol. Jo. 264. **Mentd.** *R. v. Tidd Pratt* (1865), 6 B. & S. 672; *Re Durham County Permanent Benefit Bldg. Soc., Davis's Case, Wilson's Case* (1871), 41 L. J. Ch. 124.

See, further, **BUILDING SOCIETIES**, Vol. VII., p. 457, No. 17; **FRIENDLY SOCIETIES**; **TRADE & TRADE UNIONS**.

**674. Commanding officer summarily dealing with offender—Bar to subsequent trial by court-martial.]**—If a commanding officer inadvertently or without full knowledge of the facts dealt summarily with a case, the offender could not be tried by a court-martial for that offence (**POLLOCK, B.**).—*Ex p. BROWN* (1892), 37 Sol. Jo. 27, D. C.

**675. Court-martial.]**—Action for false imprisonment brought by a master of a man of war, against his captain. Deft. pleaded two sets of pleas. The first set stated, that he imprisoned pltf. in order to bring him to a court-martial for disobedience of his orders, quarrelling, etc. The second set stated, that the imprisonment took place in consequence of charges brought against pltf. by a superior officer. The sentence of a court-martial, held to investigate the charges, cannot be received as conclusive evidence on this state of the pleadings, but, to make it so, should be pleaded as an estoppel; & it is open to the jury, if they believe that the imprisonment took place on the charges stated in the first set of pleas, to inquire into the truth of those charges, notwithstanding the decision of the court-martial upon them.—**HANNAFORD v. HUNN** (1825), 2 C. & P. 148, N. P. generally, **PUBLIC AUTHORITIES**; **ROYAL FORCES**.

**676. Domestic tribunal—Deprivation by college visitor.]**—If the sentence be given by the proper visitor, created as by the founder, or by the law, you shall never inquire into the validity or ground of the sentence (**HOLT, C.J.**).—**PHILIPS v. BURY** (1696), Carth. 180, 319; Comb. 265, 314; Holt, K. B. 715; 1 Ld. Raym. 5; Show. Parl. Cas. 35; Skin. 447; 2 Term Rep. 346; 4 Mod. Rep. 106; 1 Show. 360; 90 E. R. 1294.

**Annotations**.—**Refd.** *R. v. Chester (Bp.)* (1747), 1 Wm. Bl. 22; *R. v. Ely (Bp.)* (1794), 5 Term Rep. 475; *Whiston v. Rochester* (1849), 7 Hare, 532; *R. v. Chester* (1850), 15 Q. B. 513; *Ex p. Buller* (1855), 25 L. T. O. S. 102. **Mentd.** *Hartop v. Holt* (1695), 1 Salk. 263; *Birmingham School Case* (1726), Gilb. Ch. 178; *Snape v. Lincoln (Bp.)* (1728), 1 Barn. K. B. 122; *Bentley v. Ely (Bp.)* (1729), Fitz-G. 305; *Selwood v. Methlyn* (1729), 1 Barn. K. B. 254; *Kent v. Kent* (1734), 2 Barn. K. B. 441; *Walker's Case* (1736), Lee temp. Hard. 212; *Broadbent v. Wilks* (1742), Willes, 360; *Green v. Rutherford* (1750), 1 Ves. Sen. 462; *Young v. Lynch* (1753), Say. 84; *St. John's College, Cambridge v. Todington* (1757), 1 Burr. 158; *A.-G. v. York (Archbp.)* (1831), 2 Russ. & M. 461; *Re York* (1841), 2 Q. B. 1; *McGeath v. Geraghty* (1866), 15 W. R. 127; *Phillipotts v. Boyd* (1875), L. R. 6 P. C. 435; *Combe v. De La Bere* (1881), 4 P. D. 157.

**677. — Sentence of expulsion from college.]**—Sentence of expulsion unappealed from, given in evidence on an indictment for assaulting a fellow commoner of Queen's College, Cambridge, by turning him out of the College garden:—*Held*: conclusive for deft.—**R. v. GRUNDON** (1775), 1 Cowp. 315; 98 E. R. 1105.

**678. — Dismissal by trustees of schoolmaster.]**—In ejectment against a schoolmaster who has been removed by sentence of the trustees of the school for misbehaviour, it is not necessary for the lessors of pltf. to prove the grounds of the sentence, nor can deft. disprove them.

The adjudication was in a domestic forum & the merits of it cannot be entered into in an ejectment (**LORD MANSFIELD, C.J.**).—**DOE d. DAVY v. HADDON** (1783), 3 Doug. K. B. 310; 99 E. R. 669.

**Annotations**.—**Refd.** *Wildes v. Russell* (1866), L. R. 1 C. P. 722. **Mentd.** *Hayman v. Rugby School* (1874), L. R. 18 Eq. 28.

**679. — Disbarring by benchers of Inns of Court.]**—(1) The Inns of Ct. are voluntary societies, & the decisions of the benchers with regard to the disbenching & disbarring of their members are final & conclusive, subject only to an appeal to the Lord Chancellor & the judges as visitors.

(2) An action by benchers to recover possession of chambers & a re-conveyance of property belonging to an Inn of Ct. from a person who has been disbenched & disbarred does not give the High Ct. of Justice jurisdiction to inquire into the question whether the disbenching & disbarring were for sufficient cause & otherwise regular; such question being *res judicata* so far as the ct. is concerned.—**MANISTY v. KENEALY** (1876), 24 W. R. 918.

**680. — Award of arbitrator.]**—In an action for collision, it appeared that pltf.'s vessel & deft.'s vessel were insured in a mutual insurance co., by the rules of which it was provided that, in the event of a collision occurring between two vessels insured in the co., etc., the owners of such vessels should immediately submit a statement of the whole circumstances of the collision . . . & the directors after receiving such statement, should have power to arbitrate on the matter, & their decision should be final. Pltf. gave notice of the collision to the secretary of the co. The secretary obtained statements as to the collision from the master of pltf.'s vessel, & from the master of deft.'s vessel. A meeting of directors was held, at which deft.'s master was present, but no one on the behalf of pltf., & a resolution was passed that deft.'s vessel had not been in collision with



that of pltf.:—*Held*: there had never been a proper hearing of the case by the directors; the resolution passed by them was therefore not an arbitration within the meaning of the rule, & pltf. was not estopped by it from bringing an action for damages.—*THE WARWICK* (1890), 15 P. D. 189; 63 L. T. 561; 6 Asp. M. L. C. 545, D. C.

*Annotations*:—*Mentd.* *Re Margetts & Ocean Accident & Guarantee Corpn.*, [1901] 2 K. B. 792; *Bennett S.S. Co. v. Hull Mutual Steamship Protecting Soc.*, [1914] 3 K. B. 57.

681. ———.]—By two contracts made in 1919, pltf. bought from defts. a quantity of American fresh eggs. The contracts provided that in case of any dispute as to the quality or condition of the eggs the question should be referred to arbitration, provided that, "such reference be claimed in writing within three days after the goods shall have been landed." It was also provided that the award in writing, on an official form, of any two arbitrators, subject only to the right of appeal, should be conclusive & binding on all disputing parties. Pltf. alleged that the eggs were stale & of an inferior quality. He did not claim arbitration within three days as provided in the contracts. The parties, however, subsequently signed submissions to arbitration, & the arbitrators made their awards in two arbitrations dismissing pltf.'s claims under both contracts on the ground that pltf., not having claimed arbitration within the time limited in the arbitration clause, could not recover. In an action brought by pltf. to recover damages for breach of contract:—*Held*: the parties submitted their disputes, including the question whether the buyer had a valid claim, having regard to the time limit fixed in the arbitration clause, to arbitration, & the arbitrators' award was a bar to the action.—*AYSCOUGH v. SHEED, THOMSON & Co.* (1924), 93 L. J. K. B. 924; 131 L. T. 610; 40 T. L. R. 707; 30 Com. Cas. 23, H. L.; *affg.* (1923), 92 L. J. K. B. 878, C. A.

*Annotation*:—*Distd.* *Pinnock v. Lewis & Peat*, [1923] 1 K. B. 690.

682. ———.]—Award not dealing with claim but merely with jurisdiction of arbitrator.]—Pltfs. bought from defts. a quantity of copra cake to be of fair average quality, sound delivered. The contract provided that "the goods are not warranted free from defect rendering same unmerchantable, which would not be apparent on reasonable examination"; that any disputes arising out of the contract should be settled by arbitration; & that notice of arbitration should be given & the arbitrator nominated in writing not later than fourteen days after the final discharge of the vessel. Pltfs. resold the copra cake to B. & Co., who resold it to dealers, & they in turn resold it to farmers, who used it for feeding cattle. The cattle fed on the cake became ill, & it was then found, on analysis that the cake contained an admixture of castor beans in so large a proportion as to make it poisonous. Claims were then made by the various buyers against their sellers & by pltfs. against defts. as soon as the mischief was discovered, but this was after the expiration of fourteen days from the final discharge of the vessel. Pltfs. claimed arbitration, but the arbitrator before whom the matter came held that he had no jurisdiction, as notice of arbitration was not given nor the arbitrator nominated in time. In an action by pltfs. claiming damages, it was found that it was within the contemplation of the parties that the copra cake would be used for cattle food & nothing else:—*Held*: the award, which dealt merely with the

arbitrator's jurisdiction & not with the claim was not a bar to the action.

An award following on the arbitration clause may be an answer to the claim, & it will be an answer where it deals with the claim. But where, as in this case, the award does not deal with the claim but merely with the jurisdiction of the arbitrator, it is no answer (*ROCHE, J.*).—*PINNOCK BROTHERS v. LEWIS & PEAT, LTD.*, [1923] 1 K. B. 690; 92 L. J. K. B. 695; 129 L. T. 320; 39 T. L. R. 212; 67 Sol. Jo. 501; 28 Com. Cas. 210.

*Annotation*:—*Distd.* *Ayscough v. Sheed, Thomson* (1924), 93 L. J. K. B. 924.

Arbitrator unqualified to act.]—*See* *ARBITRATION*, Vol. II., p. 401, No. 584.

———.]—*See, generally*, *ARBITRATION*, Vol. II., p. 534 *et seq.*; *COMMONS*, Vol. XI., pp. 76, 77.

683. ———.]—Order of General Medical Council.]—*HILL v. CLIFFORD, CLIFFORD v. TIMMS, CLIFFORD v. PHILLIPS*, No. 239, *ante*.

684. Excise Commissioners — Condemnation of goods.]—Condemnation of goods by the Comrs. of Excise is not conclusive evidence to a jury in an action of trespass. Nor, in such action, does the *onus probandi* lie on pltf., but on the officer.

A condemnation of goods in the Exch. is conclusive evidence against all the world; but the reasons & authorities relied on, extend only to that ct., being the King's Supreme Ct. of revenue, & not to the inferior jurisdictions of the Boards of Excise & Customs (*per CUR.*).—*HENSHAW v. PLEASANCE* (1777), 2 Wm. Bl. 1174; 96 E. R. 692.

*Annotations*:—*Distd.* *Brittain v. Kinnaird* (1819), 1 Brod. & Bing. 432. *Refd.* *Wood v. Chessal* (1779), 2 Wm. Bl. 1254.

Condemnation of goods by Court of Exchequer, *see* Part II., Sect. 2, sub-sect. 1, B. (b) ii., *ante*.

685. Inquest—Inquest of office.]—By office, in 1542, it was found that M. died seised of certain lands, & that the same descended to his son & heir within age, & that the lands were held of the King as of his Duchy of Lancaster by knight's service, whereas in truth the same were held of one then in ward to the King as of his mesnalty; & upon the office found, the King seised the ward of the heir of M. Afterwards, in 1607, after the death of the heir of M., it was found by another office, that the heir of M. died seised of the lands, & held them of the King as of his duchy by knight's service, & that his heir was within age:—*Held*: the mesne was not estopped by the first office from traversing the last.—*HULME'S CASE* (1609), 13 Co. Rep. 61; 77 E. R. 1471; *sub nom.* *HOLMES CASE*, Ley. 13.

*Annotation*:—*Mentd.* *Cumber v. Hill* (1734), 2 Barn. K. B. 443.

686. ———.]—Coroner's inquest.]—A workman was killed as the result of a bomb dropped by enemy aircraft on an oil & colour warehouse to which he was sent by his employer in the ordinary course of his employment. His widow applied for compensation. The facts proved before the county ct. judge were that in the case of a fire breaking out upon the premises in which the deceased workman met his death, dense & suffocating smoke would be produced from the materials stored there; that while he was upon the premises they were wrecked & set on fire by a bomb or bombs from hostile aircraft; & that the deceased workman was found in the basement of the premises buried under the wreckage, but without any apparent external marks of injury upon him. Appct. sought to put in evidence, as showing the cause of death, the record of the coroner's inquisition & a certified copy of the entry in the register of deaths. The county ct. judge refused to admit them as evidence. He nevertheless held



**Sect. 1.—Judgments of courts not of record: Subsect. 4. Sect. 2.]**

upon the evidence, apart from those documents, that the workman died of suffocation by smoke; that the employment exposed him to a special risk; & that he met his death by an accident arising out of & in the course of his employment:—**Held**: neither the record of the coroner's inquisition nor the certificate of death was admissible as evidence of the cause of death, & the county ct. judge was therefore right in refusing to admit them.

The coroner's inquisition is not like a judgment *in rem*. Nothing is done which is conclusive upon any person affected by it (SWINFEN EADY, M.R.).—**BIRD v. KEEP**, [1918] 2 K. B. 692; 87 L. J. K. B. 1199; 118 L. T. 633; 34 T. L. R. 513; 62 Sol. Jo. 666; 11 B. W. C. C. 133, C. A.

**Annotations**:—**Apld.** Barnett v. Cohen, [1921] 2 K. B. 461. **Mentd.** Munro, Brice v. Marten, Same v. R., [1920] 3 K. B. 94; Smith v. G. W. Ry., [1921] 2 K. B. 237.

—**See, generally**, CORONERS, Vol. XIII., pp. 259, 260.

**687. Inquisition — Inquisition of lunacy.**—An inquisition of lunacy is always admitted to be read, but is not conclusive evidence, for you may traverse it.—**SERGESON v. SEALEY** (1742), 2 Atk. 412; 9 Mod. Rep. 370; 26 E. R. 618, L. C.

**Annotations**:—**Refd.** *Re Walden, Ex p. Bradbury* (1839), 4 Deac. 202; Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips, [1907] 2 Ch. 236; Bird v. Keep, [1918] 2 K. B. 692. **Mentd.** Revel v. Watkinson (1748), Belt's Sup. 66; Amesbury v. Brown (1750), 1 Ves. Sen. 477; Oxenden v. Compton (1793), 4 Bro. C. C. 231; Moodie v. Reid (1816), 1 Madd. 516; Burges v. Mawbey (1823), Turn. & R. 167; Cole v. Stutely (1842), 6 Jur. 314; Price v. Berrington (1851), 3 Mac. & G. 486; Jacobs v. Richards (1854), 23 L. J. Ch. 557; Elliot v. Ince (1857), 7 De G. M. & G. 475.

**688. — — — — —**—Where to an action against exors. on the bond of testator, they plead *non est factum*, & set up lunacy as a defence at the trial, an inquisition taken under a commission of lunacy against testator after the execution of the bond, finding that he had been a lunatic from a day antecedent to that, without any lucid interval, is admissible evidence.—**FAULDER v. SILK** (1811), 3 Camp. 126, N. P.

**Annotations**:—**Refd.** Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips, [1907] 2 Ch. 236; Bird v. Keep, [1918] 2 K. B. 692. **Mentd.** Towart v. Sellars (1817), 5 Dow. 231.

**689. — — — — —**—It would be very dangerous to allow a deed executed by a married woman, who was certified at the time to be of competent understanding to be treated as null & void merely because a jury more than nine years afterwards found that her insanity dated from a period prior to the execution (LORD HERSCHELL).—**VAN GRUTTEN v. FOXWELL, FOXWELL v. VAN GRUTTEN**, [1897] A. C. 658; 66 L. J. Q. B. 745; 77 L. T. 170; 46 W. R. 426, H. L.

**Annotations**:—**Consd.** Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips, [1907] 2 Ch. 236. **Mentd.** *Re Adams & Perry's Contract*, [1899] 1 Ch. 554; Pelham Clinton v. Newcastle, [1902] 1 Ch. 34; *Re Buckton, Buckton v. Buckton*, [1907] 2 Ch. 406; *Re Simcoe, Vowler-Simcoe v. Vowler*, [1913] 1 Ch. 552; *Re Lawrence, Lawrence v. Lawrence*, [1915] 1 Ch. 129; *Re Hobbs, Hobbs v. Hobbs*, [1917] 1 Ch. 569; *Re Hussey & Green's Contract, Re Hussey, Hussey v. Simper*, [1921] 1 Ch. 566.

—**See, further**, LUNATICS.

**690. Hundred court.**—The judgment is not the judgment of a ct. of record, & being therefore only evidence, like a foreign judgment, the whole is open (LORD MANSFIELD, C.J.).—**HERBERT v.**

**COOK** (1782), 3 Doug. K. B. 101; Willes, 37, n.; 99 E. R. 560.

**Annotations**:—**Refd.** Martin v. Nicolls (1830), 3 Sim. 458. **Mentd.** Williams v. Jones (1845), 2 Dow. & L. 680.

**691. Naval court — Merchant Shipping Act, 1894 (c. 60).**—An order regularly made by a duly constituted naval ct. within the scope of its jurisdiction [under above Act] is conclusive in any subsequent legal proceedings of the rights of all the parties interested, whether they are parties to the proceedings before the naval ct. or not; consequently, where by such order a seaman is discharged from his ship, the order is a bar to a civil action by the seaman against the owner for wrongful dismissal, notwithstanding that the owner was not a party to the criminal proceedings.—**HUTTON v. RAS STEAM SHIPPING CO., LTD.**, [1907] 1 K. B. 834; 76 L. J. K. B. 562; 96 L. T. 515; 23 T. L. R. 295; 51 Sol. Jo. 247; 10 Asp. M. L. C. 386; 12 Com. Cas. 231, C. A.; *affg.* (1905), 94 L. T. 645.

**Annotations**:—**Refd.** Caine v. Palace Shipping Co. (1906), 22 T. L. R. 816; Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips, [1907] 2 Ch. 236.

**692. — — — — —**—Pltfs., who were British seamen, signed an agreement to serve on a British ship on a voyage not exceeding three years' duration to any ports within 75 degrees N. & 60 degrees S. latitude, commencing at Cardiff & proceeding thence to Hong Kong, & to end at a port in Europe. At the time of signing pltfs. knew that war had broken out between Russia & Japan, that the ship was to carry a cargo of coal to Hong Kong, & that coal was treated by both belligerents as contraband of war. After arrival at Hong Kong pltfs. were told by the master that the ship was going on to Sasebo, a port & naval base in Japan, but within the geographical limits of the voyage. Pltfs. refused to go on to Sasebo with coal on board, & were thereupon charged before a Ct. of competent jurisdiction at Hong Kong with having impeded the progress of the ship by refusing to go to sea, & were convicted & imprisoned. Other sailors were substituted for pltfs., & the ship went on to Sasebo. Pltfs., after their discharge from prison, were returned to this country as distressed seamen. Pltfs. having brought an action to recover wages from the date of their trial at Hong Kong, & also general damages:—**Held**: the conviction of pltfs. at Hong Kong did not operate as an estoppel against their claim for wages.

It is well settled that a conviction is no estoppel in a civil action. . . . Estoppels must be mutual; but the litigation here is between shipowners & seamen, in the criminal proceeding at Hong Kong it was between the King & the prisoner (FARWELL, L.J.).—**CAINE v. PALACE STEAM SHIPPING CO.**, [1907] 1 K. B. 670; 76 L. J. K. B. 292; 96 L. T. 410; 23 T. L. R. 203; 51 Sol. Jo. 170; 10 Asp. M. L. C. 380; 12 Com. Cas. 96, C. A.; *affd.*, *sub nom.* PALACE SHIPPING CO., LTD. v. CAINE, [1907] A. C. 386, H. L.

**Annotations**:—**Refd.** Hutton v. Ras Steam Shipping Co., [1907] 1 K. B. 834. **Mentd.** Collins v. Simpson S.S. Co. (1907), 24 T. L. R. 178; Sibery v. Connelly (1907), 96 L. T. 140.

—**See, further**, SHIPPING.

**693. Order by registrar in voluntary winding up — Refusal of proof.**—An order made by the registrar in the voluntary winding up of a co. that a claim in respect of a judgment should not be admitted to proof does not estop the claimant from presenting a compulsory winding-up petition if after the date of the order he ascertains facts which show that the transactions of the co. ought

to be investigated by the official receiver.—*Re INECTO, LTD.* (1922), 38 T. L. R. 797.

**694. Sewers Commissioners—Order requiring landowners to repair & alter sea walls.]—**Orders of the Comrs. of Sewers, requiring land owners to repair & alter sea walls, may be given in evidence as adjudications by a ct. of competent jurisdiction, without proof of their having been acted upon. After a considerable lapse of time as seventy years, the ct. will presume that such orders were executed.—*R. v. LEIGH* (1839), 10 Ad. & El. 398; 2 Per. & Dav. 357; 113 E. R. 152.

*Annotations:—Mentd.* *R. v. Bedfordshire* (1855), 1 Jur. N. S. 208; *R. v. Duncan* (1881), 44 L. T. 521; *Fobbing Sewers Comrs. v. R.* (1886), 11 App. Cas. 449.

#### SECT. 2.—MATTERS PRECLUDING ESTOPPEL.

**695. Fraud or collusion.]—**The validity of a sentence passed in 1816, by the Consistory Ct. of London, decreeing a divorce *a vinculo* in a suit of nullity of marriage, may be impeached in a suit brought in 1842, in the Prerogative Ct., for granting letters of administration, by the issue of the marriage, pronounced null & void by the sentence of 1816. But in order to set aside such sentence, collusion between the parties, & fraud practised thereby, upon the ct., must be satisfactorily shown. An allegation, impeaching a sentence, & pleading facts, which if proved, might amount to fraud, but not collusion, rejected.—*MEDDOWCROFT v. HUGUENIN* (1844), 4 Moo. P. C. C. 386, 8 Jur. 431; 13 E. R. 352, P. C.

*Annotations:—Reid.* *Perry v. Meddowcroft* (1846), 10 Beav. 122; *The Justyn* (1862), 6 L. T. 553.

**696. —.]—**A marriage was solemnised between A. & B., but it was declared void by the Ecclesiastical Ct. Some years afterwards a child of A. & B., *en ventre sa mere* at the time of the sentence, & who necessarily was no party to the proceedings, claimed property in this ct., as descendant of A.:—*Held*: (1) he was bound by the sentence though he might avoid its effect by showing fraud & collusion in obtaining it; (2) such fraud & collusion must be shown to have taken place between the parties to the proceedings; (3) proof that the costs of the unsuccessful party had been agreed to be paid, that witnesses were not examined, & others not cross-examined, & that difficulties were not interposed which might have been, did not, together, amount to proof of fraud & collusion.—*PERRY v. MEDDOWCROFT* (1846), 10 Beav. 122; 8 L. T. O. S. 249; 50 E. R. 529.

**697. —.]—**On a question of legitimacy there were in evidence a sentence of nullity of marriage of a minor for want of her father's consent, & a statement in the parish register that the marriage took place by licence with the consent of the mother of the bride, but saying nothing as to the father's consent. There was, however, evidence leading to the conclusion that the sentence had been obtained by collusion between the husband & wife, & that the father had been aware & did not disapprove of the match:—*Held*: fifty years after the date of the sentence of nullity, the marriage ought to be presumed valid.—*HARRISON v. SOUTHAMPTON CORPN.* (1853), 4 De G. M. & G. 137; 1 Eq. Rep. 299; 22 L. J. Ch. 722; 21 L. T. O. S. 294; 18 Jur. 1; 1 W. R. 422; 43 E. R. 459, L. J.

**698. Lack of jurisdiction.]—**A railway Act provided, by s. 4, that nothing therein contained should authorise the J. railway co. to take any land without the consent of the owner. S. 43 regulated the mode of crossing other railways. The Ct. of Q. B. having decided, that, under this Act, the co. had no power to cross another railway (the

C. Railway) without the consent of the proprietors, a subsequent Act of Parliament of the same co., after reciting that under the former Act the co. had power to carry their railway across the line of the C. Railway with the consent of the proprietors, enacted, that, notwithstanding anything in the first Act, it should be lawful for the J. Railway Co. to carry their railway over the C. Railway by means of a bridge, without its being necessary to obtain the consent of that co., provided that the crossing should be made as in the first Act, except as regarded the prior consent of the owners of such railway. S. 21 enacted, that the J. Railway Co. should construct a bridge over the C. Railway in the manner agreed upon between the engineers of the two cos.; &, in case of the C. Railway engineer not assenting to the plan of the J. Railway engineer within three weeks, the manner, etc., of constructing the bridge should be referred to the county surveyor. The engineer of the J. Railway Co. submitted a plan of a bridge over the C. Railway to the engineer of the C. Railway, & on the latter assenting thereto within three weeks, referred the matter to the county surveyor who decided that a certain bridge should be built over the C. Railway, & that it should rest upon their land. The J. Railway Co. afterwards purchased land of another party, & gave notice to the C. Co. of their intention to abandon the award of the surveyor. The surveyor then made a second award, by which he decided that another bridge should be made over the C. Railway. This bridge was made against the consent of the C. Railway Co., but it did not rest upon or touch their land:—*Held*: (1) the J. Railway Co. had no right, without the consent of the C. Co., to build the bridge according to the first decision of the county surveyor; (2) as the surveyor had no power to direct a bridge to be built upon land without the consent of the owner, his first decision was not binding, & he was at liberty to make another; (3) the abandonment by the J. Railway Co. of the first decision of the surveyor did not operate as a release of their right to build any bridge whatever over the C. Railway; (4) the J. Railway Co. had the right of placing scaffolding, etc. on the land of the C. Railway, if such act was necessary, for the construction of the bridge.—*CLARENCE RY. CO. v. GREAT NORTH OF ENGLAND, ETC. RY. CO.* (1845), 13 M. & W. 706; 14 L. J. Ex. 137; 153 E. R. 295; *sub nom.* *GREAT NORTH OF ENGLAND, CLARENCE, & HARTLEPOOL JUNCTION RY. CO. v. CLARENCE RY. CO.*, 3 Ry. & Can. Cas. 624.

**699. —.]—**To an action for an injury to pl'tfs.' vessel by a collision in the river Thames, defts. pleaded, that the merits in respect of the demand by this action sought, to be enforced, had been already tried & determined, & certain proceedings, to which pl'tfs. & defts. were parties, had been had in the Admiralty Ct., & that the merits upon which pl'tfs. sought to recover in this action were thereby & then tried, &, after due proceedings had & taken in the ct., & in due form of law, determined by that ct. in favour of defts.; & that it was then held by the ct. that the collision occurred through the negligence of pl'tfs., & not through the negligence of defts.:—*Held*: the plea was no answer to the action, inasmuch as it did not show upon the face of it that the Admiralty Ct. had jurisdiction over the matter in question.—*HARRIS v. WILLIS* (1855), 15 C. B. 710; 3 C. L. R. 609; 24 L. J. C. P. 93; 24 L. T. O. S. 241; 3 W. R. 238; 139 E. R. 604.

**Judgments of courts of record.]—**See Part II., Sect. 4, *ante*.



## Part IV.—Lis alibi pendens.

CONFLICT OF LAWS, Vol. XI., pp. 477 *et seq.*; PRACTICE.

## Part V.—Estoppel by Deed.

### 1.—IN

**700. General rule.]**—A. is bound to B. in an obligation. A. is named of Dale. A. shall not be received to plead that there is Over-Dale & Nether-Dale & that there is no Dale without any addition, for the obligation is otherwise, & he shall not be received to contradict his own deed, but he shall be estopped by it.—ANON. (1484), Jenk. 163.

**701. —.]**—Though the rule be that a man is estopped from averring against anything in his own deed, yet that is, supposing it to be his deed; for where it is void, it is otherwise (PARKER, C.J.).—MITCHEL v. REYNOLDS (1711), as reported in 1 P. Wms. 181; 24 E. R. 347.

*Annotations:*—**Mentd.** Shelton v. Sire (1719), 11 Mod. Rep. 310; Chesman v. Nainby (1727), 2 Stra. 739; Gunmakers' Co. v. Fell (1742), Willes, 384; Low v. Peers (1770),

Wilm. 364; Davis v. Mason (1793), 5 Term Rep. 118; Gale v. Reed (1806), 1 East, 80; Hayward v. Young (1818), 1 Chit. 407; Homer v. Ashford (1825), 3 Bing. 322; Wickens v. Evans (1829), 3 Y. & J. 318; Horner v. Graves (1831), 7 Bing. 735; Young v. Timmins (1831), 1 Cr. & J. 331; Keppell v. Bailey (1834), 2 My. & K. 517; Hitchcock v. Coker (1837), 11 Ad. & El. 438; Wallis v. Day (1837), 2 M. & W. 273; Ward v. Byrne (1839), 5 M. & W. 548; Mallan v. May (1843), 11 M. & W. 653; Tallis v. Tallis (1853), 1 E. & B. 391; Dendy v. Henderson (1855), 11 Exch. 194; Catt v. Tourle (1869), 4 Ch. App. 654; Wilkinson v. Wilkinson (1871), L. R. 12 Eq. 604; Gravely v. Barnard (1874), L. R. 18 Eq. 518; Collins v. Locke (1879), 4 App. Cas. 674; Rousillon v. Rousillon (1880), 14 Ch. D. 351; Davies v. Davies (1887), 36 Ch. D. 359; Clegg v. Hands (1889), 44 Ch. D. 506, n.; Mogul S.S. Co. v. McGregor, Gow (1889), 23 Q. B. D. 598; Badische Anilin und Soda Fabrik v. Schott, Segner, [1892] 3 Ch. 447; Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co., [1894] A. C. 535; Kruse v. Johnson, [1898] 1 Q. B. 91; Haynes v. Doman, [1899] 1 Ch. 13; Re Hollis' Hospital Trustees & Hague's Contract (1899), 47 W. R. 691; Dowden & Pook v. Pook, [1904] 1 K. B. 45; Mouchell v. Cubitt (1907), 24 R. P. C. 194; Re Morgan, Dowson

### PART V. SECT. 1.

**700 i. General rule.]**—Pltf. brought suit to foreclose a mtge. made by deft., who alleged in her answer that she had been induced to sign it by the fraud of F. She had re-executed the instrument in the presence of the clerk of pltf.'s solr., who had deferred paying over the money in order to assure himself that deft. understood the transaction. Deft. was aware of the nature of the instrument shortly after signing it, & did not repudiate it, but entered into negotiations to obtain security from F., who had retained the money advanced on the security of the mtge.:—**Held:** deft. was estopped, as against pltf., from saying that she was not aware of the contents of the instrument.—KINNEAR v. SILVER (1776), R. E. D. 101.—CAN.

**700 ii. —.]**—In ejectment against a mtgor. by a purchaser of the equity of redemption under a warranty deed, deft. is estopped from showing that he had no title when he gave the deed; nor can he set up the title of the mtgee. in bar of the action.—DOE v. POWER (1849), 1 All. 271.—CAN.

**700 iii. —.]**—In ejectment by mtgee. against mtgor., to whom the land had been granted by the Crown, deft. proposed to show that the land was paid for by his son, who occupied it as owner till his death:—**Held:** the mtgor. was estopped by his deed from saying that he had no title.—DOE d. STEWART v. McDONALD (1850), 1 All. 673.—CAN.

**700 iv. —.]**—D. had recovered three judgments against different persons, one in the county ct. & two in the Q. B. Defts., being assignees of these judgments, received payment of and discharged the county ct. judgment, & afterwards by deed assigned to one F. the several judgments, covenanting that they had received no payment thereon, & had not released any part thereof. F. assigned to M. "the several judgments," & assignment to him, "& all benefits to be derived therefrom, either at law or in equity." M., by deed, indorsed on the assignment to himself, assigned to pltf. "all his right, title, interest, & claim to & in the several judgments referred to in the assignment thereof":—**Held:** it could not be said that,

there being no judgment to assign, the covenant could not be assigned as incident to it, for defts. by their deed & covenant were estopped from asserting that the judgment had then been paid.—COLE v. BANK OF MONTREAL (1876), 39 U. C. R. 54.—CAN.

**700 v. —.]**—D., while residing on Crown land, & after he had applied for a grant under the Labour Act, conveyed it by a warranty deed to S., who afterwards conveyed it to deft. D. after obtaining the grant conveyed the land in question to B., who conveyed to pltf. It appeared on the trial that both B. & pltf. had notice of the deed to S. before the deeds were given to them respectively:—**Held:** D. was estopped from denying that he had title to the land when he made the conveyance to S. & pltf. claiming under him as his assignee was bound by the same estoppel which runs with the land.—GUEGAIN v. LANGIS (1882), 21 N. B. R. 549.—CAN.

**700 vi. —.]**—After B. N. A. Act, 1867, came into force the Govt. of Nova Scotia granted to S. part of the foreshore of the harbour of Sydney; S. conveyed this lot through the C. Co. to deft. S. having died, his widow brought action for dower, to which the co. pleaded that the grant to S. was void, the property being vested in the Dominion Govt.:—**Held:** the co. having obtained title to the property from S. they were estopped from saying that his title was defective.—SYDNEY & LOUISBURG COAL & RAILWAY CO. v. SWORD (1892), 21 S. C. R. 152; 23 N. S. R. 214.—CAN.

**700 vii. —.]**—Upon the petition for a winding-up order, it appeared that the application was made by a creditor who had given the co. an extension of time, not yet expired, for payment of the debt. The affidavit in support of the petition was made by a person who deposed upon information & belief, & upon cross-examination thereon it appeared that he had no personal knowledge of the matters deposed to. The co. had called its creditors together, & a good deed was executed whereby the co. assigned certain property to trustees to answer the creditors' claims, & the creditors agreed to extend the time for payment:—**Held:** the creditors who had executed the deed, of whom petitioner was one, were estopped

from presenting a winding-up petition until the period of extension had expired.—*Re* ATLAS CANNING CO. (1897), 5 B. C. R. 661.—CAN.

**700 viii. —.]**—A municipality is estopped from questioning the regularity of its own proceedings relating to a tax sale, or of the assessment upon which the same were founded, as against a purchaser in good faith who has paid the purchase money & obtained a deed under the corporate seal of the municipality.—ALLOWAY v. ST. ANDREWS RURAL MUNICIPALITY (1906), 3 W. L. R. 13; 16 Man. L. R. 255.—CAN.

**700 ix. —.]**—Mtges. under seal may operate an estoppel by deed, but that applies only where the action is brought directly on the deed.—McHUGH v. UNION BANK OF CANADA (1910), 14 W. L. R. 642; 3 Alta. L. R. 177; *on appeal*, [1913] A. C. 299.—CAN.

**700 x. —.]**—In India, justice, equity & good conscience require no more than that a party should be precluded from contradicting, to the prejudice of another, an instrument pretending to the solemnity of a deed, when the parties claiming under it or their representatives have been induced to alter their position on the faith of such instrument.—PARAM SINGH v. LALJI MAL (1877), 1 L. R. 1 All. 403.—IND.

**700 xi. —.]**—W. who under a voluntary settlement, executed by his father, was entitled in remainder to an estate for life with remainder to his first & other sons in tail, subsequently to his marriage joined his father in two mtges., which recited that his father was seised in fee, & covenanted that he was so seised; the father & the two mtgees. executed a subsequent mtge. in fee, to pay them off & raise a further sum, which W. did not execute, but was aware of & joined in a collateral deed for the purpose of barring all possible estates tail & vesting the fee in his father; part of the money raised by all the mtges. being for & applied to the use of W.:—**Held:** he was estopped from setting up against his own acts any estate he had at the time of the mtges., & therefore the mtge. was a good charge on his life estate.—GUARDIAN ASSURANCE CO. v. AVONMORE (1872), 6 I. R. Eq. 391.—IR.



*v. Davey* (1910), 26 T. L. R. 398; *North Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439; *Morris v. Saxelby*, [1916] 1 A. C. 688; *Horwood v. Millar's Timber & Trading Co.*, [1917] 1 K. B. 305; *Rodriguez v. Speyer*, [1919] A. C. 59; *Hepworth Manufacturing Co. v. Ryott*, [1920] 1 Ch. 1.

**702.** —.]—No man shall be allowed to dispute his own solemn deed (LORD MANSFIELD, C.J.).—*GOODTITLE v. BAILEY* (1777), 2 Cowp. 597; 98 E. R. 1260.

*Annotations*:—*Reid. Corp v. Corp* (1793), 1 Phillim. 11, n.; *Roe d. Berkeley v. York* (Archbp.) (1805), 6 East, 86; *Halford v. Dillon* (1820), 2 Brod. & Bing. 12; *Right d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278.

**703.** —.]—Under a marriage settlement made in 1820, a father had a power of appointment among his children. He afterwards borrowed the funds subject to the power, amounting to £6,000, from the trustees of the settlement, on the security of a freehold estate which was his own property. On the marriage of his only daughter in 1853, the father settled a sum of £3,000 upon her out of his own property. In 1863, the father executed three deeds of even date. By the first, he made a voluntary settlement of the freehold estate with some other property on his eldest son, E. for his life, with remainder for the benefit of E.'s children or remoter issue, as E. should appoint & in default of appointment, to E.'s children equally, & in default of children, to himself in fee. By a second deed, the father appointed the whole of the £6,000 under his marriage settlement to E. absolutely; & the same deed contained a release by the father & his wife & also by E. & the surviving trustee of the settlement, of the mtge. debt of £6,000, & a conveyance by the same parties of the freehold estate discharged from the mtge. to the uses of the voluntary settlement of even date; by a third deed, the father gave the residue of his property to his only other son, R. The father made his will, bearing the same date, & thereby confirmed the three deeds of even date, & charged his ultimate remainder under the first deed with £3,000, in favour of his only daughter, M., & subject thereto, gave the same to R. The father died in 1864. E., although made a party to the first-mentioned deeds of even date, was not consulted on their preparation, & he at first refused to execute them, but he did in fact execute them in the year 1871:—*Held*: the condition annexed to the appointment, that E. should release the estate from the mtge. debt, was not binding upon E. until he assented to the arrangement & he might have claimed the benefit of the absolute appointment in his favour discharged from the condition, but, having executed the deeds, he had by his voluntary act assented to be bound by the conditions.—*ROACH v. TROOD* (1876), 3 Ch. D. 429; 34 L. T. 105; 24 W. R. 803, C. A.

*Annotations*:—*Mentd. Re Turner's S. E.* (1884), 28 Ch. D. 205; *Re Crawshay, Crawshay v. Crawshay* (1890), 43 Ch. D. 615.

**704. Doctrine not to be extended.**—*GENERAL FINANCE, MORTGAGE & DISCOUNT CO. v. LIBERATOR PERMANENT BENEFIT BUILDING SOCIETY*, No. 733, *post*.

## SECT. 2.—TO WHAT DEEDS APPLICABLE.

### SUB-SECT. 1.—INDENTURES.

**705. General rule.**—A man who leases by deed poll for years, or by parol may avoid this

lease to say that he had nothing in the land, *tempore dimissionis*; contrary upon a lease by indenture, for this is an estoppel.—*ANON.* (1546), Bro. N. C. 78; 73 E. R. 881.

**706.** —.]—Where a lease is made to a man of his own land by deed indented, this is an estoppel.—*ANON.* (1586), Gouldsb. 53; 75 E. R. 990.

**707.** —.]—*ANON.* (prior to 1547), Keil. 112; 72 E. R. 279.

**708.** —.]—*RIGHT d. JEFFERYS v. BUCKNELL*, No. 985, *post*.

### SUB-SECT. 2.—DEEDS POLL.

**709. General rule.**—*ANON.* (1546), No. 705, *ante*.

**710.** —.]—*RIGHT d. JEFFERYS v. BUCKNELL*, No. 985, *post*.

**711.** —.]—*PEARL LIFE ASSURANCE CO. v. JOHNSON, SAME v. GREENHALGH*, No. 830, *post*.

**712. Application of rule—Declaration that appointment made by mistake.**—A father executed a power of appointment, under which his four younger children, B., C., D., & E., became entitled, subject to his life interest, to £30,000 in equal shares. The father afterwards, by several instruments of appointment, affected to appoint the whole fund to B., C. & D. in the following shares; viz., to B. £13,000, to C. £5,000, & to D. £12,000. E., who was a son, died in his father's lifetime intestate & without issue; whereupon his share devolved to the father. After E.'s decease the father, with a view to support the subsequent appointments, executed a deed poll, declaring that the original appointment under which the children took equally was made by mistake:—*Held*: though the subsequent appointments were invalid so far as related to the shares of B., C., & D., yet as regarded the share of E. the father was bound by the statement in the deed poll, & E.'s share, amounting to £7,500, must be apportioned between B. & D. in satisfaction *pro tanto* of the losses which, though the invalidity of the subsequent appointments, had been sustained by their respective shares.—*ARMYTAGE v. ARMYTAGE* (1812), 1 Y. & C. Ch. Cas. 461; 6 Jur. 790; 62 E. R. 971.

### SUB-SECT. 3.—BONDS.

**713. General rule.**—*JEWELL v. —* (1616), 1 Roll. Rep. 408; 1 Roll. Abr. 872; 81 E. R. 571.

*Annotations*:—*Reid. Shelley v. Wright* (1737), Willes, 9; *Lainson v. Tremere* (1834), 1 Ad. & El. 792.

**714.** —.]—A. delivers his deed to B. to deliver as his deed to C.:—*Held*: a plea of *non est factum* by A. was bad, because it was his deed by the first delivery.—*TAW v. BURY* (1559), 2 Dyer, 167 a; Ben. 75; 73 E. R. 366.

*Annotations*:—*Mentd. Alford v. Lee* (1587), Cro. Eliz. 54; *Butler v. Baker* (1591), 3 Co. Rep. 25 a; *Hall v. Denbigh* (1600), Cro. Eliz. 773; *Williams v. Green* (1602), Moore, K. B. 642; *Whelpdale's Case* (1604), 5 Co. Rep. 119 a; *Oshey v. Hicks* (1610), Cro. Jac. 263; *Doe d. Garnons v. Knight* (1826), 5 B. & C. 671.

**715.** — *Bail bond.*—In an action by the assignee of a bail-bond, the declaration stated that one H. had been arrested under a *capias*, issued by virtue of a special order made by a judge; &

### PART V. SECT. 2, SUB-SECT. 3.

**713 i. General rule.**—A bond of annuity was granted by three parties, & the signature of one of them, A., was duly attested; while the signatures of the other two B. & C. were attested by two witnesses, but of whom only

one was duly designed in the testing clause thereafter; on the faith of the bond, the price of the annuity was paid to A., through the hands of B., as A.'s agent, or at least in B.'s presence & with his knowledge:—*Held*: B. was barred by *rei interventus* from objecting to the error in

the testing clause; & this was not affected by the circumstance that C. had died in the interim, & that the *rei interventus* did not extend to him.—*HAMILTON v. WRIGHT* (1839), 3 Sh. & Macf. 127; 14 Sh. (Ct. of Sess.) 323; 2 Dunl. (Ct. of Sess.) 86; 15 Fac. Coll. 135.—*SCOT.*

**Sect. 2.—To what deeds applicable: Sub-sects. 3, 4 & 5.]**

that deft. had entered into the bail-bond, with a condition, reciting that H. had been arrested by virtue of a *capias*, issued out of the Ct. of Q. B. against H. in an action of debt at the suit of pltf.; & that the bond had been duly assigned to pltf. by the sheriff according to the statute. On demurrer to the declaration:—*Held*: (1) deft. was estopped by his execution of the bail-bond from objecting that H. was not arrested in an action at the suit of pltf.—*BARNES v. KEANE* (1850), 15 Q. B. 75; 19 L. J. Q. B. 309; 15 L. T. O. S. 180; 14 Jur. 786; 117 E. R. 386.

**Obligor misdescribed.]—See Nos. 764, 768, post.**  
**Estoppel by recitals in bonds.]—See BONDS, Vol. VII., pp. 194 *et seq.***

#### SECT. 4.—VOID AND IMPERFECT DEEDS.

**716. Deed void—General rule.]—**When the bond is a good bond the recital is an estoppel, but when the bond is void, the estoppel is void too & does not bind the parties.—*NORFOLK'S CASE* (1667), as reported in *Hard.* 464; 145 E. R. 549.

**717. ———.]—MITCHEL v. REYNOLDS, No. 701, ante.**

**718. ——— Non-enrolment—Charitable use.]—**A pauper, being in custody for having left his wife & children chargeable to a parish for several years, executed an indenture, reciting "that the present, as well as former parish officers, had expended £174 in maintaining his wife & children, & that he had agreed to convey to the parish officers certain lands, etc.": & he thereby conveyed the same to trustees for the churchwardens & overseers of the poor & of the inhabitants of the parish, to the intent that the rents & profits might be applied to their use & benefit in aid of the poor rate:—*Held*: (1) this was a conveyance for the benefit of a charitable use, requiring enrolment pursuant to Charitable Uses Act, 1736 (c. 36), s. 1, & not a conveyance for a "valuable consideration actually paid," within sect. 2 of that Act; (2) a person who had been a party to the deed conveying the property, was not estopped from taking advantage of this objection.—*DOE d. PREECE v. HOWELLS* (1831), 2 B. & Ad. 711; 9 L. J. O. S. K. B. 332; 109 E. R. 1320.

*Annotation*:—*Generally*, *Mentd.* *Webster v. Southey* (1887), 36 Ch. D. 9.

**Invalid composition with creditors.]—See BANKRUPTCY, Vol. V., p. 1167, Nos. 9450–9457.**

**719. ——— Unregistered bill of sale.]—**A transaction purported to be an absolute assignment by deed of certain chattels by pltf. to defts., followed by an agreement in writing whereby pltf. hired the chattels from defts. upon the terms that, upon a certain sum being paid by pltf. to defts. by weekly instalments, the chattels were to belong to pltf., & upon default in payment of any instalment, defts. were to be entitled to resume possession:—*Held*: notwithstanding the deed, pltf. was not estopped from showing that the true nature of the transaction was a loan upon the security of the chattels, & not an absolute assign-

ment; & the documents were void under Bills of Sale Act (1878) Amendment Act, 1882 (c. 43), for want of registration.—*MADELL v. THOMAS & Co.*, [1891] 1 Q. B. 230; 60 L. J. Q. B. 227; 64 L. T. 9; 39 W. R. 280; 7 T. L. R. 170, C. A.

*Annotations*:—*Mentd.* *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 638; *Edwards v. Marcus*, [1894] 1 Q. B. 587.

**Validity of bill of sale.]—See BILLS OF SALE, Vol. VII., p. 127.**

**Forged share certificates.]—See COMPANIES, Vol. IX., p. 289.**

**720. Deed voidable only.]—**A deed of inspectorship & composition made between a debtor & his creditors in Gt. Britain contained a covenant that in a certain event debtor would, if required by the inspector, assign all his property to the inspector for the benefit of the creditors; that upon such assignment the inspector should give a certificate that debtor had so assigned, & that thereupon the debtor should be released from his debts. The deed contained a proviso that it should "cease, determine, & be void" if all the creditors in Gt. Britain to a certain amount did not execute it within six months from its date. Debtor was duly required by the inspector to execute an assignment, & did so, & received a certificate:—*Held*: (1) the deed was not void, but voidable only; the release constituted a good defence against a creditor who had executed the deed, & who, having had notice that all the creditors had not signed the deed, had endeavoured to obtain payment of a dividend out of the property assigned to the inspector.

*Semble*: (2) the proviso was inserted in the deed for the benefit of debtor, & a creditor who had executed could not take advantage of it.

Pltf. has no right to take advantage of the fact that one or more creditors did not execute the deed (*MANISTY, J.*).—*DUNN v. WYMAN* (1881), 51 L. J. Q. B. 623.

**721. Deed imperfect—General rule.]—**The estoppel could only arise if the document delivered to L. were *prima facie* complete.—*Re BALKIS CONSOLIDATED CO., LTD.* (1888), 58 L. T. 300; 36 W. R. 392; 4 T. L. R. 204.

**722. ——— Lease not executed by all lessors.]—**In covenant, pltf. declare, that A., B., C., & D., by indenture, demised to deft., & make *profert* of the counterpart. Plea: *non est factum*. After proof of the execution of the counterpart by deft., it is competent to him to produce the demising part, to show that only two of the four lessors executed it; & deft. having so done, & thereupon a nonsuit having been directed:—*Held*: the nonsuit was well.—*WILSON v. WOOLFRYES* (1817), 6 M. & S. 341; 105 E. R. 1270.

*Annotations*:—*Consd.* *Cardwell v. Lucas* (1836), 2 M. & W. 111. *Refd.* *Fishmongers' Co. v. Robertson, Fishmongers' Co. v. Booth, Fishmongers' Co. v. Staines* (1843), 6 Scott, N. R. 56. *Mentd.* *Pitman v. Woodbury* (1848), 3 Exch. 4.

**723. ——— Lease not executed by lessor.]—**A declaration in covenant stated that one J. was seised in fee, & being so seised, by a certain indenture, with the consent & approval of J. then given, made between J. of the one part, & deft. of the other part, (*profert*, sealed with the seal of deft.), it was witnessed, that, for the considerations therein mentioned, he, J., did demise to deft., his exors. & administrators, certain premises therein

#### PART V. SECT. 2, SUB-SECT. 4.

**p. Deed imperfect—Joint deed of husband & wife—Executed by husband only.]—**A covenant in a deed professing to be made jointly by husband & wife, but executed only by the husband, is not sufficient to work an

estoppel.—*DOE d. TIFFANY v. MC-CREEN* (1837) (1823–1900), 1 Ont. Dig. 2242.—*CAN.*

**q. ——— Bond not executed by all obligants.]—**A bond for money lent, hearing to be granted by A., B., & C. as principal obligants, was signed

& delivered by B. & C., A. being present at the execution of the deed, but refusing to sign it:—*Held*: B. was not afterwards entitled to repudiate the obligation on the ground that A. had not signed the deed.—*CRAIG v. PATON (or BROWN)* (1865), 4 Macph. (Ct. of Sess.) 192.—*SCOT.*



mentioned; to hold to him, his exors., etc., for the term of eleven years. By virtue of which indenture, & by permission of J. deft. afterwards entered into the premises, & was possessed thereof. That J. afterwards made his will, by which he devised the estate to his widow E. for life, remainder to pltf. for life. It then averred the death of J., & afterwards of E., his wife, whereupon pltf. became & was seised of the reversion of & in the premises in his demesne as of freehold for the term of his natural life, under & by virtue of the will. Deft. pleaded in effect that, although the deed was his deed, yet, it was not signed by J., nor by any agent of J. thereunto lawfully authorised by writing, nor was any lease for the term of eleven years put into writing & signed by J. or any agent, etc.:—*Held*: (1) the action was not maintainable by pltf. against deft. for breaches of the covenants in the indenture.

(2) If the lease was not executed by lessor, there could be no estoppel (PARKE, B.).—CARDWELL v. LUCAS (1836), 2 M. & W. 111; 2 Gale, 203; 6 L. J. Ex. 52.

*Annotations*:—*Mentd.* Cooch v. Goodman (1842), 2 Q. B. 580; Pitman v. Woodbury (1848), 3 Exch. 4.

**Deeds by infants.**—See Sect. 6, sub-sect. 3, *post*.

**Attempt by married woman to avoid restraint on anticipation.**—See Nos. 910, 911, *post*.

**Void deed of arrangement.**—See BANKRUPTCY, Vol. IV., p. 160, No. 1498.

#### SUB-SECT. 5.—UNEXECUTED DEEDS.

**724. General rule.**—By a deed of Jan. 1796, reciting S.'s bkpcy., & the conveyance under it of land, belonging to S., to T. W., T. W. conveyed to B. for the purpose of making a tenant to the *præcipe*. B. was no party to this deed; but he, in Feb. 1796, by deed not referring expressly to

the bkpcy. or the previous deed, conveyed the lands to a tenant to the *præcipe*, & declared the uses of the recovery to be to his mother for life, remainder to himself in fee: the parties to the intended recovery, named in this deed, were the same as those mentioned in the preceding:—*Held*: (1) B., in a suit respecting other land, was not estopped from disputing S.'s bkpcy.

(2) The former deed, which recites the bkpcy., etc. is not executed by deft.; & that which is, is silent respecting the bkpcy. There is, consequently, no direct estoppel. He is said to have recognised & adopted the whole of the former deed, by thus executing the latter. But is it true, as a general proposition, that a party so claiming adopts the statement of facts in an anterior deed, which go to make up his title? We are aware of no authority for such a doctrine (LORD DENMAN, C.J.).—DOE d. SHELTON v. SHELTON (1835), 3 Ad. & El. 265; 1 Har. & W. 287; 4 Nev. & M. K. B. 857; 4 L. J. K. B. 167; 111 E. R. 413.

*Annotations*:—*Generally*, *Mentd.* Leggo v. Boyd (1840), 6 Bing. N. C. 240.

**725. Deed acted on.**—A. & wife, seised, in right of the wife, of two estates, M. & F., by deeds of 1792, purporting an absolute sale, released the same to O. in fee, & covenanted to levy a fine to the uses of the deed, which was levied accordingly in 1793. By deeds of July, 1798, A. & wife conveyed M. alone to O. in fee & covenanted that the fine of 1793 & all other fines, etc., should enure to uses of this second deed. This deed was executed by all the parties but no other fine was levied. It appeared that O. did not take possession of M. till the execution of this deed. By another deed of Nov. 1798 reciting that the transaction of 1792 was a mtge., & that it had been discovered that the wife's interest in F. was for life only, & that part of the mtge. debt was satisfied by the conveyance of M., & that the remainder, with a further sum,

#### PART V. SECT. 2, SUB-SECT. 5.

**725 i. Deed acted on.**—M. attended a meeting for the forming of the C. Co. where he proposed & seconded resolutions, & was elected a director of the co. & as such his name was afterwards insisted in the deed of settlement. That deed M. never executed. He acted as a director, received fees for his attendance, signed cheques to defray the expenses, & as chairman of the board he signed the minutes making the first call. Further upon one thousand shares he paid the allotment money, & also paid the first two calls in respect of the shares. He refused to pay a third call, & the co. sued him therefor, charging him as being the holder of one thousand shares, & indebted to the co. in respect of the calls thereon, to which he had become liable in terms of the deed of settlement:—*Held*: M. was not estopped from alleging, & proving that he had not executed the deed of settlement.—DAVIS v. MONTEFIORE (1873), 12 N. S. W. S. C. R. 26.—AUS.

**725 ii.** —.—Pltfs. sued defts. for £1,000 being the amount of one share held by defts. under an agreement to purchase land from pltfs. Land was to be purchased for £16,000 which was to be provided for by 16 shares of £1,000. The person & cos. were to take & be responsible for the number of shares set opposite their names in the schedule to the agreement. Most of the parties who agreed to buy the land had signed the agreement in respect of the shares opposite their names but some had refused to sign the document. Defts. had signed in respect of one share of £1,000; before one of defts. so signed he stipulated

with pltfs. that he was not to be bound by the agreement unless & until all parties signed the same. Defts. relying on this stipulation made by one of them & also upon the general construction of the agreement refused to pay the £1,000:—*Held*: defts. were not bound by the agreement inasmuch as the same had not been signed by all the parties.—RAYMENT v. TUTHILL (1890), 16 V. L. R. 854.—AUS.

**725 iii.** —.—Where an agreement under seal, but of a nature not requiring a seal, was executed by one of two partners in the name of the firm, & the partner not executing afterwards acted under & received the benefit of it, such agreement was sustained as his deed, & he could not be allowed to dispute the authority by which it was executed in his name.—BLOOMLEY v. GRINTON (1852), 9 U. C. R. 455.—CAN.

**725 iv.** —.—A declaration on a covenant stated that by indenture between pltfs. & defts., pltfs. demised to defts. the tolls authorised by law to be received upon a certain turnpike road, for one year; that defts. covenanted to pay a certain rent therefor; & that by virtue of the demise defts. entered & were possessed for the term so to them granted. Breach, non-payment of the rent:—*Held*: defts. were estopped from denying the demise, & were bound by their express covenant to pay the rent; & the non-execution by the lessors, under such circumstances, was no defence.—FRONTENAC MUNICIPAL COUNCIL v. CHESTNUT (1852), 11 U. C. R. 365.—CAN.

**725 v.** —.—In an action of ejectment the lessor of pltf. relied upon a title derived through T. from J., &

deft. claimed to hold by possession. It was proved by T. that before he purchased the property, deft., with a view to inducing him to buy it, told him it belonged to J., that J. was heir to it, & entitled to sell it, & that if T. got a deed of it from J. he would have a good title. Soon after this conversation T. went to examine the land, & while there deft. told him he had been put on the place to watch it, & in case T. bought from J. he would not give up the possession of it unless he got a portion of it—about 200 acres. In consequence of what deft. had said to T., & after examining the land, the latter went to see J., but no agreement to purchase was arrived at on that occasion, J. wanting \$600, & T. offering \$400. A week or fortnight afterwards J. concluded to accept the \$400 & sent word to that effect. Thereupon T. said he would see what could be done with deft. He swore: "I sent word by my brother to see if deft. would take 150 acres. My brother brought a message to me, in consequence of which I bought the property." T. then obtained from J. a deed of the property &, as he said, went up to the land with a surveyor, "to run off deft. 150 acres," which he "had arranged to give him." When they got on the land deft. wanted 220 acres, which T. having purchased & paid for the title finally assented to, & 220 acres were run off. It was therefore arranged that deft. should give T. a quit claim deed of the land, except the 220 acres which had been surveyed off to him, & that T. should give deft. a deed of the 220 acres. The deeds never were executed; & finally, after the lessor of pltf. purchased from T., deft. repudiated the



2.—*To what deeds applicable: Sub-sects. 5, 6 & 7. Sect. 3: Sub-sect. 1.]*

was to be the value of the wife's interest in F., A. & wife conveyed to O., the wife's life estate in F. This deed was not executed by O., though he entered under it. On the death of the wife in 1834, F., with the deed, was given up to her son. On a bill filed by the heir of the wife, after the death of A., in 1836, against the devisee of O., to recover the estate of M., either absolutely or by way of redemption:—*Held*: as O. never signed the deed of Nov. 1798, though he entered under it, the recitals therein were not conclusive evidence against him, so as to contradict the conveyance of 1798 which was absolute upon the face of it. *Secus*: if he had signed it.—*TULL v. OWEN* (1840), 4 Y. & C. Ex. 192; 9 L. J. Ex. Eq. 33; 4 Jur. 503; 160 F. R. 975.

726. —. —.]—Deft. made a promissory note payable on demand to pltfs., as exors. of A., & at the time the note was given a deed was executed, reciting that pltfs. had agreed, with the consent of the residuary legatees, who were parties to the deed, to invest the residue of A.'s estate in certain securities, of which the note was one, until the residue should be divisible under the trusts of A.'s will. To an action on the note brought before the residue was divisible, deft. pleaded that by a contemporaneous agreement in writing it was agreed that the note should not be payable until the residue was divisible. The replication traversed the making the agreement:—*Held*: (1) the allegation of the contemporaneous agreement was proved by the deed; (2) the deed in

transaction altogether, & claimed to retain the whole land:—*Held*: deft. was estopped from disputing J.'s, & consequently the lessor of pltf.'s, title to the whole land.—*DOE v. DOHERTY v. BROWN* (1880), 19 N. B. R. 605.—*CAN.*

725 vi. —. —.]—Action of ejectment. The action was twice tried. Pltfs., exors. of original pltf., claimed title under a deed dated June 18, 1856, by H., deceased, the former owner, conveying the land to his son, R., who, on Apr. 19, 1869, mtged. to the original pltf. This mtge. having been foreclosed, the land was purchased by the mtgee. at the sheriff's sale. At the trial pltf.'s counsel tendered a copy of the deed of June 18, 1856, certified to be a true copy of the register of deeds, & accompanied by an affidavit of one of pltfs., "that the original deed of which the paper writing hereunto annexed, marked 'A.', is a copy certified under the hand of the late registrar of deeds, in & for the County of Inverness, is not in my or my co-pltf.'s possession, or under our control; & I further say that we have inquired for, & been unable to procure the same."—D., a son of the original owner, & one of the witnesses to the deed, gave evidence.—"I went to the registry of deeds office, & proved the deed from my father, H., to R., his son. It was registered June 17, 1856. I took the deed to the registry office & left it there. I am not aware of R.'s knowledge of the deed from my father." R. swore that he never saw the deed & never heard of it until a few years before the first trial in Oct. 1880. It was agreed that pltf. should become nonsuited with leave to move to set the nonsuit aside, & in case the ct. should think the nonsuit wrong, the ct. to enter a verdict for pltf.:—*Held*: the presumption was that H., the original owner having signed the deed, delivered it to D., to take to the registry office to be proved & registered; & by this registration he gave notice to all the world that he had

conveyed the land to R., & there was evidence for a jury; that by his conduct in relation to the conveyance to R. he had induced the original pltf. to accept the mortgage from R., believing the title to be vested in R. by virtue of the deed, & deft., who also claimed through his father, was estopped from denying the due execution of the deed.—*MCDONELL v. MCMASTER* (1885), Cass. Dig. 246.—*CAN.*

725 vii. —. —.]—In an action by the Crown against C. on a bond of suretyship for the faithful discharge by a govt. official of his duties as such, deft., under a plea of *non est factum*, swore that he signed the bond in blank; that he made no affidavit of justification; & that the certificate of the magistrate of the execution of the bond, as required by the statute, was irregular & unauthorised. The attesting witness to C.'s execution of the bond, & the magistrate, each swore to the correctness of his own action, & that C. must have properly executed the bond or the affidavit would not have been made or the certificate given:—*Held*: the weight of evidence was in favour of the due execution of the bond by C., & C. was estopped from denying that he had executed the bond.—*R. v. CHESLEY* (1889), 16 S. C. R. 306.—*CAN.*

725 viii. —. —.]—Pltf. was the payee & deft. was the indorser of a promissory note which was dishonoured when it fell due. Due notice of dishonour was given to deft. The maker of the note, who was deft.'s husband, was then indebted to pltf. in a sum considerably exceeding the amount of the note. At some time after its dishonour pltf. suggested to the maker that he should assign his estate to a trustee in trust for his creditors. The maker agreed, & pltf. instructed his own solrs. to prepare a deed of assignment. The deed contained no reservation of the maker of the note & the trustee, & was forwarded to pltf.

question was not executed by the pltfs., but they had acted under it, & it was in their custody, & produced by them at the trial:—*Held*: they were bound by it, & it was an answer to the action.—*WEBB v. SPICER* (1849), 13 Q. B. 886; 18 L. J. Q. B. 142; 13 L. T. O. S. 6; 14 Jur. 33; 116 E. R. 1502; *reversd.* on other grounds, 13 Q. B. 894, Ex. Ch.; *sub nom.* *SALMON v. WEBB & FRANKLIN* (1852), 3 H. L. Cas. 510, H. L.

*Annotations*:—*As to* (1) *Reid*. *Woodon v. Woodbridge* (1850), 13 Q. B. 470; *Manley v. Boycot* (1853), 2 E. & B. 46; *Canham v. Barry* (1855), 15 C. B. 597. *As to* (2) *Reid*. *Hudspeth v. Yarnold* (1850), 11 C. B. 625; *Stroughill v. Buck* (1850), 14 Jur. 741; *Pollok v. Bradbury* (1853), 8 Moo. P. C. C. 227.

727. Deed formerly approved but not executed —[Deed not acted on.]—R. after some negotiations, contracted with the assignees of Messrs. E. for the purchase of certain claims of bkpts. against the estate of G. He represented that he acted on behalf of himself & M., who was clearly cognisant of the negotiations & contract. Several documents passed between the parties, & finally a draft of a deed was prepared, which recited that the contract was a joint purchase by R. & M. This was submitted to M., who approved of it; & at that time he was willing to adopt the contract, but subsequently, upon an alteration of circumstances, M. objected to the contract, & refused to join in the purchase:—*Held*: there was no evidence that M. had entered into an agreement, or that R. acted as his agent; & the recital of an agreement in a document intended to be executed, would not bind a party who had done nothing to recognise it, though at one time it was apparent that he was willing to execute it, & the bill was dismissed

for execution by himself & other creditors. The deed contained no reservation of the rights of the creditors against sureties. Pltf. retained the deed, but did not execute it or obtain the execution of it of any other creditor:—*Held*: although he had not executed the deed, he was estopped as against the maker of the note from claiming to exercise his remedy by action for recovery of the debt otherwise than in accordance with the provisions of the deed, the execution of which he had himself procured; & as by the deed time had been given to the maker, deft. as indorser was thereby discharged.—*HATRICK v. NICOL* (1910), 29 N. Z. L. R. 472.—*N.Z.*

725 ix. —. —.]—In 1757 a party executed a deed on procuratory of resignation of his land estate in Scotland in favour of particular heirs, valid in all respects, reserving power to alter at any time during his life or even on deathbed. He afterwards in 1763 executed a new deed, with a variation in the destination to the parties favoured, applicable to the same estate but defective in the solemnities required in conveying a heritage in Scotland. There was no express revocation in this latter deed of the former but it was contended there was an implied revocation from the destruction being different:—*Held*: the latter deed although not executed according to the solemnities of the law of Scotland yet contained an obligation or declaration of the grantor's will & being executed in virtue of reserved powers was good & sufficient to found an action against the heirs to implement & these heirs having taken benefit from the deed of 1763 could not appropriate & reprobate the same deed but were bound to implement the obligations which arose from their taking benefit.—*WILSON v. HENDERSON* (1802), 4 Pat. App. 316.—*SCOT.*

r. Deed not signed by all parties.]—A party who subscribed a deed as a

against M., with costs; but as R. admitted pltf.'s case, a decree was made against him, without costs.—*FOLIGNO v. MARTIN* (1852), 22 L. J. Ch. 502; *subsequent proceedings* (1853), 16 Beav. 586.

*Annotations*:—*Mentd.* *Sweet v. Meredith* (1863), 4 Giff. 207; *Watson v. Cox* (1873), 27 L. T. 814; *Henty v. Schröder* (1879), 12 Ch. D. 666; *Hutchings v. Humphreys* (1885), 54 L. J. Ch. 650.

*See, also*, No. 1416, *post*.

**728. Deed produced as evidence.**]—*WEBB v. SPICER*, No. 726, *ante*.

**729. Policy not executed by assured.**]—*FOSTER v. MENTOR LIFE ASSURANCE CO.*, No. 738, *post*.

**Lease not executed by lessor.**]—*See* Nos. 722, 723, *ante*.

#### SUB-SECT. 6.—DEED ACKNOWLEDGED.

**730. Whether binding on contingent interest.**]—*CROFTS v. MIDDLETON*, No. 747, *post*.

#### SUB-SECT. 7.—DEED ENROLLED.

*See* No. 211, *ante*.

### SECT. 3.—RULES OF GENERAL APPLICATION.

#### SUB-SECT. 1.—MUST BE CERTAIN AND UNAMBIGUOUS.

**731. General rule.**]—*CROFTS v. MIDDLETON*, No. 747, *post*.

**732.** —.]—The condition [in a bond given by a collector of property & income tax, under Income Tax Act, 1842 (c. 35)] recited that A. "had been duly nominated & appointed a collector for the year ending," etc., & that duplicates of the assessments had been delivered & given in charge to him, with a warrant or warrants for collecting the same":—*Held*: in an action against the sureties, for A.'s default, they were not estopped by these recitals from showing that there had been no complete appointment of A. as collector, & that the duplicate assessments & warrant to collect had not been delivered to him.

As to the question, whether defts. are estopped by the recitals in the bond from setting up this defence, it is to be observed that it is a rule that estoppels must be certain to every intent (*WILLIAMS, J.*).—*KEPP v. WIGGETT* (1850), 10 C. B. 35; 20 L. J. C. P. 49; 14 Jur. 1137; 138 E. R. 15.

*Annotation*:—*Mentd.* *Durham Corpn. v. Fowler* (1889), 23 Q. B. D. 394.

**733.** —.]—(1) The covenants for title in a mtge. of a freehold estate, whether read in connection with the word "grant" or not, do not

cautioner, after hearing another person who was named in it as a co-obligant refuse to sign it, pleaded that the deed was not binding, because all the parties proposed had not signed it. The plea was repelled.—*MONTGOMERIE, ETC. (BROWN'S TRUSTEES) v. ALEXANDER (PATON'S TRUSTEE)* (1865), 38 Sc. Jur. 85.—*SCOT*.

**s. Deed executed by agent**—*Without sufficient authority*.—To an action by L. against A. the defence was release by deed. A. had executed an assignment for benefit of creditors & received authority by telegram to sign for L., the deed dated Oct. 8, 1881. Afterwards, with knowledge of it, L. continued to send goods to A., & on Nov. 5, 1881, wrote to A., "I have

done as you desired by telegraphing you to sign deed for me, & I feel confident that you will see that I am protected & not lose one cent by you. After you get things adjusted I would like you to send me a cheque for \$800." . . . In Apr. 1885, A. wrote to L., "In one year more I will try again for myself, & I hope to pay you in full." In Nov. 1886, the account sued upon was stated:—*Held*: the execution of the deed on his behalf being made without sufficient authority, L. was not bound by the release contained therein, & never having subsequently assented to the deed, or recognised or acted under it, he was not estopped from denying that he had executed it.—*LAWRENCE v. ANDERSON* (1889), 17 S. C. R. 349.—*CAN*.

amount to that precise averment that mtgor. is seised of the legal estate which is necessary to create an estoppel as against him & claiming under him.

A., by deed, purported to grant a freehold estate to B. by way of mtge. The deed contained no recitals, but there were the usual mtgor.'s covenants for title, including a covenant that mtgor. "had power to grant the premises in manner aforesaid."

The mtge. was accepted by B. on the faith of certain forged title deeds produced & handed to him by A. At the date of mtge. A. had not the legal estate nor any interest whatever in the property. Subsequently, however, A. acquired the legal estate & mortgaged it to C.:—*Held*: inasmuch as mtge. to B. contained no precise averment that A. was seised of the legal estate, no estoppel had been created in favour of B. as against C.

(2) I see no reason for extending the doctrine. It can have no operation except in the case of third parties who are innocent of fraud & who have become owners for value; & there can be no reason that I am aware of, for preferring one innocent purchaser for value to another. As against the man himself or persons claiming without value, the purchaser or mtgee. can recover without any recourse to estoppel at all; therefore, considering especially that the jurisdiction in equity & common law is now vested in every Ct. of Justice, so that no action for ejectment or, as it is now called, an action for the recovery of land, can be defeated for the want of the legal estate where pltf. has the title to the possession, I think I ought not to attempt in any way to extend this doctrine by which falsehood is made to have the effect of truth. The doctrine appears no longer necessary in law; it appears no longer useful, &, in my opinion, should not be carried further than a judge is obliged to carry it

*M.R.*).—*GENERAL FINANCE, MORTGAGE & DISCOUNT CO. v. LIBERATOR PERMANENT BENEFIT BUILDING SOCIETY* (1878), 10 Ch. D. 15; 39 L. T. 600; 27 W. R. 210.

*Annotations*:—*As to* (1) *Refd.* *Low v. Bouverie*, [1891] 3 Ch. 82; *Onward Bldg. Soc. v. Smithson*, [1893] 1 Ch. 1; *Poulton v. Moore* (1913), 83 L. J. K. B. 875. *As to* (2) *Consd.* *Williams v. Pinckney* (1897), 77 L. T. 700. *Refd.* *Low v. Bouverie*, [1891] 3 Ch. 82; *Matthews v. Usher* (1899), 68 L. J. Q. B. 988; *Poulton v. Moore* (1913), 83 L. J. K. B. 875.

**734.** —.]—Defts., trustees of a will, sold parcels of land, X., to B., which he mortgaged to C. Subsequently B. induced one of defts. to sell to him a piece of land, Y., which, though B. represented the contrary, was in fact part of X. B. mortgaged Y. to D., pltf. Eventually, C. took possession. Pltf. then sued defts., for compensation for loss caused by their misrepresentation, or, in the alternative, for breach of covenant for title:—*Held*: (1) the second conveyance of Y. did not contain such a distinct averment that defts.

#### PART V. SECT. 3, SUB-SECT. 1.

**731 i. General rule.**]—Estoppel may be sustained upon a direct & irresistible inference from the words of a deed.—*ARCHIBALD v. BLOIS* (1854), James, 307.—*CAN*.

**731 ii.** —.]—Those who rely upon a document as an estoppel must clearly establish its meaning; if there is any ambiguity, the construction may be aided by looking at the surrounding circumstances.—*MEWA KUWAR v. HULAS KUWAR* (1874), 13 B. L. R. 312.—*IND*.

**731 iii.** —.]—Estoppels ought not to be allowed unless plainly & clearly established.—*Goss v. GUARDIAN INSURANCE CO.* (1894), 7 Nfld. L. R. 805.—



*Sect. 3.—Rules of general application: Sub-sects. 1, 2, 3, 4 & 5.]*

were seised at the time of this conveyance as would estop them from denying that they were so seised; (2) as pltf. had no legal estate with which the covenants could run, he could not sue on the covenants; (3) pltf. had no remedy for misrepresentation by defts., the representation having been made honestly.

*Qu.*: whether, if the conveyance had been in terms sufficient to create an estoppel, defts. could have successfully pleaded fraud by B.—*ONWARD BUILDING SOCIETY v. SMITHSON*, [1893] 1 Ch. 1; 62 L. J. Ch. 138; 68 L. T. 125; 41 W. R. 53; 37 Sol. Jo. 9; 2 R. 106, C. A.

*Annotations*:—*As to* (1) *Consd.* *Williams v. Pinckney* (1897), 77 L. T. 700. *Refd.* *Poulton v. Moore*, [1915] 1 K. B. 400.

*Recitals.*]—*See* Sect. 4, sub-sect. 3, B. (c), *post*.

**SUB-SECT. 2.—MUST BE RECIPROCAL.**

**735. General rule.**]—*BOWMAN v. TAYLOR*, No. 810, *post*.

**736.** —.]—To constitute a good estoppel, both parties must be bound, mutuality being an essential ingredient of the doctrine.—*GAUNT v. WAINMAN* (1836), 3 Bing. N. C. 69; 2 Hodg. 184; 3 Scott, 413; 132 E. R. 335; *sub nom.* *GRANT v. WAINMAN*, 5 L. J. C. P. 344.

*Annotation*:—*Consd.* *Isaacs v. Salbstein*, [1916] 2 K. B. 139.

—.]—*DOE d. THOMAS v. WALKER* (1843), 2 L. T.

**738.** —.]—The M. insurance co. executed a deed poll which was a life policy for one year on the life of O. It was in the ordinary printed form of such policies, & commenced with a recital that the assured had on Nov. 21 last caused to be delivered into the office of the M. co. a declaration in writing; signed by them, touching the age, past & present health & other circumstances relating to O., which the assured had agreed should be the basis of the contract; & there was the usual proviso that if any thing in the declaration was untrue the policy should be void. In an action on this policy the M. co. pleaded that the declaration was untrue.

I cannot think that the recital by defts. in the policy, that it was so signed, is binding on the assured. Suppose that no signature had appeared upon any part of it, & that it had been a mere printed form with none of the blanks filled up, surely pltf. would not have been precluded from contending that it was not signed, or from showing that defts. had agreed to take upon themselves the risk of O. continuing an insurable life. It seems to me, that the doctrine of estoppel does not apply to such a transaction, & that we are bound to see whether, in truth, the declaration was signed by the directors, & what it imports. Looking to the document itself, in the place for "signature of the party whose life is to be assured," no signature appears, & in the place for "signature of party in whose favour policy is to be granted,"

**PART V. SECT. 3, SUB-SECT. 2.**

**735 i. General rule.**]—Where a party succeeds in establishing the illegality of an instrument, he will not be allowed to enforce any stipulation that may be contained therein for his benefit.—*A.-G. v. NIAGARA FALLS INTERNATIONAL BRIDGE CO.* (1873), 20 Gr. 490.—*CAN.*

**735 ii.** —.]—An arbitrator's award declared the right of a member of a Hindu family jointly possessed of

village houses & property, such member being deaf & dumb, & not a party to the arbitration & award. He afterwards sued for separate possession against the others, who in their defence denied his title to inherit by Hindu law, on account of his physical infirmity, which was from birth. The award having been produced at the hearing:—*Held*: this member of the family, being a stranger to the submission to arbitration, was under no obligation to abide by the award. &

no signature appears. In another part of the document there is the signature of one of the directors; but I think it impossible to say, as a matter of law, that this signature applies to that part of the document which contains the unsigned declaration in the name of O. (*LORD CAMPBELL, C.J.*).—*FOSTER v. MENTOR LIFE ASSURANCE CO.* (1854), 3 E. & B. 48; 2 C. L. R. 1404; 23 L. J. Q. B. 145; 22 L. T. O. S. 305; 18 Jur. 827; 118 E. R. 1058.

**SUB-SECT. 3.—ONLY AS TO FACTS.**

**739. Statement of opinion insufficient.**]—In 1910 a debtor had a receiving order in bkpcy. made against him. He subsequently paid a composition, & the receiving order was discharged. A. & B. who were creditors, did not prove under the receiving order, & did not receive the composition. In 1912, the debtor, being again in difficulties, executed a deed assigning property to a trustee in trust to pay the creditors scheduled thereto their debts, including A. & B. The trustee declined to pay A. & B. with the other scheduled creditors on the ground that their debts were barred by the discharge of the receiving order & the payment of the composition, & that they were in law not creditors at all:—*Held*: the trustee was not estopped by the deed from denying that A. & B. were in fact creditors entitled to the benefit of the deed.

I think the true view of the deed is that those names & those amounts were merely inserted as statements of the debtor as to the persons who he thought were his creditors, & the amounts in which he thought he was indebted to those creditors (*HORRIDGE, J.*).—*Re PILET, Ex p. TOURSIER (A.) & Co. & BERKELEY*, [1915] 3 K. B. 519; 84 L. J. K. B. 2133; 113 L. T. 926; 31 T. L. R. 558, D. C.

**SUB-SECT. 4.—NO ESTOPPEL BY IMPLICATION.**

**740. General rule.**]—A lessee by indenture cannot plead even against an assignee any thing which is tantamount to pleading that the lessor had no interest in the premises when he made the lease. In an action of covenant such plea is bad upon a general demurrer if the declaration shows that the lease was by indenture; & will not prevent pltf. from having judgment. A plea that the lessor made a conveyance in fee before the lease, with a traverse that he was afterwards seised in fee, is tantamount to pleading that he had no interest in the premises when he made the lease.

Privies in estate as the feeoffee, lessee, etc., shall be bound & take advantage of estoppels . . . & where the estoppel works on the interest of the land, it runs with the land, into whosoever hands the land comes (*per CUR.*).

Another objection was, that estoppels are

he consequently could not avail himself of what the award contained in his favour.—*HIRA SINGH v. GANGA SAHAI* (1883), 1 L. R. 6 All. 322; L. R. 11 Ind. App. 20.—*IND.*

**PART V. SECT. 3, SUB-SECT. 4.**

**740 i. General rule.**]—Attestation of a deed does not itself estop the person attesting from denying that he knew its contents or that he consented to the transaction with the



odious, & not to be construed or raised by implication. The answer to which was, here was no construction by implication, but a plain estoppel appeared upon the face of the declaration (*per* CUR.).—PALMER v. EKINS (1728), 2 Ld. Raym. 1550; 1 Barn K. B. 103; 2 Stra. 817; 11 Mod. Rep. 407; 92 E. R. 505.

*Annotations*:—**Consd.** Carvick v. Blagrove (1819), 1 Brod. & Bing. 531; Cuthbertson v. Irving (1859), 4 H. & N. 742. **Refd.** Gibson & Johnson v. Minet & Fector (1791), 1 Hy. Bl. 569; Cardwell v. Lucas (1836), 2 M. & W. 111; Beckett v. Bradley (1844), 7 Man. & G. 994; Cuthbertson v. Irving (1860), 6 H. & N. 135. **Mentd.** Pluck v. Digges (1831), 5 Bl. N. S. 31; Lush v. Russell (1850), 19 L. J. Ex. 244.

741. —. —.]—BOWMAN v. TAYLOR, No. 810, *post*.

742. —. —.]—RIGHT d. JEFFERYS v. BUCKNELL, No. 985, *post*.

#### SUB-SECT. 5.—WHETHER ESTOPPEL, WHERE TRUTH APPEARS.

743. **Recital — Title of lessor.**]—*Semble*: a lease by indenture cannot operate by estoppel, where it appears by recital that lessor has no estate. If the jury find a deed with a recital, this is no finding of the matter recited.—BLACKMORE v. CUMBERFORD (1680), 1 Freem. K. B. 527; 89 E. R. 395.

744. —. —.]—If a man demises by indenture lands in which he has no interest & afterwards buys them, he will be estopped from saying he had no interest in them when he bought them.—HERMITAGE v. TOMKINS (1699), 1 Ld. Raym. 729; 91 E. R. 1387, N. P.

*Annotation*:—**Refd.** Gibson & Johnson v. Minet & Fector (1791), 1 Hy. Bl. 569.

745. —. —.]—PARGETER v. HARRIS, No. 804, *post*.

746. —. —.]—A lease, granted under a power contained in a settlement, recited the title of lessor, & showed that he had only an equitable interest. A right of re-entry for a breach of the covenants in the lease was reserved to lessor & his assigns:—*Held*: lessee was not estopped from disputing the title of lessor so disclosed in the lease.—GREENAWAY v. HART (1854), 14 C. B. 340; 2 C. L. R. 370; 23 L. J. C. P. 115; 23 L. T. O. S. 171; 18 Jur. 449; 2 W. R. 702; 139 E. R. 140.

*Annotation*:—**Mentd.** Yellowly v. Gower (1855), 11 Exch. 274.

747. —. —.]—A devise of real estate to A. for life, remainder to the children of A. in fee, with a provision for survivorship & accruer in case of the death of any or either of such children under the age of 21 years & without issue, & if there should not be any child of A., or if any or all such children should die under 21 years & without issue, a devise to the heirs & assigns of A., although A. had no child at the date of the will or at the death of testator:—*Held*: (1) the gift to the heirs of A. was a contingent remainder.

(2) A. was a married woman, & during her coverture she & her husband settled her interest under the will by a deed dated in 1840, & which was acknowledged pursuant to Fines & Recoveries Act, 1833 (c. 74), upon herself for life, remainder to her children, & if none, then to her husband in fee. This deed recited the will accurately. A. died, never having had children:—*Held*: her heir claiming by descent was not estopped by this deed.

(3) The question always is, whether there is, upon the whole deed, any distinct averment either by recital or in any other way, any distinct averment of the grantor's title against which his heir or his privy in blood can assert nothing, being bound by the deed. Release is not such an averment (PAGE WOOD, V.-C.).

(4) Here there is a distinct recital of the true title (PAGE WOOD, V.-C.).

(5) Silence as to a legal right, when the facts are known to both parties, will not be an acquiescence in equity to bind the silent party.—CROFTS v. MIDDLETON (1855), 2 K. & J. 194; 1 Jur. N. S. 1133; 69 E. R. 749; *on appeal* (1856), 8 De G. M. & G. 192, L. J.J.

*Annotations*:—*As to* (2) **Refd.** General Finance, Mortgage & Discount Co. v. Liberator Permanent Benefit Bldg. Soc. (1878), 10 Ch. D. 15. *Generally*, **Mentd.** Pride v. Bubb (1871), 7 Ch. App. 64; Jones v. Frost, *Re* Fidley (1872), 7 Ch. App. 773; *Re* White & Hindle's Contract (1877), 7 Ch. D. 201; Carter v. Carter, [1896] 1 Ch. 62.

748. —. —.]—**Title of vendor.**]—Where the truth appears by recitals in a deed, professing to convey a possibility, the party conveying is not barred by estoppel, although he has received the purchase money.—DOE d. LUMLEY v. SCARBOROUGH (EARL) (1835), 3 Ad. & El. 2; 4 Nev. & M. K. B. 724; 4 L. J. K. B. 172; 111 E. R. 313; *reversd.* on other grounds, *sub nom.* SCARBOROUGH (EARL) d. SAVILE v. DOE (1836), 3 Ad. & El. 897, Ex. Ch.

*Annotations*:—**Mentd.** Egerton v. Brownlow (1853), 4 H. L. Cas. 1; Atkinson v. Holtby (1863), 10 H. L. Cas. 313; Cope v. De La Warr (1873), 8 Ch. App. 985, n.; Milbank v. Vane, [1893] 3 Ch. 79.

749. **Recital referring to earlier deed — Truth appearing in earlier deed.**]—A demise by mtgor. & mtgee. of leasehold premises contained a proviso for re-entry by either of them if lessee should assign without mtgor.'s consent. After several mesne assignments with mtgor.'s consent, the premises were assigned to M. by a deed to which S., assignee of mtge., & mtgor. were parties, & which contained a proviso for re-entry by mtgor. on M. assigning without his consent. M. paid rent to mtgor., & subsequently assigned without his consent, whereupon S. & mtgor. brought ejectment:—*Held*: (1) M. was not estopped from showing that mtgor. was not the legal reversioner.

(2) I am clearly of opinion that there is no estoppel. If, indeed, any person read the [assignment to M.] without knowing anything more of the matter he might come to the conclusion that [mtgor.] was the legal owner of the reversion. The indenture recites [the original demise], by which the truth appears; & it is clear from that recital that the legal owner of the reversion was [mtgee.] & that [mtgor.] joined in the conveyance as mtgor., & for the purpose of showing his approval of lessee as a responsible tenant (MARTIN, B.).—SAUNDERS v. MERRYWEATHER (1865), 3 H. & C. 902; 35 L. J. Ex. 115; 30 J. P. 265; 11 Jur. N. S. 655; 13 W. R. 814; 159 E. R. 790.

750. —. —.]—**Relation of landlord & tenant—Appointment of receiver.**]—In replevin, deft. made cognisance as bailiff of R. W. for rent in arrear from pltf. under a demise from R. W. On the production of the lease, under which pltf. held, R. W. was described as a receiver, appointed by the Ct. of Ch., & the rent was made payable to him or any future receiver:—*Held*: pltf. was estopped by his own deed from pleading *non tenuit*.—DANCER v.

PANDURVANG KRISHANJI v. MARKANDEYA TUKARAM (1921), 49 L. R. Ind. App. 16.—IND.

#### PART V. SECT. 3, SUB-SECT. 5.

1. *General rule.*]—The law of

estoppel ought to be looked at with a view to the principles of reason & justice on which it is founded; & when it is said that a man is estopped from averring even the truth against his own deed, the justice of not allowing

him to controvert his own contracts for the purpose of violating it, is obvious. When an exception is stated to the general rule, viz. that there is no estoppel when the truth appears, on the deed, it is clear that the man is

**Sect. 3.—Rules of general application: Sub-sect. 5.**  
**Sect.**

HASTINGS (1826), 4 Bing. 2; 12 Moore, C. P. 34; 5 L. J. O. S. C. P. 3; 130 E. R. 667.

Consd. Evans v. Matthias (1857), 29 L. T. O. S. 209; Jolly v. Arbuthnot (1859), 4 De G. & J. 224. Refd. Pluck v. Digges (1831), 5 Bli. N. S. 31; Morton v. Woods (1869), L. R. 4 Q. B. 293.

—.]—By a receivership deed executed contemporaneously with a mtge. in fee, which it recited, mtgor., & mtgee. appointed a receiver, & constituted him their agent & attorney to receive the rents of mortgaged property, & to use such remedies by way of entry & distress as should be requisite for that purpose. By the same deed mtgor. attorned as tenant from year to year to the receiver, & there was a proviso, that if default should be made in payment of mtge.-money, or interest, at the times appointed, mtgee. might enter & avoid the tenancy created by the attornment. There was also a proviso, that nothing therein contained should lessen the rights, powers or remedies of mtgee. under the mtge. On mtgor. being found bkpt.:—*Held*: (1) the relation of landlord & tenant had been created between the receiver & mtgor. by the receivership deed, & that the receiver was entitled to distrain & take the goods which had belonged to mtgor. on the mortgaged premises.

(2) If *Dancer v. Hastings*, No. 750, *ante*, is good law, & I am not aware that it has ever been questioned, it does seem to be a strong authority in favour of the establishment of a tenancy in this case, notwithstanding the deed sets forth & explains the rights & interests of all parties (LORD CHELMSFORD, C.).—JOLLY v. ARBUTHNOT (1859), 4 De G. & J. 224; 28 L. J. Ch. 517; 33 L. T. O. S. 263; 23 J. P. 677; 5 Jur. N. S. 689; 7 W. R. 532 45 E. R. 87, L. C.

*Annotations*:—As to (1) Consd. Morton v. Woods (1869), L. R. 4 Q. B. 293; *Re Threlfall, Ex p. Queen's Benefit Bldg. Soc.* (1880), 16 Ch. D. 274. Refd. Hampson v. Fellows (1868), 37 L. J. Ch. 694; *Re Roberts, Ex p. Hill* (1877), 6 Ch. D. 63; *Kearsley v. Phillips* (1883), 11 Q. B. D. 621. As to (2) Refd. Morton v. Woods (1869), L. R. 4 Q. B. 293; *Re Kitchen, Ex p. Punnett* (1880), 16 Ch. D. 226.

**752. ——— Estoppel operating contrary to intention of parties.]—**B., being mtgor. in possession, executed a mtge. on Sept. 12, 1866, of the premises to defts. to secure the repayment with interest of certain advances to be made by defts. The mtge. was by indenture between B. & defts., but was never executed by defts.; the deed recited previous mtge., which was in fee, & by it B. conveyed all the premises comprised in recited mtge. to defts., in fee, upon trust that defts. should, either immediately or at any time, sell them, " & as a further security for the principal & interest for the time being due from B. to defts., B. did thereby attorn & become tenant to defts., their heirs & assigns, as & from the date thereof, of such of the premises thereby conveyed as were in his occupation, for & during the term of ten years, if that security should so long continue, at the yearly rent of £800, to be paid on Oct. 1, the first yearly rent to be payable on Oct. 1, then next. Provided that, notwithstanding anything therein contained, & without any notice or demand of possession, it should be lawful for defts., their heirs, exors., administrators, or assigns, before or after the execution of the trusts of sale, to enter upon the mortgaged premises, or any part thereof, & to eject B. or any person claiming through him,

not contradicting his deed, but showing what it is, by insisting on its true construction; & therefore, rather is

beyond the rule than within an exception to it, because he submits to be bound by the contract as it is, but only

& to determine the term, of ten years, notwithstanding any lease that might have been granted by B." Defts. made the stipulated advances, & B. continued in occupation of the premises; & on Oct. 15, 1866, defts. distrained for the first year's rent:—*Held*: (1) the intention of the parties, as evidenced by the deed, was to create a tenancy at will only, & not a term of ten years; a deed being therefore unnecessary, the tenancy was created by the assent of the parties & the occupation, under it, & that the fact that defts. had not executed the deed was immaterial; (2) the parties having agreed that the relation of landlord & tenant should be established between them, mtgor. was estopped from setting up that defts. had no legal reversion; & it made no difference that the fact of mtgor. having only the equity of redemption appeared on the face of the deed; (3) the distress was therefore lawful.

(1) That defts. had not, in fact, the legal estate, is clear; but that may be said of all lessors, where there is a lease & a tenancy by estoppel, & where the lessors have frequently no title at all; here defts. have an equitable title only, & the question becomes of primary importance, because it is only by estoppel that defts. can be said to have the legal estate, & it is said that no estoppel arises where the truth appears upon the face of the instrument which is the evidence of the agreement between the parties & it may be taken, as appears on the mtge. deed, that defts. were not seised of the legal estate, but that it was in the first mtgee., II. A number of cases bearing on this point have been cited; but when we come to look at the facts & the *ratio decidendi* of each, none of them are directly in point. They were either actions of covenant in which the covenant must be enforceable as an obligation at law, or actions of ejectment on a clause of re-entry, where it is perfectly clear there must be the legal estate in pltf., & that if it is outstanding he cannot succeed. But even if any of the decisions or dicta were to lead to the conclusion that where the truth appears there can be no estoppel, that doctrine must be taken to be overruled by the case of *Jolly v. Arbuthnot* (No. 751, *ante*) (KELLY, C. B.).—MORTON v. WOODS (1869), L. R. 4 Q. B. 293; 9 B. & S. 632; 38 L. J. Q. B. 81; 17 W. R. 414, Ex. Ch.

*Annotations*:—As to (1) Expld. *Re Bowes, Ex p. Jackson* (1880), 14 Ch. D. 725; *Re Threlfall, Ex p. Queen's Benefit Bldg. Soc.* (1880), 16 Ch. D. 274. Refd. *Burchell v. Clark* (1876), 25 W. R. 334; *Re Knight, Ex p. Volsey* (1882), 52 L. J. Ch. 121. As to (2) Consd. *Re Kitchen, Ex p. Punnett* (1880), 16 Ch. D. 226. Refd. *Re Potter & Ferrige, Ex p. Park* (1874), De Colyar's County Court Cases, 235; *Hartcup v. Bell* (1883), Cab. & El. 19; *Kearsley v. Phillips* (1883), 11 Q. B. D. 621; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608. As to (3) Refd. *Re Bowes, Ex p. Jackson* (1880), 14 Ch. D. 725; *Kearsley v. Phillips* (1883), 11 Q. B. D. 621. As to (4) Consd. *Re Kitchen, Ex p. Punnett* (1880), 16 Ch. D. 226.

**SECT. 4.—DIFFERENT PARTS OF DEED.**

**SUB-SECT. 1.—THE DATE.**

**753. General rule.]—**If one makes & delivers an obligation at the feast of Michaelmas which bears date at the feast of Christmas after the delivery & at the feast of All Saints he releases all actions to the obligor, in an action of debt the obligor shall not be estopped from pleading his release, for although he who uses the deed shall be

questions what, upon the face of it, is its due interpretation.—PLUCK v. DIGGES (1828), 1 Hud. & R. 1,—IR,



estopped to say that it has a false date, yet he who pleads against the deed shall not be estopped, although he made the deed, for the falsity shall be in him who uses the deed having a false date.—ANON. (prior to 1580), Plowd. Queries, 45, pl. 241 ; 75 E. R. 922.

**754.** —.]—A lease purported on the face of it to have been made on Mar. 25, 1785, *habendum* to the lessee from Mar. 25, now last past, for 35 years. There was evidence to show that the lease was not executed until after Mar. 25, 1783 :—*Held* : it took effect from the time of delivery, & not from the day of the date, & consequently the term commenced on Mar. 25, 1783, & not on Mar. 25, preceding the date of the deed.

I take it to be clear that a party may show that the deed was delivered on a different day from that on which it bears date (HOLROYD, J.).—STEEL v. MART (1825), 4 B. & C. 272 ; 6 Dow. & Ry. K. B. 392 ; 107 E. R. 1060.

*Annotations* :—*Foll.* Browne v. Burton (1847), 5 Dow. & L. 289. *Consd.* *Re Slater, Ex p. Slater* (1897), 76 L. T. 529.

**755.** —.]—The date is indeed to be taken *prima facie* as the true date of execution ; but as soon as the contrary appears, the apparent date is to be utterly disregarded (PATTERSON, J.).—BROWNE v. BURTON (1847), 5 Dow. & L. 289 ; 2 Saund. & C. 220 ; 17 L. J. Q. B. 49.

**756.** —.]—Upon the sale of a ship vendor covenanted “that the hereby bargained premises, & every part thereof, are now & so from henceforth for ever shall remain free & discharged of or from all bargains, gifts, sales, incumbrances, & the like.” At the time of the date of the deed the vessel was in B. Docks. Vessels entering the B. docks were subject to a duty of 10*d.* on each ton of cargo, but the owners of the ship in question had compounded for a rate of 1½*d.* per ton, on an undertaking that, on the vessel leaving, the full duty should be paid. After the sale of the vessel, vendee took her to L., where she received her cargo, returning to the B. docks for her passengers, on leaving which the full duty of 10*d.* per ton was demanded & paid ; but the deed was not delivered until the time when the vessel was at L. :—*Held* : (1) the language of the deed spoke from the time of its delivery ; at that time the ship being at L., it was in consequence of the voluntary act of vendee that the duty attached, & there was, therefore, no breach of the covenant.

(2) *Qu.* : whether, if the deed had been delivered at the time the ship was at the docks, there would have been a breach of the covenant.

(3) The statement of the date is no estoppel at all. The date of the deed has nothing to do with the time from which it begins to operate, that is, the delivery, unless it is so provided in some covenants (POLLOCK, C.B.).—TAYLOR v. MCCALMONT (1855), 26 L. T. O. S. 93 ; 4 W. R. 59.

**757.** —.]—Deft., B., had granted to G. separate leases of four plots of land fronting on H. road & four houses which had been erected thereon by G. under a building agreement. The plan on each lease, which was made part of the description, showed a row of twelve plots with houses thereon fronting on H. road, including the house demised which alone was coloured, & a strip of land coloured brown running past the back of all the plots to E. road. The position of this strip on the plan suggested that it was intended to give access to the back of the plots, but there were no words on the plan expressing such an intention. This strip of land was included in the building agreement but not in the leases. The leases were executed in May, 1903, & then bore no date except the year 1903, but the dates July 27, 28,

29, 30, 1904, respectively, were afterwards inserted by agreement between the parties. At the latter dates the houses had been completely erected & surrounded with a fence in which gates or openings had been made in the back fences giving access to & from the brown strip. This strip, which belonged to B., had never been fenced or marked off from the rest of B.’s land. Pltf. was a mtgee. of G., who had entered into possession & claimed a right of way over the brown strip :—*Held* : the alteration of the leases did not make them void, but B. was estopped from denying that the leases were executed at the dates inserted in them with his consent.—RUDD v. BOWLES, [1912] 2 Ch. 60 ; 81 L. J. Ch. 277 ; 105 L. T. 864.

*Annotations* :—*Mentd.* Hansford v. Jago, [1921] 1 Ch. 322 ; Cory v. Davies, [1923] 2 Ch. 95.

**758. Allegation of delivery before date.**—ANON. (1434), Y. B. 12 Hen. 6, fo. 1, pl. 3.

*Annotation* :—*Refd.* Taw v. Bury (1558), 2 Dyer, 167 b.

**759.** —.]—ANON. (prior to 1580), No. 753, *ante*.

**760.** —.]—In debt by pltf. as administrator of N. upon bond made to intestate, bearing date Apr. 4, 24 Eliz., deft. pleaded that intestate died before the date of the bond, & so concluded that the writing was not his deed ; the jury found that deft. did deliver it as his deed, July 30, 23 Eliz., in the lifetime of intestate, bearing date Apr. 4, 24 Eliz., before which day intestate died :—*Held* : this was deft.’s deed ; for though a party to a deed cannot aver that it was delivered before the day on which it bears date, yet the jury are not estopped to say the truth.—GODDARD’S CASE (1584), 2 Co. Rep. 4 b ; 76 E. R. 396 ; *sub nom.* DENTON & GODDARD’S CASE, 3 Leon. 100.

*Annotations* :—*Consd.* Vooght v. Winch (1819), 2 B. & Ald. 662. *Refd.* Terry v. Huntington (1668), Hard. 480 ; Stone v. Bale (1693), 3 Lev. 348 ; Hall v. Cazenove (1804), 4 East, 477 ; Doe v. Huddart (1835), 2 Cr. M. & R. 316 ; Magrath v. Hardy (1838), 1 Arn. 352. *Mentd.* Inkersalls v. Samms (1628), Cro. Car. 130 ; Foot v. Berklay (1670), 2 Keb. 654.

**761. Allegation of delivery after date.**—To a covenant dated the ninth conditioned to pay for goods “then laden or afterwards to be laden” on board such a ship, deft. may traverse the delivery on the ninth, & plead that the deed was sealed & delivered on the twenty-eighth, & that no goods were then or afterwards shipped ; for he is not bound to pay for any goods shipped after the date & before the delivery of the deed.—OSHEY v. HICKS (1610), Cro. Jac. 263 ; 79 E. R. 227.

*Annotations* :—*Refd.* Lewis v. Helliar (1668), 2 Keb. 377 ; Steele v. Mart (1825), 4 B. & C. 272 ; *Re Slater, Ex p. Slater* (1897), 76 L. T. 529.

**762.** —.]—One may declare in covenant that the deed was indented, made & concluded on a day subsequent to the day on which the deed itself is stated on the face of it to have been indented made & concluded. Where a charter-party, dated Feb. 6, but averred not to be executed till Mar. 15, contained a covenant by the owner that the ship should & would proceed from D. where she then lay on or before Feb. 12, on her outward bound voyage, & return, etc., & a covenant by the freighter that in consideration of every thing above mentioned, etc., he would pay certain freight for the voyage ; the voyage being averred to be performed, & the freight earned, the owner may recover in an action of covenant, without averring that the ship sailed on or before Feb. 12 ; such covenant that the ship should sail on or before Feb. 12, being either no condition precedent, but only an independent covenant, for breach of which the party had his remedy in damages ; or not of the substance of the contract, which was for



Sect. 4.—*Different parts of deed: Sub-sects. 1, 2*

the performing of the voyage for which the ship was chartered, & earning the freight; or being rendered impossible to be performed by the parties themselves not having executed the deed till after the time appointed for doing the act, & thereby dispensing with the performance of it.

The substance of the pleadings shows that the charter-party was executed after the day on which it bears date, which, by all the authorities, deft. is not estopped from doing (LE BLANC, J.).—HALL v. CAZENOVE (1804), 4 East, 477; 1 Smith, K. B. 272; 102 E. R. 913.

*Annotations*:—**Refd.** Reffell v. Reffell (1866), L. R. 1 P. & D. 139; *Re Slater, Ex p. Slater* (1897), 76 L. T. 529. **Mentd.** Tarrabochia v. Hickie (1856), 1 H. & N. 183.

**763.** —.—.]—STEELE v. MART, No. 754, *ante*.

*See, generally*, DEEDS, Vol. XVII., pp. 228, 229.

## SUB-SECT. 2.—DESCRIPTION OF PARTIES.

**764. Misnomer.**—*Feme covert* after arrest & bail bond given by a wrong name, may plead the misnomer. If a person binds himself in a bond by a wrong name, he is estopped to say it is not his name.—LINCH v. HOOKE (1704), 1 Salk. 7; 6 Mod. Rep. 311; 91 E. R. 7.

*Annotation*:—**Mentd.** Hatchett v. Baddeley (1776), 2 Wm. Bl. 1079.

**765.** —.—.]—Testator having devised his lands, suffered a recovery thereof, in which, as well as in the deed, to make a tenant to the *præcipe*, the tenant was called Edward, his real name being England. In ejectment by the heir at law against the devisees:—**Held**: the recovery was good by estoppel against testator & all persons claiming under him, & the will therefore was revoked thereby.—DOE d. LUSHINGTON v. LANDAFF (LORD BP.) (1807), 2 Bos. & P. N. R. 491; 127 E. R. 720.

*Annotations*:—**Mentd.** Boughton v. Sandilands (1811), 3 Taunt. 342; Hougham v. Sandys (1827), 2 Sim. 95.

**766.** —.—.]—The warrant of attorney in a recovery cannot be amended, even to the extent of transposing the names of the vouchee.

As he has executed the deed in the name by which he is described, would he not be estopped thereby (TINDAL, C.J.).—LAMONT'S CASE (1836), 3 Bing. N. C. 297; 2 Hodg. 264; 3 Scott, 666; 132 E. R. 425.

**767.** —.—.]—In an assignment, grantee was called James James, his right name being James Janes, & his residence & occupation were given. He executed the deed by his right name, & it appeared at the trial that his residence & occupation were correctly stated in the deed:—**Held**: the assignment was not void for uncertainty, the question as to the party intended to be grantee being one of identity, & pltf. being proved to be the party intended.

Grantee is described as being of a certain place & occupation, & so far as he binds himself by the deed he is estopped from denying its validity by his execution; so far as he takes any benefit

under it, his description is a matter of identity; it was clearly established at the trial that pltf. was the party meant, by proof of his residence, trade, & execution of the deed (*per CUR.*).—JANES v. WHITBREAD (1851), 11 C. B. 406; 20 L. J. C. P. 217; 17 L. T. O. S. 78; 138 E. R. 530.

*Annotations*:—**Mentd.** Coates v. Williams (1852), 7 Exch. 205; Cox v. Hickman (1860), 8 H. L. Cas. 268; Hidsen v. Barclay (1864), 3 H. & C. 361; Mason v. Briton Medical & General Life Assocn. (1888), 4 T. L. R. 755.

**768. Misdescription.**—In an original writ deft. was described as T. B. of C. in the county of N. upon a writ of error, brought to reverse the outlawry; the error assigned was, that T. B. was not, before or at the time of the original writ, of or conversant in C. aforesaid, & that there was not any town, hamlet, or place of the name of C. in that county. Plea to this assignment of errors, that pltf. prosecuted his writ with intent to declare upon a bond made by deft., by which he was described as T. B. of C. in the county of N.:—**Held**: this was an estoppel.—BONNER v. WILKINSON (1822), 5 B. & Ald. 682; 1 Dow. & Ry. K. B. 328; 106 E. R. 1340.

*Annotation*:—**Refd.** Horton v. Westminster Improvement Comrs. (1852), 21 L. J. Ex. 297.

*See, further*, BONDS, Vol. VII., pp. 164, 165.

## SUB-SECT. 3.—RECITALS.

A. *In General.*

*See, generally*, DEEDS, Vol. XVII., p. 362.

**769. General rule.**—(1) As for the estoppel by reason of a recital, there may be a great deal of difference between a conclusion or estoppel by a condition in an obligation, & upon a recital in a deed. Our books say generally such a recital in a deed binds not (BRIDGMAN, C.J.).

(2) When I make a lease for years of a reversion, & this not good for want of attornment, this shall never work by estoppel, for lessor had an interest out of which his grant might have been made good, if the ceremony requisite, which was attornment, had been performed, which belonged not to lessor to do, or to get done (BRIDGMAN, C.J.).

(3) If I release all my right in all my lands in D., which I have by descent from my father, though I have no lands there but from my mother, nothing passeth. But if my release had been of Whiteacre, which I had by descent of the part of my father, the release is good. So if I lease all my lands lying in such a parish, or which descended to me from my mother I am not estopped to say, I had no such land there but otherwise if it were of Whiteacre, which I had by descent from my mother (BRIDGMAN, C.J.).—FOOTE v. BERKLEY (1666), O. Bridg. 527; Cart. 147; 124 E. R. 726; *affd.* (1670), 1 Vent. 83.

**770.** —.—.]—BOWMAN v. TAYLOR, No. 810, *post*.

**771. Application of rule.**—(1) By indenture between pltf. & deft., reciting, *inter alia*, that deft. had advanced money to O. on the security of certain deeds, & that deft. was interested in those deeds to that extent, & that it had been agreed

## PART V. SECT. 4, SUB-SECT. 3.—A.

**769 i. General rule.**—In a suit for dissolution of marriage, it is competent for either party to dispute facts admitted by the recitals to a deed of separation entered into between them; although in an action founded on the deed such recitals would be conclusive between the parties.—JONES v. JONES (1885), 11 V. L. R. 130.—AUS.

**769 ii.** —.—.]—A grantor by a foreclosure deed is bound by the terms in

the same & where it is not possible to draw from the face of the deed, both from the operative clause & recitals any other conclusion than that it was the grantor's intention to receive the whole of the property described in the deed, the grantor is estopped from denying the operation of the deed according to such intention.—SHANNON v. SMITH (1922), 69 D. L. R. 291.—CAN.

**769 iii.** —.—.]—The parties to a bill

of sale & their privies are estopped from denying that moneys recited in the deed to be due on a joint account are so due, although in fact the moneys were advanced by the mtgees. separately.—TAYLOR v. KNAPMAN (1883), 2 N. Z. L. R. 265.—N.Z.

**a. Application of rule**—*Sub-grantee not bound by recital of grantee's seisin.*—A. conveyed to B., covenanting that at the time of making the conveyance he was seised in fee

pltf. should make further advances to O., & deft. should assign the deeds & his interest therein to pltf. as a security, deft. assigned them to pltf., & covenanted that the money so advanced to O. by deft. was due & unsatisfied to him. In an action on this deed, assigning as breach that the money was not due at the time of making the covenant:—*Held*: the recital that the money had been advanced, was to be taken as the language of deft. only, & did not estop pltf. from saying that it had not been advanced. (2) Where a recital is intended to be an agreement of both parties to admit a fact, it estops both parties; but it is a question of construction whether the recital is so intended.—*STROUGHILL v. BUCK* (1850), 14 Q. B. 781; 19 L. J. Q. B. 209; 15 L. T. O. S. 22; 14 Jur. 741; 117 E. R. 301.

*Annotations*:—As to (2) *Refd.* *Wiles v. Woodward* (1850), 5 Exch. 557; *Norman v. Mitchell* (1854), 5 De G. M. & G. 648.

**772. — Party gaining benefits.]—**(1) Articles of settlement were executed, which secured to husband a life interest in the real & personal estate to which the wife was or might become entitled & his father covenanted in the event of the husband's death to secure a sum of £200 a year to the wife for life, to be charged on real estate in Scotland. The wife was a minor, & was entitled under an executory devise in remainder to real estates, the articles also reserved to her a power of appointing the personal estate. Her brother & heir-at-law was also as trustee a party to the articles, & also to two subsequent deeds relating to her settled property, which recited that his sister was of age at the time of marriage. The wife afterwards died, without issue, in the life of her husband leaving her brother her heir-at-law. By her will she executed the power, & appointed the personal estate for benefit of her nieces, but during her life she did no act to render the articles valid as to her real estate. By the death of her heir-at-law subsequently the executory devise took effect & upon a bill filed by her husband, to obtain the benefits secured to him by the articles:—*Held*: the marriage articles did not affect the real estate; the heir-at-law was not estopped from taking the real estate by descent & the ct. could not vary the articles.

(2) If a recital is made in a deed which is untrue & by virtue of it a person executing the deed either gains a benefit or obtains something from another person, he cannot afterwards dispute the validity of that statement; but that is not the present case. This is a collateral recital with respect to the rights & interests of other persons & it in no respect is binding (*ROMILLY, M.R.*).—

simple. B. afterwards conveyed to C., reciting that he was then possessed in his own right of the land in question. In an action by C., the assignee of B., against A., upon the covenant:—*Held*: C. was not estopped by B.'s recital.—*GAMBLE v. REES* (1850), 6 U. C. R. 396.—*CAN.*

**b. — Bond to indemnify sheriff — Recital of ownership.]—**A sheriff, holding executions against deft., took from him a bond reciting that the sheriff had seized deft.'s goods, & indemnifying the sheriff "against any loss, damage, or liability, which may be incurred by reason of the execution, wrongful execution, or non-execution of the said writ." The sheriff afterwards sold the goods contrary to deft.'s wish, who informed him that they belonged to one G. G. brought trover against the sheriff & recovered the value of the goods. The sheriff then sued deft. on his bond:—*Held*:

deft. was not estopped by the recital from denying his property in the goods.—*CORBETT v. HOPKIRK* (1852), 9 U. C. R. 479.—*CAN.*

**c. — Conveyance by married woman.]—**B., a married woman, in order to carry out an agreement between her husband & his creditors consented to convey to the creditor a farm, her separate property, in consideration of the transfer by her husband to her of the stock & other personal property on it & of indemnity against her personal liability on a mtge. against said farm. The conveyance, agreement & bill of sale of the chattels were all executed on the same day, the agreement, to which B. was not a party, containing a recital that the husband was owner of the said chattels but giving the creditor no security upon them. The chattels having subsequently been seized under execution against the husband it was

*CAMPBELL v. INGILBY* (1856), 21 Beav. 567; 25 L. J. Ch. 761; 27 L. T. O. S. 51; 3 Jur. N. S. 410; 4 W. R. 433; 52 E. R. 979; *affd.* on other grounds (1857), 1 De G. & J. 393, L. J.J.

*Annotations*:—*Generally, Mentd.* *Ingilby v. Ancotts* (1856), 21 Beav. 585; *Anderson v. Abbott* (1857), 23 Beav. 457; *Willoughby v. Middleton* (1862), 2 John. & H. 344; *Brown v. Brown* (1866), L. R. 2 Eq. 481; *Codrington v. Lindsay* (1873), 8 Ch. App. 578.

**773. — Recital as to rights of strangers.]—***CAMPBELL v. INGILBY*, No. 772, *ante*.

**774. What amounts to recital.]—***PEARSE v. MORRICE*, No. 866, *post*.

**Recital in draft deed sent for approval—Whether admission.]—***See* No. 1416, *post*.

**775. Recitals in earlier title deeds.]—***DOE d. SHELTON v. SHELTON*, No. 724, *ante*.

**776. Recital true but incomplete.]—**Pltf., born in 1875, was an only child. Her father died in 1886. She married in Jan. 1892, being then entitled under the settlement made on the marriage of her father & mother, dated Apr. 15, 1874, subject to the exercise by her mother of the power of appointment contained in that settlement in favour of the issue of the marriage & to her mother's life interest to the property comprised in the settlement. By a voluntary settlement dated July 27, 1892, after reciting that the property comprised in the settlement of Apr. 15, 1874, was vested in trustees upon trust to pay the income to pltf.'s mother for life, & upon her death upon trust for pltf., her heirs, exors., administrators, & assigns, pltf. conveyed all her reversionary property under the settlement of Apr. 15, 1874, to trustees upon trust for conversion & to pay the income to herself for life, then to her husband for life, & on the death of the survivor, on the usual trusts for the benefit of their issue, with a trust in default of issue in favour of pltf. The settlement contained no covenant to settle after-acquired property, & no power of revocation. In Aug. 1897, pltf.'s mother, in exercise of the power contained in the settlement of Apr. 15, 1874, irrevocably appointed that the trustees of that settlement should stand possessed of the property therein comprised in trust for pltf., her exors., administrators, & assigns absolutely. There was no issue of the marriage between pltf. & her husband:—*Held*: (1) the deed of July 27, 1892, only passed the interest which pltf. had under the deed of Apr. 15, 1874, & did not comprise the interest taken by her under the appointment.

(2) The recital, though inaccurate, was true as far as it went, & worked no estoppel either legal or equitable.

(3) Equitable estoppel is not applied in favour of a volunteer.—*LOVETT v. LOVETT*, [1898] 1 Ch

claimed, on interpleader proceedings, that the bill of sale was in fraud of the creditor:—*Held*: the recital in the agreement worked no estoppel as against B.—*BOULTON v. BOULTON* (1898), 28 S. C. R. 592.—*CAN.*

**d. — Recital in deed of sale.]—**A. claimed certain property from B., the daughter of C., on the ground that on the death of C. it had descended to D. as the heir of C., & produced a *kobala* containing a recital that on the death of C., who had died childless, it had descended to D.:—*Held*: A. was not estopped from proving that C. had left a son, E., who survived him.—*GOUR MONEE DEBEA v. KRISHNA CHUNDER SANNYAL* (1878), I. L. R. 4 Cal. 397.—*IND.*

**e. — Fraudulent representation by minor as to age.]—**A minor representing himself to be of full age sold certain property to A. & executed a registered deed of sale. The deed



**Sect. 4.—Different parts of deed: Sub-sect. 3, A. & B. (a), (b)**

82; 67 L. J. Ch. 20; 77 L. T. 650; 46 W. R. 105; 42 Sol. Jo. 81.

**Annotations:—**As to (1) *Reid*. *Re Walpole's Marriage Settlement*, *Thomson v. Walpole*, [1903] 1 Ch. 928; *Re Rush, Warre v. Rush*, [1922] 1 Ch. 302. As to (2) *Reid*. *Re Maddy's Estate*, *Maddy v. Maddy*, [1901] 2 Ch. 820. *Generally*, *Mentd. Re Bulteel's Settlement*, *Bulteel v. Manley*, [1917] 1 Ch. 251.

**777. Recital unknown to party executing.]—***Re VICTORIA PERMANENT BENEFIT BUILDING, INVESTMENT & FREEHOLD LAND SOCIETY, EMPSON'S CASE*, No. 949, *post*.

Effect of recitals generally, *see* DEEDS, Vol. XVII., pp. 362 *et seq.*

**Truth in recitals.]—***See* Nos. 748, 749, *ante*.

**Recitals in bonds.]—***See* BONDS, Vol. VII., pp. 191 *et seq.*

**B. Rules of General Application.**

**(a) General Recitals.**

**778. General rule.]—**A lessor made a lease of lands by indenture to begin after the expiration of a lease thereof made to one D. In an action by the second lessee against the lessor the lessor pleaded that there was no such D. at the time of the supposed lease made to D.:—*Held*: the lessor was estopped by the recital of the first lease to say that there was no such D., & although the common ground was that a recital was not an estoppel, yet where the recital was material it was otherwise.—*ANON.* (1578), 2 Leon. 11; 74 E. R. 316.

**Annotation:—***Consd.* *Shelley v. Wright* (1737), Willes, 9.

**779. —.]—**In articles of agreement executed between A. & E. whereby A. lets a house to E., & E. agrees to pay the rent; if B., a third person, covenant therein for himself etc., on behalf of E. that E. shall pay the rent, & sign the deed, an action of covenant, on non-payment by E. will lie against B.

General recital is not an estoppel, but a recital of a particular fact is so (*HOLT, C.J.*).—*SALTER v. KIDLEY* (1688), 1 Show. 58; *Carth.* 76; *Holt*, K. B. 210; 89 E. R. 447.

**Annotations:—***Consd.* *Bensley v. Burdon* (1830), 8 L. J. O. S. Ch. 85. *Reid.* *Right d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278.

**780. —.]—**(1) A deed of release, executed by A., reciting that A. is seised of certain lands in fee, operates by way of estoppel against him, & all claiming under him.

(2) *Qu.*: whether a person having a title by estoppel, by means of a deed containing a covenant for further assurance is entitled to the assistance of a ct. of equity, to have a positive title given to him.

(3) A general recital will not operate as an estoppel, but the recital of a particular fact will have that effect (*LORD LYNDHURST, C.*).—*BENSLEY v. BURDON* (1830), 8 L. J. O. S. Ch. 85, L. C.; *previous proceedings* (1826), 2 Sim. & St. 519.

**Annotations:—**As to (1) *Distd.* *Right d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278. *Consd.* *Crofts v. Middleton* (1855), 2 K. & J. 194; *General Finance, Mortgage & Discount Co. v. Liberator Permanent Benefit Bldg. Soc.* (1878), 10

contained a recital that he was twenty-two years of age.

In a suit by him to set aside the sale on the ground of his minority:—*Held*: he was estopped.—*GANESH LALA v. BAPU* (1896), 1 L. R. 21 Bom. 198.—*IND.*

**PART V. SECT. 4, SUB-SECT. 3.—**  
**B. (b).**

**782 i. General rule.]—**A recital in a deed of a particular fact is binding

on one who has executed the deed, although it was not executed by him who relies on the estoppel.—*HUNGERFORD v. HUNTER* (1855), 5 L. Ch. R. 417.—*IR.*

**i. Application of rule — Company bound like individual.]—**Where the affidavit of *bona fides* is made by an officer of an incorporated co., the co. is like an individual, bound by the recitals in the mtge., *e.g.* recital of an agreement in writing for future

Ch. D. 15. As to (3) *Reid.* *General Finance, Mortgage & Discount Co. v. Liberator Permanent Benefit Bldg. Soc.* (1878), 10 Ch. D. 15.

**781. Whether general or particular — Party put upon inquiry.]—**Objection by a purchaser upon illegitimacy, upon the circumstance, that the register of marriage could not be found, an inaccurate statement in a deed, & some particularity of description of the child in a will:—*Held*: objection was overruled upon a general release; which, though only reciting generally, that objections were taken, was sufficient, as binding the party to inquire into the nature of the objections.—*BRAYBROKE (LORD) v. INSKIP* (1803), 8 Ves. 417; 32 E. R. 416, L. C.

**Annotations:—***Reid.* *Cholmondeley v. Clinton* (1817), 2 Mor. 171. *Mentd.* *Wall v. Bright* (1820), 1 Jac. & W. 494; *Lewin v. Guest* (1826), 1 Russ. 325; *Galliers v. Moss* (1829), 1 B. & C. 267; *Baring v. Booth* (1832), 1 L. J. Ch. 204; *Bainbridge v. Ashburton* (1836), 2 Y. & C. Ex. 347; *Lindsell v. Thacker* (1841), 12 Sim. 178; *Rackham v. Siddall* (1848), 16 Sim. 297; *Pyrke v. Waddingham* (1852), 10 Hare, 1; *Goodman v. Goodman* (1859), 28 L. J. Ch. 745; *Martin v. Laverton* (1870), L. R. 9 Eq. 563; *Sidebotham v. Knott* (1872), 28 L. T. 700; *Re Packman & Moss* (1875), 1 Ch. D. 214; *Re Brown & Sibly's Contract* (1876), 3 Ch. D. 156; *Lysaght v. Edwards* (1876), 2 Ch. D. 499; *Re Bellis's Trusts* (1877), 5 Ch. D. 501; *Re Franklyn's Mortgages*, [1888] W. N. 217.

**(b) Particular Recitals.**

**782. General rule.]—***SALTER v. KIDLEY*, No. 779, *ante*.

**783. —.]—***ANON.* (1578), No. 778, *ante*.

**784. —.]—**A party executing a deed, is estopped by the recital of a particular fact in that deed to deny such fact. Therefore where it was recited in the condition of a bond that obligor had received divers sums of money for obligee which he had not brought to account but acknowledged that a balance was due to obligee:—*Held*: obligor was estopped to say that he had not received any money for the use of obligee. Where deft. pleads matter of excuse that admits a non-performance, except in the case of an award, pltf. need not assign a breach in his replication. When pltf. replies that deft. is estopped to plead his plea, he may demand judgment generally.—*SHELLEY v. WRIGHT* (1737), Willes, 9; 125 E. R. 1029.

**Annotations:—***Consd.* *Hill v. Manchester & Salford Waterworks Co.* (1831), 2 B. & Ad. 544. *Reid.* *Lainson v. Tremere* (1834), 1 Ad. & El. 792; *Bringlee v. Goodson* (1839), 5 Bing. N. C. 738.

**785. —.]—***BENSLEY v. BURDON*, No. 780, *ante*.

**786. —.]—***BOWMAN v. TAYLOR*, No. 810, *post*.

**787. —.]—***CARPENTER v. BULLER*, No. 959, *post*.

**788. —.]—***WILES v. WOODWARD*, No. 814, *post*.

**789. Receipt of money.]—***SHELLEY v. WRIGHT*, No. 784, *ante*.

**790. Amount of rent reserved.]—**In an action upon a bond, appearing upon oyer to be conditioned for the payment of the rent of certain premises, recited in the condition to be demised by indenture at a certain specific rent, as by the said indenture, etc., deft. cannot plead that the indenture mentioned in the condition was an indenture by which a certain rent, less in amount than the rent mentioned in the condition, was

advances.—*Re GREAT WEST SADDLERY CO., NEWLANDS v. HIGGINS* (1908), 7 W. L. R. 59; 1 Alta. L. R. 18.—*CAN.*

**g. — Deed not personally executed by maker.]—**The rule that in an action upon a deed by the other party thereto the maker is estopped from denying the truthfulness of the recital therein as to his title does not apply where the maker did not personally execute the deed, but it was executed



reserved, & that such less rent has been paid.—  
**LAINSON v. TREMERE** (1834), 1 Ad. & El. 792; 3  
 Nev. & M. K. B. 603; 4 L. J. K. B. 207; 110 E. R.  
 1410.

**Annotations :—****Folld.** Bowman v. Taylor (1834), 2 Ad. & El. 278. **Consd.** Young v. Raincock (1849), 7 C. B. 310. **Refd.** Carpenter v. Buller (1841), 8 M. & W. 209; Carter v. Carter (1857), 3 K. & J. 617; Smith v. Osborne (1857), 6 H. L. Cas. 375.

**791. Whether general or particular—Party put upon inquiry.]—BRAYBROKE (LORD) v. INSKIP, No. 781, *ante*.**

(c) *Only when Clear and Positive.*

**792. General rule.]**—Where husband & wife assign to a purchaser, for valuable consideration, a share of an ascertained fund, in which the wife has a vested interest in remainder, expectant on the death of a tenant for life, & both the wife & the tenant for life outlive the husband, the wife is entitled, by right of survivorship, to claim the whole of that share of the fund against such particular assignee for valuable consideration. If the wife, after her husband's death, executes an assignment of the fund, which recites former assignments by the husband, & purports to be made subject to them, she does not thereby recognise or confirm those former assignments. The wife does not acquiesce in those assignments, or waive her right to claim against them, by forbearing to impeach them till the death of the tenant for life.

It would be too much to attribute such an effect to such recitals & such phrases: they were intended merely to state the order in which the assignments were to have priority (*LORD LYNDHURST, C.*).—*HONNER v. MORTON* (1828), 3 Russ. 65; 38 E. R. 500, L. C.

**Annotations** :—**Refd.** Baker v. Bradley (1855), 7 De G. M. & G. 597; Wright v. Vanderplank (1856), 8 De G. M. & G. 133. **Mentd.** Crowder v. Stone (1829), 3 Russ. 217; Stiffe v. Everitt (1836), 1 My. & Cr. 37; Ellison v. Ellison (1843), 13 Sim. 309; Scarpellini v. Atcheson (1845), 7 Q. B. 864; Whittle v. Henning (1848), 2 Ph. 731; Fitzgerald v. Fitzgerald (1849), 8 C. B. 592; Greedy v. Lavender (1850), 13 Beav. 62; Harley v. Harley (1852), 10 Hare, 325; Michelmore v. Mudge (1860), 2 Giff. 183.

**793.** - [RECEIVED] RIGHT d. JEFFERYS v. BUCKNELL,  
No. 985, *post*.

794. —.] —KEPP v. WIGGETT, No. 732, *ante*.

795. ———. —DOE d. THOMAS v. WALKER  
(1843), 2 L. T. O. S. 123.

**796.** — .] — An averment or recital in a deed, in order to be an estoppel, must be direct & positive; & a recital in a deed that certain premises "were conveyed or intended to be conveyed," did not estop the party from showing by evidence that such premises were not conveyed. — **HARRIES v. HOOPER** (1847), 10 L. T. O. S. 137.

797. —.]—Two trustees, one of whom was a solr., advanced money on mtge. Mtgor., with the concurrence of the solr. trustee, sold part of the mortgaged property without disclosing mtge. Regular conveyances in fee to the purchasers were executed by mtgor., containing a recital that he was seised or otherwise well & sufficiently entitled in fee simple. The solr. trustee received the purchase-money, & retained it. Eleven years afterwards both trustees executed a reconveyance of the property so sold, the other trustee believing, on the representation of the solr.-trustee, that the property was then about to be sold by mtgor. Soon afterwards the solr.-trustee absconded, &

the other trustee then filed a bill against mtgor. & the purchasers, praying for foreclosure against them:—*Held*: (1) though the purchasers were purchasers for valuable consideration without notice, they could not avail themselves of any legal estate acquired by means of the reconveyance, which, having been obtained by fraud, must be cancelled; & they had purchased only the equity of redemption; (2) under the form of conveyance adopted, neither pltf. nor mtgor. was estopped from denying that the legal estate had passed by the conveyance to the purchasers.

(3) A mtge. deed could not be produced, & a copy purporting to have been furnished by the solr. who held the deed was produced on behalf of pltf. as evidence of the deed; pltf. also deposed to the existence of mtge. Defts. had in their answers not expressly challenged mtge. deed, & had admitted that there had been a reconveyance of part of the property comprised in mtge.:—*Held*: as against these defts., mtge. deed was sufficiently proved.

(4) The estoppel, if it arose at all, would arise by virtue of the first recital in the conveyance. If the recital had been a recital simply that S. was seised, there might have been an estoppel, but the recital is one out of which no estoppel can arise, because it is not precise or unambiguous. It is a recital which, in substance, amounts to a statement that he had an estate either at law or in equity, & the fact that it states that the estate, whatever it was, was free from incumbrances, creates no estoppel for the purpose of making the legal estate pass. There is, therefore, no estoppel operating so as to convey the legal estate to the purchasers (*LORD CAIRNS, C.*).—*HEATH v. CREALOCK* (1874), 10 Ch. App. 22 ; 44 L. J. Ch. 157 ; 31 L. T. 650 ; 23 W. R. 95, L. C. & L. JJ.

*Annotations:—As to (2) Refd. General Finance Mortgage & Discount Co. v. Liberator Permanent Benefit Bldg. Soc. (1878), 10 Ch. D. 15; Onward Bldg. Soc. v. Smithson, [1893] 1 Ch. 1; Poulton v. Moore (1913), 83 L. J. K. B. 875. As to (4) Refd. Re Horton, Horton v. Perks, Horton v. Clark (1884), 51 L. T. 420; Low v. Bouverie, [1891] 3 Ch. 82. Generally, Mentd. Waldy v. Gray (1875), L. R. 20 Eq. 238; The Horlock (1877), 2 P. D. 243; Ordigosa v. Brown, Janson (1878), 38 L. T. 145; Heath v. Pugh (1881), 50 L. J. Q. B. 473; Re Morgan, Pillgrem v. Pillgrem (1881), 18 Ch. D. 93; Manners v. Mew (1885), 29 Ch. D. 725; Re Ingham, Jones v. Ingham, [1893] 1 Ch. 352; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Brigg v. Thornton, [1904] 1 Ch. 386.*

**798.** —.]—(1) An estate was settled (subject to two mtges. to X. in fee) to the use of A. for life, with remainder, in default of A.'s issue, which happened, to the use of B. for life, with remainder to the use of A. in fee. B. was also absolutely entitled to a £2,000 mtge. for a term of five hundred years on the fee. By a settlement made in 1876 on C.'s marriage (after reciting the titles of A. & B. subject to the two mtges. to X.) A. & B. "according to their respective estates & interests," conveyed the fee simple "& all the estate etc.," of the grantors to trustees to hold to the use of A. B. & C. for successive life estates, with remainder to uses to secure a jointure to C.'s wife, with remainders over. This deed contained no reference to the £2,000 mtge. B. afterwards voluntarily transferred the £2,000 mtge. to C., who charged it in favour of pltfs., who had no notice of the settlement. A. & B. having died, an action was brought by pltfs. to establish the £2,000 mtge. as

by an attorney, whose authority pltf. was held to be presumed to know & pltf. knew that he himself was at the time the owner of the property.—**DINSMORE v. PHILIP**, [1918] 1 W. W. R. 405; *reversd.*, 20 B. C. R. 123.—CAN.

**PART V. SECT. 4, SUB-SECT. 3.—**  
**B. (c).**

**h. Application of rule — Recitals entirely language of grantor.]—**The recitals in a deed poll were entirely the language of the grantor:—*Held*:

they were not binding on the grantee & he was not estopped from setting up the contrary in an action not founded on the instrument & wholly collateral to it.—*MINAKER v. ASH* (1861), 10 C. P. 363.—**CAN.**

*Sect. 4.—Different parts of deed: Sub-sect. 3, B. (c)*

against the settlement:—*Held*: no estoppel as to the mtge. was raised by the settlement, & there was no ground for equitable relief in favour of those claiming under the settlement on account of any representation made by B. or standing by on his part.

It is said that [B.] & all parties claiming under him are estopped at law from setting up the [£2,000] mtge. against any of the persons who take under the settlement. To raise such an estoppel at law there must be a distinct & precise averment; there is no such averment in the settlement (CHITTY, L.J.).

(2) The common law doctrine of estoppel is of a very personal nature, & only exists between the parties to the transaction. It is part of the law of evidence, & is not the same as the equitable doctrine. You cannot found an action on it, as you can in equity (VAUGHAN WILLIAMS, L.J.).—WILLIAMS v. PINCKNEY (1897), 67 L. J. Ch. 34; 77 L. T. 700, C. A.

799. —.]—The owner of two adjoining plots of land conveyed the western plot with a house thereon to his wife in fee simple together with a right of way over the eastern plot. The wife then conveyed the western plot & house by way of mtge. in fee simple together with the right of way over the eastern plot. Subsequently, while the mtge. was subsisting, the husband, who still remained the owner of the eastern plot, by deed, dated May 25, 1907, conveyed that plot to pltf. in fee simple for value, & the wife joined in the deed for the purpose of releasing the eastern plot from the right of way. The deed contained a recital that "under & by virtue of a certain indenture of conveyance" (identifying it) "the said A. W." (the wife) "is entitled to a right of way at all times & for all purposes for A. W., her heirs, & assigns, owners, & occupiers of" the house on the western plot "over & across" the eastern plot, & that it had been agreed that she should join in the deed for the purpose of releasing the land thereby conveyed from such right of way; & the deed in its operative part stated that she "hereby releases the piece of land & hereditaments hereby conveyed from" the right of way reserved to her by the indenture. The mtge. was not referred to in this deed, nor had pltf. notice of it. The wife died, leaving all her property to her husband & appointing him exor. of her will. & later the husband died, having appointed R. his exor. Subsequently R. paid off mtge., & mtgees. conveyed the western plot & the house thereon to him. R. thereupon conveyed the western plot & the house for value to deft. together with the right of way over the eastern plot. Deft. had no notice of the release of the right of way. Deft. claimed to exercise the right of way:—*Held*: the right of way was released by the deed of May 25, 1907, except as regards the rights of mtgees., & upon the reconveyance by mtgees., their right to take possession of the mortgaged premises & to exercise the right of way determined & the right of way became absolutely released & extinguished; & therefore deft. was not entitled to the right of way claimed; (2) the recital in the deed of May 25, 1907, was sufficiently precise to estop deft., who claimed through the wife, from asserting that the right of way was not released.

(3) With regard to the question of estoppel by recital in a deed, it is truly said that the law of estoppel in the case of real property is different from the law of estoppel as between persons. It

is the law which operates when a grantee of land has had a conveyance of the whole interest in the land from a grantor who himself at the time had only a partial interest in the land. The former then has a right, when grantor gets the entire interest in the land, to say as against all the world that that interest has passed to him. It does not then depend upon the mere representation by grantor that he had the whole interest. The estate feeds the estoppel, & therefore ceases to be an estate by estoppel only & becomes an interest (PHILLIMORE, L.J.).—POULTON v. MOORE, [1915] 1 K. B. 400; 84 L. J. K. B. 462; 112 L. T. 202, C. A.

*See, also, Sect. 3, sub-sect. 1, ante.*

*C. Particular Instances.*

800. **Grantor's estate.**—In an action of covenant by B. upon an indenture by A. to B. reciting that A. was seised in fee of certain lands, A. pleaded that she had nothing in the land at the time of the grant but that a stranger was seised of it:—*Held*: A. was estopped by the deed.—NEWTON v. WEEKES (1648), Aleyn, 79; 82 E. R. 925.

801. — **Free from incumbrances.**—One who has been mtgee. of certain premises afterwards takes a conveyance in fee simple in which the same premises are described as unincumbered, from a vendee of mtgor.; this in the absence of fraud is conclusive evidence to show that the amount of the first mtge. was paid.—JONES v. WILLIAMS (1817), 2 Stark. 52, N. P.

802. —.]—BENSLEY v. BURDON, No. 780, *ante*.

803. — **Lands in occupation of lessee.**—A recital in a freehold lease, that the lands are "now in the occupation & tenure of the lessee & his undertenants," estops the lessor from contending that the lessee was not in possession, so as to render livery of seisin unnecessary.—REES d. CHAMBERLAIN v. LLOYD (1811), Wight. 123; 145 E. R. 1198.

804. — **Estoppel of lessee.**—Covenant. Declaration that, by indenture between pltfs. & A. since deceased, of first part, B. therein described as guardian of C. & D., minors & devisees under the will of E., deceased, of second part, & deft. of third part, after reciting that the parties of the first part, & B. in right aforesaid, were the owners of the closes, etc., thereafter described, subject to mtge. for £3,500, the interest whereof was payable half-yearly at the office of W., & had agreed to let the same to deft., it was by the indenture expressed & purported that pltfs. & A., with the consent & approbation of B., did demise the closes to deft., his exors., etc., for seven years, yielding & paying therefor yearly during the demise £153 11s. at the office of W. aforesaid, in part of the interest on the mtge., by equal half-yearly payments; covenant by deft. with pltfs. & A., their heirs, etc., to pay the yearly sum at the place & in manner before mentioned; breach, nonpayment of parcel of a half-yearly sum, due since the death of A.; averment, that pltfs. & A., or any or either of them, never had any reversion in the premises purported to be demised. Plea: that the reversion of the demised premises, expectant on the determination of the demise, was, at the making of the indenture, & from thence to the death of A., in pltfs. & A., & from her death until making of the after mentioned indenture, was in pltfs., who, before breach, assigned the reversion by indenture to S.; verification. Replication: that no reversion in the supposed



demised premises, expectant, etc., was at the time, etc., or from thence, etc. in pltf. & A., or, from her death until, etc., in pltf.; conclusion to the country:—*Held*: (1) the facts being disclosed on the face of the lease, neither party was estopped from denying that lessors had a legal reversion.

(2) *Semble*: lessee was estopped by the recitals in the lease, from averring that lessors had a legal reversion.—*PARGETER v. HARRIS* (1845), 7 Q. B. 708; 15 L. J. Q. B. 113; 5 L. T. O. S. 346; 10 Jur. 260; 115 E. R. 656.

*Annotations*:—*As to* (1) *Appld.* *Jolly v. Arbuthnot* (1858), 28 L. J. Ch. 274. *Refd.* *Rowbotham v. Wilson* (1857), 8 E. & B. 123; *Cuthbertson v. Irving* (1860), 6 H. & N. 135; *Morton v. Woods* (1868), 37 L. J. Q. B. 242. *Generally, Mentd.* *Magnay v. Edwards* (1853), 13 C. B. 479.

*See, further*, Nos. 969, 994, *post*, & *generally* LANDLORD & TENANT.

805. —.]—By indenture of lease, dated June 26, 1810, between A., the father of pltf., & B., the father of deft., reciting a former lease of July 27, 1801, made between W. & M. his wife, & A., which recited that M. was entitled to moiety of lands in W. F., & to two-thirds for life or for some other estate of freehold, & that A. was entitled to the other moiety & the other third part, respectively, or some other share of the same lands, for some estate of freehold, etc., & by which, W. & M. his wife, demised the moiety & two-third parts respectively of M. to A. for forty years from Apr. 5, 1801. A. demised to B. amongst other premises, the lands of which M. was by the recital in the lease of 1801, said to be entitled to two-thirds & himself, A. to one-third, of the lands in W. F., for the remainder of the term of forty years, except the last ten days. A. died in 1813, & B. in 1818, leaving pltf. & deft., their respective representatives. Deft. continued in the occupation of the lands in W. F. down to the time of the trial, he & his father having regularly paid rent to pltf. & his father down to Lady Day, 1841, when the lease of 1801 expired. In debt for use & occupation of an undivided third part of the lands in W. F., since Lady Day, 1841:—*Held*: (1) the recital in the lease of 1801 was *prima facie* evidence that A. was entitled to one-third of the lands in W. F.; *semble*: (2) the estoppel created by the recital ceased upon the expiration of the lease.—*BAYLEY v. BRADLEY* (1848), 5 C. B. 396; 16 L. J. C. P. 206; 136 E. R. 932.

*Annotation*:—*Generally, Mentd.* *Leigh v. Dickson* (1884), 15 Q. B. D. 60.

806. —.]—*SMITH v. OSBORNE*, No. 1006, *post*.

807. —.]—*Re HORTON, HORTON v. PERKS, HORTON v. CLARK*, No. 844, *post*.

808. Grantor's title.]—*CROFTS v. MIDDLETON*, No. 747, *ante*.

Lessor's title.]—*See* Nos. 743–747, *ante*.

Vendor's title.]—*See* No. 745, *ante*.

809. Payment of consideration.]—*Applts.* against an order of removal, proved that J. J., the father of the pauper's wife, being seised in fee of land & having several children, it was in his lifetime agreed between them that part of the land should be allotted to each child, in pursuance of which agreement, on the marriage of the pauper in 1808 a portion of the land was allotted to him, upon which he built a house, & resided in it for sixteen years & then sold the whole for £60 to a party who held it ever since. Resp. then produced

a conveyance to the pauper of the land in question in 1815 by S. J., the eldest son & heir at law of J. J. It recited that the pauper had agreed to purchase the above parcel of land of S. J. & had paid him two guineas for the same, but no conveyance thereof had yet been made & then expressed, that in consideration of that sum, S. J. bargained & sold, etc.:—*Held*: *applts.* were not estopped by the recital of this deed from giving parol evidence that the consideration stated in the deed was never paid or intended to be paid; & the deed was made for the purpose of confirming the pauper's title to the land allotted to him in virtue of the parol agreement.—*R. v. CHEADLE (INHABITANTS)* (1832), 3 B. & Ad. 833; 1 L. J. M. C. 75; 110 E. R. 306.

*Annotation*:—*Refd.* *R. v. Billingham* (1836), 5 Ad. & El. 676.

810. Invention & letters patent.]—Declaration in covenant stated that, by indenture, after reciting that pltf. had invented certain improvements in the construction of looms, & had obtained letters patent for such invention, & that he had agreed with defts. to let them use the invention for a certain part of the term granted by the letters patent, in consideration of certain covenants, etc., pltf. covenanted to permit defts., to use & have the benefit of such invention & patent, & defts., in consideration of the grant, etc., covenanted to perform the agreement on their part. Breach, non-performance. Pleas, after setting out the patent, that the supposed invention therein, & in the declaration mentioned, was not nor is a new invention; & that pltf. was not the first or true inventor of the improvements in the indenture & letters patent mentioned:—*Held*: (1) if the pleas amounted to a denial of pltf. having invented the improvements, in the sense in which the deed alleged him to have done so, defts. were estopped by their recital in the deed from contradicting that fact; (2) if the pleas did not amount to such denial, but were intended merely to allege that pltf. was not the sole inventor, or that the invention had taken place long before the patent was granted, such pleas were no answer to the action.

(3) There may be an estoppel by matter of recital.

(4) If a party has by his deed recited a specific fact, though introduced by "whereas," it seems to me impossible to say that he shall not be bound by his own assertion so made under seal (*LORD DENMAN, C.J.*).

(5) Where a man has entered into a solemn engagement by deed under his hand & seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted (*TAUNTON, J.*).

(6) It is said that in a case of estoppel, nothing is to be taken by way of intendment (*PATTESON, J.*).—*BOWMAN v. TAYLOR* (1834), 2 Ad. & El. 278; 4 Nev. & M. K. B. 264; 4 L. J. K. B. 58; 111 E. R. 108.

*Annotations*:—*As to* (3) *Refd.* *Cutler v. Bower* (1848), 11 Q. B. 973; *Young v. Raincock* (1849), 7 C. B. 310; *Hills v. Laming* (1853), 9 Exch. 256. *Generally, Refd.* *Stroughill v. Buck* (1850), 14 Q. B. 781; *Smith v. Scott* (1859), 6 C. B. N. S. 771; *Oxley v. Holden* (1860), 8 C. B. N. S. 666; *Ashpittel v. Bryan* (1864), 5 B. & S. 723.

811. —.]—By articles of agreement under seal, reciting that letters patent had been granted to deft. for improvements in purifying gas, & that other letters patent had been granted to pltf. for an improved mode of manufacturing gas, & that

#### PART V. SECT. 4, SUB-SECT. 3.—C.

808 i. Grantor's title.]—If A., with the knowledge that the recital in a sale deed that the land thereby conveyed belongs to B. & is in B.'s enjoyment as

J.—VOL. XXI.

owner, attests the sale deed executed by B. in favour of pltf. he is estopped from setting up thereafter his title to the land, even though he might be the certified purchaser of the same in

ct. auction.—*KANDASAMI v. NAGALINGA* (1913), I. L. R. 36 Mad. 564.—*IND.*

k. Recital of indebtedness.]—Deft. being indebted to pltf. by an indenture



**Sect. 4.—Different parts of deed: Sub-sect. 3, C.]**

disputes had arisen between the parties as to their respective rights under the letters patent to the use of oxide of iron for the purpose of purifying gas, & that a writ of *sci. fa.* had been sued out by pltf. to repeal the letters patent granted to deft., & that another patent for purifying coal gas by oxides of iron had been applied for by deft., & that other letters patent had been sued out by pltf.; & that, in order to put an end to the aforesaid differences, the parties had entered into that agreement; deft. covenanted with pltf., & pltf. agreed, that deft. should have the exclusive use of the inventions granted to pltf., so far as the same related to the purification of gas by the hydrated oxides of iron, paying therefor certain royalties: that pltf. should have the exclusive use of the inventions granted to deft. so far as the same related to the purification of gas by anhydrous oxides of iron, paying therefor certain royalties; that, for the purposes of that agreement, & the determination of the amount of royalties, it should be assumed that defts. were entitled to the exclusive use of anhydrous oxides, & pltf. entitled to the exclusive use of hydrated oxides. The agreement also provided, that, in case of any breach of certain stipulations, the party so doing should pay to the other a certain sum as liquidated damages. In an action to recover that sum, deft. pleaded that pltf.'s patents were not valid, that the inventions were not new, & that pltf. was not the first inventor. On demurrer:—*Held*: the pleas were bad, inasmuch as deft. was estopped by the agreement from disputing the validity of the patents.—*HILLS v. LAMING* (1853), 9 Exch. 256; 23 L. J. Ex. 60; 156 E. R. 109.

**812. Proposal of assignment for benefit for creditors.]**—An insolvent having several executions in his house, at the suggestion of deft., who was one of his creditors, executed an assignment to him of all his effects for the benefit of such creditors as should come in & sign the deed. The deed recited that the insolvent "had proposed" the assignment. The execution creditors were accordingly paid their claims, & deft. taking possession of the goods & premises, carried on the business for some time, when he sold the whole concern for a larger amount than it would have realised if it had been disposed of by the sheriff. The deed was signed by several of the execution creditors. The insolvent, within three months from the assignment went to prison, & afterwards obtained his discharge under Insolvent Act, 1826 (c. 57):—*Held*: this deed was not voluntary within sect. 32 of above Act, & deft. was not estopped by the recital in the deed of assignment from contending that the deed was not voluntary.—*KNIGHT v. FERGUSON* (1839), 5 M. & W. 389; 2 Horn. & H. 59; 151 E. R. 165.

*Annotation*:—*Distd. Jackson v. Thompson* (1842), 2 Q. B. 887.

**813. Incorporation of company.]**—The first count of the declaration stated, that, by a certain deed made on Jun. 11, 1845, between pltf. & defts., a joint-stock co., therein described as registered & incorporated in pursuance of 7 & 8 Vict. c. 110, reciting, amongst other things, that the co. had been duly formed under a deed of settlement bearing date May 22 then last past, in consideration of pltf.'s covenanting to convey his interest in certain letters patent to the co. as soon as an

Act of Parliament should be obtained to authorise it, & in the meantime licensing them to work the patents, defts. covenanted to pay pltf. £15,000, out of the money raised by the first instalments or calls on the shares of the co. Breach, that, although instalments or calls on the shares were, before the commencement of the suit, paid to the co., out of which they might & ought to have paid the £15,000, & although a convenient & reasonable time for the payment thereof had elapsed since the making of the deed & payment of the instalments or calls, the co. had not paid the same.

The second count set out certain articles of agreement, dated June 12, 1845, between pltf. of the one part, & the co., therein described as registered & incorporated in pursuance of 7 & 8 Vict. c. 110, of the other part, reciting the sale of the letters patent to the co. for £15,000, whereby it was agreed, "that the sum of £15,000 in cash should be paid to pltf. as soon as conveniently could be done after the execution of the articles, out of the money raised by the first instalments or calls on the shares in the co.; & assigned for breach, that, although the co. had, within a convenient & reasonable time after the execution of the articles of agreement, to wit, on, etc., could & might, by calls & instalments on the shares of the co., have raised the last-mentioned sum of £15,000, & a convenient & reasonable time for raising the money, & paying the same in cash to the pltf., had elapsed, the co. had refused to pay the same:—*Held*: pleas (a) that the co. was not incorporated by any charter or Act of Parliament, nor was the same duly & lawfully registered & incorporated according to the form of the statute & in the deed & articles respectively mentioned, & (b) that the co. was a co. requiring a certificate of complete registration, & that at the time of the obtaining a certificate of complete registration, the co. was not formed by a deed or writing under the hands & seals of the shareholders therein, or any of them, in pursuance of the statute, nor was there at any time any such deed of settlement of the co. as required by the statute for the same reason were bad, defts. being estopped, by the recital in the deed from denying their incorporation.—*PILBROW v. PILBROW'S ATMOSPHERIC RY. CO.* (1848), 5 C. B. 440; 5 Ry. & Can. Cas. 89; 17 L. J. C. P. 166; 10 L. T. O. S. 345; 136 E. R. 950.

*Annotations*:—*Mentd. Woodbridge Union Grdns. v. Colneis & Carlford Hundreds Corpn. of Grdns.* (1849), 18 L. J. Q. B. 126; *Sunderland Marine Insee. v. Kearney* (1851), 16 Q. B. 925; *Scott v. Ebury* (1867), L. R. 2 C. P. 255; *Melhado v. Porto Alegre Ry.* (1874), L. R. 9 C. P. 503; *Re Nassau Phosphate Co.* (1876), 2 Ch. D. 610.

**814. Delivery of goods.]**—In trover for paper, it appeared, that pltf. & deft. had been in partnership together as paper manufacturers & iron merchants. The partnership was dissolved by a deed, which recited, that it had been agreed that the business of a paper manufacturer should belong exclusively to deft., & the business of an iron merchant to pltf., but that pltf. should receive out of the stock, paper to the value of £898 4s. 11d., which should remain in the paper mill for a year, at his option. The deed also recited, that in performance of that arrangement paper to the value of £898 4s. 11d. had been delivered to pltf., & the same was then in the mill, as pltf. acknowledged. It was then witnessed, that in performance of the arrangement, pltf. & deft. dissolved partnership, & pltf. assigned to deft. the stock in trade of the

reciting his indebtedness, & that he had agreed with pltf. for the repayment of the said sum due within six months from date, with interest, conveyed to

pltf. certain lands, *habendum* in fee: Proviso, that pltf., if the debt was duly paid, would re-convey. In an action to recover the money:—*Held*: deft.

could not deny that he was at the date of said indenture indebted to pltf.—*ALLNUTT v. RYLAND* (1862), 11 C. P. 300.—CAN.

business of a paper manufacturer, except the £898 4s. 11d. worth of paper so delivered to pltf. as aforesaid, & deft. assigned to pltf. the stock in trade of the business of iron merchants; there were also mutual releases. No paper whatever was set apart or delivered to pltf., but the jury found that deft. had converted the whole stock:—*Held*: (1) the parties were estopped by the deed, to say that no such delivery had taken place.

(2) The present claim is not collateral to the deed, as was the case in *Carpenter v. Buller*, No. 959, *post*. It is therefore, an estoppel on both (PARKE, B.).—*WILES v. WOODWARD* (1850), 5 Exch. 557; 20 L. J. Ex. 261; 155 E. R. 244; *sub nom. WILLS v. WOODWARD*, 15 L. T. O. S. 395. *Annotation*:—*As to* (2) *Reid. S. E. Ry. v. Warton* (1861), 31 L. J. Ex. 515.

**815. Previous agreement.]**—A., being a trustee for the younger children of S. H. S., advanced a sum of £5,185 3s. 4d. upon the security of certain estates in Berkshire, which C. S. on Jan. 20, 1832, demised to A. for 300 years, to secure the repayment. The money was borrowed for S. H. S., who was tenant in tail of the S. estates in remainder expectant on the death of his mother, the tenant for life, & on Jan. 21, 1832, S. H. S. demised the S. estates to C. S. for 2,000 years, to indemnify him & the Berkshire estates from the £5,185 3s. 4d. & interest, secured to A.; & by deeds dated Jan. 23, & 24, 1832, in further compliance with an agreement recited in this deed, he settled the S. estates upon various uses, for the benefit of his family. On the death of the tenant for life, S. H. S., being greatly indebted to G. S. F., executed a disentailing deed, & conveyed the S. estates to G. S. F. giving him a power of sale over the estates as a security for the money due; this was subsequently confirmed by another deed, & in a suit instituted by G. S. F., insisting that the settlement of Jan. 23, & 24, 1832, was voluntary & void against the subsequent alienation for value made to G. S. F. who had notice of the settlement:—*Held*: S. H. S. & C. S. were, by executing the deed, estopped from alleging that the recital was false.—*FORD v. STUART* (1852), 15 Beav. 493; 21 L. J. Ch. 514; 51 E. R. 629.

*Annotation*:—*Mentd. Clarke v. Wright* (1861), 7 Jur. N. S. 1032

**816. Corporation acting under statutory powers.]**—*HILL v. MANCHESTER & SALFORD WATER WORKS Co.*, No. 938, *post*.

**817. —.]**—*HORTON v. WESTMINSTER IMPROVEMENT COMRS.*, No. 914, *post*.

**818. Execution & destruction of deed.]**—A married woman, having a power of appointment over property, joined in a deed of compromise in which she recited that she had previously executed a deed of appointment in favour of certain of the parties to the compromise, but had destroyed it. In a suit instituted after her death, & nearly forty years after the execution of the deed of compromise:—*Held*: the recital was conclusive evidence against her personal representative of the execution & destruction of the deed of appointment.—*DYNE v. COSTOBADIE* (1853), 17 Beav. 140; 1 Eq. Rep. 116; 23 L. J. Ch. 66; 21 L. T. O. S. 135; 1 W. R. 315; 51 E. R. 986.

**819. Surrender of security.]**—In Jan. 1851, A. entered up & registered judgment on a warrant of attorney against B. a beneficed clergyman. By an agreement contemporaneous with the warrant of attorney, B. agreed to assign to A. the rentcharge in lieu of tithe as a security for the debt. By a deed dated in Nov. 1851, after reciting that A. had agreed to allow B. to receive the rentcharge for his own use upon his having

the security therein contained, B. assigned to A. certain property by way of security for the debt. In Dec. 1851, C. entered up judgment against B. C. afterwards registered it, & sued out a writ of sequestration upon it:—*Held*: A. was estopped by the recital in the mtge. from obtaining a receiver of the benefice.—*BATES v. BROTHERS* (1853), 2 Sm. & G. 509; 2 Eq. Rep. 321; 23 L. J. Ch. 150; 22 L. T. O. S. 196; 17 Jur. 1174; 2 W. R. 116; 65 E. R. 503; *on appeal* (1854), 2 Sm. & G. 518, L. JJ.; *subsequent proceedings*, 2 Sm. & G. 518.

**820. Construction of will.]**—Testator by his will bequeathed to A., a married woman, “an annuity of £600 sterling *per annum*, to commence six months after my decease, for her life, & the issue from her body lawfully begotten; in failure of which, to revert to my heirs.” He appointed two friends as trustees “for A., so that the annuity may be secured for her sole use & benefit.” He appointed other parties exors. of his will. After testator’s death, by certain deeds in 1798, a construction by the exors. & other parties was put upon this bequest which excluded the notion that A. took an absolute interest in the annuity; & by a settlement made on a subsequent marriage, A. *dum sola*, adopted the construction so previously put upon this bequest:—*Held*: A. was bound by the construction put upon the will by the deed of 1798, & so recited in the settlement of 1808, which formed a contract between the parties, & she & her issue were bound by that construction.—*Re WYNCH’S TRUSTS, Ex p. WYNCH* (1854), 5 De G. M. & G. 188; 2 Eq. Rep. 1025; 23 L. J. Ch. 930; 23 L. T. O. S. 259; 18 Jur. 659; 2 W. R. 570; 43 E. R. 842, L. C. & L. JJ.

*Annotations*:—*Mentd. Goldney v. Crabb* (1854), 19 Beav. 338; *Re Banks’ Trusts, Ex p. Hovill* (1855), 2 K. & J. 387; *Law v. Thorp* (1858), 27 L. J. Ch. 649; *Re Andrew’s Will* (1859), 27 Beav. 608; *Williams v. Lewis* (1859), 6 H. L. Cas. 1013; *Jackson v. Calvert* (1860), 1 John. & H. 235; *Re Jeaffreson’s Trusts* (1866), L. R. 2 Eq. 276; *Surridge v. Clarkson* (1866), 14 W. R. 979; *Herrick v. Franklin* (1868), L. R. 5 Eq. 593; *Re Barker’s Trusts* (1883), 52 L. J. Ch. 565.

**821. Vesting of estate.]**—In 1801, by a deed since lost, after reciting the conveyance to defts. by V., by a deed poll of even date, of the site of a canal & other premises, in consideration of an annual rent of £105, to be paid to him “or the person or persons to whom the freehold or inheritance of the premises thereby released should for the time being belong, in case the instrument or deed poll had not been made”; defts. covenanted with V., “& to & with the person or persons to whom the freehold or inheritance of the hereditaments & premises hereinbefore recited to be released shall for the time being belong,” to pay the yearly rent-charge in manner as & at the times whereon the same shall become due & payable; & a power to distrain for non-payment of the rent-charge was given, & covenants made by defts. to & with persons described in the same terms as the grantees of the rentcharge. In 1827, by a deed poll reciting the last deed verbatim, & the fact of its loss, & reciting the death of V., & that the “freehold & inheritance of the hereditaments & premises mentioned & comprised in the deed poll, or the rentcharge or yearly sum of £105, was then vested in J., & that the rentcharge had been duly paid to V. during his life, & to J. since his death; defts. ratified & confirmed the deed poll so executed as aforesaid, & declared that the same should be “good, valid & effectual, to all intents & purposes, according to the true intent & meaning thereof, notwithstanding the same is lost or mislaid as aforesaid.” In an action by the assignee of the rentcharge:—*Held*: the



*Sect. 4.—Different parts of deed: Sub-sect. 3, C.]*

terms of the deed of 1801 were explained by the recital contained therein, & the recitals of the deed of 1827, & the latter deed, admitting under defts.' seal that the rentcharge was then vested in fee in J., estopped defts. from denying it, & formed good evidence of a valid grant.—*GWYN v. NEATH CANAL CO.* (1868), L. R. 3 Exch. 209; 37 L. J. Ex. 122; 18 L. T. 688; 16 W. R. 1209.

*Annotation:—Mentd. Watling v. Lewis*, [1911] 1 Ch. 414.

**822. Contract treated as subsisting.]—**Under an order of the Insolvent Debtors' Ct., the interest of the insolvent in certain freehold & copyhold premises was directed to be sold. In the particulars of sale the property was described as freehold & part copyhold. At the sale deft. was declared the purchaser. He signed the contract & paid the purchase money. On delivery of the abstract of title deft. raised an objection whether the property was, by the dealings of the parties, to be treated as real or personal estate, in other words, whether the insolvent's interest was absolute in the land as money, or whether he was tenant by the curtesy only. The purchaser insisted on the objection, & afterwards rescinded the contract. After so doing, he took from the heir-at-law of the wife, in consideration of £200, a conveyance by deed of his interest in the property, subject to the insolvent's life-estate. In this deed deft. recited that the question of title was still pending between the vendors, the assignees in insolvency, & himself. The creditors' assignee in insolvency filed a bill for specific performance:—*Held*: the recital in the deed rendered it impossible for deft. to say that he had rescinded the contract.—*MURRELL v. GOODYEAR* (1859), 2 Giff. 51; 29 L. J. Ch. 298; 1 L. T. 291; 6 Jur. N. S. 91; 66 E. R. 22; *on appeal* (1860), 1 De G. F. & J. 432, L. JJ.

*Annotations:—Mentd. Reed v. Don Pedro North Del Rey Gold Mining Co.* (1864), 10 L. T. 836; *Hume v. Pocock* (1866), L. R. 1 Eq. 662; *Halkett v. Dudley*, [1907] 1 Ch. 590.

**823. Amount due for costs under mortgage—Whether taxation barred.]—**A mtge.-deed contained a recital that a certain sum was due for costs. Those costs were not then ascertained; but, by arrangement, the mtge.-money & costs, as recited, were advanced by A., "the accounts to be thereafter adjusted." The mtgee. then transferred the property to A. The solr., who had acted for all parties, afterwards sent in the bill of costs, when it was found to be more than the amount paid, & to comprise items properly chargeable only to mtgor.; but without which items it would not have amounted to the recited sum. Mtgee. then took out a summons for the taxation of the bill of costs:—*Held*: the summons must be dismissed, as mtgee. was estopped by the recital in the mtge.-deed.—*Re FORSYTH* (1865), 34 Beav. 140; 11 L. T. 616; 11 Jur. N. S. 213; 13 W. R. 307; 55 E. R. 587; *on appeal*, 2 De G. J. & Sm. 509, L. JJ.

*Annotations:—Folld. Re Gold* (1871), 24 L. T. 9. *Consd. Re Foster, Barnato v. Foster*, [1920] 3 K. B. 306.

**824. ———.]—**Under pressure of a threat by first mtgee. to transfer his mtge. to third mtgee., the second mtgee. paid off the first mtge. debt, interest & costs, under protest against the amount of the costs, & accepted a transfer of the first mtge. The deed of transfer recited that a certain sum was due for costs, & assigned it, as well as the principal & interest, to the transferee. On a summons by the transferee for taxation of the bill of costs, which had been delivered six days before completion of the transfer:—*Held*: he

was estopped by the recital in the deed from obtaining an order for taxation.—*Re GOLD* (1871), 24 L. T. 9; 19 W. R. 343.

*Annotation:—Consd. Re Foster, Barnato v. Foster*, [1920] 3 K. B. 306.

**825. Inability to pay debts.]—**By a will certain property was given upon trust for A. during his life, or until he should become bkpt. or insolvent, or make a general assignment for the benefit of his creditors, or otherwise deprive himself, or be deprived by law, of the beneficial enjoyment thereof, & after the happening of any such event, over:—*Held*: the gift took effect upon A. executing a composition deed containing a recital that he was unable to pay his debts in full, & A. could not afterwards dispute the accuracy of the recital.—*BILLSON v. CROFTS* (1873), L. R. 15 Eq. 314; 42 L. J. Ch. 531; 37 J. P. 565; 21 W. R. 504.

**826. Purpose of acquisition of land.]—**Where a conveyance recited that certain land was bought by justices "for the purposes of Prison Act, 1865 (c. 126), & upon or for no other trust, intent or purpose whatsoever":—*Held*: with reference to the purposes for which the land was bought, the justices were bound by the recital, & as under sects. 23 & 44 of above Act, land could be bought only for prison purposes, the land in question became vested in the Prison Comrs. without payment of compensation under Prison Act, 1877 (c. 21), ss. 48, 60.—*PRISON COMRS. v. NICHOLSON* (1882), 30 W. R. 881, C. A.

**827. Agreement to settle.]—**A marriage settlement, duly executed by the intended wife, contained a recital that it had been arranged & agreed that after-acquired personal property of the wife should be settled upon the trusts thereafter declared, & that the husband should enter into the covenant in that behalf thereafter contained. The settlement contained a covenant, not preceded by the words "it is hereby agreed & declared," but expressed to be "in further pursuance of the recited arrangement & agreement," by the husband alone that the husband & the wife respectively, or their respective exors. or administrators, would do & execute all such acts, deeds & assurances as should be necessary for vesting such after-acquired property for all the right & interest of the wife or the husband, as such husband, therein in the trustees upon the trusts of the settlement. & that in the meantime, & until such settlement should be made, the husband & the wife respectively, & their respective exors., administrators & assigns, & all other persons in whom the premises should be vested, should stand possessed of the same upon the trusts thereinbefore mentioned. The words of the covenant were wide enough to include property given to the wife for her separate use, & the question was, whether such property was bound by this covenant, the wife not having joined in it:—*Held*: it was, for any ambiguity that might arise by reason of the wife not joining in the covenant could be explained by looking at the recital, & the whole scope of the deed, & from that it appeared that there was an intention to settle property of this nature, & the wife having executed the deed was bound by the agreement contained in it, although she did not expressly join in the covenant.—*Re DE ROS' TRUST, HARDWICKE v. WILMOT* (1885), 31 Ch. D. 81; 55 L. J. Ch. 73; 53 L. T. 524; 34 W. R. 36.

*Annotations:—Consd. Re Haden, Colling v. Haden*, [1898] 2 Ch. 220. *Reid. Re Macpherson, Macpherson v. Macpherson* (1886), 55 L. J. Ch. 922; *Re Coghlan, Broughton v. Broughton*, [1894] 3 Ch. 76; *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518.



**828. Recitals in conveyance to trustees.]**—The ordinary recitals & forms commonly used in conveyances & assignments to trustees with a view of keeping all notice of the trust off the title, are not misrepresentations on the face of the document which will displace the equitable title of a *cestui que trust*, even though they may have been fraudulently made use of by a dishonest trustee to show that he was in fact the absolute owner.—**CARRITT v. REAL & PERSONAL ADVANCE CO.** (1889), 42 Ch. D. 263; 58 L. J. Ch. 688; 61 L. T. 163; 37 W. R. 677; 5 T. L. R. 559.

**Annotations:**—**Consd.** *Rimmer v. Webster*, [1902] 2 Ch. 122. **Mentd.** *Re Richards, Humber v. Richards* (1890), 45 Ch. D. 589; *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 691. *Re West & Hardy's Contract*, [1904] 1 Ch. 145; *v. Linom*, [1907] 2 Ch. 104; *Hill v. Peters*, [1918] 2 Ch. 104.

**829. Payment of insurance premium.]**—On Dec. 14, 1895, pltf. signed a proposal form addressed to deft. co. for an insurance against loss by burglary, the form stating that no insurance would be considered in force until the premium was paid. The first premium was stated to be 9s. 11d. to Jan. 1, 1897, & 9s. 9d. annually afterwards. On Dec. 18, a protection note was given to pltf., reciting the proposal & declaring pltf. to be provisionally protected, subject to the conditions contained in the form of policy used by the co., for seven days from that date. The seven days expired on Dec. 25, & on the night of the next day pltf. suffered a loss by burglary. On Dec. 27, at a meeting of the directors of the co., who were ignorant of the loss, a policy was duly signed & sealed insuring pltf. from Dec. 14, 1895, to Jan. 1, 1897, the policy reciting that the first premium, 9s. 11d., had been paid, & one of the provisoes therein stated that no assurance by way of renewal or otherwise should be held to be effected until the premium due thereon should have been paid. No premium was ever paid, & the policy never left the co.'s office:—**Held:** the co. must be taken to have waived the prepayment of the premium, & they were therefore liable on the policy.—**ROBERTS v. SECURITY CO.**,

[1897] 1 Q. B. 111; 66 L. J. Q. B. 119; 75 L. T. 531; 45 W. R. 214; 13 T. L. R. 79; 41 Sol. Jo. 95, C. A.

**Annotations:**—**Mentd.** *Equitable Fire & Accident Office v. Ohing Wo Hong*, [1907] A. C. 96; *Allis, Chambers Co. v. Fidelity & Deposit Co., of Maryland* (1913), 29 T. L. R. 506.

**830. Proposal for insurance policy.]**—Pltf. effected with an insurance co. a policy of insurance under the seal of the co. upon the life of her husband therein called the assured. The policy was expressed to be issued in consideration of pltf. having signed a proposal, such proposal being the basis of the contract & it being stipulated that if the proposal contained any untrue statement as to the state of health of the assured the policy should be void. Upon the death of the assured pltf. who had duly paid the premiums claimed the amount insured. The co. resisted the claim on the ground that the proposal on which the policy had been issued contained misrepresentations as to the assured's health. At the hearing before justices of a complaint under Collecting Societies & Industrial Insurance Companies Act, 1896 (c. 26) for non-payment of the sum insured pltf. satisfied the justices that a proposal produced by the co. & purporting to be signed by her was not signed by her or with her authority & she further stated that no proposal at all had been signed by her or with her authority:—**Held:** (1) the co. having issued the policy & received the premiums were estopped from contending that in consequence of the want of a proposal there was no contract; (2) the mere fact that pltf. instead of confining her evidence to the disproof of the proposal put forward by the co. made the admission irrelevant to her own case, that there had been no proposal at all did not prevent her from taking the benefit of that estoppel, & the co. were liable on the policy.

It may be suggested that resps. in these cases were not free to rely upon any such estoppel because they have asked the justices to find & the justices have found that there was no proposal at all. With regard to that, in the first place it

**828 i. Recitals in conveyance to trustees.]**—By a deed of settlement made between the settlor & the trustees, & executed by all the parties, after reciting that the trust fund had been delivered to the trustees, it was agreed that the trustees should invest the fund, & pay the income to the wife of the settlor during her life. Some weeks before the execution of the deed the fund had been handed to the trustees, who on the same day paid it to the settlor, with the concurrence of the wife. The settlor had not repaid the amount:—**Held:** the trustees were not estopped by the recital from showing that they had so paid over the fund to the settlor & had not received it back.—**MCDONALD v. McFARLANE & GORE** (1900), 19 N. Z. L. R. 427.—N.Z.

**1. Deed of constitution of association—Membership of signatories.]**—The M. Assocn. issued to the N. Bank a guarantee policy against loss not exceeding £1,000 by the dishonesty of L., while in the employ of the bank. The policy was signed by G. & B. as "directors" of the assocn., was dated Nov. 20, 1862, & was granted under the deed of constitution of the assocn. This deed was dated July 1, 1862, but it was not executed by G. until Dec. 2, 1862, & by B. until Jan. 1, 1863:—**Held:** the deed dated July 1, 1862, reciting that debts were parties was evidence of their being "members" of the assocn. on that date although the deed was not executed by one of them till Dec. 2, 1862, & by the other

till Jan. 1, 1863.—**NATIONAL BANK OF AUSTRALASIA v. BROCK** (1864), 1 W. W. & A'B. 208.—AUS.

**m. — Registration of association.]**—G. was sued by the official agent of a mining co. for contribution. The evidence of the registration of the co. was defective, but the deed of assocn. of the co. executed by G. & which recited the registration & incorporation of the co. was put in evidence:—**Held:** the recitals in the deed were only *prima facie* evidence of the registration; & if it were proved *aliunde* that the registration was defective the magistrates could adopt such evidence.—**REEVES v. GREENE** (1869), 6 W. W. & A'B. 87.—AUS.

**n. Deed of assignment for benefit of creditors—Execution by creditor.]**—Where a deed of assignment for the benefit of creditors under 5 Vict. No. 9 recited that the assignor was indebted to the creditors in the amounts set forth in a schedule thereto, & contained a release as to such debts:—**Held:** one of such creditors who had executed the deed was estopped thereby, & not entitled to claim a dividend upon a larger amount than appeared in such schedule as due to him.—**HERMANN v. FRENCH** (1879), 5 V. L. R. 15.—AUS.

**o. Recitals in bill of sale.]**—Pltf., being indebted to debts, in a sum of about \$16,000, executed a bill of sale to them of a large amount of personal property. This bill of sale contained a recital that pltf. had contracted &

agreed with debts. for the absolute sale to them of the same & of the equity of redemption in the land in question granted by him to them by deed of even date, in consideration of the release by debts. from his indebtedness to them; & on the same day pltf. executed a conveyance of his equity of redemption in the lands mentioned to two of debts., for the expressed consideration of \$1,000:—**Held:** debts. were not estopped by the recital in the bill of sale from denying the fact of their having purchased the property, & such recital does not operate as an estoppel unless in an action directly founded on the instrument containing the recital or in one which is brought to enforce the rights arising out of such instrument.—**FULLERTON v. BRYDGES** (1895), 10 Man. L. R. 431.—CAN.

**p. —.]**—A bill of sale contained a recital that a certain sum was due from the mtgor. to the mtgee., & a covenant by the mtgor. to pay that sum, & also any other sum, which on taking an account might appear to be due thereon:—**Held:** the mtgee. was not estopped by the recital from claiming that the debt due at the date of the bill of sale was larger than the sum therein named.—**RITHEV v. BEAVEN** (1897), 5 B. C. R. 457.—CAN.

**q. Recitals in marriage settlement.]**—By a marriage settlement the intending wife settled a share of settled moneys to which she was entitled under a deed of appointment, subject

**Sect. 4.—Different parts of deed: Sub-sect. 3, C.; sub-sects. 4 & 5.]**

was clearly not necessary for the purpose of resps.' case that they should prove that there was no proposal; all that was necessary for them to prove was that the proposal form relied upon & produced by the co. was not a proposal form signed by them, therefore it seems to me to be not very relevant whether it did or did not come out before the justices that in fact there was no proposal (WALTON, J.).

(3) The policy is a deed & contains a recital that there was a proposal. By that recital I think the co. are estopped (WALTON, J.).—PEARL LIFE ASSURANCE CO. v. JOHNSON, SAME v. GREENHALGH, [1909] 2 K. B. 288; 78 L. J. K. B. 777; 100 L. T. 483; 73 J. P. 216, D. C.

*Annotation*:—*Mentd.* Tofts v. Pearl Life Assco. (1913), 110 L. T. 190.

**SUB-SECT. 4.—PARCELS-PROPERTY DEALT WITH.**

**831. Property comprised.]**—A demise of premises in W., late in the occupation of A., particularly describing them, part of which was a yard, does not pass a cellar situate under that yard which was then in the occupation of B., another tenant of the lessor. Lessor, in an ejectment brought no recover the cellar, is not estopped by his deed from going into evidence, to show that the cellar was not intended to be demised.—DOE d. FREELAND v. BURT (1787), 1 Term Rep. 701; 99 E. R. 1330.

*Annotations*:—*Mentd.* Whittington v. Corder (1852), 20 L. T. O. S. 175; *Martyr v. Lawrence* (1864), 2 De G. J. & Sm. 261; *Devonshire v. Pattinson* (1887), 20 Q. B. D. 263; *Thomas v. Owen* (1887), 20 Q. B. D. 225.

**832. —.]**—Deft., who was one of the canons of W. demised by way of mtge. for 99 years, if he should so long live & continue a canon, to lessor of pltf., "All that the canonry of him, deft., of W., & all glebe & other lands, messuages, tenements, & hereditaments belonging thereto; & all

to a right of revocation reserved by the deed of appointment, & the appointment was afterwards revoked, & a larger share of the moneys appointed to her. Prior to the settlement the deed of appointment recited in the deed had, unknown to the settlor, been revoked & a new appointment made to her:—*Held*: she was estopped by the recital from denying that the original appointment was at that time in full force & effect.—PEARCE v. HOLMES (1902), 21 N. Z. L. R. 544.—N.Z.

**PART V. SECT. 4, SUB-SECT. 4.**

**r. Property comprised—In sheriff's deed.]**—A sheriff's deed, being but a completion of the sale, is only good for land actually sold; a party therefore is not estopped by such a deed from proving by parol that portions of the land therein described as sold were not in fact included in the sale.—DOE d. MILLER v. TIFFANY (1818), 5 U. C. R. 79.—CAN.

**s. — Parol evidence.]**—Defts. desiring to borrow money on mtge., took pltf., who was the solr. of the mtgee., upon the land offered as security, & pointed out the boundaries of the land. Pltf. drew up a mtge. in which the land was described as that on which defts. resided, but the boundaries given were shown by parol evidence not to include the portion on which they resided, although it was clearly the intention of all parties that this portion should be included in the mtge. Pltf. having taken an assignment of the mtge., foreclosed

it, & bought in the property at a sheriff's sale, the description in the sheriff's deed following that in the mtge. Pltf. then brought action of ejectment, & defts., as to this portion, pleaded that pltf. had no title:—*Held*: defts. were not estopped from saying that the land in question was not included in the mtge., but that the verdict for pltf. must be sustained, as it was the clear intention to include the portion on which defts. resided, & the ambiguity had been cleared up by parol evidence.

Deft. was estopped by his representation that the whole of the land, including the part in question, was to be comprised in the mtge.—FULLERTON v. IBBITSON (1878), 3 R. & C. 225.—CAN.

**835 i. Qualification—Following particular description.]**—The City of Toronto offered land for sale, according to a plan showing one block of 5 lots, each about 200 feet in depth, running from east to west, bounded north & south by a lane, & east by a lane running along the whole depth of the block & connecting the other two lanes. South of this block was a similar block of smaller lots, running north & south. The lane at the east of the first lot was a continuation, after crossing the long lane between the blocks, of lot 10 in the second block. The advertisement of sale stated that "lanes run in rear of the several lots." M. purchased the first block, & C. lot 10 in the second. Before registry of the plan, M. applied to the city

& every the rights, rents, advantages, & appurtenances to the canonry belonging." On ejectment brought on the demise of mtgee., it appeared in evidence that there was no property attached to any individual canonry, but that the whole property belonged to the dean & chapter, & that the surplus rents, after payment of certain expenses thereout, were divided equally among the dean & the other members of the chapter; all the canons had houses assigned to them for their residence, but no particular house was appropriated to any one canonry; whenever a vacancy occurred the canons had a right of choice of the vacant house according to their seniority, & the house which was left after the other canons had made their selection, was assigned to the new canon. Deft. had retained possession of the same house which was assigned to him upon his installation:—*Held*: deft. was not estopped, by the mtge. deed, from showing that the house in question did not belong to the canonry.—DOE d. BUTCHER v. MUSGRAVE (1840), 1 Man. & G. 625; 9 L. J. C. P. 318; 4

**833. — Erroneous description not objected to.]**—If A. having notice that certain portions of his own & the neighbouring lands of B. are required for a public undertaking, & receive money by way of compensation for all the lands so required, but suffer an erroneous description of the property to be acted on by the promoters, whereby a small parcel of his own land is treated in the plans & conveyances as the land of B.:—*Semble*: he is estopped afterwards from objecting that in the conveyance executed by himself only the twenty acres passed, & the one acre which intervened between the twenty acres & the lands of B. did not pass.—DOE d. HYDE v. MANCHESTER CORPN. (1851), 17 L. T. O. S. 288, N. P.; subsequent proceedings, 18 L. T. O. S. 77.

**834. Qualification—Following general description.]**—FOOTE v. BERKLEY, No. 769, ante.

**835. — Following particular description.]**—FOOTE v. BERKLEY, No. 769, ante.

council to have the lane at the east of the block closed up & included in his lease, which was granted. C. then objected to taking a lease of his lot with the lane closed, but afterwards accepted a lease which described the land as leased according to the plan exhibited at the sale & plan 352, which showed the lane closed. He brought an action against the city & M. to have the lane re-opened:—*Held*: that C. having accepted a lease after the lane was closed, in which reference was made to plan 352, he was bound by its terms & had no claim to a right of way over land thereby shown to be included in the lease to M.—CAREY v. TORONTO CORPN. (1885), 14 S. C. R. 172.—CAN.

**835 ii. —.]**—The evidence in this case was sufficient to warrant the conclusion that the land in question in this suit, claimed as part of lot 25 on the east side of Queen Street, Paisley, was laid out by the Crown on the original plan or survey as a street, & as such was dedicated to the public; & that, even if the description in the patent from the Crown subsequently issued to pltf. was sufficient to include the land in question, the reservation in the patent of all the streets within the "above described parcel of land," would have the effect of excluding it; & the fact of pltf., in a deed by him to O., of lot 25, in his description of the metes & bounds of the lot, describing the northern limit of it, which adjoined the land in question, as running along the edge of a street,



**836. — Not descriptive of nature of land.]—**In covenant on a lease demising meadow, pasture, & arable lands, & describing two closes by the name of "Lane's Meadows" in which lessee covenants to pay £5 for every acre of meadow he shall plough; if the breach be assigned in ploughing up two meadows called "Lane's Meadows," deft. may plead that the lands called "Lane's Meadows," were time out of mind arable, & traverse them being meadow; for the words "Lane's Meadows" in the lease being descriptive of the local situation, & not of the nature of the land, they do not estop from trying the fact.—*SKIPWORTH v. GREEN* (1724), 8 Mod. Rep. 311; 11 Mod. Rep. 388; 1 Stra. 610; 88 E. R. 222.

*Annotation:—*Refd. *Palmer v. Ekins* (1728), 2 Stra. 817.

**Boundaries & abutments—Right of way by implication.]—**See *EASEMENTS*, Vol. XIX., pp. 102, 103.

**837. — Right of access.]—**(1) The general words incorporated by Conveyancing Act, 1881 (c. 41), in every conveyance not expressing a contrary intention, will pass to the purchaser all ways actually used by him at the date of the conveyance, though used only by permission of the vendor.

Deft. in this action was the owner of two houses adjoining each other, one in his own occupation, the other held by pltf. co. under a lease from deft., & occupied by their managers & servants carrying on their business. The houses were separated by a roadway leading to & forming part of deft.'s yard. By permission of deft., renewed from time to time to successive managers, pltf.'s servants & their predecessors in title had used in business hours a way across the yard to a door opening thereon in the back part of their premises for all purposes of their business. The entrance to the yard was closed by wooden doors, which were always locked by deft. at night, & he kept sole control of the key. Deft. sold to pltf. co. the house leased to them, & conveyed it by a deed containing no general words or reference to any right of way:—*Held*: such a right of way as pltf.'s had actually enjoyed at the date of the deed passed to them by virtue of the general words inserted in the deed by Conveyancing Act, 1881

amounted to a declaration by pltf. of a dedication of the land in question as a street, either by the Crown before the issue of the patent to pltf. or by pltf. himself; & that, at all events, coupling the description in the deed with the plan of survey, & with evidence given to show that in consequence of the land being broken, the only accessible way of communication between the two streets between which lot 25 was situated, was on this piece of land, & the fact of its user as a highway, & statute labour expended on it, there was clear evidence of such dedication, & pltf. was estopped in equity, if not at law also, from denying the dedication.—*ROWE v. SINCLAIR* (1876), 26 C. P. 233.—CAN.

**835 iii. — — —.]—**Persons claiming under the patentee conveyed to defts. a portion of the land granted by such patent "extending to the river," reserving the right to the grantors "to raise the dam one foot, & overflow accordingly":—*Held*: the words of such conveyance purported to convey to the centre of the bed of the river; & after the reservation of the right to raise the dam in the river, the grantors could not be heard to say that they had not the right to convey to the centre of the river.—*KIRCHHOFFER v. STANBURY* (1878), 25 Gr. 413.—CAN.

**835 iv. — — —.]—**Pltf. had title to a piece of land adjoining the westerly boundary of M. road. They alleged that the road was only 66 feet wide at

(c. 41), though the enjoyment was wholly permissive & precarious.

(2) The fact that the conveyance states that the property is bounded by a roadway constructed & leading to the yard estops deft. from saying there is not in fact a roadway which necessarily passes the door in pltf.'s wall opening on to the yard (*FARWELL, J.*).—*INTERNATIONAL TEA STORES CO. v. HOBBS*, [1903] 2 Ch. 165; 72 L. J. Ch. 543; 88 L. T. 725; 51 W. R. 615.

*Annotations:—*As to (1) *Apld. Lewis v. Meredith*, [1913] 1 Ch. 571; *White v. Williams*, [1922] 1 K. B. 727.

Rights passing on conveyance of land, see, generally, *SALE OF LAND*.

#### SUB-SECT. 5.—COVENANTS.

**838. General rule.]—**Ejectment cannot be maintained contrary to lessor's covenant.—*RIGHT d. GREEN v. PROCTOR* (1768), 4 Burr. 2208; 98 E. R. 151.

**839. Covenant to procure office.]—**In an action on a covenant to procure the deputation to an office in the same manner as another was deputed, deft. is estopped to say there was no deputation & the manner of the former deputation need not be shown.—*BARWICKE v. GYRSON* (1612), Cro. Jac. 297; 79 E. R. 255, Ex. Ch.

**840. Covenant for quiet enjoyment—& further assurance.]—**In ejectment, which is a fictitious action to recover the possession, lessor of pltf. shall not be permitted to defeat a solemn deed under his own hand, covenanting that deft. shall enjoy the premises, & also, for further assurance. *GOODTITLE v. BAILEY* (1777), 2 Cowp. 597; E. R. 1260.

*Annotations:—*Refd. *Halford v. Dillon* (1820), 2 Brod. & Bing. 12; *Right d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278. *Mentd. Corp v. Corp* (1793), 1 Phillim. 11, n.; *Roe d. Berkeley v. York* (Archbp.) (1805), 6 East, 86.

**841. Covenant for title—Free from incumbrances.]—**By marriage settlement J. G. had a power of appointing portions for daughters to the amount of £16,000, under a term of years created for raising the same: he appointed £13,000 part thereof among four of his daughters, on their

edge.—*PLUMB v. MCGANNON* (1871), 32 U. C. R. 8.—CAN.

**a. — — —.]—**In trespass *q.c.f.* it appeared that deft. conveyed to pltf. 19 acres of lot 2 in the 5th concession of Barton, described by metes & bounds, commencing at the north-east angle of the lot. This starting point upon the ground was undisputed, & it was admitted that the description given enclosed the land claimed by pltf.:—*Held*: deft. was estopped by his deed, & could not set up any question as to boundary between lots one & two.—*CROSSWAITE v. GAGE* (1871), 32 U. C. R. 196.—CAN.

**b. Reservation of right of way in deed—Acceptance of deed by grantee—Whether grantee estopped.]—**Where a deed of land contained a reservation of a way in favour of the grantor at a place where no way existed at the date of the deed:—*Held*: the grantee by accepting the deed was bound by the reservation contained in it.—*LOYAL PRINCE OF WALES LODGE v. SINFIELD* (1891), 40 N. S. R. 30.—CAN.

#### PART V. SECT. 4, SUB-SECT. 5.

**c. Covenant to pay annuity.]—**By deed, reciting that A., by his will, had devised to D. the sum of £10,000, to be paid out of testator's C. estates, which he thereby charged with the payment thereof, & which estates he devised to deft., it was witnessed

that point, & erected their fence 33 feet from the centre line of the road, the position of which was not disputed. Defts. contended that the road was 99 feet wide at that point & encroached upon the land inside pltf.'s fence to a depth of 16½ feet all along the frontage of the property. The transfer from pltf.'s predecessors in title described the land as commencing on the westerly limit of M. road, "as the said road is shown on plan 472." That plan showed the width of the road at the point in question to be 99 feet:—*Held*: pltf.'s were estopped from claiming title to the strip of land in dispute, whatever may have been the width of the road.—*PETERSON v. BITULITHIC & CONTRACTING CO.* (1913), 24 W. L. R. 19; 4 W. W. R. 223.—CAN.

**t. Boundaries—To water's edge.]—**O. conveyed to P., part of lot 33, & he conveyed by the same deed, "as appurtenant to the land, a full, free, & unrestricted right of way, in a certain strip of land, adjoining the westerly side of the said parcel of land, extending from the highway aforesaid to the water's edge of the river at all times & seasons for ever hereafter." In an action for obstructing the right of way:—*Held*: it would be no defence that the boathouse was below high-water mark, though O.'s right only extended so far, for O. & deft., claiming under him, were estopped by O.'s deed to P., which granted to the water's



**Sect. 4.—Different parts of deed: Sub-sects. 5 & 6.]**

respective marriages, & took assignments from them of their interests in the term. On the marriage of the eldest son, J. G. & the eldest son covenant that the settled estate is free from all incumbrances. After this J. G. makes his will, & appoints the remaining £3,000 to his only unmarried daughter. Notwithstanding the clear intention of J. G. to keep the term alive for his benefit, yet his covenant in the son's marriage settlement will bar his claim of any benefit from it as against the parties interested under that settlement.—*GOWER v. GOWER* (1783), 1 Cox, Eq. Cas. 53; 29 E. R. 1059.

**842. —.]—A.** whose name has been registered as the part-owner of a vessel on the oath of B., & has afterwards conveyed such share by deed to B., covenanting for the goodness of his title, cannot be admitted to prove by the evidence of B. that he had in fact no interest in the vessel. *NICKSON v. THOMAS* (1815), 1 Stark. 85, N. P.

*Annotation:—*Dbtd. *Rands v. Thomas* (1816), 5 M. & S. 244.

**843. — In mortgage.]—GENERAL FINANCE, MORTGAGE & DISCOUNT CO. v. LIBERATOR PERMANENT BENEFIT BUILDING SOCIETY, No. 733, ante.**

**844. Covenant for further assurance.]—**By a marriage settlement, dated in 1863, after reciting that B., the wife, was "seised of or otherwise well entitled to" the freeholds therein described, subject to the life estate of J. C. P., & that she was entitled to leasehold premises & certain personal estate, the freeholds were conveyed to trustees, subject to the life estate of J. C. P., & the leaseholds & the personal estate were assigned to them, upon trust as to £10,000, for B. for life, & afterwards for A., the husband, for life, & subject thereto, as to all the realty & personalty, as B. should appoint, & in default in trust for B. for life, & if she should predecease her husband, in trust as to the realty for her heirs, & as to the personalty for her next of kin, as if she had died unmarried. The settlement contained the usual covenant for further assurance. At the date of the settlement it was believed that B. was entitled to the entirety of the freeholds & leaseholds, subject to the life estate of J. C. P., whereas she was entitled to only thirteen-sixteenths thereof, & J. C. P. was then, & to the time of his death, entitled to three-sixteenths. J. C. P. died in 1866, having by his will given his property to B. B. made her will in 1880, & in exercise of the powers in the settlement, & of every other power, gave all the freeholds & leaseholds comprised in the settlement to W. W. P. & T. H. P. equally; & she gave all the rest of her personal estate to trustees to pay the income to her husband for life, & afterwards to divide such estate equally between J. B. P., W. W. P., & T. H. P. She declared that her exors. should have power to sell her real & personal estate. B. made a codicil in 1880, revoking the gift of any moneys or other properties which she should have accumulated from or purchased with the income of the property comprised in the settlement, or the corpus of any property not included in the settlement & otherwise acquired, & giving the same to her husband. T. H. P. died in B.'s lifetime, without issue. The questions were, who was entitled to the share of

the residuary personal estate, the gift of which lapsed, by the death of T. H. P.; who was entitled to the three-sixteenths of the freeholds; & who was entitled to the interest in such three-sixteenths, the gift of which lapsed by the death of T. H. P.?

—*Held*: (1) B. had made the personal estate which was included in the residuary gift part of her own assets, & so far as it lapsed, it passed to her next of kin, as though at her death it had belonged to her absolutely: (2) the person claiming under the appointment had, as regards the three-sixteenths of the freeholds, the right to insist upon that claim, either on the ground that the recital in the settlement amounted to an estoppel, or that he had an equity to enforce the covenant for further assurance; B. had made the property part of her own estate, & so far as it lapsed, it devolved upon her heir-at-law.—*Re HORTON, HORTON v. PERKS, HORTON v. CLARK* (1884), 51 L. T. 420.

*See, also, No. 840, ante.*

**845. By sub-lessee—To perform covenants in head lease.]—**If an under-lessee covenant to perform all the covenants in the original lease, & an action for breach of covenant be brought by lessor, declaring, "that by an indenture made between the parties aforesaid, it was covenanted, etc.," these words imply, that the original lease was executed by pltf., & if they did not, deft. is estopped, by having executed the under-lease, in which original lease is recited, from saying, that there is no such lease or covenants.

As to the estoppel it is very full against deft., for he has covenanted in the second lease to perform all the covenants in the original lease which on [pltf.'s] part were to be paid done or performed, by which he is now estopped to say that there were so such covenants in the original lease (*per CUR.*).—*ATKINSON (EXECUTRIX OF ATKINSON) v. COATSWORTH* (1722), 8 Mod. Rep. 33; 1 Stra. 512; 88 E. R. 25.

*Annotation:—*Consd. *Wood v. Day* (1817), 1 Moore, C. P. 389.

**846. By husband—In performance of recited agreement by husband & wife—Whether wife bound.]—***Re DE ROS' TRUST, HARDWICKE v. WILMOT*, No. 827, *ante*.

**847. As to value of premises.]—**In ejectment by grantee of an annuity against grantor, for premises on which the annuity was secured, it appeared that no memorial had been enrolled. Lessor of pltf. contended that none was necessary, by Annuity Act, (1813) (c. 141), s. 10, the premises being of greater value than the annuity, in proof of which he relied on a clause in the annuity deed, wherein deft. covenanted that the premises were of more than sufficient value to answer & pay the annuity. Deft. offered evidence to prove that the premises were not of such value when the annuity was granted. *Qu.*: whether a covenant, as above, is a declaration which estops the party making it from afterwards disputing in an action the fact covenanted for. But, assuming that it were so in other cases:—*Held*: it could not preclude a party from giving proof that the annuity was granted in contravention of the statute.—*DOE d. CHANDLER v. FORD* (1835), 3 Ad. & El. 649; 1 Har. & W. 378; 5 Nev. & M. K. B. 209; 5 L. J. K. B. 25; 111 E. R. 561.

*Annotation:—*Refd. *Doe d. Levy v. Horne* (1842), 3 Q. B. 757.

— granted to pltf. an annuity of £200, to be payable out of the interest of the said sum of £10,000. The deed contained a covenant, by deft., that he would pay the annuity

during the life of D., & that the £10,000 should remain a charge on the C. estates. There was also a covenant for further assurance by D., & by deft.:—*Held*: deft. was estopped

from showing that the C. estates were discharged from the payment of the annuity.—*BRUCE v. PONSONBY (LORD)* (1844), 7 I. L. R. 414.—*IR.*

## SUB-SECT. 6.—RECEIPT CLAUSE AND INDORSEMENT.

**848. General rule.**—Bill against an extrix. to reform articles made by her husband in which he was bound to pay £6,000 to pltf., who acknowledged the receipt of the whole, viz. £4,000 in money, & the rest by a conveyance of lands, etc., but those lands being settled on the wife in jointure, pltf. exhibited a bill against her for performance of her husband's articles:—*Held*: pltf. having acknowledged the receipt of £6,000, that was an evidence of the performance of the articles since pltf. made no further demand for several years; & it was unreasonable to put an exor. to prove a precise payment after so long a time.—*NEWCASTLE (DUKE) v. CLEYTON* (1676), *Cas. temp. Finch*, 246; 23 E. R. 135.

**849.** —.]—In an action for money had & received, if deft. shows a deed of assignment of the money to himself, & a receipt for the consideration money indorsed, it is a good discharge, though there are pregnant evidences of suspicion that the consideration is falsely recited, & that the money never was paid.—*ROWNTREE v. JACOB* (1809), 2 Taunt. 141; 127 E. R. 1030.

*Annotations*:—*Consd.* Lampon v. Corke (1822), 5 B. & Ald. 606. *Follid.* Baker v. Dewey (1823), 1 B. & C. 704.

**850.** —.]—This was an action for not executing a lease pursuant to an agreement in the following form: "K. agrees to sell & V. agrees to purchase, the house & shop fixtures specified in the inventory for the sum of £150 to be paid on the day of taking possession. . . . It is further agreed that K. shall grant, & V. take, a lease of the house, containing all the covenants of the original lease, at the clear yearly rental of £60 for the term of twenty years. . . ." The lease, when tendered to deft. for execution, stated "That, in consideration of the sum of £150 paid by V., & for, & in consideration of the yearly rents, covenants, & agreements hereinafter reserved & contained on the part of V., his exors., administrators, & assigns, to be paid & performed, he did grant, etc." Deft. refused to execute the lease, on the ground that the consideration stated therein was, in fact, the consideration for the shop & fixtures:—*Held*: deft. was justified in refusing to execute the lease, because, although according to *R. v.*

*Scammonden*, No. 855, *post*, he would not be estopped from showing that a greater consideration was paid than that expressed in the deed, he would be estopped from showing a smaller one.—*VONHOLLEN v. KNOWLES* (1844), 12 M. & W. 602; 13 L. J. Ex. 140; 2 L. T. O. S. 370; 152 E. R. 1339.

*Annotation*:—*Consd.* Manning v. Bailey (1848), 1 Exch. 45.

**851.** —.]—*Semble*: it is still doubtful at law whether a person, not being blind or illiterate, who executes a deed on a false representation of its contents, is not estopped from denying its validity as between himself & a person who innocently acts upon the faith of it.—*HUNTER v. WALTERS, CURLING v. WALTERS, DARNELL v. HUNTER* (1871), 7 Ch. App. 75; 41 L. J. Ch. 175; 25 L. T. 765; 20 W. R. 218, L. C. & L. JJ.

*Annotations*:—*Consd.* King v. Smith, [1900] 2 Ch. 425. *Refd.* Favell v. Wright (1891), 64 L. T. 85; Onward Bldg. Soc. v. Smithson, [1893] 1 Ch. 1; Lloyds Bank v. Bullock, [1896] 2 Ch. 192; Howatson v. Webb, [1908] 1 Ch. 1. *Mentd.* *Re* Russell Road Purchase-moneys (1871), L. R. 12 Eq. 78; *R. v. Shropshire Union Co.* (1873), L. R. 8 Q. B. 420; *Ortigosa v. Brown* (1878), 47 L. J. Ch. 168; *Re* Vernon, Ewens (1886), 33 Ch. D. 402; *Lloyd v. Grace, Smith*, [1911] 2 K. B. 489.

**852.** —.]—By deed under seal between pltf. & deft., after reciting an agreement by pltf. to transfer to deft. their interest in certain inventions & letters patent for the sum of £1,000, it was witnessed that in pursuance of such agreement, & in consideration of £1,000 upon the execution, etc., paid by deft. to pltf., the receipt of which pltf. thereby acknowledged & therefrom discharged deft., pltf. thereby granted & assigned the inventions & letters patent to deft. In an action on the deed by pltf. subsequently to recover the £1,000 from deft., the first count of the declaration charged that in consideration of pltf. executing a deed of assignment to deft. of certain inventions & letters patent, deft. promised that, upon pltf. being ready & willing to deliver the deed to deft., deft. would accept the same, & pay the agreed consideration of £1,000; that the pltf. were ready & willing, etc., but deft. would not accept delivery of the deed, & had not paid the £1,000. The second count charged that, by an indenture between pltf. & deft., it was agreed that pltf. should transfer to deft. their interest, etc., in

## PART V. SECT. 4, SUB-SECT. 6.

**848 i. General rule.**—Where a father, intending in the distribution of his property to give his son 100 acres of land, was induced by the son to exchange it for the property of a stranger, the father paying £125 for such exchange, & the son promising to repay it, so that it might go in the distribution to the rest of the family, & the father then for a nominal consideration conveyed to the son the land received in exchange:—*Held*: the exors. of the father might maintain an action against the son for the £125, as money paid to his use, & were not estopped by the consideration stated in the deed.—*MCBRIDE v. PARNELL* (1835), 4 O. S. 152.—*CAN.*

**848 ii.** —.]—Pltf. sold & conveyed to deft. certain land, the deed containing a receipt for the purchase money, \$800, with a receipt for the purchase money also indorsed. Pltf. then sued deft. upon the common counts for the purchase money of the land, on an account stated. Deft. pleaded, among other pleas, payment. After the sale deft. told one M. that he had only paid pltf. \$41, & offered to pay him, M., whatever pltf. was willing he should. It also appeared, though not very clearly, that pltf. was present at this conversation:—*Held*: pltf. was concluded by the receipt in the deed & he could not

recover on either count.—*CASEY v. MCCALL* (1868), 19 C. P. 90.—*CAN.*

**848 iii.** —.]—Pltf. in Aug. 1867, conveyed to deft. certain land, by deed containing a receipt for the purchase money. It appeared, however, that when this conveyance was made, some question being raised as to pltf.'s title, deft. retained \$100 of the purchase money, & in Oct. following, gave pltf. the following agreement: "Fifteen months after date, I promise to pay to the order of W., or bearer, the sum of \$100, providing that the title is good, on lots known as town hall, court house, & fair ground, situated on the north side of E. street, for value received," these being the lots conveyed. Pltf. sued deft. on this agreement, & on the common counts, to which deft. pleaded payment:—*Held*: pltf. was estopped by the receipt in the deed, which included this \$100, & he could not recover.—*HARRISON v. PRESTON* (1873), 22 C. P. 576.—*CAN.*

**848 iv.** —.]—T. paid to D., a real estate agent, \$700 as part payment of the purchase price of a certain lot. D. procured from N., the owner of the lot, an agreement under seal for the sale of the lot to T., containing a recital of payment of & a receipt for \$700 on account of the purchase price, & delivered the same to T. D. in reality paid only a \$20 "deposit"

to N. the owner, & afterwards absconded:—*Held*: N. was estopped from denying receipt of the \$700, & T. was entitled to a conveyance on payment of the balance mentioned in the agreement.—*TUYTENS v. NOBLE* (1908), 8 W. L. R. 50; 13 B. C. R. 484.—*CAN.*

**848 v.** —.]—Receipt indorsed upon deed bearing date 1728, would alone in 1791 be evidence of payment of the consideration.—*CHANDOS (DUCHESS) v. BROWNLOW* (1791), 2 Ridg. Parl. Rep. 345.—*IR.*

**848 vi.** —.]—Equity will not permit a party to travel out of the formal deed to give proof of an agreement, for a consideration less valuable than the consideration stated, & when a deed recites a valuable consideration, no other can be proved.—*DROUGHT v. EUSTACE* (1828), 1 Mol. 328.—*IR.*

**d. — Estoppel must be pleaded.**—In an action for unpaid purchase-money, the acknowledgment in the deed of conveyance of payment of the purchase-money does not, in the absence of the plea of estoppel, preclude pltf. from showing that the purchase-money had not in fact been paid; although the deed be given in evidence by pltf. himself as proof of the fact of the sale & conveyance.—*PORTS v. NIXON* (1870), 1 R. 5 C. L. 45.—*IR.*

**e. Admission of further indebtedness**



**Sect. 4.—Different parts of deed: Sub-sects. 6, 7,**

certain inventions & letters patent for the sum of £1,000; pltf. thereupon assigned the inventions, etc., to deft., but deft. had not paid the £1,000. By his plea to the first count deft. denied the promise & breaches, & the readiness & willingness of pltf. as alleged; & to the second count he pleaded that the indenture was not his deed, & that pltf. did not assign the inventions, etc. At the trial it was proved that no consideration money was in fact paid or passed. Deft. contended that the deed contained no covenant or agreement to pay the £1,000; & secondly, that, by the recital of payment & receipt of the money, pltf. were estopped from denying its payment.

Upon a motion to set aside the nonsuit directed at the trial, & to enter a verdict for pltf. for £1,000:—*Held*: the deed contained no covenant to pay the £1,000, & in the face of the acknowledgment therein contained that deft. had paid the money, it was impossible to imply such a covenant on his part, & that too on partial evidence.—*MORGAN'S PATENT ANCHOR CO., LTD. v. MORGAN* (1876), 35 L. T. 811.

*Annotation*:—*Mentd.* Burchell v. Thompson, [1920] 2 K. B. 80.

**853. Operation of rule—Money paid to solicitor producing executed deed.**—Solrs. induced deft. to invest a sum as on a transfer of a mtge. from pltf., mtgees, who were their clients. They induced these mtgees. to execute a transfer with a receipt, representing it to be a re-conveyance on payment off. They handed the deed to deft. & paid him interest as if from mtgor. Pltf. made no inquiry as to mtge. The solrs. having become bankrupt, & the sum never having been paid to the pltf.:—*Held*: pltf. could not recover from the deft., because, by handing the executed deed & receipt to the solrs., they had enabled them to represent that the sum had been paid to pltf., & had thus given deft. an equity which must prevail over their equity as unpaid vendors.—*GORDON v. JAMES* (1885), 30 Ch. D. 249; 53 L. T. 641; 34 W. R. 217, C. A.

*Annotations*:—*Refd.* National Provincial Bank of England v. Jackson (1886), 33 Ch. D. 1; Coupe v. Collyer (1890), 62 L. T. 927; London Freehold & Leasehold Property Co. v. Suffield, [1897] 2 Ch. 608.

**854.** ———.]—Two trustees advanced money on a mtge. of realty. A., one of the trustees, paid the money to B., a solr., who produced to him mtge. deed executed by C. as mtgor. The deed, which contained the usual receipt for the money in the body of it, was handed over by B. to A., who retained it. C., who was not a man of much education, & employed B. from time to time in relation to his property, had implicit confidence in B. & had signed the deed on his

—*How far estoppel affected.*—*Qu.*: whether one who has conveyed land & acknowledged in the deed the receipt of the purchase-money, can recover a balance unpaid, on an admission by the purchaser that he owes it.—*M'ALLISTER v. DAY* (1858), 4 All. 37.—CAN.

**1. Bond for payment of another sum—How far estoppel affected.**—An estoppel arising from an admission in a conveyance of land of the receipt of the purchase money, is opened by a bond from the purchaser to the vendor, conditioned to pay such sum for the property as arbitrators should determine.—*CORAM v. WHETEN* (1859), 4 All. 293.—CAN.

**g. Collateral agreement as part of consideration—How far estoppel affected.**—Action on the common

counts, & on an agreement between pltf. & deft., by which, in consideration that pltf. would deliver to deft. at M., when requested, that portion of the rigging of the vessel R. then on board the vessel deft. would pay pltf. \$400. Deft. pleaded payment before action, & release by deed. At the trial this agreement was proved, & one of even date, under pltf.'s hand & seal, by which pltf. sold to deft. for \$800, the receipt whereof was acknowledged, the body & hull of the R., & also his rights in a contract for stripping the vessel, & any payments due from the T. insurance co. for stripping the vessel, or from deft. for any work done under the contract to strip the vessel. It also appeared that the vessel had run upon a reef, pltf. had been employed by the T. insurance co. to strip her & put the outfit in a place of safety,

advice but did not know it was a mtge., & had not instructed B. to obtain a mtge. B. misappropriated the money & absconded. On discovery of fraud C. brought an action against the trustees to set aside mtge.:—*Held*: in the circumstances C. was estopped by his conduct from denying (a) mtge. was valid; (b) B. had authority to receive mtge. money.—*KING v. SMITH*, [1900] 2 Ch. 425; 69 L. J. Ch. 598; 82 L. T. 815; 16 T. L. R. 410.

*Annotation*:—*Refd.* Howatson v. Webb, [1907] 1 Ch. 537.

—.]—*See, also*, Conveyancing Act, 1881 (c. 41), s. 56.

— **Receipt clause in mortgage—Subsequent assignment or sub-mortgage—Priorities.**—*See* MORTGAGE.

**855. Whether payment of consideration larger than expressed may be shown.**—The consideration expressed in the deed of conveyance was £28, but parol evidence was admitted to prove that £30 was the real consideration.—*R. v. SCAMONDEN (INHABITANTS)* (1789), 3 Term Rep. 474; 2 Bott. 5th ed., 510; 100 E. R. 685.

*Annotations*:—*Apld.* Vonhollen v. Knowles (1844), 2 L. T. O. S. 370. *Refd.* R. v. Llangunnor (1831), 2 B. & Ad. 616; *Ex p.* Morley (1832), 1 Deac. & Ch. 50; Clifford v. Turrell (1845), 14 L. J. Ch. 390. *Mentd.* Rich v. Jackson (1794), 4 Bro. C. C. 514; R. v. Cottingham (1827), 7 B. & C. 603; R. v. Stoke upon Trent (1843), 5 Q. B. 303; Harris v. Rickett (1859), 4 H. & N. 1.

**856.** ———.]—*VONHOLLEN v. KNOWLES*, No. 850, ante.

*See, further*, DEEDS, Vol. XVII., pp. 370 et seq. **Statutory receipt under Building Societies Act, 1874 (c. 42), s. 42.**—*See* BUILDING SOCIETIES, Vol. VII., pp. 482, 483, Nos. 170–173.

**Recital of receipt of payment.**—*See* Nos. 809, 814, 829, ante.

**SUB-SECT. 7.—CONDITION IN BONDS.**

**857. General rule—Only where condition particular.**—General words do not imply any certainty, nor conclude any person; as where the condition of a bond is to devise or grant all his lands in the tenure of A., etc., obligor may say that he has nothing there. *Secus*: where the condition is particular.—*DODDINGTON'S CASE, HALL d. DODDINGTON v. PEART* (1594), 2 Co. Rep. 32 b; Poph. 60; 1 Roll. Abr. 872; 76 E. R. 484.

*Annotations*:—*Refd.* Jewell v. — (1616), 1 Roll. Rep. 408; Swyft v. Eyres (1639), Cro. Car. 546; Foote v. Berkley (1666), O. Bridg. 527; Shelley v. Wright (1737), Willes, 9; Lainson v. Tremere (1834), 4 L. J. K. B. 207; Low v. Bouverie, [1891] 3 Ch. 82. *Mentd.* Barker v. Bacon (1604), Cro. Jac. 48; Mirril v. Nichols (1614), 2 Bulst. 176; Stukeley v. Butler (1614), Hob. 168; R. & Hunsdon v. Arundel & Howard (1616), Hob. 109; Bainbridge v. Gardiner (1665), O. Bridg. 402; Doe d. Smith v. Galloway (1833), 5 B. & Ad. 43; Morrell v. Fisher (1849), 4 Exch. 591; Norman v. Norman, [1919] 1 Ch. 297.

for which he was to receive \$250 & the hull. Deft. bought the outfit from the insurance co. for \$930, & the hull & rights under the stripping contract from pltf. for \$800. Deft. only paid pltf. \$400 on the agreement signed by pltf., & gave him the agreement now sued on:—*Held*: pltf. was not estopped by the receipt in the deed from showing that the agreement sued on was part of the consideration for the deed, & that the \$400 mentioned in the agreement was unpaid.—*SMITH v. MCCALLUM* (1874), 34 U. C. R. 479.—CAN.

**h. Whether real transaction may be proved.**—The statement of the consideration in a deed of conveyance does not estop the parties from proving the real agreement & transaction.—*FIRMIN v. PUBLIC TRUSTEE* (1889), 7 N. Z. L. R. 277.—N.Z.



**858.** ———.]—In debt, the condition of the obligation was if deft. should suffer pltf. to enjoy his right in such a land. Deft. pleaded that pltf. had no right:—*Held*: a good plea.—*CORRANTS' CASE* (1575), 2 Dyer, 196 a; 73 E. R. 432.

**859.** ———.]—In debt on bond, the condition of which was if the obligee might fetch & carry all such parts of marl as he ought of right to have in a marl pit that then the obligation should be void. Deft. pleaded that the obligee had not, nor of right ought to have, any marl there:—*Held*: a good plea, & the recital was not an estoppel but otherwise if the condition had been special.—*WREN v. CITTELL* (1606), 2 Dyer, 196 a; 73 E. R. 432.

**860.** ———.]—*FLETCHER v. FARRER* (1614), 1 Roll. Abr. 873.  
*Annotation*:—*Consd. Lainson v. Tremore* (1834), 1 Ad. & El. 792.

**861.** ———.]—*KING v. PERSEVALL* (1616), 1 Roll. Rep. 430; 1 Roll. Abr. 872; 81 E. R. 586.  
*Annotations*:—*Refd. Shelley v. Wright* (1737), Willes, 9; *Lainson v. Tremore* (1834), 4 L. J. K. B. 207.

**862.** Condition to perform covenants in indenture—*Estoppel from pleading no indenture.*—*FITCH v. BISSIE* (1605), Brownl. 57; 123 E. R. 663.

**863.** ———.]—*JEWELL v. —* (1616), 1 Roll. Rep. 408; 1 Roll. Abr. 872; 81 E. R. 571.  
*Annotations*:—*Refd. Shelley v. Wright* (1737), Willes, 9; *Lainson v. Tremore* (1834), 1 Ad. & El. 792.

**864.** ——— *Estoppel from pleading no such covenants in indenture.*—*HUDLAND v. POVY* (1661), 1 Lev. 3; 83 E. R. 267; *sub nom. PAVIE v. HALL*, 1 Keb. 127; *sub nom. HALL v. PAVIE*, 1 Keb. 167.

*See, further, BONDS, Vol. VII., pp. 194 et seq.*

#### SUB-SECT. 8.—OTHER PARTS OF DEED.

**865.** Power given by deed.]—One in consideration of marriage & of £500 portion which he is to have with his wife, by settlement, impowers the wife to dispose of £200 by her will; they live together fifteen years, & the wife gives the £200 away by her will; the husband at this distance of time shall not be admitted to say he had not £500 with his wife, but shall pay the money.—*NORTH v. ANSELL* (1731), 2 P. Wms. 618; 2 Eq. Cas. Abr. 209; 24 E. R. 885.

*Annotation*:—*Refd. Campbell v. Ingilby* (1856), 21 Beav. 567.

**866.** Statement in attestation—*Whether equivalent to recital.*—*Qu.*: (1) whether where parties to an indenture, after the words "in witness whereof" insert a special statement of the execution of the two parts of such deed by them respectively, that is a recital in the deed, & estops a party proved to have executed from denying the execution of the others.

(2) I am most strongly inclined to think, that words coming after "*in cujus rei testimonium*," are not part of the deed, & do not estop the party subscribing them (*TAUNTON, J.*)—*PEARSE v.*

*MORRICE* (1834), 2 Ad. & El. 84; 4 Nev. & M. K. B. 48; 4 L. J. K. B. 21; 111 E. R. 32.

*Annotations*:—*As to* (1) *Refd. Willington v. Browne* (1845), 8 Q. B. 169. *Generally, Mentd. R. v. St. Gregory* (1834), 2 Ad. & El. 99; *Oldroyd v. Crampton* (1837), 4 Bing. N. C. 24.

**867.** Memorandum endorsed.]—*DOE d. GAISFORD v. STONE*, No. 883, *post*.

*Execution in wrong name—Party misnamed in deed.*—*See Sub-sect. 2, ante.*

**868.** Habendum—*Conveyance subject to incumbrances—Whether purchaser estopped from disputing validity of judgment.*—The docket of a judgment, which was docketed under 4 Will. & M., c. 20, contained every requisite particular, except the number roll, which, however, appeared, a few pages further on in the same book, in an entry of the issue:—*Held*: (1) the requisitions of the statute were not sufficiently complied with, & the judgment was invalid as against subsequent purchasers; (2) the fact that the conveyance to the purchasers was made subject to incumbrances, this judgment not being mentioned in it, did not estop the purchasers from disputing the validity of the judgment.—*BRANDLING v. PLUMMER* (1857), 8 De G. M. & G. 747; 26 L. J. Ch. 326; 29 L. T. O. S. 31; 3 Jur. N. S. 401; 5 W. R. 391; 44 E. R. 578, L. JJ.

**869.** Proviso.]—By indenture between pltf. & deft., deft. appointed under a power, that certain lands should remain to the use of himself & his heirs, subject to a proviso, that if pltf. should pay deft. £800 by a certain day, deft. should convey the land to pltf., with a covenant, that until default in payment, pltf. should continue to hold the land; & a proviso, that when the interest of the mtge.-money should be in arrear, deft. should be at liberty to enter the land in question & distrain for the same:—*Held*: the distress was good, this being to be looked on in the light of an agreement between the parties, that deft. should enter & take pltf.'s goods if the payment were in arrear, & therefore, pltf. could not object that he had no legal estate in the land, to enable him to grant a power of distress.—*CHAPMAN v. BEECHAM* (1842), 3 Q. B. 723; 3 Gal. & Dav. 71; 12 L. J. Q. B. 42; 3 Jur. 968; 114 E. R. 683.

*Annotations*:—*Refd. Pollitt v. Forrest* (1847), 11 Q. B. 949; *Brown v. Metropolitan Counties, etc. Soc.* (1859), 1 E. & E. 832. *Mentd. Pollitt v. Forrest* (1845), 9 J. P. 408.

#### SUB-SECT. 9.—PARTICULAR WORDS.

**870.** "Belonging & appertaining"—*Confined to legal appurtenances.*—"Belonging & appertaining" in a conveyance mean only legally belonging & appertaining, & vendor is not estopped thereby from disputing the right to a watercourse which had previously been sued by the occupier of the premises conveyed but which was not enjoyed by right.—*LOMAX v. ASHWORTH* (1846), 6 L. T. O. S. 316.

**871.** "Granted, bargained, sold"—*Release.*—*RIGHT d. JEFFERYS v. BUCKNELL*, No. 985, *post*.

#### PART V. SECT. 4, SUB-SECT. 8.

**869 i.** Proviso.]—A., B. & C. executed to D. a mtge. of lands, comprised in the petition for sale, & of C.'s lands to secure £2,914 9s. 9d., of which £900 was B.'s debt, & the remainder C.'s debt. The mtge. contained a proviso that, as between A., B. & C., A. was a surety only, & that B. & C. respectively were sureties only for portion of the sum; yet, with regard to D., they were to be considered as principal debtors, so as not to be released by time being given to any other or others

of them, or by any act or omission of D., whereby, as sureties only, they would be released. B. subsequently executed to D. two other mtges. of the lands comprised in the petition. A. having paid D. the full amount of the debt secured by the first mtge., claimed to stand in D.'s place for £900, being B.'s debt, & the moiety of £2,914 9s. 9d., being C.'s debt, for which both he & B. were joint sureties, & to be placed on the final schedule on foot of, & in the priority of, the first mtge.:—*Held* A.'s claim was valid, & he was not estopped by the special proviso of the

mtge. from relying on his equitable rights of surety.—*Re KIRKWOOD'S ESTATE* (1878), 1 L. R. Ir. 108.—*IR.*

*k.* Declaration as to nature of transaction.]—A contract by deed for the letting & hiring of goods, part of which already belong to the hirer, with a declaration that none of such goods had been sold or belonged to the hirer, is a document which required registration. Such declaration will not estop the hirer from showing the real nature of the transaction.—*ORIENTAL HOTEL Co., LTD. v. THOMSON* (1879), 5 V. L. R. 485.—*AUS.*

## SECT. 5.—PARTICULAR DEEDS.

**872. Release of legacies — On assumption that estate insufficient—Fund subsequently falling in.]**—Testatrix by her will bequeathed to her trustees & exors. £4,000 upon trust for investment, & to pay the income to a married niece for life for her separate use, & afterwards to stand possessed of the trusts funds for her children, & in case her niece should die leaving no children, testatrix directed that the trusts funds should form part of her residuary estate. She also bequeathed several other pecuniary legacies, & her will contained a residuary bequest. The estate proved insufficient to pay the pecuniary legacies in full, & the pecuniary legatees, including the niece, executed a deed of release, to which the residuary legatees were not parties, by which they acknowledged the receipt of dividends upon their legacies in discharge of the amounts of the several legacies, & released exors. & also the estate & effects of testatrix "from & against all actions & suits, cause & causes of action & suit, claims & demands whatsoever, which either at law or in equity, or otherwise howsoever" they might have against exors., or against the estate & effects of testatrix. The niece afterwards died without leaving issue, & the sum which thus fell into the estate was sufficient to pay the balances on the pecuniary legacies in full. The legacy of £4,000 was fully recited in the deed of release:—*Held*: the release did not operate as an estoppel so as to prevent the pecuniary legatees from claiming to have the balances of their legacies made up out of the sum which had thus fallen in, as it could not have been intended to enure for the benefit of the residuary legatees.—*Re GHOST'S TRUSTS* (1883), 49 L. T. 588.

**Effect of releases.]**—See, generally, CONTRACT, Vol. XII., pp. 514, 515.

**Construction of releases.]**—See, generally, CONTRACT, Vol. XII., pp. 502 *et seq.*, & No. 985, *post*.

**873. Mortgage by bridge commissioners—Estoppel from alleging non-compliance with Bridge Act.]**—By a private Act for building a bridge over the Thames at S., the comrs. were empowered to raise money by mtge., & to convey, as a security, "the bridge & the toll-houses & all the tolls, & all right, title, & interest to the same," according to a form of mtge. contained in the Act, to hold till the money borrowed, with interest, should be paid & satisfied. The Act contained no clause as to ejectment, or the parties recovering on their own

demises only. To an ejectment brought against the clerk of the comrs. by one who was not first mtgee., to recover possession of the bridge, toll-houses, & tolls:—*Held*: the comrs. were estopped by their own deed from putting in a prior subsisting mtge. to defeat the action by showing that all the legal estate had passed to the prior mtgee., & this notwithstanding that, as comrs., they were not acting for their own benefit, but in a public capacity.—*DOE d. LEVY v. HORNE* (1842), 3 Q. B. 757; 3 Gal. & Dav. 239; 12 L. J. Q. B. 72; 7 J. P. 178; 7 Jur. 38; 114 E. R. 698.

**Annotation:—***Reid. R. v. White* (1843), 12 L. J. M. C. 31.

**Assignment of or licence to use patent.]**—See PATENTS.

**Separation deeds.]**—See HUSBAND AND WIFE.

**Deed enrolled.]**—See Sect. 2, sub-sect. 7, *ante*.

## SECT. 6.—ON WHOM BINDING AND WHO MAY TAKE ADVANTAGE OF ESTOPPEL.

## SUB-SECT. 1.—PARTIES.

**874. General rule.]**—*HILL v. MANCHESTER & SALFORD WATER WORKS CO.*, No. 938, *post*.

**875. —.]**—The proprietors of a music-hall, by a deed of assn., vested it in trustees, & empowered them to manage it, & declare dividends of the income amongst the share-holders, in proportion to their shares, & to make a reserved fund not exceeding a certain amount. The deed contained a clause that it should bind all the parties who executed it, & it was executed by the trustees & the claimants, who were proprietors, but not by all the proprietors:—*Held*: the claimants, having executed the deed, were precluded, by the stipulation that it should bind those who executed it, from setting up that it was inoperative till executed by all the proprietors.—*FREEMAN v. GAINSFORD* (1865), 18 C. B. N. S. 185; Hop. & Ph. 255; 5 New Rep. 275; 34 L. J. C. P. 95; 11 L. T. 675; 11 Jur. N. S. 116; 13 W. R. 343; 144 E. R. 412.

**Annotations:—***Mentd. Robinson v. Ainge* (1869), 33 J. P. 360; *Spencer v. Harrison* (1879), 5 C. P. D. 97; *Watson v. Black* (1885), 16 Q. B. D. 270.

**876. Whether all parties.]**—*STROUGHILL v. BUCK*, No. 771, *ante*.

**877. Party not joining in covenants.]**—*Re DE ROS' TRUST*, *HARDWICKE v. WILMOT*, No. 827, *ante*.

## PART V. SECT. 5.

**l. Mining company's deed embodying rules.]**—*Qu.*: whether if all the shareholders in a mining co. after incorporation signed a deed or articles of agreement embodying rules, they would be estopped from setting up the invalidity of those rules.—*BALLARAT & CHILTERN GOLD MINING CO. v. CLEELAND* (1870), 1 V. R. (Law) 183.—AUS.

**m. Warrant of attorney.]**—Deft. whose lands have been sold under statute execution, issued upon a judgment entered upon a warrant of attorney signed by himself, is estopped as against a purchaser at sheriff's sale from setting up title in a third party.—*CONNELLY v. MCLEOD* (1881), 2 P. E. I. 373.—CAN.

**n. Administration bond.]**—An action was brought at common law by the judge of Probate against an administratrix & sureties for not faithfully administering. The administratrix made default, & the sureties pleaded an equitable defence that the administratrix had, with the knowledge of the creditors, at whose instance

the suit was brought, continued trading instead of settling the estate of the intestate, & that the deficiency of assets had resulted from such trading:—*Held*: however this equitable defence might avail against the creditors so assenting, it afforded no answer to those, if any, who had not acquiesced.—*SUTHERLAND v. WILSON* (1881), 2 R. & G. 354; 2 C. L. T. 95.—CAN.

**o. Deed of compromise.]**—*SHEETS v. TAIT* (1896), Cout. 158.—CAN.

## PART V. SECT. 6, SUB-SECT. 1.

**p. Second mortgagee — Transfer of first mortgage—For valuable consideration.]**—Where A. mtged. his property to two persons at different times, & died after default, upon the first mtge. without having redeemed either, & the first mtgee. having taken possession sold for a valuable consideration to A.'s heir, who entered into possession & died, leaving B. his heir, who was also A.'s heir:—*Held*: the second mtgee., having a mtge. of the equity of redemption only, could not eject B., who was in by purchase, & not by

descent, & was therefore not estopped by A.'s deed.—*DOE d. GILLESPIE v. MACAULAY* (1837), 2 Ont. Dig. 4432.—CAN.

**q. Sheriff—In official capacity.]**—There can be no estoppel on a sheriff, when sued as an individual, by reason of a deed executed by him exclusively as a public officer.—*KISSOCK v. JARVIS* (1859), 9 C. P. 156.—CAN.

**r. Trustee.]**—H., as trustee for creditors of the firm of R., sued applt., a member of the firm, for \$4,720, alleging that a registered transfer from one J. to him, as trustee, of a similar sum with all rights, mtges., etc., thereunto appertaining due by applt. to J. for the price of lands; that a transfer of promissory notes signed by applt. for the same amount & representing the price of sale of the property, but which were to be in payment thereof only if paid at maturity. Applt. was a party & intervened to the deed of transfer & declared himself satisfied & subject to its condition. Applt. pleaded that H. had no action as trustee & that the price had been paid by the promissory



**878. Signatory of deed of settlement of company.]—**F. was the holder of a policy of insurance granted by the N. Life Co. on the life of C. In 1856 the N. Life Co. transferred its business, assets, & liabilities to the B. Co., which at the same time took over the business of the N. Fire Co. In that co. F. was a shareholder, & in respect of his shares therein he had shares in the B. Co. allotted to him, & he executed the deed of settlement of the B. Co. as a shareholder. In that deed the agreement between the B. Co. & the N. Life Co. was recited. F. paid the premiums on the policy to the B. Co., & he received dividends on his shares in that co. In 1858, the B. Co. transferred its business, assets & liabilities to the A. Co. Thenceforth F. paid the premiums to the A. Co. till it stopped payment, & was ordered to be wound up. The B. Co. & the N. Life Co. were also ordered to be wound up:—*Held*: by reason of F.'s position as a shareholder in the B. Co., he was estopped from making any claims upon the N. Life Co. in respect

of the policy.—*Re NATIONAL PROVINCIAL LIFE ASSURANCE SOCIETY, FLEMING'S CASE* (1871), 6 Ch. App. 393; 19 W. R. 663, L. JJ.

*Annotation*:—*Mentd. Wilson v. Lloyd* (1873), L. R. 16 60.

**Misnomer or misdescription of parties.]—***See Sect. 4, sub-sect. 2, ante.*

#### SUB-SECT. 2.—PRIVIES.

**879. General rule.]—**All who claim under the estoppel shall be bound thereby.—*EDWARDS v. OMELLHALLUM* (1639), March, 64; 82 E. R. 413; *sub nom. OMELLAUGHLAND v. HOOD*, 1 Roll. Abr. 874.

*Annotation*:—*Reid. Webb v. Austin* (1844), 7 Man. & G. 701.

**880. —.]—**Estoppels bind only privies to them & not a stranger.—*ANON.* (1641), March, 105; 82 E. R. 432.

*Annotation*:—*Consd. Doo d. Bruno v. Martyn* (1828), 8 B. & C. 497.

**881. Who are privies — Party deriving title**

notes which were now prescribed:—*Held*: applt., having become a party to the registered transfer, which gave resp. as trustee all mtgee.'s rights, was estopped from denying the efficacy of such deed or of the right of pltf. to sue thereunder in his quality of trustee.—*MITCHELL v. HOLLAND* (1889), 16 S. C. R. 687.—CAN.

**876 i. Whether all parties.]—**Testator by his will devised to his son G. "the property I may die possessed of in the village of M., also lot 28 in the tenth concession of B." In the early part of the will he had used the words "wishing to dispose of my worldly property." Testator did not own lot 28, & the only land he did own in the tenth concession of B. was a part of lot 29. The will contained no residuary devise:—*Held*: the part of lot 29 owned by testator did not pass by the will to the son. After the death of the testator, all his children executed a deed of release to the exors. of his will, containing a recital that the part of lot 29 owned by testator was devised to the son G., & that he was then in possession:—*Held*: there was no estoppel as among the members of the family, who together constituted one party to the deed.—*Re BAIN & LESLIE* (1894), 25 O. R. 136.—CAN.

#### PART V. SECT. 6, SUB-SECT. 2.

**881 i. Who are privies—Party deriving title from party estopped.]—**In an action of ejectment, in which deft. was the mtgor. in possession of the lands, & pltf. was the transferee of deft.'s right, title, & interest in those lands from the sheriff, who sold under a writ of *fi. fa.*, deft. contended that as the legal estate was outstanding in the mtgee., pltf. could not succeed:—*Held*: deft. could not set up that defence, as he was as much estopped from impeaching the sheriff's transfer as he would have been from impeaching his own.—*SMITH v. SMYTHE* (1890), 11 N. S. W. L. R. 295; 7 N. S. W. W. N. 19.—AUS.

**881 ii. —.]—**A., the patentee of lot 12 in the second concession of R., died intestate before 1843, leaving deft. B. his heir-at-law. By indenture dated Sept. 12, 1843, deft. B., without having entered on the lot, in consideration that the lessor of pltf. had sworn that intestate, the original locatee of the lot, had bargained & sold to him the lot, & also in consideration of 5s., conveyed to the lessor of pltf. the lot in fee. This indenture was registered on June 3, 1850. By indenture, made Jan. 21, 1850, between deft. B. & G., then in possession of the north half of the lot, G., for the considerations mentioned, had surrendered & assigned the north half to

deft. B. This indenture was registered on Feb. 26, 1850. Also, by two several indentures dated Jan. 21, 1850, between deft. B. & defts. C. & D. respectively, it was witnessed, that deft. B. conveyed to defts. C. & D., respectively, the south half of the lot, viz. fifty acres of the south half to each of the defts. C. & D.; & defts. C. & D. severally mortgaged the property conveyed to them severally by deft. B. These indentures were registered on Feb. 16, 1850. It appeared that twelve years since, a man named W. was in possession of this lot, claiming under one H.; that a deed of bargain & sale of the lot existed, but was not produced or proved, as from the patentee to H.; that on Oct. 11, 1838, H. executed a conveyance in fee of the lot to W., which was registered on Feb. 24, 1850; that on Mar. 18, 1841, W. executed a conveyance to G., which was registered the same day; that G. continued in possession of the north half ever since, & that defts. C. & D. entered into possession of the south half under him:—*Held*: deft. B. was estopped from disputing the title of his own bargainee against his own deed; & as to the south half, defts. C. & D. being estopped from disputing his title to mtgee., were also estopped from disputing the title of the lessor of pltf. claiming under a deed from him.—*DOE d. SPAFFORD v. BREAKENRIDGE* (1852), 1 C. P. 492.—CAN.

**881 iii. —.]—**Pltfs. being owners of land below low-water mark in the harbour of St. John, granted to H. the owner of a lot fronting thereon, the right to extend below low-water mark a wharf built upon his lot, & H. covenanted for himself his heirs & assigns, that he would not erect any buildings on the wharf so to be built. H. afterwards extended his wharf beyond low-water mark & assigned to deft., who erected buildings on the wharf. Low-water mark had receded to the outer end of the wharf since the grant was made:—*Held*: the assignee was estopped from denying that the wharf was built & occupied subject to the conditions of the grant, & from claiming a right to build, as owner of the land by accretion.—*ST. JOHN'S CORPN. v. SMITH* (1854), 3 All. 103.—CAN.

**881 iv. —.]—**In ejectment against A. & B., pltf. proved possession of the land in 1827; that in 1835 he had ejected A.; that in 1848 B. had leased the land from him for a year & paid rent, & that A. retook possession immediately after being ejected:—*Held*: B. was estopped by the lease from disputing pltf.'s title, but A. was not estopped & might show

title in a third person.—*DOE v. BROWN* (1857), 3 All. 433.—CAN.

**881 v. —.]—**By an arrangement made within ten years before an action of ejectment was begun, the land in question was conveyed by the owners of the legal estate to D., through whom pltf. claimed. One of the terms of the conveyance & a part of the consideration was that D. should, & he did thereby, release a debt which he held against deft. & others. Deft. did not execute the conveyance, but he was an assenting party to the whole transaction, & was aware that the conveyance was being executed, & that D. was releasing his liability:—*Held*: he was estopped from setting up a prior adverse possession in himself as effectually as if he had been a conveying party.—*McDIARMID v. HUGHES* (1888), 16 O. R. 570.—CAN.

**881 vi. —.]—**C. & his three sons, being of age, lived on a lot of land, two of them with their father, & the other in a house by himself. They all worked on the land without any division. C. mtged. the land to the lessor of pltf. In ejectment against C. & the sons, they appeared jointly & entered into the common consent rule, & a verdict was given for pltf. against all defts. On a motion for a new trial:—*Held*: though C. was estopped by his mtge. from disputing the title of the lessor of pltf., his sons were not estopped; & the lessor of pltf. having proved no title except the mtge., there should be a new trial.—*DOE d. BURK v. CORMIER* (1890), 30 N. B. R. 142.—CAN.

**881 vii. —.]—**S. conveyed to deft. co. a lot of land being a part of the foreshore of the harbour of Sydney, granted to him by the Govt. of Nova Scotia, after the coming into force of British North America Act. After the death of S., his widow brought an action claiming dower in the lot, to which deft. pleaded that the grant to S. was void, the title to the lot being in the Dominion Govt.:—*Held*: the co. having obtained title to the lot from S. were estopped from saying that his title was defective.—*SYDNEY & LOUISBURG COAL & RAILWAY CO. v. SWORD* (1892), 21 S. C. R. 152; 23 N. S. R. 214.—CAN.

**881 viii. —.]—**In 1841 land was granted by King's College to G., who in 1849 conveyed it to a married woman, who, with her husband, was in possession at the time of the grant to G. The conveyance to the married woman was executed by her husband. The husband & wife lived together on the land till her death, in 1864, & the husband till 1870, he dying in Jan. 1889. In an action of ejectment



*Sect. 6.—On whom binding and who may take advantage of estoppel: Sub-sect. 2.]*

from party estopped.]—TAYLOR v. NEEDHAM, No. 930, *post*.

882. ———.]—CHOLMONDELEY (EARL) v. CLINTON (LORD), No. 915, *post*.

883. ———.]—Pltf. in ejectment claiming under a mtgee. gave in evidence the mtge. deed executed by mtgor. & mtgee., which recited that mtgor. was seised in fee. Deft. was no party to this deed, but had subsequently indorsed upon it this memorandum "the within premises were charged by me, W. S., the purchaser of the equity of redemption thereof, with the payment of the further sum of £325":—*Held*: the memorandum was evidence for the jury that deft. came in under mtgor., & if so, he was estopped from setting up an adverse title prior to the date of mtge. deed.—DOE d. GAISFORD v. STONE (1846), 3 C. B. 176; 15 L. J. C. P. 231; 7 L. T. O. S. 207; 10 Jur. 480; 136 E. R. 71.

884. ———.]—Where a tenant in tail has entered into a contract for the sale of his estates for value, & in order to convey them to the purchaser, has suffered a recovery which turns out to be technically defective at law, the ct. will not allow persons claiming under him to take advantage of the flaw.—HOWARD v. SHREWSBURY (EARL) (1867), L. R. 3 Eq. 218; 36 L. J. Ch. 283; 15 W. R. 301; *on appeal*, 2 Ch. App. 760, L. C. & L. JJ.

885. ——— By assurance inter vivos.]—EDWARDS v. OMELLHALLUM, No. 879, *ante*.

886. ———.]—PALMER v. EKINS, No. 740, *ante*.

887. ———.]—WEBB v. AUSTIN, No. 998, *post*.

begun in Oct. 1889, by the heir-at-law of the wife against persons claiming through the husband:—*Held*: (1) the conveyance to the wife was made by the procurement of the husband, & he took an estate under it, & having no other right or title to the land, was estopped from denying the validity of G.'s title; (2) pltf. were not estopped by the dealings of their ancestress with the land.—MARSH v. WEBB (1891), 21 O. R. 281; 19 A. R. 564; 22 S. C. R. 437.—CAN.

881 ix. ———.]—A person, having a *raiya* interest in certain lands, mtged. the same to pltf. without the landlord's consent. Subsequently various transfers of portions of the lands mtged. were effected to different persons by the widow of the mtgor. Finally, the widow sold a portion of the mtged. lands with the consent of the landlord to one R., who after his purchase took a fresh lease of the same from the landlord at an enhanced rent on payment of a premium. A suit having been instituted by the mtgee. for recovery of the mtge. money, the widow & all the subsequent transferees, including the purchaser, were made parties. The purchaser pleaded that he was not a necessary party to the suit, & that the mtge. was invalid on the ground that the *raiya* right was not transferable:—*Held*: the purchaser claiming under a title party, at least created by the mtgor., was estopped from raising the plea of non-transferability of the holding.—RADHA KANTA CHAKRAVARTI v. RAMANANDA SHAHA (1912), 1 L. R. 39 Calc. 513.—IND.

881 x. ———.]—*Scmble*: although no estate passed by a deed, the assignees of the grantor of that estate could avail themselves of the estoppel thereby created.—CHURCH v. DALTON (1852), 2 I. C. L. R. 249.—IR.

888. ———.]—An assignee of the reversion may establish his title against lessee by way of estoppel.

B., being mtgor. in possession, on Feb. 22, 1848, by indenture executed by him & deft., demised to deft. certain premises for seven years, & deft. covenanted to repair. On Feb. 2, 1854, B. executed an indenture, whereby, after reciting mtge. & that he had sold the equity of redemption to pltf., he "granted, bargained & sold, aliened, released & surrendered the premises, & all his estate, right & title, both at law & in equity therein, to pltf.," etc. Pltf. sued deft. for a breach of the covenant to repair. The declaration, after stating the lease & covenant, alleged that B. by deed assigned the premises to pltf., whereby the reversion thereof, subject to the term created by the lease, vested in pltf. Deft. pleaded that B. did not assign the premises to pltf.; nor had he at the time of making the lease any reversion of & in the premises; nor did any reversion in the premises come to pltf.:—*Held*: deft. was estopped from denying that lessor had such a legal estate as would warrant the lease; & as no other legal estate or interest was shown to have been in lessor, it must be taken as against lessee, by estoppel, that lessor had an estate in fee.—CUTHBERTSON v. IRVING (1860), 6 H. & N. 135; 29 L. J. Ex. 485; 158 E. R. 56; *sub nom.* IRVING v. CUTHBERTSON, 3 L. T. 335; 6 Jur. N. S. 1211; 8 W. R. 704.

*Annotations*:—*Refd.* Morton v. Woods (1869), 38 L. J. Q. B. 81; Hartcup v. Bell (1883), Cab. & El. 19; Onward Bldg. Soc. v. Smithson, [1893] 1 Ch. 1; Keith v. Gancia (1904), 73 L. J. Ch. 411. *Mentd.* Underhay v. Read (1887), 58 L. T. 457; David v. Sabin (1893), 62 L. J. Ch. 347; Brigg v. Thornton, [1904] 1 Ch. 386.

Assignee of lessor.]—*See, further, LANDLORD & TENANT.*

881 xi. ———.]—R., who had possession but no title, let lands by parol to deft. for a term of two years, within which period R., by deed, assigned the same to pltf., who, before the expiration of the two years, demanded possession from deft. & brought an ejectment against him:—*Held*: deft. was estopped from denying R.'s title, under whom pltf. derived, & pltf. was entitled to recover.—WARD v. RYAN (1875), 1 R. 10 C. L. 17.—IR.

881 xii. ———.]—In 1869, G. mtged. lands in fee to O. In 1877, on the death of O., the trustees for sale of O.'s will, by assignment of the mtge. of 1869, conveyed lands to C., in which deed G. joined as a confirming & granting party. G. had in 1882, demised the lands to H. for ten years, from 1870 to 1880. After 1880, H. continued in possession, paying the old rent to G., & in 1883, he served an originating notice to fix a fair rent under Land Law (Ireland) Act, 1881, s. 8, & in May, 1887, an order fixing same was made. In Mar. 1887, C., having demanded possession, served a writ of ejectment on the title, claiming possession. At the trial C. failed to prove the will of O., but did prove the deed of 1877, which contained a recital of the devise to trustees for sale contained in O.'s will:—*Held*: the recital of the devise by O. to trustees contained in the deed of 1887 was sufficient evidence of that devise, & H., claiming through G., was estopped from denying that recital.—CLARKE v. HALL (1888), 22 L. R. Ir. 383; 24 L. R. Ir. 316.—IR.

881 xiii. ———.]—A man, employed to thatch a farmer's dwelling-house for a daily wage, fell off the roof & sustained injuries resulting in death. In deceased's lifetime an agreement was entered into on his behalf with the employer, by which the latter

admitted his liability under W. C. Act, & agreed to pay half wages by way of compensation. In a claim by the widow for compensation:—*Held*: there was no estoppel, as appet., the widow, was not a party to the agreement, & did not claim under it, but claimed as a dependant under the Act.—MANTON v. CANTWELL, [1918] 2 I. R. 563; 53 I. L. T. 97.—IR.

881 xiv. ———.]—R. purchased seventeen shares in a block of native land. R. & the other grantees agreed orally that the Native Land Ct. should partition the block, R. abandoning part of the acreage he was entitled to in settlement of other claims. The ct. made an adjudication accordingly, which was afterwards found to be invalid. R. entered into possession of the land awarded to him, & afterwards sold to L. Four of the conveyances to R. were void as not having been certified by the Native Lands Frauds Comr., & L. purchased those shares again either from the grantees or from sub-purchasers:—*Held*: as the four grantees, whose conveyances were void, were no parties to the agreement for partition, neither they, nor L. as representing them, were estopped from denying it.—LOCKE v. KAHUTIA (1887), 5 N. Z. L. R. C. A. 214.—N.Z.

881 xv. ———.]—A deed of assignment was executed by a private co. by a director of the co. signing on its behalf without affixing the common seal. The co. filed a creditors' petition alleging the deed of assignment as an act of bankruptcy:—*Held*: it is not necessary that the deed should be actually executed by a petitioning creditor in order that he may be estopped by the deed, it being sufficient to show that he is privy to its execution; & the execution by the director was ample evidence that the creditor was privy to the deed.—RE ABURN (1908), 27 N. Z. L. R. 442.—N.Z.

**889.** ——— Mortgagee—Prior mortgage unknown to prior mortgagee.]—A mtge. executed in 1871 contained a recital that mtgor. was indebted to mtgee. in the sum of £1,500 for moneys advanced by her to him, & that he had agreed to secure the payment of the same by mtge. The money had been advanced in 1864, & the evidence showed that there was at that time no agreement for mtge., & that there had been no subsequent pressure by lender. Mtge. deed was retained in the possession of mtgor., & there was nothing to show that mtgee. knew of its execution until Feb. 1874:—*Held*: mtge. was void under 27 Eliz. c. 4, as against mtgee. for value whose mtge. was executed in Feb. 1872, the recital of the agreement not operating as an estoppel against him.—*CRACKNALL v. JANSON* (1879), 11 Ch. D. 1 40 L. T. 640; 27 W. R. 851, C. A.

*Annotation*:—*Mentd.* *Wigan v. English & Scottish Law Life Assce. Asscn.*, [1909] 1 Ch. 291.

**890.** ——— ———.]—By indenture of Feb. 6, 1845, W., equitable tenant for life in possession, under the will of the Earl A., of, amongst other hereditaments, the land demised by the indenture, granted a lease to S., deft. & to C. & B., whose estate deft. now has, of a piece of land for a term of eighty years, at a yearly rent of £5; by the following description, *viz.* "All that piece or parcel of ground, part of H. farm within the hamlet of I. in the county of J., bounded on the north & east by lands belonging to W., on the south by a public road leading from Y. to Z. & on the west by another public road leading from Y. to N., together with cottages & buildings thereon, & with the right of a carriage-road, from the piece or parcel of ground to the works of S., C. & B., at N., the ground plot whereof is shown in the margin of these present" & the lessees thereby covenanted to build certain houses on the demised land. At the date of the lease S. & C. & B. were owners respectively of certain mills & works at N., & trustees under the will held the fee simple & inheritance of the lands on each side of two public roads for a considerable distance. Several houses, occupied as private residences, & called X. Terrace, have since the date of the lease been erected on the demised land by lessees, who have also since the same date made the carriage-road upon land, parcel of the hereditaments comprised in the will, & other than the demised land, & erected a stone bridge over the river there at the north-west end of the carriage-road to connect the same with the mills & works. This carriage-road does not communicate directly with the demised land, but runs from the bridge southwards into the public road from Y. to Z., having the other public road from Y. to N. on the east, between it & the demised land. In Oct. 1865, deft. & the other lessees assigned the demised land to the M. Railway Co. for the residue of the term, subject to the yearly rent, but expressly reserving out of the assignment the before described right of carriage-road; & by an indenture of Dec. 26, 1865, to which W. was a party, the trustees of Earl A.'s will conveyed the same land to the co. in fee simple. In 1875, the trustees put up to auction & sold, & by indenture dated Sept. 29, 1875, to which W. was a directing party, conveyed to pltf. in fee, amongst other lands, the carriage-road in question, by the following description: "A road to the works & premises of S., C., & B., situate in N., for which S., B., & C. pay an acknowledgment of 1s. *per annum*. By the 8th condition of sale it was stated that "every lot was sold subject to all right of way &

other easements charged & subsisting thereon." After the assignment & conveyance to the M. Railway Co., deft. continued to use the road up to the date of this action, & since the conveyance to pltf., entered upon & passed over the road, not only for going to or from X. Terrace, or the land demised by the lease of 1845, but also for going to & from & for the carriage of goods between his works & the M. Railway station, which is not on any part of the demised land, & also for going to & from collieries & other places in connection with his works, & he claimed to use, & then still used, the road by himself & servants & persons employed at his works for all purposes connected therewith. On Sept. 28, 1875, a six months' notice was given by W. & the trustees to deft. to give up all hereditaments held by him in the county of J. as yearly tenant, & since Mar. 25, 1876, payment of the 1s. *per annum* in respect of the user of the road was demanded by pltf. of deft., & refused by the latter; & it was admitted that such acknowledgment has never been paid by deft. or any lessee under the lease of 1845; but, up to the assignment to the M. Railway Co., the rent reserved by that lease was duly paid to & received by W. Pltf. had no knowledge or notice of the existence of the lease of 1845, or of deft.'s claim to any right of way other than is expressed in the conditions of sale & the conveyance to pltf., or as might be inferred therefrom, & from the existence of the road itself leading from the highway to deft.'s premises.

In an action by pltf. to recover damages from deft. for his wrongful entry upon & user of the carriage-road:—*Held*: whether W. had or had not power to grant the lease for eighty years, yet, as he was a party to the conveyance of Sept. 1875, to pltf., both he & pltf., who claimed through him, were estopped from disputing during W.'s lifetime, the grant of land & roadway contained in the lease; & although pltf., even if without notice, could not claim title to the lands except subject to any charge or burden created by W. yet, having had notice sufficient to put him upon inquiry, he could not be deemed a purchaser for value without notice.—*SUMNER v. SCHOFIELD* (1880), 43 L. T. 763.

**891.** ——— ——— By descent.]—The fine of T. enures by estoppel, & afterwards when the remainder comes to his son that he shall claim in nature of a descent & therefore shall be bound by the estoppel.—*WEALE v. LOWER* (1672), Poll. 54; 86 E. R. 509.

*Annotations*:—*Appld.* *Doe d. Christmas v. Oliver* (1829), 10 B. & C. 181. *Consd.* *Webb v. Austin* (1844), 7 Man. & G. 701. *Refd.* *Vick v. Edwards* (1735), 2 Eq. Cas. Abr. 474; *Sturgeon v. Wingfield* (1846), 15 M. & W. 224; *Rowbotham v. Wilson* (1857), 27 L. J. Q. B. 61. *Mentd.* *Doe d. Bruno v. Martyn* (1828), 8 B. & C. 497.

**892.** ——— ———.]—In ejectment by an heir-at-law, against deft. who claims under a lease granted by an ancestor of lessor of pltf.; if such lease, being in the hands of lessor of pltf., be produced at the trial by him on notice, it may be given in evidence, without proof of its execution by the subscribing witness.

An heir-at-law producing a lease granted by an ancestor, under whom he claims, although it is to be used as evidence against his right to present possession of the land, is estopped from disputing the due execution of the instrument (*BAYLEY, J.*).—*DOE d. TINDALE v. HEMMING* (1826), 2 C. & P. 462, N. P.; *subsequent proceedings*, 6 B. & C. 28.

*Annotation*:—*Mentd.* *Bell v. Chaytor* (1843), 1 Car. & Kir. 162.

**893.** ——— ———.]—A. executed a disposition, by which, in the event of his predeceasing his parents without leaving heirs of his body, he



*Sect. 6.—On whom binding and who may take advantage of estoppel: Sub-sects. 2, 3 & 4.]*

gave all his estate, heritable & movable, then belonging or which should belong to him at his death, to his parents & the longest liver of them, & after the death of the longest liver, then to such person & for such uses as he himself might appoint by deed during his life, & even on death-bed; & in case he should die without executing such deed, then to such person & for such uses as his parents should by deed appoint. His parents predeceased A., having with his consent executed a mutual trust disposition & settlement in favour of trustees therein named. A. afterwards executed a trust disposition & settlement, giving all his estate to trustees therein named, declaring the uses, & revoking all former settlements as far as they interfered with it; & he died on the same day without heirs of his body:—*Held*: A.'s first deed did not preclude his heir-at-law from challenging & reducing the death-bed deed.—*GORDON v. CLYNE* (1839), 6 Cl. & Fin. 539; Macl. & Rob. 72; 7 E. R. 801, H. L.

894. ——— By will.]—*ARCHER v. POPE* (1754), 2 Ves. Sen. 523; 28 E. R. 334.

*Annotation*:—*Mentd.* *Worthington v. Wiginton* (1855), 20 Beav. 67.

895. ——— ———.]—*DOE d. LUSHINGTON v. LANDAFF* (LORD BP.), No. 765, *ante*.

896. ——— ———.]—Settlor, by deed, purported to grant an annuity out of certain land, & to grant a term of a hundred years to a trustee to secure the annuity. At that time the settlor had not the legal estate, which was outstanding in mtgees. The settlor died, devising to his three sons, who paid off mtge., & the mtgees. conveyed the estate to the uses of the will. The devisees then sold to a purchaser without notice of the annuity. The annuitant filed a bill against the trustee of the term & the purchaser to recover the annuity:—*Held*: annuitant had no remedy in equity against purchaser, but might compel the trustee to proceed at law & establish his title, if any, against the purchaser. *Scmble*: devisees would not be estopped from denying the grant of the term.—*CLEMON v. GEACH* (1870), 6 Ch. App. 147; 40 L. J. Ch. 44; 19 W. R. 53, L. C.

897. ——— ——— Widow continuing in possession.]—Where a mtge. of copyhold premises by lease & release recited, that by indentures of lease & release, mtgor., a copyholder for lives, had contracted with the Bishop of R. for the absolute purchase of the inheritance, in fee simple of the copyhold premises, & that the Bishop of R. had granted & released the same, parcel of the manor of the prebend of W., to hold the same to mtgor., his heirs & assigns for ever; & mtge. deed then witnessed that mtgor. granted & released the premises in fee, subject to the usual proviso for redemption:—*Held*: (1) there was no sufficient evidence furnished by the recital that there had been any enfranchisement of the copyhold.

(2) *Qu.*: whether the above recital was evidence, by way of estoppel, against the widow, in possession, of mtgor.—*DOE d. NORTH v. WEBBER* (1837), 3 Bing. N. C. 922; 3 Hodg. 203; 5 Scott, 189; 6 L. J. C. P. 319; 132 E. R. 666.

898. ——— ———.]—J. conveyed B. in fee to L. in 1827, & the wife of J. was a party to that deed. It was agreed at the time of executing the conveyance, that J. should continue to occupy till he or L. died. L. died, & his heir gave J. notice to quit. A few days after the notice to quit expired, J. died, & his widow, continued in possession. On ejectment brought by the heir

against the widow:—*Held*: she could not set up a prior mtge. of B. by J., for her possession accrued through J., & therefore she was estopped by the conveyance of 1827.—*DOE d. LEEMING v. SKIRROW* (1837), 7 Ad. & El. 157; 2 Nev. & P. K. B. 123; Will. Woll. & Dav. 517; 112 E. R. 430.

899. ——— ——— Widow claiming under husband's friendly society policy.]—*FORTUNE v. ORR* (1894), Diprose & Gammon, 539.

900. ——— Assignee under order of court.]—Testator, seised in fee of an undivided moiety in certain real estates, devised all his real & personal estate to two persons, their heirs, exors. & administrators, in trust, to receive the rents & profits, & pay thereout various annuities, which they were authorised to raise by mtge. of all or any part of the estates. The will also contained a power to the trustees to accept surrenders of old leases & to grant new ones, with certain specified conditions.

The lessor of pltf. was heir-at-law of the surviving trustee, & had received the rent reserved as to both moieties; but the moiety, not belonging to testator, had been conveyed to him under a decree of the Ct. of Ch.:—*Held*: he could not be estopped by the lease; & the receipt of rent would only create a tenancy from year to year, which had been determined by a notice to quit.

Even if he had demised the entirety, & although the lessor of pltf. is his heir, yet there could be no estoppel in this case, for the lessor of pltf. does not take the moiety in question as his heir, but as a purchaser (*PATTESON, J.*).—*DOE d. BLGRAVE v. STEPHENS* (1850), 15 L. T. O. S. 541.

901. ——— Whether cestui que use bound by estoppel of feoffee to uses.]—*Cestui que use* can have no advantage of an estoppel in the deed of feoffment to uses.—*ANON.* (1678), 1 Freem. K. B. 475; 89 E. R. 356.

902. ——— Assignment by trustee in bankruptcy—Whether bankrupt estopped.]—In 1873 letters patent for improvements in lace machines were granted to H., who in 1877 went into liquidation, & the patent was sold by the trustee to pltf. H. afterwards entered into partnership with S., & this action was brought against S. & H. to restrain them from infringing the patent. By an order made when the action had come on for trial, it was postponed, with liberty to S. & H. to deliver specified objections. These were that S. & H. denied infringement, & that S. objected to the validity of the patent on the ground of want of novelty & insufficiency of the specification. From the cross-examination of pltf.'s witnesses it appeared that one of the subsidiary combinations in the machine was not novel. The ct. of first instance was of opinion that the patentee had not claimed this subsidiary combination as his invention, held the patent valid, & granted an injunction against both defts., & an inquiry as to damages. Defts. appealed. The Ct. of Appeal held that on the construction of the specification H. had claimed the subsidiary combination as his invention, & that the patent was invalid, & that there being nothing to prevent S. from insisting on this objection, his appeal must succeed:—*Held*: H. was not estopped from disputing the validity of the patent, either by matter of record, on the ground that the latter's patent were of record; or by deed, by reason of the specification being under his seal; or by matter *in pais*, on the ground of the statements in his petition to the Crown, there being nothing to show that pltf. bought on the faith of those statements.—*CROPPER v. SMITH* (1884), 26 Ch. D. 700; 53 L. J. Ch. 891; 51 L. T. 729; 33 W. R. 60; Griffin's Patent Cases,



60 ; 1 R. P. C. 81, C. A. ; *reversd.* on other grounds (1885), 10 App. Cas. 249, H. L.

*Annotations* :—*Mentd.* *Re Hall* (1888), 21 Q. B. D. 137 ; *Shoe Machinery Co. v. Cutlan*, [1896] 1 Ch. 108 ; *Dowler v. Keeling* (1898), 14 T. L. R. 257 ; *Van Berkel v. Simpson* (1906), 23 R. P. C. 237 ; *Re Crighton & Law Car & General Insee. Corpn.*, [1910] 2 K. B. 738.

**Liquidator—Whether bound by estoppel affecting company.**—*See COMPANIES*, Vol. IX., p. 309, No. 1923, & Vol. X., pp. 874, 875, Nos. 5937, 5939.

*See, further*, Sub-sect. 7, *post*.

#### SUB-SECT. 3.—INFANTS.

**903. General rule.**—An infant possessed of a term sold it to another man for a certain sum of money, &, after attaining his full age he received part of the sum, by which it was said that he was estopped from avoiding his grant :—*Held* : he was not estopped, but could avoid the grant because it was void at the commencement, & no act afterwards could make it good.—*ANON.* (1564), Dal. 64 ; 123 E. R. 276.

**904.** —.]—Where a person is of age when he makes a lease, & has nothing in the premises, but they afterwards descent to him, the lease shall enure by way of estoppel. *Secus* : if he had been an infant.—*SMITH v. Low* (1739), 1 Atk. 489 ; *West temp. Hard.* 669 ; 26 E. R. 310, L. C.

**905.** — **Plea of delivery before date of deed.**—*ANON.* (prior to 1580), Plowd. Queries, 45, pl. 241 ; 75 E. R. 922.

**906. Deed executed by infant representing himself of age.**—By an indenture of settlement, dated in 1850, after reciting that the intended wife was possessed of a capital in business estimated at £1,000, & that upon the treaty for the marriage it was agreed that the intended husband, deft., should enter into a covenant for payment to the trustee of a sum of £1,000, it was witnessed that deft. did thereby covenant to pay £1,000 to the trustee upon certain trusts for the separate use of the intended wife, & if she should die in the lifetime of deft., then for the children of the intended wife by a former marriage. The marriage was solemnised, & deft. entered into possession of the stock in trade, & carried on the business till the death of the wife in 1857. The trustee originally nominated had never acted, & for several years there was virtually no trustee whatever ; but later a trustee was appointed, who soon after the wife's death demanded payment of £1,000, & upon deft. refusing to pay, instituted this suit in the name of the children of the earlier marriage as their next friend. Deft. resisted the demand, on the ground that he was not bound by the covenant by reason of his infancy at the time of his marriage, & that that fact was known to his wife at that time. It was proved that deft. did not attain twenty-one till the year 1853, but the evidence established as against him, that he, at the time of the execution of the deed, asserted to the solr. of the wife who had prepared it, that he was of full age. It appeared, however, to be also established that the wife was aware of his real age, notwithstanding those assertions, & consequently that she was not defrauded by them. The judge on the ground of the misrepresentation, & also of acquiescence, held that deft. was not entitled to set up the plea of infancy in bar to the covenant, & deft. appealed from the decree :—*Held* : the case must upon the evidence be considered as if the fact of the infancy

had been stated on the settlement, &, as to acquiescence, deft.'s rights continued as they were on the day after his marriage.—*NELSON v. STOCKER* (1859), 4 De G. & J. 458 ; 28 L. J. Ch. 760 ; 33 L. T. O. S. 277 ; 5 Jur. N. S. 751 ; 7 W. R. 603 ; 45 E. R. 178, L. JJ.

*Annotations* :—*Expld.* *Leslie v. Sheill*, [1914] 3 K. B. 607. *Refd.* *Wright v. Leonard* (1861), 5 L. T. 110 ; *Burton v. Levey* (1891), 7 T. L. R. 248 ; *Mohori Bibee v. Dhar-modas Ghose* (1903), 19 T. L. R. 295.

**Deeds of infants & ratification.**—*See, generally* INFANTS.

#### SUB-SECT. 4.—FEME COVERT.

**907. Allegation of delivery before date of deed.**—*ANON.* (prior to 1580), Plowd. Queries, 45, pl. 241 ; 75 E. R. 922.

**908. By surrender of copyholds.**—(1) *Feme covert* without husband's joining, but in his presence surrenders her copyholds to use of her will or appointment, & devises it :—*Qu.* : whether good. (2) Fine by *feme covert* is good against her heir by estoppel.

The question then is, whether the wife can surrender that estate into the hands of the lord, so as to make it effectual ? A fine differs from the case of a surrender ; for that will be good against the heir by estoppel, although it passes no estate at all : but if a surrender is not good, there will be no estoppel, & no estate can pass into the hands of the lord (*LORD HARDWICKE, C.*).—*TAYLOR v. PHILIPS* (1749), 1 Ves. Sen. 229 ; 27 E. R. 999, L. C. ; *subsequent proceedings* (1750), 2 Ves. Sen. 23, L. C.

*Annotations* :—*As to* (1) *Consd.* *Compton v. Collinson* (1790), 1 Hy. Bl. 334. *As to* (2) *Refd.* *Goodtitle v. Morse* (1789), 3 Term Rep. 365.

**909. Recital in deed acknowledged.**—*Semble* : a married woman is bound by estoppel by a recital in a deed duly executed & acknowledged by her, in the same manner as if she were a *feme sole*.—*JONES v. FROST, Re FIDDEY (SOLICITOR)* (1872), 7 Ch. App. 773 ; 42 L. J. Ch. 47 ; 27 L. T. 465 ; 20 W. R. 1025, L. JJ.

**910. Whether effective to avoid restraint on anticipation—Restraint fraudulently concealed.**—A married woman having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mtge. of such property, concealing the restraint upon anticipation. Mtgee. obtained a judgment against her for the amount lent, & a charging order to charge her next accruing dividend :—*Held* : such charging order must be discharged ; for in no case & by no device could the restraint upon anticipation be evaded.—*STANLEY v. STANLEY* (1878), 7 Ch. D. 589 ; 47 L. J. Ch. 256 ; 37 L. T. 777 ; 26 W. R. 310.

*Annotations* :—*Expld.* *Cahill v. Cahill* (1883), 8 App. Cas. 420. *Fold.* *Bateman v. Faber*, [1898] 1 Ch. 144. *Refd.* *Re Glanvill, Ellis v. Johnson* (1886), 31 Ch. D. 532 ; *Hyde v. Hyde* (1888), 13 P. D. 166 ; *Hood-Barrs v. Cathcart*, [1894] 1 Q. B. 559.

**911. — Mistake.**—A married woman was entitled to the income of property during her life for her separate use without power of anticipation, subject to a proviso that on a specified event her interest should cease, & the property be held in trust for her husband. In order to assist her husband to make an arrangement with a creditor, she executed a deed-poll, whereby she admitted, believing then that it was true, though, as she afterwards alleged, it was not in fact true, that the

#### PART V. SECT. 6, SUB-SECT. 4.

t. *Effect of bill of sale—Granted by husband to wife—Purpose of defeating creditors.*—*HALL v. QUESNEL* (1922), D. L. R. 80.—*CAN.*

*Sect. 6.—On whom binding and who may take advantage of estoppel: Sub-sects. 4, 5, 6, 7 & 8.]*

event mentioned in the proviso had occurred, & that her life interest had determined, & she released that interest in favour of her husband. On the faith of this deed the creditor entered into arrangements with the husband for his benefit. The wife subsequently, notwithstanding the deed, claimed to receive the income of the property during her life:—*Held*: she could not by admission or estoppel or in any other way by her own act get rid of the protection afforded by the restraint on anticipation, & her right to receive the income was unaffected by her admission contained in the deed-poll.—*BATEMAN (LADY) v. FABER*, [1898] 1 Ch. 144; 67 L. J. Ch. 130; 77 L. T. 576; 46 W. R. 215; 14 T. L. R. 81; 42 Sol. Jo. 80, C. A. *Annotation*:—*Consd. Re Wimperis, Wicken v. Wilson*, [1914] 1 Ch. 502.

SUB-SECT. 5.—LUNATICS.

LUNATICS.

SUB-SECT. 6.—CORPORATIONS.

**912. Whether bound—Deed ultra vires.]**—The trustees of a public Turnpike Act, which empowers them to erect toll-houses & mortgage the tolls, & which declares that there shall be no priority among the creditors, have no power to mortgage the toll-houses or gates. If in fact they have made such a mtge., & an ejectment is brought against them by the mtgee., they are not estopped by their deed from insisting that the Act gives them no such power.—*FAIRTITLE d. MYTTON v. GILBERT* (1787), 2 Term Rep. 169; 100 E. R. 91.

*Annotations*:—*Consd. Doe d. Levy v. Horne* (1842), 3 Q. B. 757; *Bowen v. Brecon Ry., Ex p. Howell* (1867), L. R. 3 Eq. 541. *Refd. Doe d. Banks v. Booth* (1800), 2 Bos. & P. 219; *Doe d. Baggaley v. Hares* (1833), 4 B. & Ad. 435; *Re Companies Acts, Ex p. Watson* (1888), 21 Q. B. D. 301; *St. Mary, Islington, Vestry v. Hornsey U. C.*, [1900] 1 Ch. 695. *Mentd. Doe d. Thompson v. Lediard* (1832), 4 B. & Ad. 137; *Fripp v. Bridgwater & Taunton Canal & Stolford Ry. & Harbour Co.* (1857), 29 L. T. O. S. 176; *Guest v. Poole & Bournemouth Ry.* (1870), L. R. 5 C. P. 553.

**913. ———.]**—The words “in case he was appointed or elected by the trustees” in Turnpike Roads Act, 1822 (c. 126), s. 134, apply to cases where there was an appointment or election *de facto* by the trustees, in contra-distinction to an appointment by Act; & therefore, proof of a party having acted as trustee, & of an order made by the trustees for his appointment or election, is sufficient; & that even under a local Act, whereby the appointment of new trustees, on death or removal, is required to be under the hands & seals of five of the old trustees, & although it is shown that the order for such appointment was not so made

I am inclined to think the trustees, acting in the execution of a public trust under an Act of Parliament, are not estopped from saying that this deed is not their own act (*LITLEDALÉ, J.*)—*DOE d. BAGGALEY v. HARES* (1833), 4 B. & Ad. 435; 1 Nev. & M. K. B. 237; 2 L. J. K. B. 88; 110. T. D. 510.

*v. Penfold, Doe*

**914. ———.]**—The Westminster Improvement Comrs. were authorised by several Acts of Parliament to borrow such sums of money as they should think necessary for the purposes of the Act & to give bonds for the same, & which

bonds were assignable. In an action by pltf., as transferee of one of such bonds, the condition of which recited that defts. had, in pursuance of the Acts, borrowed of one T. P. £5,000, for enabling them to carry the Acts into execution, defts. pleaded that they did not borrow the sum of T. P., or any part thereof, for the purposes of the Acts, & that they were not authorised to make the bond, & that the same was made contrary to the provisions of the Acts, of which T. P. & pltf. had notice at the time the bond was made & transferred to pltf.:—*Held*: (1) the plea was bad.

(2) Defts. also pleaded, that at & before the bond was made, certain persons, namely, C. M. & W. M. were entitled to receive from defts. certain bonds; that T. P. & others conspired fraudulently to procure for T. P. one of the bonds to which C. M. & W. M. were entitled, & that by means of such conspiracy & fraud they procured C. M. & W. M. to authorise defts. to give to T. P. one of the bonds they were so entitled to; & that the bond sued upon was thereupon given to T. P. by defts., & that they, defts., had never borrowed any sum of money from T. P., of all which premises pltf. at the time of the transfer to him of the bond had notice:—*Held*: bad, because defts. could not set up as a defence the fraud that had been committed upon C. M. & W. M., by whose directions they had, in pursuance of their contract with them, given the bond to T. P.

(3) The meaning of estoppel is this—that the parties agree for the purpose of a particular transaction to state certain facts as true. . . . But the whole matter is opened where the statement is made for the purpose of concealing an illegal contract, for persons cannot be allowed to escape from the law by making a false statement (*MARTIN, B.*)—*HORTON v. WESTMINSTER IMPROVEMENT COMRS.* (1852), 7 Exch. 780; 21 L. J. Ex. 297; 19 L. T. O. S. 219; 155 E. R. 1165.

*Annotations*:—*As to* (1) *Refd. Re Companies Acts, Ex p. Watson* (1888), 21 Q. B. D. 301. *As to* (2) *Refd. Royal British Bank v. Turquand* (1855), 5 E. & B. 248. *As to* (3) *Refd. Prince of Wales Assoc. v. Harding* (1858), E. B. & E. 183; *Re Holland, Gregg v. Holland*, [1901] 2 Ch. 145.

**915. ———.]**—*Re Companies Acts, Ex p. WATSON*, No. 1060, *post*.

**916. ———.]**—Pltfs. were by trusted with the control & management of part of the navigations of rivers O. & F., with power to charge such tolls, within limits, as the Corpn. deemed necessary to carry on the two navigations in which the public had an interest. In 1888 the Corpn. entered into two agreements with the firm of H. L. & Sons. By the O. agreement the Corpn. covenanted to allow the firm, their successors & assigns, the right to carry cargoes on the O. in consideration of the annual payment of £600 in place of the authorised dues & charges, with a proviso that there should each year be refunded to the firm, their successors & assigns, the difference between the £600 & the amount ordinarily charged on the traffic actually carried. By the F. agreement the firm covenanted to pay the Corpn. £200 *per annum* for twenty years as a composition for the ordinary tolls, & the Corpn. covenanted to allow the firm, their successors & assigns, the free use of the F. navigation, on payment of £200 *per annum* in lieu of tolls, for such further term or terms as the firm, their successors or assigns, might from time to time desire. Defts. were the successors of H. L. & Sons:—*Held*: the agreements were *ultra vires*, because during their currency, which depended on the wishes of defts., the Corpn., no matter what emergency might arise, had disabled itself from exercising its statutory

powers to increase the tolls so far as might be necessary; &, being *ultra vires* at the date of their execution, the agreements did not become *intra vires* by reason of estoppel, lapse of time, ratification, acquiescence, or delay.—*YORK CORPN. v. LETHAM (H.) & SONS, LTD.*, [1924] 1 Ch. 557; 131 L. T. 127; 40 T. L. R. 371; 68 Sol. Jo. 459; 22 L. G. R. 371.

*Annotation*:—*Mentd.* *Southport Corpn. v. Birkdale District Electric Supply Co.* (1924), 69 Sol. Jo. 176.

**917.** — *Deed intra vires.*—*DOE d. LEVY v. HORNE*, No. 873, *ante*.

**Limitation of powers—Of corporations.**—*See* CORPORATIONS, Vol. XIII., pp. 354 *et seq.*

**Of companies.**—*See* COMPANIES, Vol. IX., pp. 604 *et seq.*

**By share certificate.**—*See* COMPANIES, Vol. IX., pp. 287 *et seq.*

#### SUB-SECT. 7.—VOLUNTEERS.

**918. Whether volunteer can take advantage of.**—A trustee executed a settlement declaring trusts of a sum of £2,000 belonging to settlor, a married woman, which sum was thereby untruly recited to be in his hands, upon the faith of a promise by the marriage woman to pay the sum to him out of her separate estate. The sum was never paid:—*Held*: neither the trustee of the settlement, nor a volunteer under it, could enforce the promise.—*MARLER v. TOMMAS* (1873), L. R. 17 Eq. 8; 43 L. J. Ch. 73; 22 W. R. 25.

**919.** — *Equitable estoppel.*—*LOVETT v. LOVETT*, No. 776, *ante*.

**920. Whether estopped by recital of ante-nuptial agreement in post-nuptial settlement.**—By a post-nuptial settlement dated in 1873, to which the testamentary guardians of the wife, then an infant, were parties, after a recital that previously to the marriage the husband agreed to make such settlement of his wife's fortune as was thereafter contained, it was witnessed that the husband, being entitled in right of his wife to a reversionary interest in personalty, subject to the contingency of his predeceasing her without reducing it into possession, covenanted that on the fund falling into possession he & his wife would assign it to the trustees on the usual trusts for the wife, husband, & issue of the marriage, the husband's life interest being determinable of bkpcy. The husband was not indebted at the time, nor was he contemplating embarking in trade. In 1877 the wife died. In 1898 the husband was adjudicated bkpt. In 1899 the fund fell into possession. There was issue of the marriage:—*Held*: the settlement was good against the trustee in bkpcy., on the grounds that that there was no evidence of its having been made with intent to defeat creditors so as to render it void under 13 Eliz. c. 5, & no such intent ought, in the circumstances, to be inferred; & the deed was not voluntary but, taken as a whole, constituted such a note or memorandum of the recited parol ante-nuptial contract in consideration of marriage as satisfied Stat. Frauds, s. 4, & enabled the contract to be enforced both against the settlor who signed it & against his trustee in bkpcy., the recital of the contract being admissible in evidence as against the trustee setting up the statute.—*Re HOLLAND, GREGG v. HOLLAND*, [1902] 2 Ch. 360;

71 L. J. Ch. 518; 86 L. T. 542; 50 W. R. 575; 18 T. L. R. 563; 46 Sol. Jo. 483; 9 Mans. 259, C. A.

*Annotations*:—*Mentd.* *Carruthers v. Peake* (1911), 55 Sol. Jo. 291; *Re Gillespie, Ex p. Knapman* (1913), 20 Mans. 311; *Re Davies, Ex p. Miles*, [1921] 3 K. B. 628.

#### SUB-SECT. 8.—STRANGERS.

**921. General rule.**—*ANON.* (1641), No. 880, *ante*.

**922.** — *ANON.* (1649), Clay. 140.

**923.** — *It has been said, that the husband is a mere stranger as regards the lease, & that deft. is estopped from denying his title; but it should be observed, that deft. is a mere stranger as regards the interest of lessor, & therefore, he is entitled to show, generally, that it has ceased (HOLROYD, J.).—HILL v. SAUNDERS* (1825), 4 B. & C. 529; 7 Dow. & Ry. K. B. 17; 4 L. J. O. S. K. B. 2; 107 E. R. 1157.

*Annotation*:—*Mentd.* *Jones v. Clarke* (1842), 3 Q. B. 194.

**924.** — *The occupier of chambers in Lincoln's Inn conveyed them, with the usual permission given by the trustees of the estates of the Inn, for a valuable consideration, to lessor of pltf. & subsequently conveyed them for value, with a similar permission, to deft., who took possession:—Held: the lessor of pltf. was not entitled to recover possession in ejectment, inasmuch as the doctrine of estoppel did not operate, there being no privity of estate between deft. & the original occupier who conveyed, the privity of estate being between deft. & the trustees of the Inn.—DOE d. MARCHANT v. ERRINGTON* (1839), 6 Bing. N. C. 79; 8 Scott, 210; 9 L. J. C. P. 9; 3 Jur. 1126; 133 E. R. 31.

*Annotation*:—*Refd.* *Doe d. Butcher v. Musgrave* (1840), 1 Man. & G. 625.

**925.** — *To trespass de bonis asportatis, deft. pleaded that by indenture of July 29, 1847, it was agreed between Q. & deft., who then, & during all the time thereafter mentioned, was possessed of certain premises for a term unexpired therein, that Q. should hold the premises as tenant at will to deft., at the yearly rent of £150 payable quarterly; for which rent it should be lawful for deft. to distrain as landlords may for rent reserved on leases for years; that Q. held the premises under the indenture & agreement; that rent for three years & a quarter, during all which time Q. held the premises under the indenture as such tenant, & deft. was possessed of them as aforesaid, became due; whereupon deft. distrained the goods for rent. Pltf. demurred, after setting out on over the indenture, whereby, after reciting that the premises in question were demised by M. to Q. for 21 years wanting one day; & that deft. had consented to lend Q. £400 on the same being secured as thereafter mentioned; it was witnessed that Q. demised the premises by way of mtge. to deft., at a peppercorn-rent, & it was further agreed, that Q. should hold the premises as tenant at will to deft., at the yearly rent of £150, with power of distress:—Held: (1) the plea was bad, for not alleging a seisin in fee in deft., or deducing a title so as to enable him to distrain the goods of pltf., who neither was a party to the deed, nor claimed under Q.*

(2) In order to justify a distress of this kind, the plea ought to commence by alleging a seisin in fee, & regularly trace a complete title down to deft. In the present case, there is only a title by

#### PART V. SECT. 6, SUB-SECT. 8.

**921 i. General rule.**—A recital in a deed of a particular fact is binding on one who has executed the deed, although it was not executed by him who relies on the estoppel.—*HUNGERFORD v. BECHER* (1855), 5 L. C. L. R. 417.—*IR.*



*Sect. 6.—On whom binding and who may take advantage of estoppel: Sub-sect. 8. Sect. 7: Sub-sects. 1 & 2.]*

estoppel between the parties to the deed, & it is  
deft. or  
(1852),

8 Exch. 138; 21 L. J. Ex. 336; 22 L. J. Ex. 18;  
20 L. T. O. S. 81, 83; 16 Jur. 1001; 1 W. R.  
39; 155 E. R. 1292.

*Annotation:—Generally, Mentd. Re Lord (1854), 1 K. & J.  
90.*

**926.** —.]—A person entitled to a legacy charged upon testator's real estate, received from the exor., who was also devisee of the real estate, a promissory note for the amount of the legacy. The legatee subsequently, at the request of the exor., & to enable him to borrow money upon the land, executed a deed reciting payment of the legacy, & purporting to release the exor. & the real & personal estate of testator from the legacy. The legacy remained unpaid, & no interest was paid upon the legacy, or upon the promissory note, for twelve years:—*Held*: as between devisee & legatee, the land still remained charged with the legacy.—*HORNOR v. HEATH* (1856), 27 L. T. O. S. 330, L. J.J.

**927.** —.]—Pltf., in an action of ejectment, brought in 1862, had executed a mtge. in fee of the premises in 1844, in the lifetime of his mother, who was then in possession, to one J.; & deft., who had purchased under a power of sale contained in this mtge., for four years preceding the issue of the writ, had been in the receipt of the rents. Pltf. in 1861 took out letters of administration to his mother, who died in 1848, & claimed title, as administrator, to the residue of an unexpired term of years determinable on lives existing at the date of the issue of the writ. At the trial pltf. gave evidence that the premises were in the possession of his mother in her lifetime, & in order to cut down the legal presumption of a seisin in fee, gave parol evidence to show the interest his mother took was less than the fee, by giving evidence of search for & probable loss of & secondary evidence of the contents of a deed of assignment of the premises for the remainder of a term of 99 years, subject to lives, under which the mother was alleged to have been in possession, & under which he now claimed:—*Held*: (1) there was evidence for the jury of the existence of such a term, & it might be presumed that the possession of the mother was with reference to that term; (2) for the purposes of this action, pltf. was a stranger & suing as administrator to his mother in a different right from that in which he had executed the mtge. in his mother's lifetime, & the fact of his having a beneficial interest in the premises, as one of his mother's next-of-kin, did not make him the less a stranger, & he was, therefore, not estopped by the mtge. from relying on his title to the term as administrator.—*METTERS v. BROWN* (1863), 1 H. & C. 686; 1 New Rep. 367; 32 L. J. Ex. 138; 7 L. T. 795; 9 Jur. N. S. 416; 11 W. R. 429; 158 E. R. 1060.

**928.** —.]—Where pltf., a purchaser of a legal estate, had express notice that defts. obtained possession of the land bought under a deed which purported to convey to them an equitable title thereto:—*Held*: he must convey the legal estate to defts. Erroneous recitals in the deed as to the derivation of the equitable title actually transferred did not estop defts. or vitiate the notice.—

*TRINIDAD ASPHALTE Co. v. CORYAT*, [1896] A. C. 587; 65 L. J. P. C. 100; 75 L. T. 108; 45 W. R. 225, P. C.

**929.** —.]—In 1904, a society wrote by its secretary, W., offering defts. for erection in their borough a fountain bearing an inscription in memory of a dog stated to have been done to death in the laboratories of University College by vivisections extending over more than two months, & in memory of 232 other dogs stated to have been vivisected in the same place during 1903. Defts. accepted the offer, & the fountain was erected in 1906, at the expense of W. Prior to its being unveiled, defts. obtained from W. the deposit of £300 to answer any litigation against them in respect of the inscription & a covenant of indemnity. This covenant was contained in an agreement of Sept. 12, 1906, which recited the offer of the fountain by the Society, & that defts. had agreed to erect & maintain it. In Mar. 1910, defts. removed the fountain, & the present action was brought by W. & by two members of the Society on its behalf, for a mandatory injunction to compel defts. to re-erect it. They relied on the recital in the agreement of Sept. 12, 1906, as constituting an agreement by estoppel to maintain the fountain: *Held*: (1) on the construction of the agreement of Sept. 12, 1906, the recital had reference to an agreement by defts., with the Society, & not with W., & could not operate as an agreement by estoppel in favour of W., & as the Society was not a party to the agreement there was no estoppel as between it & defts.; (2) the inscription on the fountain was defamatory, & its publication contrary to the public interest as being calculated to lead to a breach of the peace; & therefore, the ct. would not in any case have enforced by mandatory injunction an agreement to maintain the fountain.—*WOODWARD v. BATTERSEA BOROUGH COUNCIL* (1911), 104 L. T. 51; 75 J. P. 193; 27 T. L. R. 196; 9 L. G. R. 248.

*See, further, Sub-sect. 2, ante.*

**930.** — *Deed poll.*—(1) An assignee of a lease by indenture is estopped by the deed which estops his assignor. Therefore he cannot plead *non dimisit*. But if an estate be created by deed poll, *ne lessa, ne grantu, ne chargea, ne enfeoffu, ne dona*, etc., are good pleas for a stranger to the deed.

He who takes an estate under a deed is privy in estate, & therefore never can be in a better position than he from whom he takes it (*MANSFIELD, C.J.*).—*TAYLOR v. NEEDHAM* (1810), 2 Taunt. 278; 127 E. R. 1084.

*Annotations:—As to (1) Reidd. Seymour v. Franco* (1828), 7 L. J. O. S. K. B. 18; *Eight d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278; *Cooke v. Blake* (1847), 1 Exch. 220; *Magnay v. Edwards* (1853), 1 C. L. R. 141.

## SECT. 7.—EXCEPTIONS.

### SUB-SECT. 1.—FRAUD.

*See, generally, MISREPRESENTATION & FRAUD.*

**931.** *As against party guilty of fraud.*—I am ready to admit that beyond the strict legal estoppel by deed & *in pais*, we have received into the law of England a sort of moral estoppel. We say no man shall be heard to allege his own crime or turpitude in his defence. In that sense I agree that no man shall take advantage of his own fraud, & he shall not set up his own fraud by way of defence (*EYRE, C.B.*).—*GIBSON v. MINET* (1791),

**Annotations:—***Refd.* *Beeman v. Duck* (1843), 11 M. & W. 251; *Ashpitel v. Bryan* (1864), 5 B. & S. 723; *Vaghiano v. Bank of England* (1889), 23 Q. B. D. 243. **Mentd.** *Bishop v. Hayward* (1791), 4 Term Rep. 470; *Master v. Miller* (1791), 4 Term Rep. 320; *Ex p. Royal Bank of Scotland* (1815), 19 Ves. 310; *Stone v. Marsh* (1827), 6 B. & C. 551; *Re Jones, Ex p. Jones* (1833), 3 Deac. & Ch. 525; *Taylor v. Mosely* (1833), 6 C. & P. 273; *Saunderson v. Piper* (1839), 5 Bing. N. C. 425; *White v. Spettigue* (1845), 13 M. & W. 603; *Flower v. Allan* (1863), 2 H. & C. 688; *Sewell v. Burdick* (1884), 10 App. Cas. 74; *Chamberlain v. Young*, [1893] 2 Q. B. 206.

**Annotations:**—**Apld.** *Phillipotts v. Phillipotts* (1850), 10 C. B. 85. **Consd.** *Bowes v. Foster* (1858), 2 H. & N. 779. **Refd.** *Prole v. Wiggins* (1836), 3 Bing. N. C. 230; *Doe d. Williams v. Lloyd* (1839), 5 Bing. N. C. 741; *Bessey v. Windham* (1844), 6 Q. B. 166. **Mentd.** *Doe d. Garnons v. Knight* (1826), 5 B. & C. 671.

*Annotations*:—**Consd.** *Phillpotts v. Phillpotts* (1850), 10 C. B. 85. **Refd.** *White v. Morris* (1852), 11 C. B. 1015; *Bowes v. Foster* (1858), 27 L. J. Ex. 262. **Mentd.** *Haylock v. Sparke* (1853), 1 E. & B. 471.

935. —.]—A husband took a lease of land in his wife's name & built a house upon it with his own money. He used his wife's name in the transaction with her knowledge & connivance because he was in debt, & was desirous of protecting the property from his creditors. In an action by him against his wife for a declaration that she held the property as trustee for him :—*Held* : he could not be allowed to set up his own fraudulent design as rebutting the presumption that the conveyance was intended as a gift to her, & she was entitled to retain the property for her own use, notwithstanding that she was a party to the fraud.—*GASCOIGNE v. GASCOIGNE*, [1918] 1 K. B. 223 ; 87 L. J. K. B. 333 ; 118 L. T. 347 ; 34 T. L. R. 168, D. C.

937. —. — HAYNE v. MALTBY, No. 994, *post*.

**PART V. SECT. 7, SUB-SECT. 2.**

printed the answer was not true. There was nothing to prevent A. from reading over the questions & answer before signing the application:—*Held*: the co. was estopped from setting up the breach of warranty on the ground that such breach was caused by the misconduct or negligence of their agent.—**BALLANTYNE v. MUTUAL LIFE INSURANCE Co. OF NEW YORK** (1891), 17 V. L. R. 520.—**AUS.**

bond they had given, appearing on the face of it to be given for those purposes, they pleaded that the bond was not given for those purposes:—*Held*: insufficient, as they showed no case of fraud; therefore the general rule of estoppel applied.—*HILL v. MANCHESTER & SALFORD WATER WORKS Co.* (1831), 2 B. & Ad. 544; 1 L. J. K. B. 230; 109 E. R. 1245.

*Annotations:—***Consd.** Horton v. Westminster Improvement Comrs. (1852), 7 Exch. 780. **Refd.** Lainson v. Tremere (1834), 1 Ad. & El. 792; Doe d. Chandler v. Ford (1835), 3 Ad. & El. 649; Royal British Bank v. Turquand (1855), 5 E. & B. 248; *Re Companies Acts, Ex p.* Watson (1888), 21 Q. B. D. 301. **Mentd.** Clarke v. Imperial Gas Light & Coke Co. (1832), 2 L. J. K. B. 30; Norwich Corpn. v. Norfolk Ry. (1855), 4 E. & B. 397; Prince of Wales Assoc. v. Harding (1858), E. B. & E. 183.

939. —.]—By the deed of copartnery of a joint-stock bank, the directors were to submit yearly abstracts of the co.'s affairs, showing a balance, which abstracts should be binding on the partners, who were to have no right to examine the co.'s books ; but it was to be competent to a majority of partners at a general meeting to appoint two of themselves to examine & report on the co.'s affairs in general. It was also provided that, if any time it should be found on balancing the books that the losses amounted to a certain sum, the co. was to be *ipso facto* dissolved. A., a partner, filed his bill, alleging that the yearly abstracts were false & fraudulent ; that the losses already equalled the specified amount ; that the directors had misapplied the funds, & by undue influence procured a majority of partners to back them ; & that the co. was insolvent :—*Held* : A. was not estopped by the deed from seeking redress in a ct. of equity ; for the deed contemplated a case where the abstracts were *bond fide*, & not fraudulent.—NORTH BRITISH BANK v. COLLINS (1852), 20 L. T. O. S. 157 ; 1 W. R. 537, H. L.

**941. Fraud of testator.]—**PHILLPOTTS v. PHILLPOTTS, No. 958, *post*.

942. As between party deceived—& innocent third party.]—HUNTER v. WALTERS, CURLING v. WALTERS, DARNELL v. HUNTER, No. 851, *ante*.

943. — — —.]—ONWARD BUILDING SOCIETY  
v. SMITHSON, No. 734, *ante*.

*See, further, DEEDS, Vol. XVII., p. 235.*

944. — —.]—KING v. SMITH, No. 851, ante.

*See* MISTAKE.

**945. Whether party estopped.]**—Where a man is called upon to join in a conveyance for the purpose of obviating a specified objection to title, he will not be bound by it, as to any interest of which he has not been apprised. But, if he consents to

induced by the conduct of the other party.—**AUSTRALIA HOTEL CO., LTD.** v. **MOORE** (1899), 20 N. S. W. Eq. 155.—**AUS.**

**945** *iii.* —.]—An admission by deed that an amount is due is binding, even when the amount has been arrived at by taking an account upon an incorrect basis.—*SINCLAIR v. DANIELL* (1879), O. B. & F. 1.—N.Z.

**945 iv. —**]—A lessor is not estopped from seeking to rectify a mistake in the description of the land in his lease by having received the whole rent since the discovery of the mistake, if at the time he was still asserting the mistake.—**FARELLY v.**



**Sect. 7.—Exceptions: Sub-sects. 2, 3 & 4.]**

join in the conveyance, upon being told generally that there are objections to the title, he must be taken to have inquired into the nature of those objections, & cannot afterwards raise a question as to the extent of his information.—**CHOLMONDELEY (EARL) v. CLINTON (LORD)** (1817), 2 Mer. 171; 35 E. R. 905; *subsequent proceedings* (1820), 2 Jac. & W. 1; (1821), 4 Bli. 1, H. L.

*Annotations:—Mentd.* Grenfell v. Girdlestone (1837), 2 Y. & C. Ex. 662; Sturgis v. Champneys (1839), 5 My. & Cr. 97.

**946. — In equity.]—(1) Qu.:** if a party has by his own act put a construction upon a deed, whether he or *a fortiori*, those who claim under can dispute that construction.

**(2) Qu.:** if a deed is executed which does not effectuate the intention of grantor, & parties who claim under it act under a common mistake that A. is the supposed grantee, & A. creates incumbrances upon the land supposed to be granted, whether it is not a bar to relief in equity, & whether relief will be granted after such transactions & a lapse of time.

If a deed of confirmation is executed under a mistake, & the party confirming being dead, there is a probability from circumstances that he would not, or a doubt whether he could have raised any question upon the mistake, it is doubtful whether a ct. of equity would permit parties claiming under him to take advantage of the mistake.—**CHOLMONDELEY (EARL) v. CLINTON (LORD)** (1821), 4 Bli. 1; 4 E. R. 721, H. L.; *subsequent proceedings* (1823), Turn. & R. 107, L. C.

*Annotations:—As to (2) Refd.* Stone v. Godfrey (1854), 5 De G. M. & G. 76. *Generally, Mentd.* Dillon v. Parker (1822), Jac. 505; Bennett v. Colley (1832), 5 Sim. 181; Ashton v. Milne (1833), 6 Sim. 369; Leith v. Irvine (1833), 1 My. & K. 277; Parrott v. Palmer (1834), 3 My. & K. 632; Grenfell v. Girdlestone (1837), 2 Y. & C. Ex. 662; Bent v. Young (1838), 2 Jur. 202; Sturgis v. Champneys (1839), 5 My. & Cr. 97; Davies v. Quarterman (1840), 4 Y. & C. Ex. 257; Anderson v. Wallis (1842), 12 L. J. Ch. 291; Boldell v. Golightly (1842), 12 L. J. Ch. 187; Sayer v. Wagstaff (1843), 2 Y. & C. Ch. Cas. 230; Farr v. Sherrife, Dykes v. Farr (1845), 4 Hare, 512; Fulham v. McCarthy (1848), 1 H. L. Cas. 703; Christ's Hospital v. Granger (1849), 1 H. & Tw. 533; A.-G. v. Murdoch (1852), 1 De G. M. & G. 86; Cottrell v. Hughes (1855), 3 C. L. R. 496; Penny v. Allen (1857), 7 De G. M. & G. 409; Robertson v. Norris (1858), 1 Giff. 421; Wing v. Angrave (1860), 8 H. L. Cas. 183; Marshall v. Smith (1862), 5 Giff. 37; Pearce v. Morris (1869), 5 Ch. App. (1882), 20 C. L. R. 645; Magnus v. Quinquaglia National Bank (1887), 36 Ch. D. 25; Farrar v. Farrars

EVANSON (1886), 5 N. Z. L. R. 155.—**N.Z.**

**945 v. — .]**—A. obtained a decree for the specific performance by B. of a contract for the sale of lands let to A. by B. with an option to purchase. Both the claim & the decree described the lands as contained within certain sectional boundaries which both parties then believed to comprise the whole of the lands of which A. had been in possession. B. executed a transfer to A. which followed the description in the claim & decree. It was afterwards found that part of the lands of which A. had been & had remained, in possession, & of which he had intended to claim a transfer, extended beyond the sectional boundaries given in the claim & decree, & so had not been included in the transfer to A. B. brought an action to recover possession of this part from A., & A. counter-claimed for a transfer of it from B.:—*Held:* A. was not estopped by the decree in the former suit, as there never had been any election, actual or imputable, to give up anything to which the agreement & possession entitled him.—**BLINKHORNE v. BRECHLEY** (1898), 16 N. Z. L. R.

**498.—N.Z.**

**945 vi. — .]**—A testator by his trust settlement directed his trustees to set apart & secure to each of his daughters in life, & their children respectively in fee, the sum of £1,500, it being declared that whatever sums might have already been paid by him to any of his children & vouched by receipt or other written documents, should be accounted as so much of the provision falling to such child under his settlement. Several years before, testator had, on the occasion of the marriage of one of his daughters, conveyed to her a house, & received from her an acknowledgment, declaring that the conveyance was to be equivalent to £1,000 of her patrimony:—*Held:* the children were not barred from insisting to be preferred according to the full measure of their legal rights in respect of their having accepted of interest, or granted discharges on the mistaken footing that their provisions, as given by the settlement, were of less amount than they were truly by law entitled to.—**HUTCHISON v. ANDERSON'S TRUSTEES** (1853), 15 Dunl. (Ct. of Sess.) 570; 25 Sc. Jur. 346; 2 Stuart, 323.—**SCOT.**

(1888), 40 Ch. D. 395; Bolton v. Salmon, [1891] 2 Ch. 48; Soar v. Ashwell, [1893] 2 Q. B. 390; Turner v. Walsh, [1909] 2 K. B. 484.

**947. — .]**—A husband mortgaged some property which was afterwards put into settlement. The settlement exercised by the husband & wife contained a recital that the mtge. debt was £1,200, whereas it was in fact £1,400. There was evidence to show that the wife had admitted the error & acted on the assumption that the true sum was £1,400. After the death of mtgee. & his wife:—*Held:* parties claiming under the husband were not estopped by his execution of the settlement from disputing its accuracy.—**SCHOLEFIELD v. LOCKWOOD** (No. 2) (1863), 32 Beav. 436; 1 New Rep. 559; 33 L. J. Ch. 106; 8 L. T. 409; 9 Jur. N. S. 738; 11 W. R. 555; 55 E. R. 17; *on appeal*, 4 De G. J. & Sm. 22, L. C.

**948. — .]**—A party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact, & not through fraud or deception on his part.—**BROOKE v. HA** (1868), L. R. 6 Eq. 25.

**949. — .]**—**Contributory in winding up of building society.]—E.**, the surveyor of a benefit building society, at the request of the directors, agreed to purchase land of the society on the understanding that he could immediately mortgage it to the trustees of the society for the full amount of the purchase-money. The land was conveyed to E., & he executed, without reading it or knowing its contents, a deed prepared by the solr. of the society mortgaging the land to the trustees, which he believed to be an ordinary mtge. for securing the purchase-money & interest. The deed in fact recited that E. was a member of the society, & had subscribed for a certain number of shares, & that the purchase-money had been advanced to him in respect of his shares, & it contained a covenant by E. to make payments on the shares according to the rules of the society. E. never applied for shares, & did not comply with any of the conditions prescribed by the rules for the admission of members, his name was not entered in the register of members, & the directors never called upon him to make any payments as a member. Two years after the date of the mtge. society was ordered to be wound

the mtge. deed did not represent the real trans-

**945 vii. — .]**—A. possessed two contiguous stances of ground, fenced out at different times by the same proprietor. He built two tenements upon the ground, but the northern tenement extended twelve feet over the southern stance. Many years thereafter he sold each of the stances, with the buildings thereon, to separate purchasers, who, in the belief that each tenement stood entirely upon its own stance, entered each into possession of one of the tenements. Each purchaser afterwards resold, repeating the former erroneous description of the subjects. The second purchaser of the southern stance threatened to evict the second purchaser of the northern from the portion of the northern tenement built on his ground. In an action of reduction at the instance of the second purchaser of the northern tenement against the first:—*Held:* the sale was reducible on the ground of essential error, & was not barred by the terms of the articles of roup under which the sale had taken place, binding the purchaser to have satisfied himself as to the extent & rental of the subjects.—**HAMILTON v. LUMSDEN** (1861), 33 Sc. Jur. 319.—**SCOT.**



action, & E. could not be made a contributory.—*Re VICTORIA PERMANENT BENEFIT BUILDING INVESTMENT & FREEHOLD LAND SOCIETY, EMPSON'S CASE* (1870), 1 L. R. 9 Eq. 597; 22 L. T. 855; 18 W. R. 585.

**950 — Composition with creditors.]**—When a creditor compounds with his debtor under a false impression, in which debtor knowingly leaves him, as to the extent of debtor's estate, creditor is not estopped from suing for the balance of his debt.—*VINE v. MITCHELL* (1834), 1 Mood. & R. 337, N. P.

**951. — — —.]**—Although creditor gave his assent to a proposal of bkpt. to assign his effects for the benefit of his creditors, yet, where the deed contained an unexplained stipulation in favour of a particular creditor, quite different from what he had reason to suppose it would contain:—*Held*: the first-named creditor was not bound by the deed, but might sue out a *fiat* upon it as an act of bkpcy.—*Re MARSHALL, Ex p. MARSHALL* (1841), 1 Mont. D. & De G. 575; 10 L. J. Bcy. 34; 5 Jur. 466, Ct. of R.

**952. — Interest on purchase money miscalculated.]**—Deft. purchased a policy of assurance sold by pltf., subject to a condition that the purchaser should pay down a deposit of £20 *per cent.*, & sign an agreement for payment of the remainder on Jun. 8, 1835, but should the completion of the purchase be delayed, purchaser was to pay interest on the balance of the purchase money at £5 *per cent. per annum*, from that day until the purchase was completed. The purchase was not completed until Jan. 1836, when deft. paid the purchase money & interest, & pltf. then delivered to him an assignment of the policy, containing a release of deft. from all claim in respect of the purchase of the policy & all moneys due to pltf. in respect thereof. It was afterwards discovered that pltf.'s attorney had miscalculated the interest by £34:—*Held*: in an action to recover this sum, the release was a bar.—*HARDING v. AMBLER* (1838), 3 M. & W. 279; 1 Horn. & H. 48; 7 L. J. Ex. 132; 2 Jur. 305; 150 E. R. 1149.

**953. — Truth known to party setting up deed.]**—Where a mtge. was taken in part in respect of a sum for which mtgee. represented himself to mtgor. as being liable as a surety for the latter, & such representation was erroneous, to the knowledge of mtgee.:—*Held*: to that extent the security could not be supported.—*LAKE v. BRUTTON* (1856), 8 De G. M. & G. 440; 25 L. J. Ch. 842; 27 L. T. O. S. 294; 2 Jur. N. S. 839; 44 E. R. 460, L. JJ.

*Annotations*:—*Mentd.* Campbell v. Rothwell (1877), 47 L. J. Q. B. 144; Forbes v. Jackson (1882), 19 Ch. D. 615.

#### SUB-SECT. 3.—ILLEGALITY.

**954. General rule.]**—*HORTON v. WESTMINSTER IMPROVEMENT COMRS.*, No. 914, *ante*.

**955. — —.]**—*DOE d. CHANDLER v. FORD*, No. 847, *ante*.

**956. — —.]**—In an action on a bond by the administrators of obligee, it was pleaded that the bond was given in pursuance of a corrupt agreement, that obligee should take the son of obligor,

as his apprentice to learn the profession of surgeon, apothecary, & man-midwife, for two years only, but that in certain articles of agreement it should be made to appear that the apprentice was articulated for five years; in order that by such corrupt contrivance the parties might fraudulently & illegally procure the apprentice to be admitted for the purpose of practising as an apothecary upon serving two years instead of five years, as required by the statute. After verdict, it was moved to enter judgment for pltf., *non obstante veredicto*, upon the ground that no apprenticeship for five years was required for the business of a surgeon, & that deft. could not object to the legality of his own bond; but the ct. refused to grant a rule.—*PROLE v. WIGGINS* (1836), 3 Bing. N. C. 230; 2 Hodg. 204; 3 Scott, 601; 6 L. J. C. P. 2; 132 E. R. 398.

**957. Operation against privies.]**—Where a deceased party had conveyed to lessors of pltf. certain premises which he inhabited until his death, by a deed of sale, under Charitable Uses Act, 1736 (c. 36), & survived the transaction for more than a year, & shortly after the execution of the deed, he had transferred to trustees a certain sum of money, greater by a few pounds than that which he received on the sale, for the purpose of enabling them to build a chapel upon the premises which had been sold:—*Held*: it was competent to deft., the heir-at-law, to give evidence to the jury that the transaction was fraudulent & collusive, for the purpose of evading above Act; he was not estopped from so doing by the fraud of the ancestor through whom he claimed.—*DOE d. WILLIAMS v. LLOYD* (1839), 5 Bing. N. C. 741; 8 Scott, 93; 9 L. J. C. P. 83; 3 Jur. 265, 751; 132 E. R. 1286; *subsequent proceedings* (1840), 1 Man. & G. 671.

*Annotation*:—*Refd.* *Re Holland, Gregg v. Holland*, [1901] 2 Ch. 145.

**958. Whether rule absolute.]**—In covenant upon an annuity deed:—*Held*: defts., exors., were estopped from pleading that the deed was made fraudulently & collusively between testator & pltf. for the purpose of multiplying voices, & subject to a secret trust & condition that no estate or interest should pass beneficially to pltf. by the indenture. Under 7 & 8 Will. 3, c. 25, s. 7, & 10 Ann. c. 23, s. 1, a fraudulent conveyance made for the mere purpose of conferring a vote, is void only to the extent of preventing the right of voting from being acquired, but is valid & effectual, as between the parties, to pass the interest.—*PHILLPOTTS v. PHILLPOTTS* (1850), 10 C. B. 85; 20 L. J. C. P. 11; 138 E. R. 35.

*Annotations*:—*Refd.* Bowes v. Foster (1858), 2 H. & N. 779. *Mentd.* Badische Anilin und Soda Fabrik v. Hickson, [1906] A. C. 419.

**Illegal contracts generally.]**—See CONTRACT, Vol. XII., pp. 234 *et seq.*

**Void deeds.]**—See Sect. 2, sub-sect. 4, *ante*.

**Deeds ultra vires.]**—See Sect. 6, sub-sect. 6, *ante*.

#### SUB-SECT. 4.—DURESS.

See CONTRACT, Vol. XII., pp. 92 *et seq.*; FRAUDULENT & VOIDABLE CONVEYANCES.

#### PART V. SECT. 7, SUB-SECT. 3.

**954 i. General rule.]**—A debenture issued by a municipal council under their corporate seal, & signed by the head of such corp., for payment of a debt due or loan contracted under a bye-law which does not provide by

special rate for the payment of such debt or loan, does not estop such municipal council from setting up as a defence to an action on the debenture the invalidity & nullity of such bye-law.—*MELLISH v. BRANTFORD TOWN COUNCIL* (1852), 2 C. P. 35.—**CAN.**

**954 ii. — —.]**—Where by statute power is given to grant a lease for 21 years, & a lease is granted for that term with the right to perpetual renewal, such lease is wholly void.—*OTAGO HARBOUR BOARD v. SPEDDING* (1885), 4 N. Z. L. R. 272.—**N.Z.**

## SECT. 8.—OPERATION OF THE ESTOPPEL.

## SUB-SECT. 1.—AS TO MATTERS COLLATERAL.

**959. General rule.**—(1) Where a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, & a contract is made with reference to that recital, it is not, as between the parties to the instrument, & in an action upon it, competent to the party bound to deny the recital; & a recital in an instrument not under seal may be such as to be conclusive to the same extent.

(2) But a party to an instrument is not estopped, in an action by another party, not founded on the deed, & wholly collateral to it, to dispute the facts so admitted; but evidence of the circumstances under which such admission was made, is receivable to show that the admission was inconsiderately made, & is not entitled to weight as a proof of the fact it is used to establish.

(3) An estoppel which is not pleaded as such is not conclusive, but if given in evidence, leaves the matter at large before the jury.—*CARPENTER v. BULLER* (1841), 8 M. & W. 209; 10 L. J. Ex. 393; 151 E. R. 1013.

*Annotations*:—As to (1) *Apld.* *Re Simpson, Ex p. Morgan* (1876), 2 Ch. D. 72. *Refd.* *Young v. Raincock* (1849), 7 C. B. 310; *Wiles v. Woodward* (1850), 5 Exch. 557. As to (2) *Apld.* *Carter v. Carter* (1857), 3 K. & J. 617; *Fraser v. Pendlebury* (1862), 31 L. J. C. P. 1; *Re Simpson, Ex p. Morgan* (1876), 2 Ch. D. 72. *Refd.* *Stroughill v. Buck* (1850), 14 Q. B. 781; *S. E. Ry. v. Warton* (1861), 6 H. & N. 520. *Generally, Mentd.* *Re Foster, Barnato v. Foster*, [1920] 3 K. B. 306.

**960.** —.—*WILES v. WOODWARD*, No. 814, *ante*.

**961.** —.—The doctrine of estoppel by deed only applies between the parties to the deed & to matters arising out of the deed. In collateral matters the deed would be evidence, but no estoppel.—*CARTER v. CARTER* (1857), 3 K. & J. 617; 27 L. J. Ch. 74; 30 L. T. O. S. 349; 4 Jur. N. S. 63; 69 E. R. 1256.

*Annotations*:—*Refd.* *Heath v. Crealock* (1874), 31 L. T. 650; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34. *Mentd.* *Bates v. Johnson* (1859), John. 304; *Prosser v. Rice* (1859), 28 Beav. 68; *Young v. Young* (1867), L. R. 3 Eq. 801; *Wilkinson v. Castle* (1868), 37 L. J. Ch. 467; *Pilcher v. Rawlins* (1872), 7 Ch. App. 259; *Blackwood v. London Chartered Bank of Australia* (1874), L. R. 5 P. C. 92; *Mumford v. Stohwasser* (1874), 22 W. R. 833; *Re Palmer, Clarke v. Palmer* (1882), 51 L. J. Ch. 634; *Clarke v. Palmer* (1883), 48 L. T. 857; *Bailey v. Barnes*, [1894] 1 Ch. 25; *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231.

**962.** —.—Declaration on a bond, conditioned for the due performance by deft. of a contract to execute certain railway works, according to a specification. Breach: that deft. did not complete three tunnels according to the specification. Plea: by way of estoppel, that, before the suit, by another deed, it was declared that, with certain exceptions therein mentioned, not relating to the causes of action, deft. & plffs. had adjusted & mutually satisfied every other claim or demand which the parties then had against each other, as plffs. & deft. did by the deed severally admit.

Replication: setting out the deed which, after reciting the contract to execute the railway works, & a provision therein, for the reference to arbitration in case deft. should be hindered in the execu-

tion of the works by plffs. or their engineers; & that plffs. had made out an account containing a variety of matters in respect of which they claimed compensation, a copy whereof was contained in a schedule to the deed, further recited: that, with the exception of the claims contained in the schedule, S. E. R. Co., plffs., & C. W., deft., had settled, adjusted & mutually satisfied every other account, claim or demand which the parties had against each other arising out of the contract, as the S. E. R. Co. & C. W. did thereby severally admit & acknowledge; but the claims of C. W. set forth in the schedule, were disputes; & that it had been agreed that the claims of C. W. in the schedule should be referred to the award of G. W.; Witnessed; that the parties covenanted to abide by the award of G. W. that the submission should not be defeated by the death of the parties, & that the costs should be in the discretion of the arbitrators, etc.:—*Held*: there was no estoppel; by the true meaning of the deed the arbitrators were confined to the matters mentioned in the schedule, & the admission was made for the purpose of the reference only.

Every deed must be construed, according to that which, looking at the document itself, appears to be the intention of the parties. It is true that in construing a deed the ct. cannot look at collateral matters, but the intention of the deed appearing upon the face of it must be regarded. In *Carpenter v. Buller*, No. 959, *ante*, it was held that a party to an instrument is not estopped in an action by another party not founded on the deed & wholly collateral to it; but evidence of the circumstances under which such admission was made is receivable to show that the admission was inconsiderately made, & not entitled to weight as proof of the fact it is used to establish. That appears to me to be conclusive. The arbitration was a wholly collateral matter. The admission, is evidence, & may be strong or of very little value according to circumstances (*MARTIN, B.*).—*SOUTH EASTERN RY. CO. v. WARTON* (1861), 6 H. & N. 520; 31 L. J. Ex. 515; 158 E. R. 214.

**963.** —.—A mtgee. having agreed to assign his security on payment of principal, interest & costs, made a claim for costs to which he was not entitled. Assignee, on mtgee. refusing to execute the assignment on any other terms, by the direction of mtgor., paid the whole sum claimed under protest:—*Held*: (1) mtgor. might recover the excess in an action for money had & received, not as money paid under duress in the strict legal sense of the term, but as a payment made involuntarily under undue pressure; (2) mtgor. was not estopped from setting up this claim by the recital in the assignment to which he was a party that the whole sum paid was due for principal, interest & costs; a recital, although an estoppel upon the parties to the deed, where the matter of the deed itself is in dispute, is not so in a matter which is collateral to the main object of the deed.—*FRASER v. PENDLEBURY* (1861), 31 L. J. C. P. 1; 10 W. R. 101.

*Annotations*:—As to (2) *Refd.* *Brandon Hill v. Lane*, [1915] 1 K. B. 250; *Re Foster, Barnato v. Foster*, [1920] 3 K. B. 306.

## PART V. SECT. 8, SUB-SECT. 1.

**959 i. General rule.**—There can be no estoppel arising out of a deed in respect to a right of action arising out of something wholly collateral to it.—*COAST LUMBER CO. v. BATES*, [1917] 2 W. W. R. 1223; 37 D. L. R. 398.—*CAN.*

**959 ii.** —.—When a recital in a deed is relied on in a proceeding collateral to the deed, or to the purpose

for which the deed was made, it does not work an estoppel, but is simply a piece of evidence.—*DONEGALL v. TEMPLEMORE* (1858), 9 I. C. L. R. 374.—*IR.*

**959 iii.** —.—A licensee of a patent cannot dispute the title of the licensor in connection with the purpose for which the licence was granted, but is entitled to dispute the validity of the licensor's title in any other con-

nection.—*AFRICAN GOLD RECOVERY CO. v. LACE* (1894), 1 O. R. 240.—*S. AF.*

*c. Release*—*Whether bar to execution of judgment.*—*Sci. fu.* by J., assignee of W., assignee of R., deceased, who had recovered judgment in Trinity Term, 1811, against P.; defts. being J., devisee of the heir-at-law of P., & the terre tenants of P.:—*Held*: a release by the survivor to the party under whom the terre tenants claimed,

**964.** —.]—Recitals in a deed do not operate as an estoppel against a party to the deed in an action not founded on the deed, but collateral to it.—*Re SIMPSON, Ex p. MORGAN* (1876), 2 Ch. D. 72; 45 L. J. Bey. 36; 34 L. T. 329; 24 W. R. 414, C. A.

*Annotations*:—**Refd.** *Brandon Hill v. Lane*, [1915] 1 K. B. 250; *Re Foster, Barnato v. Foster*, [1920] 3 K. B. 300. **Mentd.** *Sugden v. St. Leonards* (No. 1) (1876), 31 L. T. 289.

**965.** —.]—The valuation in a valued policy is conclusive between the parties only for the purpose of the contract itself & of the rights arising from it. Compensation paid *aliunde* to the assured, in respect of loss not covered by a valued policy, cannot be recovered by an underwriter who has paid as for a total loss; since the loss insured against is not diminished by the compensation, & the assured is not estopped from alleging that there was an excess in value above the amount agreed in the policy.—*BURNAND v. RODOCANACHI* (1882), 7 App. Cas. 333; 51 L. J. Q. B. 548; 47 L. T. 277; 31 W. R. 65; 4 Asp. M. L. C. 576, H. L.

*Annotations*:—**Refd.** *British Dominions General Insee. v. Duder*, [1915] 2 K. B. 394. **Mentd.** *Castellain v. Preston* (1883), 11 Q. B. D. 380; *Elgood v. Harris*, [1896] 2 Q. B. 491; *Stearns v. Village Main Reef Gold Mining Co.* (1905), 21 T. L. R. 236; *The Commonwealth*, [1907] P. 216; *City Tailors v. Evans* (1921), 91 L. J. K. B. 379; *Edwards v. Motor Union Insee.*, [1922] 2 K. B. 249.

**966. Sufficiency of stamp on bill.**—In an action by an indorsee against the acceptor of a bill, which upon the face of it purported to be a foreign bill:—*Held*: deft. was not estopped from showing, that, though dated abroad, the bill was in fact drawn in London; although it was proved that this was done at his express request, & that pltf., who took the bill for value, was not cognisant of the circumstances.—*STEADMAN v. DUHAMEL* (1815), 1 C. B. 888; 14 L. J. C. P. 270; 5 L. T. O. S. 391; 135 E. R. 792.

*Annotation*:—**Mentd.** *Cave v. Mills* (1862), 6 L. T. 650.

**967. Recital of amount due for costs—Whether right to taxation lost.**—*Re FORSYTH*, No. 823, *ante*.

**968.** — —.]—*Re GOLD*, No. 821, *ante*.

#### SUB-SECT. 2.—DURATION OF THE ESTOPPEL.

**969. Estoppel created by lease.**—Estoppels shall endure no longer than the lease by which they are created.—*JAMES v. LONDON* (1585), Cro. Eliz. 36; 78 E. R. 302; *subsequent proceedings*, *sub nom. LONDON'S CASE* (1591), 4 Co. Rep. 51 a.

**970. — As between former devisee & devisees of former devisor—Effect of surrender.**—*PLEDAL'S CASE* (1567), Cro. Eliz. 36, n.; 78 E. R. 302.

*Annotation*:—**Refd.** *Magrath v. Hardy* (1838), 7 L. J. C. P.

**971. — As between landlord & tenant—Demise of lessee's own lands.**—E. J. being seised of certain premises in fee, W. by indenture demised the said premises to the said E. J. for 30 years, & E. J. died possessed. T. J., his son & heir, after

of all suits & demands, before execution had issued, was a sufficient release of the judgment; & a release in these terms was a good plea in bar to any subsequent execution of the judgment, although the deed did not in terms release executions.—*SHIRLEY v. SHIRLEY* (1855), 8 Ir. Jur. 127.—**IR.**

#### PART V. SECT. 8, SUB-SECT. 3.—A.

**977 i. As between mortgagor & mortgagee.**—A clause in a memorandum of mtgo. under Land Transfer Act, 1885, whereby the mtgor. attorns

tenant to the mtgee. creates no tenancy except by estoppel, & therefore, as third persons are not bound by the estoppel, their goods on the premises are not liable for distress for rent due to the mtgee. *Seemle*: such an attornment clause creates a tenancy by estoppel as between the mtgor. & mtgee.—*JELLICOE v. WELLINGTON LOAN CO.* (1885), 4 N. Z. L. R. 330.—**N.Z.**

**d. Operation of rule—Title subsequently acquired.**—Deft. was not estopped by his mere grant from setting

the expiry of the term, entered on the premises:—*Held*: the estoppel did not translate the freehold from one to the other.—*LONDON v. JAMES* (1584), 1 And. 128; 123 E. R. 390; *sub nom. JAMES' CASE*, Moore, K. B. 181.

**972.** — — —.]—If a man accepts a lease for years by deed indented of his own land, the estoppel ends with the lease, & then both parts of the indenture belong to lessor.—*LONDON'S CASE* (1591), 4 Co. Rep. 54 a; 76 E. R. 1007.

**973.** — — —.]—*HAYNE v. MALTBY*, No. 994, *post*.

*See, also*, No. 805, *ante*; & No. 998, *post*; & generally, **LANDLORD & TENANT**.

**974. As between mortgagor & mortgagee.**—*DAVIES v. BUSH*, No. 992, *post*.

**975.** —.]—*SIMM v. ANGLO-AMERICAN TELEGRAPH CO.*, *ANGLO-AMERICAN TELEGRAPH CO. v. SPURLING*, No. 1113, *post*.

#### SUB-SECT. 3.—ESTATES BY ESTOPPEL.

##### A. When Grantor has no Title.

**976. As between landlord & tenant.**—If one makes a lease for years in which he had nothing & afterwards purchases the lands & dies, if it be by deed his heir is estopped from avoiding it.—*ANON.* (1560), Moore, K. B. 20; 72 E. R. 412.

*See, generally*, **LANDLORD & TENANT**.

**977. As between mortgagor & mortgagee.**—A., seised in fee of an undivided moiety of lands, & holding the other moiety as tenant to B., mortgages the entirety to C. Subsequently B. recovers his moiety in ejectment against A., & afterwards grants to A. a lease for fourteen years. In ejectment by C. against A., the latter is estopped from setting up the lease from B.—*DOE d. OGLE v. VICKERS* (1836), 4 Ad. & El. 782; 6 Nev. & M. K. B. 437; 6 L. J. K. B. 266; 111 E. R. 977.

**978.** —.]—*DOE d. LEVY v. HORNE*, No. 873, *ante*.

**979. Whether arising on surrender of copyholds.**—*TAYLOR v. PHILIPS*, No. 908, *ante*.

**980.** —.]—Devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs.—*DOE d. BLACKSELL v. TOMKINS* (1809), 11 East, 185; 103 E. R. 975.

*Annotations*:—**Refd.** *Doe d. Baverstock v. Rolfe* (1838), 8 Ad. & El. 650; *Rider v. Wood* (1855), 1 K. & J. 644; *Randfield v. Randfield* (1860), 1 Drew. & Sm. 310.

**981.** —.]—A copyhold was surrendered to the use of husband & wife, for their natural lives & the life of the longer liver of them, & from & after the decease of the survivor of them, to the right heirs of the survivor for ever:—*Held*: the husband & wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor.

In *Vick v. Edwards*, No. 984, *post*, the object

up a title subsequently acquired, at least when it did not appear that he had no title at all at the time of his grant.—*FRASER v. SUTHERLAND*, 15 C. L. T. Occ. N. 17.—**CAN.**

**e.** — — —.]—S. conveyed to the deft. by deed poll of bargain & sale, land of which he had neither title nor possession, but he afterwards acquired a title, which was purchased by pltf. at sheriff's sale, without notice of the prior conveyance:—*Held*: deft. had no estate by estoppel, & pltf., not claiming under, or recognising the



*Sect. 8.—Operation of the estoppel: Sub-sect. 3, A., B. & C.]*

was to pass the fee, & LORD TALBOT thought that might be done by a fine, operating by way of estoppel. A surrender of a copyhold cannot have that effect (ABBOTT, C.J.).—*DOE v. WILSON* (1821), 4 B. & Ald. 303; 106 E. R. 918.

*Annotation:—*Refd. *Doe d. Baverstock v. Rolfe* (1838), 8 Ad. & El. 650.

**982. Operation of rule—Nature of grantor's estate—Reversion by estoppel in fee.]**—In 1742 a farm was demised by the Broderers' Co. to F. for 100 years, with a covenant for perpetual renewal. In 1827, the residue of this term had become vested in B., who in that year assigned it by way of mtge., with a proviso for redemption. On May 22, 1828, H. demised the same farm for 21 years to pltf. On Jan. 12, 1836, mtgees. & H. surrendered the premises to the Broderers' Co. On Jan. 13, 1836, the co. demised them to H. for 100 years; & shortly afterwards the unexpired residue of that term, & all the estate & interest of H. in the premises, were assigned to deft. In an action by pltf. against deft. on a covenant in the lease from H. to pltf., to keep down the rabbits on the farm, deft. pleaded, first, that H. did not demise to pltf.; second, that the reversion on that lease did not vest in deft.:—*Held*: both these issues ought to be entered for pltf.; for the lease, being by deed, was a good demise by way of estoppel, & a reversion in H. by estoppel was thereby created, which *prima facie* was a reversion in fee, & therefore was not surrendered to the Broderers' Co., but passed from H. to deft.—*STURGEON v. WINGFIELD* (1816), 15 M. & W. 224; 15 L. J. Ex. 212; 153 E. R. 831.

*Annotations:—*Refd. *Rowbotham v. Wilson* (1857), 27 L. J. Q. B. 61; *Dollen v. Batt* (1858), 4 Jur. N. S. 835; *Cuthbertson v. Irving* (1859), 4 H. & N. 742; *Hickman v. Machin* (1859), 28 L. J. Ex. 310; *Heath v. Crealock* (1874), 10 Ch. App. 22.

*See, generally, LANDLORD & TENANT.*

**983. — Whether court of equity will assist party claiming by estoppel.]**—*BENSLEY v. BURDON*, No. 780, *ante*.

— *As between lessor & lessee.]—See LANDLORD & TENANT.*

**984. — Against whom—Trustees with power of sale—Though inheritance in abeyance.]**—Lands are devised to A. & B. & the heirs of the survivor in trust to sell; though the inheritance be in abeyance, yet the trustees by a fine may make a good title by estoppel.—*VICK v. EDWARDS* (1735), 3 P. Wms. 372; 2 Eq. Cas. E. R. 1107, L. C.

*Annotations:—*Consd. *Doe d. Brune v. Martyn* (1828), 8 B. & C. 497; *Doe d. Christmas v. Oliver* (1829), 10 B. & C. 181. Refd. *Doe v. Wilson* (1821), 4 B. & Ald. 303; *Parker v. Carter* (1815), 4 Hare, 400; *Hodkinson v. Quinn* (1860), 1 John. & H. 303. Mentd. *Quarm v. Quarm*, [1892] 1 Q. B. 181.

**985. — Mortgagor disputing mortgagee's title.]**—A. having an equitable fee in certain lands, mortgaged the same to B. by lease & release. The release recited, that A. was legally or equitably entitled to the premises conveyed; & the releasor covenanted, that he was lawfully

deed to deft., was not estopped as a privy in estate with S. from setting up the legal title which S. had acquired since the conveyance to deft.—*DOE v. WETMORE* (1855), 3 All. 140.—CAN.

f. —.]—M. made a voluntary deed of certain land to L. At that time M. had no title to the land, it having been previously sold for taxes & conveyed by deed to B. There were no recitals or covenants for title in the deed to L., & by it M. did "assign, transfer,

demise, release, convey, & for ever quit claim" to L., his heirs & assigns, all his estate in the land. Subsequently B. sold & conveyed the land to M. *Held*: the deed from M. to L. did not operate by estoppel to vest the estate in the land subsequently acquired from B. in L., for there was no recital or covenants for title, it did not purport to grant any estate in the land, but merely to assign or release & quit claim to L., M.'s interest therein, & it never had any operation, for L.

or equitably seised in his demesne of & in, & otherwise well entitled to the same. The legal estate was subsequently conveyed to A., & he afterwards for a valuable consideration conveyed the same to C. Upon ejectment brought by B. against C.:—*Held*: (1) there being in the release no certain & precise averment of any seisin in A., but only a recital & covenant that he was legally or equitably entitled, C. was not thereby estopped from setting up the legal estate acquired by him, after the execution of the release; (2) the release did not operate as an estoppel by virtue of the words, "granted, bargained, sold, aliened, remised, released," etc. because the release passed nothing but what the releasor had at the time, & A. had not the legal title in the premises at the time of the release; (3) this case did not fall within the rule, that a mtgor. cannot dispute the title of his mtgee., because C. claimed as a purchaser for a valuable consideration without notice, a legal interest which was not in A. at the time of the mtge. to B., A. having then only an equitable interest, which passed to B. whose title as to that was not disputed.

(4) There are many authorities that show that an estoppel may be by any indenture or deed poll (LORD TENTERDEN, C.J.).

(5) It is a rule that an estoppel should be certain to every intent, & therefore if the thing be not precisely & directly alleged or be mere matter of supposal, it shall not be an estoppel (LORD TENTERDEN, C.J.).—*RIGHT d. JEFFERYS v. BUCKNELL* (1831), 2 B. & Ad. 278; 9 L. J. O. S. K. B. 304; 109 E. R. 1146.

*Annotations:—*As to (1) Consd. *Monypenny v. Monypenny* (1861), 9 H. L. Cas. 114. Apld. *Heath v. Crealock* (1874), 10 Ch. App. 22. Consd. *Onward Bldg. Soc. v. Smithson*, [1893] 1 Ch. 1. Refd. *General Finance, Mortgage, & Discount Co. v. Liberator Permanent Benefit Bldg. Soc.* (1878), 10 Ch. D. 15. As to (2) Refd. *Doe d. Downe v. Thompson*, *Downe v. Thompson* (1847), 9 Q. B. 1037; *Crofts v. Middleton* (1856), 25 L. J. Ch. 513. As to (3) Refd. *Pitt v. Williams* (1836), 5 Ad. & El. 885. As to (5) Refd. *Crofts v. Middleton* (1856), 25 L. J. Ch. 513; *Onward Bldg. Soc. v. Smithson*, [1893] 1 Ch. 1; *Poulton v. Moore* (1913), 83 L. J. K. B. 875.

*See, generally, MORTGAGE.*

**986. — Whether third parties.]**—

Where a person having no title purports to let land to a tenant, though the tenant is estopped from denying landlord's title, yet third parties are not estopped, & if a third party's goods are distrained, he may sue the nominal landlord for conversion.—*TADMAN v. HENMAN*, [1893] 2 Q. B. 168; 57 J. P. 664; 9 T. L. R. 509; 5 R. 479.

*See, generally, Sect. 6, ante.*

**987. — Where title subsequently acquired by possession.]**—Where grantor, who has no title, purports by deed to convey a piece of land to A. for life with remainders over & A. enters upon the land under the deed, & afterwards acquires a good title by possession against the true owner, A. & his privies are respectively estopped as against the remaindermen from disputing the validity of the deed.—*DALTON v. FITZGERALD*, [1897] 2 Ch. 86; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685; 13 T. L. R. 456; 41 Sol. Jo. 560, C. A.

*Annotations:—*Consd. *Re Anderson*, *Pegler v. Gillatt*, [1905] 2 Ch. 70. Refd. *Re Coole*, *Coole v. Flight*, [1920] 2 Ch. 536.

never paid anything for the land, never went into possession, never claimed to be owner of it or paid the taxes, & from the first repudiated the gift.—*CASSELMAN v. CASSELMAN* (1885), 9 O. R. 442.—CAN.

g. —.]—If a party, who has not any interest in an estate, enters into a contract respecting it, & subsequently acquires an interest, that interest will be bound by the contract.—*JONES v. KEARNEY* (1841), 41 E. R. 74; 1 Dr. & War. 134.—IR.

*B. When an Interest passes.*

**988. General rule.]**—When a deed enures by passing an interest, it shall not be taken by way of estoppel.—*TREPORT'S CASE* (1594), 6 Co. Rep. 14 b; 77 E. R. 274.

*Annotations:—***Refd.** *Friend v. Eastabrook* (1777), 2 Wm. Bl. 1152; *Wood v. Day* (1817), 1 Moore, C. P. 389; *Pluck v. Digges* (1831), 5 Bli. N. S. 31; *Delaney v. Fox* (1857), 11 C. B. N. S. 768. **Mentd.** *Baker v. Hacking* (1635), Cro. Car. 405; *Poole v. Haskey* (1663), O. Bridg. 364; *Baddeley v. Leppingwell* (1764), Wilm. 228; *Doe d. Campbell v. Hamilton* (1849), 13 Q. B. 977.

**989. —.]**—*COOKES v. BELLAMY* (1664), 1 Sid. 187; 82 E. R. 1048.

*Annotations:—***Mentd.** *George & Norman* (1731), 2 Barn. K. B. 51; *Franklyn v. Reeve* (1735), 2 Stra. 1023; *Pemberton v. Chapman* (1858), E. B. & E. 1056.

**990. —.]**—A lessee for years covenanted to pay the rent to lessor, his heirs & assigns, & also to deliver up possession of the demised premises at the expiration of the term, to lessor, his heirs & assigns. In an action of ejectment brought by devisee of lessor against assignee of lessee, after the expiration of the term, to recover possession of the premises:—*Held*: assignee was not estopped by such covenant from showing that lessor was only tenant for life of the premises demised.

Where an interest passes there is no estoppel (*PARKE, B.*)—*DOE d. STRODE v. SEATON* (1835), 2 Cr. M. & R. 728; Tyr. & Gr. 19; 1 Gale, 303; 5 L. J. Ex. 73; 150 E. R. 308.

*Annotations:—***Refd.** *Weeks v. Birch* (1893), 69 L. T. 759.

**Mentd.** *Barrs v. Jackson* (1842), 1 Y. & C. Ch. Cas. 585.

— **As between landlord & tenant.]**—*See* LANDLORD & TENANT.

*See, generally, LANDLORD & TENANT.*

**991. Whether interest passes—Lease of reversion without attornment.]**—*FOOTE v. BERKLEY*, No. 769, *ante*.

**992. — Mortgage by life tenants by lease, release & fine—Whether mortgagee gets fee.]**—By settlement of Feb. 1803, W. E., on the marriage of his daughter, conveyed hereditaments to trustees, their heirs, etc., to the use of himself, until the marriage; & then to the use of the husband for life; remainder to the trustees, to preserve, etc.; remainder to the wife for life; remainder to the trustees, to preserve, etc.; remainder to certain uses in favour of the child, or children of the marriage; remainder to the survivor of the husband & wife, & the heirs & assigns of such survivor for ever. By lease & release, of Nov. 1810, reciting that there was no issue, & that J. L. B. had lent the husband £6,000, for which he had given his bond in the penal sum of £12,000; the husband & wife, for better

security, granted the premises to J. L. B. in fee; but subject, & without prejudice, to the uses, etc., by the settlement limited to the child or children of the marriage, & which, on the decease of the survivor of them, should be subsisting; & subject to a proviso for redemption, & re-conveyance; & it was by the indenture covenanted by mtgors. to levy a fine *come ceo*, etc., of the premises, to enure to the use of the mtgee., his heirs, & assigns, during the lives of the mtgors., & the life of the survivor; remainder to the uses, estates, or interests, etc., limited by the settlement in favour of the children, etc., to the end that all, & every such uses, etc., might be corroborated, strengthened & confirmed; & when the same should determine, to the use of mtgee., his heirs, & assigns, for ever, subject to the proviso for redemption. A fine *come ceo* was accordingly levied. Mtge. having been paid off after the time prefixed; by lease & release, of Dec. 1812, mtgee. reconveyed the premises to the trustees, their heirs, etc., to hold to the uses of the original settlement. It was afterwards thought that the fine destroyed the contingent remainder in fee to the survivor of the husband & wife, & divested the resulting reversion in fee to W. E., settlor, & that neither interest was restored by the re-conveyance, but that a tortious contingent remainder in fee was thereby limited to the survivor, & a tortious reversion in fee resulted to mtgee., or became vested in the trustees: & to remedy the apprehended mischief, amongst other purposes, other conveyances, which were only prepared, or partly executed, & proceedings were resorted to:—*Held*: the fine, & the deed to lead its uses, were to be taken together as one & the same assurance; & therefore, the legal operation of the fine, alone, was controlled & limited by the lawful intention of the conusors apparent on the face of the deed, viz., merely to give a charge by way of security to mtgee. on their own interests, which the lease & release would have done without the fine, if a married woman had not been a necessary party; & the interest of the mtgee. in the fee depended on the estoppel, & was brought to an end by the re-conveyance.—*DAVIES v. BUSH* (1825), McCle. & Yo. 58; 148 E. R. 321.

*Annotations:—***Refd.** *Doe d. Brune v. Martyn* (1828), 8 B. & C. 497. **Mentd.** *Alexander v. Mills* (1870), 6 Ch. App. 126, n.

*C. Interest when it accrues feeds the Estoppel.*

**993. General rule.]**—*WEALE v. LOWER*, No. 891, *ante*.

## PART V. SECT. 8, SUB-SECT. 3.—B.

**h. Where interest passes.]**—Land had been granted to pltf.'s wife, & during her lifetime he had allowed deft. to occupy. She afterwards died without having had children, & pltf. brought ejectment:—*Held*: he could not recover, for deft. was not estopped from showing that pltf.'s title had expired.—*ROBERTSON v. BANNERMAN* (1859), 17 U. C. R. 508.—**CAN.**

**k. —.]**—Deft., being lessee for years, with a right to purchase the fee, in 1859 mortgaged to S. for £75, payable in four years, with a proviso that until default deft. should hold possession. In 1861 he made another mtge. of the same premises to pltf. in fee for £118, payable in six years, with a similar proviso. In 1863 the first mtge. was assigned by S. to pltf.; & on ejectment brought by him upon it, deft. set up the proviso in the second mtge., on which there had been no default:—*Held*: pltf. was not estopped, for the second mtge. might take effect by passing an interest; & if pltf. was

estopped by the second mtge., deft. was estopped by the first, & an estoppel against an estoppel sets the matter at large; but, *semble*, the redemption in a mtge. cannot operate, by estoppel or otherwise, to grant a greater estate than the mtgor. conveyed, out of which it was carved, & here he had no such title as he professed to pass.—*JAMES v. MCGIBNEY* (1864), 24 U. C. R. 155.—**CAN.**

**l. —.]**—Where deft., claiming to be the owner of certain land, procured pltf.'s tenant to attorn to him & thereby claimed the possession:—*Held*: pltf. was entitled to recover by reason of deft. having thus obtained possession from pltf.'s tenant; but this was not to estop deft. from disputing pltf.'s title & showing title in himself in any action he might bring to recover possession.—*MULHOLLAND v. HARMAN* (1884), 6 O. R. 546.—**CAN.**

## PART V. SECT. 8, SUB-SECT. 3.—C.

**993 i. General rule.]**—Where a

nominee of the Crown, before the issuing of letters patent, conveys in fee to one person, either by indenture or deed poll, & he afterwards obtains the patent to himself, & then conveys to another, who again conveys to the patentee of the Crown, & his assigns, as privies in estate, are estopped by the first conveyance, & the patent feeds the estoppel & makes it a vested interest & estate.—*DOE d. HENNESSY v. MYERS* (1832), 2 O. S. 458.—**CAN.**

**993 ii. —.]**—To an action for breach of covenant for title in a mtge. to pltfs., executed by T., defts.' grantee, R., one of the defts., pleaded that T. did not, after the making of that deed, convey the lands to pltfs. The deed from defts. to T. was dated June 22, 1855, & the mtge. from T. to pltf. was dated Apr. 10, 1855. Both were registered on July, 28, 1855; the deed first. It appeared that there were two mtges. from T. to pltfs. on another lot, when this mtge. was made, & instead of which it was given. After executing this mtge., T. found that



*Sect. 8.—Operation of the estoppel: Sub-sect. 3, C.]*

**994.** —.—.]—(1) A. asserting that he had a right to a patent machine, covenanted with B. that he should use it in a particular manner, in consideration of which B. covenanted that he would not use any other; in an action by A. on the covenant, B. is not estopped by the covenant from pleading in bar to the action that the invention was not new, or that the patentee was not the inventor; but he may thus show that the patent was void.

(2) The doctrine of estoppel is not applicable here. Where indeed an heir apparent, having only the hope of succession, conveys during the life of his ancestor an estate, which afterwards descends upon him, although nothing passes at that time, yet when the inheritance descends upon him, he is estopped to say that he had no interest at the time of the grant: there an estoppel is founded on law, conscience, & justice: But what is the case here? Who is estopped? The person supposed to be estopped is the very person who has been cheated & imposed upon (LORD KENYON, C.J.).

(3) Neither does this case resemble the case of landlord & tenant; for the tenant is not at all events estopped to deny the landlord's title; the estoppel only exists during the continuance of his occupation (LORD KENYON, C.J.).—HAYNE v. MALBY (1789), 3 Term Rep. 438; Dav. Pat. Cas. 156; 100 E. R. 665.

*Annotations:—As to (1) Distd.* Bowman v. Taylor (1831), 2 Ad. & El. 278. *Expld.* Neilson v. Fothergill & Thompson (1841), 1 Web. Pat. Cas. 287. *Consd.* Nickels v. Ross (1849), 8 C. B. 679. *Refd.* Hills v. Laming (1853), 9 Exch. 256; Smith v. Scott (1859), 6 C. B. N. S. 771.

**995.** —.—.]—Where husband & wife granted to trustees an estate, of which the wife's father was seised in fee-simple, & afterwards, in the life of the father, they levied a fine of the lands to the uses of the settlement, & the father afterwards died, leaving the wife one of the co-heiresses:—*Held*: her moiety of the estate became subject to the uses of that settlement, by reason of the fine, as an estoppel against the husband & wife & all persons claiming title under them.—HELPS v.

a deed from defts. to him was necessary to give the legal title, & he got the deed in question. The two mtges. were not discharged until Aug. 16, 1855.

*Held*: assuming the deed of Apr. 10, 1855, to have been a completed instrument from its date, the usual covenant contained in it that the grantor was seised in fee at the date of the deed created an estoppel, & the estoppel was fed by the estate T. acquired by deed of June 22, 1885.—TRUST & LOAN CO. OF UPPER CANADA v. RUTAN (1877), 1 S. C. R. 561.—CAN.

**993 iii.** —.—.]—M., in building a house, by mistake built part of it on the land of the adjoining owner B. On discovering this he applied to B. with a view of purchasing a portion of B.'s lot, & B. on July 29, 1880, wrote, "I hereby offer to sell you 25 feet frontage for the sum of \$250 to be paid six months from this date, otherwise this offer to be null," & B. accepted such offer at the foot in the words, "I hereby accept the above offer." M. seven days after registered a plan as No. 327, alleged to be of his own property, but which included the 25 feet as part of lot M., & the next day executed a mtge. on lot M. with a description, which included the twenty-five feet, & which was assigned to defts. The O. S. Co. was then to sell to McM. was not acted on within the six months limited, & B. afterwards, in Jan. 1883, sold & conveyed the 25 feet to M. The O. S. Co. subsequently sold under the power of sale

in their mtge. to deft., W. having completed the purchase within six months:—*Held*: no interest in the 25 feet passed to the O. S. Co. under M.'s mtge., & the subsequent conveyance to him "fed the estoppel" created by his prior mtge. to the extent only of M.'s interest, which was that of owner of the equity of redemption, or owner of the 25 feet.—NEVITT v. McMURRAY (1886), 11 A. R. 126.—CAN.

**993 iv.** —.—.]—Pltf. agreed to sell a parcel of land, one-half of the purchase-money to be paid in cash & the other half to be secured by a mtge. thereon. A deed & mtge. were prepared & executed, the cash payment made, & the deed delivered to the purchaser, the mtge. being delivered to the vendor's agent to be registered. The purchaser had obtained a loan of the cash payment from deft. upon the security of a first mtge. to be given upon the land in question, & this mtge. was prepared, executed & delivered before the execution & delivery of the deed & was registered before the deed to the purchaser & before the mtge. to pltf. Upon receiving the deed the purchaser handed it to deft.'s agent, who then registered it, pltf.'s mtge. having in the meantime been also registered. Pltf. & deft. acted in good faith, & each without knowledge or notice of the other's mtge.:—*Held*: deft.'s mtge. was valid only by estoppel, & was fed by estoppel to the extent only

HEREFORD (1819), 2 B. & Ald. 242; 106 E. R. 355.

*Annotations:—Refd.* Doe d. Bruno v. Martyn (1828), 7 L. J. O. S. K. B. 60; Right d. Jefferys v. Bucknell (1831), 2 B. & Ad. 278.

**996.** —.—.]—If a person had conveyed a defective title, & he afterwards acquires a good title, this ct. will make that good title available to make the conveyance effectual (SHADWELL, V.-C.).—NOEL v. BEWLEY (1829), 3 Sim. 103; 57 E. R. 938.

*Annotations:—Expld.* Smith v. Osborne (1857), 6 H. L. Cas. 375. *Apld.* Re Hoffe's Estate Act, 1885 (1900), 82 L. T. 556; Re Bridgewater's Settlement, Partridge v. Ward, [1910] 2 Ch. 342. *Consd.* Re Harper's Settlement, Williams v. Harper, [1919] 1 Ch. 270. *Refd.* Gresham Life Assoc. Soc. v. Crowther (1914), 111 L. T. 887.

**997.** —.—.]—A fine passed by a person who has a contingent remainder in fee, effectually passes his interest; because, although, until the contingency happen, it operates by estoppel only, yet, when the contingency has happened, it then operates upon the estate, as if the fine had passed after the happening of the contingency.—DOE d. CHRISTMAS v. OLIVER (1829), 10 B. & C. 181; 5 Man. & Ry. K. B. 202; 8 L. J. O. S. K. B. 137 109 E. R. 418.

*Annotations:—Consd.* Poulton v. Moore, [1915] 1 K. B. 400. *Refd.* Doe d. Thomas v. Jones (1831), 1 Tyr. 506; Right d. Jefferys v. Bucknell (1831), 2 B. & Ad. 278; Parker v. Carter (1845), 4 Hare, 400. *Mentd.* Cole v. Sewell (1848), 2 H. L. Cas. 186; Freeman v. Cooke (1848), 2 Exch. 654; Cornish v. Abington (1859), 28 L. J. Ex. 262; Hobbs v. Henning (1865), 17 C. B. N. S. 791; Godard v. Gray (1870), L. R. 6 Q. B. 139; Meyer v. Ralli (1876), 1 C. P. D. 358; Carlton v. Bowcock (1884), 51 L. T. 659; Re Henderson, Nouvion v. Freeman (1887), 37 Ch. D. 244.

**998.** —.—.]—Particulars of sale described the property as "a shop & a dwelling-house, with rooms & offices over, for many years occupied by a tenant under a 21 years' lease, nine of which will be unexpired at Lady-day, 1843, at a rent of £48, & held by lease for a term of 64 years, at a ground rent of £8 8s." By the abstract delivered, it appeared that A., by indenture of Sept. 30, 1817, demised the premises to B. for 89 years less 21 days from Michaelmas, 1817, with various covenants to be performed by B., his heirs, etc.; that B., on Mar. 25, 1820, mortgaged the premises

of the interest taken by the purchaser under the deed; that interest was subject to the right of pltf. to have a legal mtge. for the balance of purchase money, & pltf.'s mtge. was therefore entitled to priority.—McMILLAN v. MUNRO (1898), 25 A. R. 288.—CAN.

**993 v.** —.—.]—Where a nominee of the Crown, before patent is granted, conveys his interest to another, & after the decess of such nominee a patent is granted to his personal representatives as such, they are estopped by the covenants contained in the deed of decessed from denying that he was the owner of the lands at the date of the deed, & the legal estate conveyed by the Crown to such representatives feeds the estoppel in favour of his grantee.—BERARD v. BRUNEAU (1915), 8 W. W. R. 635; 25 Man. L. R. 400.—CAN.

**993 vi.** —.—.]—If a person being sole next of kin, is in possession of a chattel term without letters of administration having been obtained & there are no debts due by decessed, or anything to prevent such next of kin from using the term as his own, being the sole beneficial owner, he can sell the term; if the purchaser goes into possession under the contract of sale, the vendor cannot afterwards, either by obtaining a grant of administration, or in any other way, disaffirm his own act, & annul the contract.—HAMILL v. MURPHY (1883), 12 L. R. Ir. 400.—IR.



for the residue of the term, to secure £487, & interest to C.; & that, by indenture of Apr. 2, B. demised the premises to D. for 21 years less eight days, at the rent of £48, with covenants of the part of D., similar to those of B. in the indenture of Sept. 1817.

Mtgees. were willing to execute any conveyance that might be requisite for the purpose of making a good title to the purchaser:—*Held*: (1) B. was in a situation to make a good title to the premises sold, the lease to D., though originally a lease by estoppel, being convertible into a lease in interest, by the concurrence of mtgees.

(2) The general understanding appears to be, that "An indenture of lease, or a fine *sur concessit*, for years, will be an estoppel only during the term. It first operates by way of estoppel, & finally when grantor obtains an ownership, it attaches on the seisin & creates an interest, or produces the relation of landlord & tenant; & there is a term commencing by estoppel, but for all purposes it becomes an estate or interest. It binds the estate of lessor, etc., & therefore continues in force against lessor, his heirs, etc. It also binds the assigns of lessor & of lessee (TINDAL, C.J.).—WEBB v. AUSTIN (1844), 7 Man. & G. 701; 8 Scott, N. R. 419; 13 L. J. C. P. 203; 3 L. T. O. S. 282; 135 E. R. 282.

*Annotations*:—As to (1) *Refd.* Weld v. Baxter (1856), 11 Exch. 816; Cuthbertson v. Irving (1859), 4 H. & N. 742. Generally, *Mentd.* Hickman v. Machin (1859), 28 L. J. Ex. 310.

999. —.]—Petition by six petitioners for distribution of a fund in ct. A., one of the petitioners, being at that time only entitled to one-ninth, purported to assign one-sixth share of the fund to B. A. subsequently acquired the remaining one-eighteenth. The petitioners asked for payment of one-ninth of A.'s shares to resps., B. & his mtgees., & the remainder of the share to A. Resps. claimed the whole of the share:—*Held*: the ct. had jurisdiction to decide the question raised, on petition, & would be reluctant to put the parties to the expense of an action; & though the assignment was of a defective title, yet as assignor afterwards acquired a good title to the whole share, resps. were entitled to the whole of A.'s one-sixth share.—*Re* HOFFE'S ESTATE ACT, 1885 (1900), 82 L. T. 556; 48 W. R. 507; 44 Sol. Jo. 484.

*Annotations*:—*Apld.* *Re* Bridgwater's Settlement, Partridge v. Ward, [1910] 2 Ch. 342. *Expld.* *Re* Harper's Settlement, Williams v. Harper, [1919] 1 Ch. 270. *Refd.* Gresham Life Assce. Soc. v. Crowther (1914), 111 L. T. 887.

1000. —.]—If assignor with a defective title purports & intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual, even though the defect in title is apparent on the face of the assignment.—*Re* BRIDGWATER'S SETTLEMENT, PARTRIDGE v. WARD, [1910] 2 Ch. 342; 79 L. J. Ch. 746; 103 L. T. 421.

*Annotations*:—*Apld.* Gresham Life Assce. Soc. v. Crowther (1914), 111 L. T. 887. *Expld.* *Re* Harper's Settlement, Williams v. Harper, [1919] 1 Ch. 270.

1001. —.]—POULTON v. MOORE, No. 799, *ante*.

1002. —.]—Where a mtgor. makes false representations as to existing facts relying on which a mtgee. lends him money, those who claim through the mtgor. for value, but with notice of the representations, are estopped from denying the truth of the representations & must if possible make them good.—GRESHAM LIFE ASSURANCE SOCIETY v. CROWTHER, [1915] 1 Ch. 214; 84 L. J. Ch. 312; 111 L. T. 887; 59 Sol. Jo. 103, C. A.

1003. —.]—A marriage settlement made in 1861 gave the husband & wife, or survivor, power

to appoint the settled funds among the children of the marriage. In 1904 one of the daughters, on her marriage, executed a settlement which contained a recital that, under the settlement of 1864, & a deed poll executed by her parents, she was entitled in reversion expectant upon the death of the survivor of her parents, both then living, to one-third part of £6,000 of the trust funds of the settlement of 1864, & witnessed that the daughter assigned to the trustees "all that the third part or share" to which she was entitled in reversion expectant as aforesaid. The mother survived the father & died in 1917, having by her will, made in 1916, appointed £2,000, part of the funds settled in 1864, to the daughter. There was no evidence of any other appointment by deed poll or otherwise:—*Held*: the appointed sum of £2,000 was caught by & subject to the settlement of 1904.—*Re* HARPER'S SETTLEMENT, WILLIAMS v. HARPER, [1919] 1 Ch. 270; 88 L. J. Ch. 245; 120 L. T. 439.

— Application to landlord & tenant.]—See LANDLORD & TENANT.

1004. Interest uncertain at time of grant—Subsequent accrual by survivorship.]—VICK v. EDWARDS, No. 984, *ante*.

1005. Copyhold subsequently acquired by descent—Death of grantor before conveyance perfected.]—*Semble*: one erroneously believing himself entitled to a copyhold was admitted, & sold it: it afterwards descended to him; he died without perfecting the conveyance; this is a personal equity, & does not bind his heir.—MORSE v. FAULKNER (1792), 3 Swan. 429; 1 Anst. 11; 36 E. R. 936.

*Annotations*:—*Consd.* West v. Berney (1819), 1 Russ. & M. 431; Lyde v. Mynn (1833), 1 My. & K. 683. *Mentd.* Right d. Taylor v. Banks (1832), 3 B. & Ad. 664; Doe d. Perry v. Wilson (1836), 5 Ad. & El. 321; R. v. Dullingham (1838), 8 Ad. & El. 858.

1006. Estate accruing under different title.]—(1) If a man contracts to convey, to mtge., or to settle an estate, & he has not at the time of his contract a title to the estate, but afterwards acquires such a title as enables to perform his contract, he is bound to do so. But a covenant to settle land which the covenantor should succeed to under a will, does not bind him to settle whatever interest he might derive *aliunde* in the same land.

(2) In a marriage settlement there was a recital that A., a party thereto, had a contingent remainder in land under a will, & he covenanted when the remainder became vested in him in possession to convey the land to the uses of the settlement. A. was not in fact so entitled, but was entitled as expectant heir in tail. The tenant in tail in possession barred the entail & afterwards devised the land to A.:—*Held*: not having taken the land under the will, but *aliunde*, A. was not bound by his covenant to settle it; A. was not estopped by the recital from saying that he had not a contingent interest under the will.—SMITH v. OSBORNE (1857), 6 H. L. Cas. 375; 30 L. T. O. S. 57; 3 Jur. N. S. 1181; 6 W. R. 21; 10 E. R. 1340, H. L.

*Annotations*:—As to (1) *Consd.* *Re* Harper's Settlement, Williams v. Harper, [1919] 1 Ch. 270. *Refd.* Ford v. Tynte (1865), 34 L. J. Ch. 452. Generally, *Mentd.* *Re* Keep's Will (1863), 32 Beav. 122; Hurry v. Morgan (1866), L. R. 3 Eq. 152; Brown v. Rainsford (1867), 16 W. R. 198; *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252; Waite v. Littlewood (1872), 8 Ch. App. 70; *Re* Johnson, Hickman v. Williamson (1884), 53 L. J. Ch. 1116; Askew v. Askew (1888), 57 L. J. Ch. 629; *Re* Bowman, *Re* Lay, Whytehead v. Boulton (1889), 41 Ch. D. 525; Powell v. Hellicar, [1919] 1 Ch. 138.

1007. Where original title fictitious—Priority as against purchaser for value without notice.]—In

. 8.—*Operation of the estoppel: Sub-sect. 3, C.; sub-sect. 4. Sect. 9. Part VI. Sect. 1.]*

May & Sept. 1873, mtges. in fee of property in S. were transferred to D.; D. sub-mortgaged the property to L.; L. sold it to H. in trust for M.; H. conveyed it to M. in trust for D. D. then prepared fictitious leases of the property, all dated Mar. 8, 1870. By one of these, L. purported to demise the property to T.; T. mortgaged it to K. By another of these, T. purported to demise the property to M. M. mortgaged it to Q., who assigned it to P. M., & D. subsequently procured a loan from McS. & Co. on a deposit of the genuine deeds:—*Held*: McS. & Co., being purchasers for value without notice, their mtge. ranked first on the estate; the sham mtges. to K. & P. did not attach themselves so as to make a burden on the estate, when D. subsequently acquired the absolute beneficial interest in it.—*KEATE v. PHILLIPS* (1881), 18 Ch. D. 560; 50 L. J. Ch. 664; 44 L. T. 731; 29 W. R. 710.

**1008. Application to interests in land.]**—In 1770 a private Act of Parliament was passed to provide for the allotment of commons & commonable lands, etc. These lands were described as having mines under the surface. Comrs. were appointed to allot, having due regard to the mines, according to the rights of the various persons interested in the lands, some of which were divided into small parcels. The comrs., by their award, allotted the lands, so that some of the mines allotted to A. were situated under portions of the land allotted to B. The persons interested executed this award, which, reciting that this mode of allotment had been necessary, contained a clause, declaring that the proprietors agreed with each other, & their heirs, that the lands so allotted should be lawfully held & enjoyed by the allottees without molestation, & without any mine owner being subject to any action for damages on account of working & getting the mines, or by reason that the lands might be “rendered uneven & less commodious to the occupiers thereof, or by sinking in hollows, & being otherwise defaced & injured where such mines shall be worked . . . the several proprietors having agreed with each other, & being willing & desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or incumbrance which may arise from the cause aforesaid.” The mines were worked by A., his assignee, & the surface of the land thereby, but without negligence, injured:—*Held*: whatever is the general right in the surface to support, this clause in the award operated as a grant of a right to disturb the surface of the land, & B., therefore, could not maintain an action for damages on that account.

If the comrs. had no power to award the surface to one person & the minerals to another, it would follow that the award was totally void; but B. would still be bound by the deed which he executed, which would operate as a grant of the right to win the coals in such a manner as might injure the superjacent land. He would not be estopped from saying that he was not at the time the owner of the surface, because his defect of title appeared upon the same instrument, & so the estoppel would be avoided, & he would be in the same situation as if, without any legal right but at the same time fully believing that he had it, he had executed to another person, a grant of a right to get the minerals under a particular close, & so to disturb the soil of that close, & had afterwards acquired the legal title to that close. This

acquisition would operate by feeding the estoppel (*LORD WENSLEYDALE*).—*ROWBOTHAM v. WILSON* (1860), 8 H. L. Cas. 348; 30 L. J. Q. B. 49; 2 L. T. 642; 24 J. P. 579; 6 Jur. N. S. 965; 11 E. R. 463, H. L.; *affg.* (1857), 8 E. & B. 123, Ex. Ch.

*Annotations*:—*Consd.* *Shaffo v. Johnson* (1863), 8 B. & S. 252, n.; *Buccleuch v. Wakefield* (1870), L. R. 4 H. L. 377; *Eaton v. Jeffcock* (1872), L. R. 7 Exch. 379. *Refd.* *Dugdale v. Robertson* (1857), 3 K. & J. 695; *Murchie v. Black* (1865), 19 C. B. N. S. 190; *Proud v. Bates* (1865), 6 New Rep. 92; *Hammersmith & City Ry. v. Brand* (1869), L. R. 4 H. L. 171; *Hext v. Gill* (1872), 7 Ch. App. 699; *Smith v. Darby* (1872), L. R. 7 Q. B. 716; *Hall v. Byron* (1877), 4 Ch. D. 667; *Dixon v. White* (1883), 8 App. Cas. 833; *Pountney v. Clayton* (1883), 11 Q. B. D. 820; *Consett Waterworks Co. v. Ritson* (1889), 64 L. J. Ch. 293, n.; *G. N. Ry. v. I. R. Comrs.*, [1901] 1 K. B. 416. *Mentd.* *Bonomi v. Mackhouse* (1859), E. B. & E. 646; *Brown v. Robins* (1859), 4 H. & N. 186; *Scots Mines Co. v. Leadhills Mines Co.* (1859), 34 L. T. O. S. 34; *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585; *Blackett v. Bradley* (1862), 1 B. & S. 940; *Jones v. Tapling* (1862), 8 Jur. N. S. 333; *Richards v. Harper* (1866), 4 H. & C. 55; *Williams v. Bagnall* (1866), 15 W. R. 272; *Woodall v. Hingley* (1866), 14 L. T. 167; *Richards v. Jenkins* (1868), 18 L. T. 437; *Aspden v. Seddon* (1875), 10 Ch. App. 394; *Ramsay v. Blair* (1876), 1 App. Cas. 701; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Bell v. Love* (1883), 10 Q. B. D. 547; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; *N. B. Ry. v. Park Yard Co.*, [1898] A. C. 643; *Sitwell v. Londesborough*, [1905] 1 Ch. 460; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co.*, [1906] A. C. 305; *Butterley Co. v. New Hucknall Colliery Co.*, [1910] A. C. 381; *Davies v. Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488; *Thomson v. St. Catharine's College, Cambridge & Mappin's Masbro' Old Brewery, etc.* (1918), 118 L. T. 758; *Westhoughton U. D. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159; *Davies v. Powell Duffryn Steam Coal Co. (No. 2)* (1921), 91 L. J. Ch. 40; *Consett Industrial & Provident Soc. v. Consett Iron Co.*, [1922] 2 Ch. 135.

**1009. Application to easement — Easement granted for term only.]**—In 1861 A. granted to B. a lease for 21 years of a house “together with all edifices . . . lights . . . easements, advantages, & appurtenances thereto belonging, or therewith held, used, or enjoyed.” At the date of the lease A. held, for the residue of a term expiring at Christmas, 1868, an adjoining house, over which most of the light came to the back windows of the house leased to B. On the expiration of this lease, A. purchased the fee simple of the adjoining house, & in 1872 he pulled down that house with the intention of rebuilding it to a greater height than its former height. B., whose lights were not ancient lights, filed a bill to restrain A. from raising the new house to a greater height than the old house:—*Held*: the lease to B. only amounted to a grant of the light coming over the adjoining house during A.'s term in it, & on subsequently acquiring the fee simple of the adjoining house, A. was not estopped either at law or in equity from dealing with the house in such a way as to interfere with B.'s lights.—*BOOTH v. ALCOCK* (1873), 8 Ch. App. 663; 42 L. J. Ch. 557; 29 L. T. 231; 37 J. P. 709; 21 W. R. 743, L. J.

*Annotations*:—*Consd.* *Davis v. Town Properties Investment Corp.*, [1903] 1 Ch. 797. *Refd.* *Beddington v. Atlee* (1887), 35 Ch. D. 317. *Mentd.* *Master v. Hansard* (1876), 4 Ch. D. 718; *Godwin v. Schweppes*, [1902] 1 Ch. 926; *Quicke v. Chapman*, [1903] 1 Ch. 659.

**Estate accruing after estoppel determined.]**—*See Sub-sect. 2, ante.*

SUB-SECT. 4.—INTEREST BY ESTOPPEL.

**1010. Demise of shares.]**—A. by indenture demised to B., for ten years, the dividends to be declared on certain railway shares, at a certain yearly rent, payable half-yearly. In covenant by A. against B. upon this deed, the declaration alleged that A. was a member of the co., & as such was possessed of or entitled to certain shares therein,



etc.: the declaration then set out the indenture, & alleged a breach of a covenant to pay the rent. B. pleaded "that A., at the time of the making of the indenture, was not possessed of, or entitled to, the shares," etc.:—*Held*: (1) B. was estopped by his deed from so pleading; (2) it was not necessary to repay the estoppel, which sufficiently appeared upon the pleadings.—*BECKETT v. BRADLEY* (1844), 7 Man. & G. 994; 2 Dow. & L. 586; 8 Scott, N. R. 843; 14 L. J. C. P. 3; 4 L. T. O. S. 134 A; 8 Jur. 1073; 135 E. R. 403.

*Annotation*:—As to (1) *Refd.* *Stroughill v. Buck* (1850), 14 Q. B. 781.

**Right of access.**—See No. 837, *ante*; *EASEMENTS*, Vol. XIX., pp. 102, 103.

### SECT. 9.—PLEADING ESTOPPEL.

**1011. Necessity for pleading.**—Where the estoppel appears on the record, the other side may demur.—*KEMPE v. GOODALL* (1705), 2 Ld. Raym. 1154; 1 Salk. 277; 92 E. R. 263.

*Annotations*:—*Consd.* *Wilkins v. Wingate* (1794), 6 Term Rep. 62. *Refd.* *Evans v. Fauconberg* (1726), 1 Com. 391; *Palmer v. Ekyns* (1728), 1 Barn. K. B. 103.

**1012.** —.]—*BECKETT v. BRADLEY*, No. 1010, *ante*.

**1013.** —.]—*FREEMAN v. COOKE*, No. 1019, *post*.

**1014.** —.]—*ASHPITEL v. BRYAN*, No. 3, *ante*.

**1015. Effect of not pleading.**—Declaration stated the execution of a deed by pltf. & deft.; the plea did not traverse the execution, but alleged new matter, upon which the replication took issue. The deed was put in at the trial, & its recital directly contradicted the new matter

alleged in the plea:—*Held*: deft. was not precluded from submitting such matter of defence to the jury, inasmuch as pltf. had not pleaded the recital of the deed by way of estoppel.—*BOWMAN v. ROYSTON* (1835), 2 Ad. & El. 295, n.; 1 Har. & W. 221; 4 Nev. & M. K. B. 551; 4 L. J. K. B. 62; 111 E. R. 114.

*Annotations*:—*Refd.* *R. v. Johnson* (1836), 5 Ad. & El. 488; *Carpenter v. Buller* (1841), 8 M. & W. 209; *Pilgrim v. Southampton & Dorchester Ry.* (1849), 18 L. J. C. P. 139; *Young v. Raincock* (1849), 7 C. B. 310.

**1016.** —.]—*CARPENTER v. BULLER*, No. 959, *ante*.

**1017.** —.]—*Jury may find truth.*—*FREEMAN v. COOKE*, No. 1019, *post*.

**1018.** —.]—The declaration set out a recovery in ejectment by P. H. claiming as above & an eviction of H. S. Y. by due process of law. To this declaration, deft. pleaded, *inter alia*, that A. H. died intestate, leaving deft.'s wife her only child & heir-at-law, & that H. S. Y., intending, etc., instigated P. H. to claim right & title to the messuage, & to bring ejectment, & so deft. said that H. S. Y., of his own wrong, & by & through his own act & procurement, was evicted, etc. Pltfs. replied *de injuria*:—*Held*: assuming that the recital in the deed—that vendor's wife was heir of A. H.—would have operated as an estoppel against pltf.'s testator, after eviction by title paramount, if properly pleaded & relied upon, such estoppel was waived by joining issue upon a replication which put in issue the fact of the wife's heirship alleged in the plea, instead of rejoining the estoppel.—*YOUNG v. RAINCOCK* (1849), 7 C. B. 310; 18 L. J. C. P. 193; 13 L. T. O. S. 401; 13 Jur. 539; 137 E. R. 124.

*Annotations*:—*Expld.* *Stroughill v. Buck* (1850), 14 Q. B. 781. *Refd.* *Wiles v. Woodward* (1850), 5 Exch. 557. *Mentd.* *Norman v. Mitchell* (1854), 5 De G. M. & G. 648.

— **Separation deed.**—See *HUSBAND & WIFE*.

## Part VI.—Estoppel in Pais.

### SECT. 1.—NATURE OF.

**1019. General rule.**—(1) In trover by the assignees of a bkpt. against a sheriff for the conversion of bkpt.'s goods, seized under a *fi. fa.* against C. & D., it appeared, that, immediately before the seizure, bkpt. told the officer that the goods were the property of C.; & immediately afterwards, he contradicted that statement, & said they were the goods of D. The jury found, that the goods were in reality bkpt.'s; but also, that he represented the goods to the officer as the goods of C., so as to induce the officer, by that false representation, to seize them:—*Held*: under the plea of not possessed, this finding did not estop bkpt., & pltfs. as assignees, from complaining of the seizure of the goods as their own.

(2) The rule laid down by the Ct. of Q. B., that, "where one, by his words or conduct, wilfully

causes another to believe in the existence of a certain state of things, & induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time"; & again, "a party who negligently or culpably stands by, & allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the party whom he has himself assisted in deceiving," is to be taken with this explanation, that, by the term "wilfully" must be understood, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, & that it is acted upon accordingly; & if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the

### PART V. SECT. 9.

**1011 i. Necessity for pleading.**—In an action for the purchase money of land conveyed, a receipt under seal in the conveyance is conclusive evidence under the plea of payment; & it is unnecessary to plead the estoppel specially.—*KETCHUM v. SMITH* (1861), 20 U. C. R. 313.—CAN.

**1011 ii.** —.]—*Held*: the sheriff, in an action for the purchase-money of goods sold, was not estopped from denying the payment by the acknowledgment under seal, in the bill of sale, of receipt from G., the trustee & agent of defts., the purchasers for

it was not specially pleaded, the action was not upon the deed nor against a party to it, & there was nothing on the face of it to connect G. with defts.—*CARRALL v. BANK OF MONTREAL* (1861), 21 U. C. R. 18.—CAN.

**1011 iii.** —.]—A party relying upon estoppel must plead it expressly.—*HART v. GREAT WEST SECURITIES & TRUST CO., LTD.*, [1918] 2 W. W. R. 1061; 11 Sask. L. R. 336; 42 D. L. R. 185.—CAN.

**1011 iv.** —.]—The statement of claim contained four counts, the second setting out a certain deed. At the trial pltf. elected to rely on the third & fourth counts only. Deft. corpn.

set up a defence of estoppel by the deed set out in the second count. Deft. had not pleaded the deed:—*Semble*: under the rules of 1882 deft. corpn. was nevertheless entitled to avail itself of the defence of estoppel.—*LITCHFIELD v. BLENHEIM CORPN.* (1890), 8 N. Z. L. R. 638.—N.Z.

**m.** —.]—*What amounts to plea.*—A plea that pltf. had never been in possession of land, except only as tenant to deft. under a lease in writing made between the parties, does not amount to a plea of estoppel.—*POLQUIN v. ST. BONIFACE* (1908), 17 Man L. R. 693.—CAN.



## 1.—Nature of. Sect. 2.]

representation to be true, & believe that it was meant that he should act upon it, & did act upon it as true, the party making the representation would be equally precluded from contesting its truth; & that conduct, by negligence or omission, when there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect.

(3) Estoppels by record & by deed must, in order to make them binding, be pleaded if there be an opportunity, otherwise, the party omitting to plead it waives the estoppel, & leaves the cause at large, on which the jury may find according to the truth. With respect to estoppels *in pais*, in certain cases there is no doubt they need not be pleaded in order to make them obligatory. For instance, where a man represents another as his agent, in order to procure another person to contract with him as such, & he does contract, the contract binds in the same manner as if he made it himself & is his contract in point of law & no form of pleading could leave such a matter at large & enable the jury to treat it as no contract. The same rule appears to apply to all similar estoppels *in pais* (PARKE, B.).—FREEMAN v. COOKE (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L. J. Ex. 114; 12 L. T. O. S. 66; 12 Jur. 777; 154 E. R.

*Annotations:—As to (1) Refd.* Lewis v. Clifton (1854), 22 L. T. O. S. 259. *As to (2) Apld.* Howard v. Hudson (1853), 2 E. & B. 1. *Consd.* Jordan v. Money (1854), 5 H. L. Cas. 185. *Apld.* A.-G. v. Stephens (1855), 1 K. & J. 724. *Consd.* Clarke & Chapman v. Hart (1858), 6 H. L. Cas. 633; Cornish v. Abington (1859), 4 H. & N. 549; Swan v. North British Australasian Co. (1863), 2 H. & C. 175. *Apld.* Re Bahia & San Francisco Ry. (1868), L. R. 3 Q. B. 584; Webb v. Herne Bay Comrs. (1870), L. R. 5 Q. B. 642; McKenzie v. British Linen Co. (1881), 6 App. Cas. 82. *Consd.* Scarf v. Jardine (1882), 7 App. Cas. 345. *Apld.* Hall v. West-End Advance Co. (1883), Cab. & El. 161; Manchester & Oldham Bank v. Cook (1883), 49 L. T. 674; Miles v. McIlwraith (1883), 8 App. Cas. 120. *Consd.* Low v. Bouverie, [1891] 3 Ch. 82. *Apld.* Re Bentley & Yorkshire Breweries, Ex p. Harrison (1893), 69 L. T. 204; Henderson v. Williams, [1895] 1 Q. B. 521; Pierson v. Altrincham U. C. (1917), 86 L. J. K. B. 969. *Refd.* Foster v. Mentor Life Assce. (1854), 3 E. & B. 48; Kent v. Thomas (1856), 1 H. & N. 473; Bigg v. Strong (1857), 3 Sm. & G. 592; Bill v. Richards (1857), 26 L. J. Ex. 409; Dunston v. Paterson (1857), 2 C. B. N. S. 495; Simpson v. Accidental Death Insee. (1857), 2 C. B. N. S. 257; Richards v. Johnson (1859), 5 Jur. N. S. 520; Ward v. S. E. Ry. (1860), 2 E. & E. 812; Cave v. Mills (1861), 8 Jur. N. S. 363; McCance v. L. & N. W. Ry. (1861), 7 Jur. N. S. 1304; White v. Greenish (1861), 11 C. B. N. S. 209; Betts v. Menzies (1862), 10 H. L. Cas. 118; Ashpitel v. Bryan (1863), 3 B. & S. 474; Harding v. Hall (1866), 14 L. T. 410; Brook v. Hook (1871), L. R. 6 Exch. 89; Macted v. Paine (1871), L. R. 6 Exch. 132; Smith v. Hughes (1871), L. R. 6 Q. B. 597; Stimson v. Farnham (1871), L. R. 7 Q. B. 175; Citizens' Bank of Louisiana v. First National Bank of New Orleans (1873), L. R. 6 H. L. 352; Wallis v. Biddick (1873), 22 W. R. 76; Arnold v. Cheque Bank, Same v. City Bank (1876), 1 C. P. D. 578; Harris v. G. W. Ry. (1876), 1 Q. B. D. 515; Polak v. Everett (1876), 1 Q. B. D. 669; Roden v. London Small Arms Co. (1876), 46 L. J. Q. B. 213; Johnson v. Credit Lyonnais Co. (1877), 3 C. P. D. 32; Burkinshaw v. Nicolls (1878), 39 L. T. 308; Joseph v. Webb, Joseph v. Lyons, Joseph v. Pidcock, Joseph v. Jones (1884), Cab. & El. 262; Russell v. Watts (1885), 10 App. Cas. 590; Roe v. Mutual Loan Fund Asscn. (1887), 56 L. T. 631; Bank of England v. Vagliano, [1891] A. C. 107; Sarat Chunder Dey v. Gopal Chunder Lala (1892), 56 J. P. 741; Balkis Consolidated Co. v. Tomkinson, [1893] A. C. 396; Scholfield v. Lonsborough, [1895] 1 Q. B. 536; Bloomenthal v. Ford, [1897] A. C. 156; Farquharson v. King, [1901] 2 K. B. 607; Bell v. Marsh, [1903] 1 Ch. 528; Sheffield Corp'n. v. Barclay, [1903] 2 K. B. 580; Morison v. London County & Westminster Bank (1913), 108 L. T. 519; Joint Stock Bank v. Macmillan & Arthur, [1918] A. C. 777; Bradford v. Price (1923), 92 L. J. K. B. 871; (now) v. Woodhouse, [1923] 2 K. B. 210. *Consd.* Halifax v. Lyle (1849), 3 Exch. 446. *Generally, Refd.* Tomkinson v. Balkis Consolidated Co., [1891] 2 Q. B. 614. *Mentd.* Fletcher v. Fletcher (1859), 1 E. & E. 420; Sweeting v. Pearce (1859), 6 Jur. N. S.

753; Angus v. Dalton (1877), 3 Q. B. D. 85; Palmer v. Moore, [1900] A. C. 293.

1020. —.]—Pltf. bought goods which were to be consigned to him at Liverpool from St. Helen's by defts.' railway. On July 7, 1873, pltf. received advice-notes from defts. informing him that three parcels of goods had been received by them for his account, & that they held them subject to his order & to the payment of rent & charges. Pltf. immediately instructed his broker to sell the whole. Early in Aug., pltf. received invoices of the three parcels from his vendors, & paid for the whole by an acceptance which was duly honoured. The goods were sold on Aug. 21, & the rent & charges on the three parcels were paid to defts. by the broker; but it turned out that two parcels only had been delivered to defts., the third still remaining on the premises of the vendors, & pltf. was obliged to pay to his vendees £5 4s. 1d., the difference between the price at which they had bought the third parcel & what they had to pay for other goods. Defts.' servants were aware on July 9, that they had never received the third parcel, but no notice of the mistake was given to pltf. until Sept. 1, after the goods had been re-sold & the charges paid. In a special action for non-delivery of the third parcel, with a count in trover:—*Held*: (1) defts. were not estopped from showing that the goods had never reached their hands.

(2) If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, & if the second believes in such state of things & acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist (*per CUR.*).

(3) If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, & it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes & acts, the first is estopped from denying the existence of such a state of facts (*per CUR.*).

(4) If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, & that it was a true representation & that the latter was intended to act upon it in a particular way, & he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented (*per CUR.*).

(5) If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, & such culpable negligence has been the proximate cause of leading & has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards as against the first, to show that the state of facts referred to did not exist (*per CUR.*).—CARR v. LONDON & NORTH WESTERN RY. CO. (1875), L. R. 10 C. P. 307; 44 L. J. C. P. 109; 31 L. T. 785; 39 J. P. 279; 23 W. R. 747.

*Annotations:—As to (1) Refd.* Barnetts, Hoares v. South London Tram. Co. (1886), 11 T. L. R. 848; Compania Naviera Vasconzada v. Churchill & Sim, Same v. Burton, [1906] 1 K. B. 237. *As to (2) Consd.* Sarat Chunder Dey v. Gopal Chunder Lala (1892), 56 J. P. 741. *Refd.* Farneloe v. Bain (1876), 1 C. P. D. 445; Coventry v. G. E. Ry. (1883), 11 Q. B. D. 776; Manchester & Oldham Bank v. Cook (1883), 49 L. T. 674; Seton v. Lafone (1887), 19 Q. B. D. 68; Gillman, Spencer v. Carbutt (1889), 61 L. T. 281; Foster v. Tyne Pontoon & Dry Docks Co. & Renwick (1893), 63 L. J. Q. B. 50; Dixon

*v. Kennaway*, [1900] 1 Ch. 833; *Comitti v. Mahor* (1905), 94 L. T. 158; *L. & Y. Ry., L. & N. W. Ry. & Graesor v. MacNicol* (1918), 88 L. J. K. B. 601; *Dominion Coal Co. v. Maskinonge S.S. Co.*, [1922] 2 K. B. 132; *Bradford v. Price* (1923), 92 L. J. K. B. 871. *As to* (3) **Consd.** *Tomkinson v. Balkis Consolidated Co.*, [1891] 2 Q. B. 614; *Cavanagh v. Whitechurch* (1900), 16 T. L. R. 303. **Apld.** *Comitti v. Mahor* (1905), 94 L. T. 158. **Refd.** *Farmeloe v. Bain* (1876), 1 C. P. D. 445; *Coventry v. G. E. Ry.* (1883), 11 Q. B. D. 776; *Manchester & Oldham Bank v. Cook* (1883), 49 L. T. 674; *Seton v. Lafone* (1887), 19 Q. B. D. 68; *Gillman, Spencer v. Carbutt* (1889), 61 L. T. 281; *Sarat Chunder Dey v. Gopal Chunder Lala* (1892), 56 J. P. 741; *Foster v. Tyne Pontoon & Dry Docks Co. & Renwick* (1893), 63 L. J. Q. B. 50; *Dixon v. Kennaway*, [1900] 1 Ch. 833; *L. & Y. Ry., L. & N. W. Ry. & Graesor v. MacNicol* (1918), 88 L. J. K. B. 601; *Dominion Coal Co. v. Maskinonge S.S. Co.*, [1922] 2 K. B. 132; *Bradford v. Price* (1923), 92 L. J. K. B. 871. *As to* (4) **Apld.** *Re Bentley & Yorkshire Breweries, Ex p. Harrison* (1893), 69 L. T. 204. **Consd.** *Cavanagh v. Whitechurch* (1900), 16 T. L. R. 303; *Colley v. Overseas Exporters*, [1921] 3 K. B. 302. **Refd.** *Farmeloe v. Bain* (1876), 1 C. P. D. 445; *Coventry v. G. E. Ry.* (1883), 11 Q. B. D. 776; *Manchester & Oldham Bank v. Cook* (1883), 49 L. T. 674; *Seton v. Lafone* (1887), 19 Q. B. D. 68; *Gillman, Spencer v. Carbutt* (1889), 61 L. T. 281; *Sarat Chunder Dey v. Gopal Chunder Lala* (1892), 56 J. P. 741; *Foster v. Tyne Pontoon & Dry Docks Co. & Renwick* (1893), 63 L. J. Q. B. 50; *Dixon v. Kennaway*, [1900] 1 Ch. 833; *Comitti v. Mahor* (1905), 94 L. T. 158; *L. & Y. Ry., L. & N. W. Ry. & Graesor v. MacNicol* (1918), 88 L. J. K. B. 601; *Dominion Coal Co. v. Maskinonge S.S. Co.*, [1922] 2 K. B. 132; *Bradford v. Price* (1923), 92 L. J. K. B. 871. *As to* (5) **Apld.** *Coventry v. G. E. Ry.* (1883), 11 Q. B. D. 776; *Seton v. Lafone* (1887), 19 Q. B. D. 68. **Consd.** *Foster v. Tyne Pontoon & Dry Docks Co. & Renwick* (1893), 63 L. J. Q. B. 50; *L. & Y. Ry., L. & N. W. Ry. & Graesor v. MacNicol* (1918), 88 L. J. K. B. 601. **Refd.** *Farmeloe v. Bain* (1876), 1 C. P. D. 445; *Manchester & Oldham Bank v. Cook* (1883), 49 L. T. 674; *Gillman, Spencer v. Carbutt* (1889), 61 L. T. 281; *Sarat Chunder Dey v. Gopal Chunder Lala* (1892), 56 J. P. 741; *Dixon v. Kennaway*, [1900] 1 Ch. 833; *Dominion Coal Co. v. Maskinonge S.S. Co.*, [1922] 2 K. B. 132; *Bradford v. Price* (1923), 92 L. J. K. B. 871. **Generally, Refd.** *Harris v. Truman* (1881), 7 Q. B. D. 340; *Joseph v. Webb*, *Joseph v. Lyons*, *Joseph v. Pidcock*, *Joseph v. Jones* (1884), *Cab. & Kl.* 262; *Proctor v. Bennis* (1887), 36 Ch. D. 740; *Low v. Bouverie*, [1891] 3 Ch. 82; *Whitechurch v. Cavanagh*, [1902] A. C. 117; *Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117. **Mentd.** *L. & N. W. Ry. v. Hudson*, [1920] A. C. 324.

**1021. —.**—(1) **Appls.**, who were timber merchants, warehoused with a dock co. the timber they imported, & instructed the dock co. to accept all transfer or delivery orders signed by their clerk. The clerk had their authority to make limited sales to their known customers. The clerk under an assumed name fraudulently sold timber of applts. to resps., who knew nothing of applts. or of the clerk under his real name, & who bought & paid the clerk for the timber in good faith. The clerk carried out the sales by giving the dock co. orders for the transfer of timber into his assumed name, & then in that name giving delivery orders to resps.:—**Held**: applts., not having held out the clerk to resps. as their agent to sell to resps., were not estopped from denying the clerk's authority to sell.

(2) If [applts.] had represented their clerk C. to be invested with disposing power, & (note the importance of the next sentence) if anybody, supposing C. to be invested with that power, had acted upon it to his own prejudice, then undoubtedly estoppel would have arisen; the person who had improperly & negligently allowed C. to be apparently so invested with authority would be estopped from denying that C. had authority (**LORD HALSBURY, C.**).

(3) Estoppel arises where you are precluded from denying the truth of anything which you have represented as a fact although it is not a fact (**LORD HALSBURY, C.**).—**FARQUHARSON BROTHERS**

& Co. *v. KING & Co.*, [1902] A. C. 325; 71 L. J. K. B. 667; 86 L. T. 810; 51 W. R. 91; 18 T. L. R. 665; 46 Sol. Jo. 584, II. L.

**Annotations**:—*As to* (1) & (2) **Consd.** *Weiner v. Gill*, *Same v. Smith*, [1906] 2 K. B. 574. **Refd.** *Rimmer v. Webster*, [1902] 2 Ch. 163; *Truman v. Attenborough* (1910), 103 L. T. 218; *Macmillan v. London Joint Stock Bank*, [1917] 2 K. B. 439; *Bradford v. Price* (1923), 92 L. J. K. B. 871. **Generally, Mentd.** *Herdman v. Wheeler*, [1902] 1 K. B. 361.

*See, also*, No. 1020, *ante*, No. 1032, *post*.

## SECT. 2.—BY LIVERY, ENTRY, OR ACCEPTANCE OF ESTATE.

**1022. Livery.**—(1) The term "surrender by operation of law" is properly applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, & which would not be valid if his particular estate continued to exist. Thus, when lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not the power to make the new lease; & as the lessor could not grant the new lease until the prior one had been surrendered, the acceptance of such new lease is of itself a surrender of the former one. Such surrender is the act of the law, & takes place independently of, & even in spite of, the intention of the parties.

(2) The acts in *pais*, which bind parties by way of estoppel, are acts of notoriety, not less formal & solemn than the execution of a deed; as, for instance, livery, entry, acceptance of an estate, & the like.—**LYON v. REED** (1844), 13 M. & W. 285; 13 L. J. Ex. 377; 3 L. T. O. S. 302; 8 Jur. 762; 153 E. R. 118.

**Annotations**:—*As to* (1) **Folld.** *Nickells v. Atherstone* (1847), 10 Q. B. 944. **Consd.** *Phillips v. Miller* (1875), L. R. 10 C. P. 420. **Refd.** *Doe d. Hill v. Fry* (1845), 6 L. T. O. S. 83; *Oastler v. Henderson* (1877), 2 Q. B. D. 575; *Fenner v. Blake*, [1900] 1 Q. B. 426. *As to* (2) **Refd.** *Grimwood v. Moss* (1872), L. R. 7 C. P. 360; *Serjeant v. Nash* (1903), 89 L. T. 112. **Generally, Mentd.** *Cannan v. Hartley* (1850), 9 C. B. 634; *Mines Royal Socs. v. Magnay* (1854) 10 Exch. 489; *Davison v. Gent* (1857), 1 H. & N. 744; *Ward v. Lumley* (1860), 29 L. J. Ex. 322; *Wallis v. Hands*, [1893] 2 Ch. 75.

**1023. Entry—With tenant as coparcener.**—**ANON.** (1309), Y. B. 2 Edw. 2, 39; Sel. Soc. Y. B., Vol. I., 161.

**1024. —.**—**LYON v. REED**, No. 1022, *ante*.

**1025. Acceptance of estate—Admittance to copyhold—Fealty to lord of manor.**—Where a copyholder has been admitted to a tenement & done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture from showing that the legal estate was not in the lord at the time of admittance.—**DOE d. NEPEAN v. BUDDEN** (1822), 5 B. & Ald. 626; 1 Dow. & Ry. K. B. 243; 106 E. R. 1319.

—*See, generally*, COPYHOLDS, Vol. XIII., pp. 137 *et seq.*

**1026. —.**—**LYON v. REED**, No. 1022, *ante*.

**Acceptance of rent.**—*See* LANDLORD & TENANT.

**Payment of rent.**—*See* LANDLORD & TENANT.

**1027. Surrender—Of copyholds.**—**TAYLOR v. PHILIPS**, No. 908, *ante*.

**1028. —.**—*See* —.—If the heir apparent of a copyholder in fee surrender in the lifetime of his ancestor, & survive him, the heir of such surrenderor is not estopped by that surrender of his ancestor, from claiming against the surrenderee.

**Qu.**: whether, in the case of a freehold estate

chattel.—**LYNCH'S LESSEE v. LYNCH** (1843), 11 L. R. 131.—**IR.**

**o. —.**—*See* —.—**CREAGH v. BLOOD** (1845), 3 Jo. & Lat. 133.—**IR.**

## PART VI. SECT. 2.

**n. Demise by lessor to stranger—Effect of.**—A demise by the lessor to

a stranger with the lessee's assent, possession accompanying the act, is a surrender by operation of law of the lessee's interest, whether freehold or



*Sect. 2.—By livery, entry, or acceptance of estate.*  
*Sect. 3: Sub-sect. 1, A.]*

if the heir had made a feoffment under such circumstances, his heir would not be estopped.—*GOODTITLE v. MORSE* (1789), 3 Term Rep. 365; 100 E. R. 623.

*Annotation:—*Refd. *Right d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278.

1029. ———. ———.]—*DOE d. BLACKSELL v. TOMKINS*, No. 980, *ante*.

———. ———.]—*See, generally, COPYHOLDS*, Vol. XIII., pp. 130–132, Nos. 1618–1651.

1030. ———. *By operation of law.*]—*LYON v. REED*, No. 1022, *ante*.

———. ———. *Delivery of possession.*]—*See LANDLORD & TENANT*.

———. ———. *Grant of new lease to tenant.*]—*See LANDLORD & TENANT*.

———. ———. *Change in position of tenant.*]—*See LANDLORD & TENANT*.

———. ———. *Lease to third party with tenant's consent.*]—*See LANDLORD & TENANT*.

1031. *Delivery of possession—Delivery up of title deeds—Instructions to tenant to pay rent to new landlord.*]—*G.* demised premises to *D.*, who entered & paid him rent. During the term, a third party, *T.*, disputed *G.*'s title, & they agreed to be bound by the opinion of a barrister, who decided in *T.*'s favour. *G.*, thereupon, delivered up the title deeds, & permitted *T.*'s attorney to tell *D.*, the tenant, that he must, in future, pay the rent of *T.* as his landlord. *D.* then paid rent accordingly; but *G.* afterwards distrained upon him for the same rent. On replevin, avowry & plea in bar stating the above facts:—*Held*: (1) *G.*'s claim of title as landlord to *D.* had expired; (2) his conduct amounted to an admission of that fact; (3) *D.* was not estopped from alleging it.

*G.* is estopped from setting up his relation of landlord against *D.*, having himself induced *D.* to pay rent to another person (*DENMAN, C. J.*).—*DOWNS v. COOPER* (1841), 2 Q. B. 256; 1 Gal. & Dav. 573; 11 L. J. Q. B. 2; 6 Jur. 622; 114 E. R. 100.

*Annotation:—*Mentd. *Roberts v. Shalless* (1858), 1 F. & F. 139.

— *By tenant to landlord.*]—*See LANDLORD & TENANT*.

### SECT. 3.—BY REPRESENTATION.

#### SUB-SECT. 1.—RULES OF GENERAL APPLICATION.

##### A. In General.

1032. *How estoppel arises.*]—In an action of trover, it appeared that pltf. being the legal owner of the goods in question, they were seized while in the actual possession of a third party under an execution against such third party, & sold to deft.:—*Held*: under a plea denying pltf.'s possession, deft. might show that pltf. authorised the sale, & a jury might infer such authority from pltf. consulting with the execution creditor as to the disposal of the property, without mentioning his own claim, after he knew of the seizure & of the intention to sell.

Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, & induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a former state of things as existing at the same

90. *Distd.* *Sandys v. Hodgson* (1839), 10 Ad. & El. 472. *Consd.* *Cheltenham & Grand Junction Western Union Ry. v. Daniel, Same v. De Medina* (1841), 6 Jur. 577. *Consd. & Expld.* *Freeman v. Cooke* (1848), 2 Exch. 654. *Consd.* *Price v. Groom* (1848), 2 Exch. 542; *Doe v. Challis* (1851), 17 Q. B. 166. *Apld.* *West & Green v. Elmore* (1851), 18 L. T. O. S. 207. *Distd.* *Howard v. Hudson* (1853), 2 E. & B. 1. *Consd.* *Jorden v. Money* (1854), 5 H. L. Cas. 185; *Dunston v. Paterson* (1857), 2 C. B. N. S. 495; *Simpson v. Accident Death Insee.* (1857), 2 C. B. N. S. 257; *Clarke & Chapman v. Hart* (1858), 4 H. L. Cas. 633; *Richards v. Johnson* (1859), 5 Jur. N. S. 520; *White v. Greenish* (1861), 11 C. B. N. S. 209. *Distd.* *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175. *Consd.* *McCance v. L. & N. W. Ry.* (1864), 11 L. T. 426; *Harding v. Hall* (1866), 14 L. T. 410. *Apld.* *Phillips v. ImThurn* (1866), L. R. 1 C. P. 463; *Re Bahia & San Francisco Ry.* (1868), L. R. 3 Q. B. 584; *Webb v. Herne Bay Comrs.* (1870), L. R. 5 Q. B. 642. *Distd.* *Goddard v. Smith* (1872), L. R. 3 P. & D. 7. *Consd.* *Morrison v. Universal Marine Insee.* (1873), L. R. 8 Exch. 197. *Distd.* *Wadling v. Oliphant* (1875), 1 Q. B. D. 145. *Consd.* *Goodwin v. Roberts* (1876), 1 App. Cas. 476; *Itumball v. Metropolitan Bank* (1877), 2 Q. B. D. 194; *Alderson v. Maddison* (1880), 5 P. & D. 293; *Ashby v. Day* (1885), 54 L. J. Ch. 935. *Apld.* *Roe v. Mutual Loan Fund* (1887), 19 Q. B. D. 347; *Tomkinson v. Balkis Consolidated Co.* (1891), 64 L. T. 816; *Re Bentley & Yorkshire Breweries, Ex p. Harrison* (1893), 69 L. T. 204. *Consd.* *MacLaine v. Gatty*, [1921] 1 A. C. 376. *Distd.* *Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117. *Refd.* *Brown v. Thorpe* (1841), 11 L. J. Ch. 73; *Doe d. Muston v. Gladwin* (1845), 6 Q. B. 953; *Boydell v. Eckstein* (1846), 7 L. T. O. S. 261; *Banks v. Newton* (1847), 16 L. J. Q. B. 142; *Nicholls v. Atherstone* (1847), 10 Q. B. 944; *Machu v. L. & S. W. Ry.* (1848), 2 Exch. 415; *R. v. Ambergate, etc., Ry.* (1853), 20 L. T. O. S. 246; *Foster v. Mentor Life Assee.* (1854), 3 E. & B. 48; *Hawker v. Hallelwell* (1856), 3 Sm. & G. 194; *Tyerman v. Smith* (1856), 6 E. & B. 719; *Bill v. Richards* (1857), 26 L. J. Ex. 409; *Cornish v. Abington* (1859), 4 H. & N. 549; *Levy v. Hale* (1859), 29 L. J. C. 1 127; *Re North British Australasian Co. & Joint-Stock Companies Acts, 1856 & 1857, Ex p. Swan* (1859), 7 C. B. N. S. 400; *Piggott v. Stratton* (1859), 1 De G. F. & J. 33; *Cairncross v. Lorimer* (1860), 3 L. T. 130; *Broadbent v. Barlow* (1861), 3 De G. F. & J. 570; *Cave v. Mills* (1861), 8 Jur. N. S. 363; *Loffus v. Maw* (1862), 3 Giff. 592; *Palmer v. Met. Ry.* (1862), 31 L. J. Q. B. 259; *Ashpittel v. Bryan* (1863), 3 B. & S. 474; *Metters v. Brown* (1863), 7 L. T. 795; *McEvoy v. Drogheda Harbour Comrs.* (1867), 16 W. R. 34; *Knights v. Wiffen* (1870), L. R. 5 Q. B. 660; *Stimson v. Farnham* (1871), L. R. 7 Q. B. 175; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 6 H. L. 352; *Le Clerc v. Greene* (1873), 22 W. R. 428; *Shropshire Union Rys. & Canal Co. v. R.* (1875), L. R. 7 H. L. 496; *Walrond v. Hawkins* (1875), L. R. 10 C. P. 342; *Polak v. Everett* (1876), 1 Q. B. D. 669; *Johnson v. Credit Lyonnais Co.* (1877), 3 C. P. D. 32; *Re Church & Empire Fire Insee. Fund, Andress' Case* (1878), 8 Ch. D. 126; *Simm v. Anglo-American Telegraph Co., Anglo-American Telegraph Co. v. Sparling* (1879), 5 Q. B. D. 188; *Joseph v. Webb, Joseph v. Lyons, Joseph v. Piddcock, Joseph v. Jones* (1883), Cab. & El. 262; *Manchester & Oldham Bank v. Cook* (1883), 49 L. T. 674; *Colonial Bank v. Cady & Williams, London Chartered Bank of Australia v. Cady & Williams* (1890), 15 App. Cas. 267; *Low v. Bouverie*, [1891] 3 Ch. 82; *Flatau v. Sawyer* (1892), 8 T. L. R. 656; *Sarat Chunder Dey v. Gopal Chunder Lala* (1892), 56 J. P. 741; *Henderson v. Williams*, [1895] 1 Q. B. 521; *Scholfield v. Lonsborough* (1895), 14 R. 151; *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; *Farquharson v. King*, [1901] 2 K. B. 697; *Morison v. London County & Westminster Bank* (1913), 108 L. T. 379; *Coleman v. London County & Westminster Bank*, [1916] 2 Ch. 353; *London Joint Stock Bank v. MacMillan & Arthur*, [1918] A. C. 777; *Pearl Mill Co. v. Ivy Tannery Co.*, [1919] 1 K. B. 78; *Colley v. Overseas Exporters*, [1921] 3 K. B. 302; *Bradford v. Price* (1923), 92 L. J. K. B. 871. *Mentd.* *Fletcher v. Manning* (1844), 12 M. & W. 571; *Ringham v. Clements* (1848), 12 Q. B. 260; *Angus v. Dalton* (1877), 3 Q. B. D. 85; *Hunt v. Fripp* (1897), 77 L. T. 516; *Re National Bank of Wales*, [1899] 2 Ch. 629; *Palmer v. Moore*, [1900] A. C. 293.

1033. ———.]—*FREEMAN v. COOKE*, No. 1019, *ante*.

1034. ———.]—If any person, by actual expressions or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or licence, & acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct. *G.*, the foreman of pltf.,

*Will. Woll. & Dav.* 678; 112 E. R. 179.

*Annotations:—*Apld. *Gregg v. Wells* (1839), 10 Ad. & El.



a lithographic printer, employed by him to get orders for printing, being desirous of publishing certain maps & other works for himself, agreed with deft., a publisher, to supply maps, etc., to him to be sold on commission. He then entered an order as from deft. in pltf.'s order book. Maps & other goods were supplied to deft. from pltf.'s premises, some of them accompanied by delivery notes requesting deft. to receive the goods from pltf. Receipts to the same effect were signed by deft. Pltf. made out an account amounting to £108, charging deft., & handed it to G., who showed it to deft. Deft. accepted bills for a part of the amount of this account & gave the balance in cash to G., who handed the cash & bills to pltf. Other goods being supplied, pltf. sent the invoice of them to deft. charging him with the price. Deft. applied to G. for an explanation, & on being told by G. that it was a mistake, took no steps to inform pltf. The jury found that deft. did not authorise G. to use his name in ordering the goods; but that from the manner in which deft. had acted pltf. believed that he was selling the goods to deft.:—*Held*: deft. was liable to pltf. for the price of the goods.

The rule is, that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists & acts on that inference, he shall be afterwards estopped from denying it (*BRAMWELL, B.*). —*CORNISH v. ABINGTON* (1859), 4 H. & N. 549; 28 L. J. Ex. 262; 7 W. R. 504; 157 F. R. 956.

*Annotations*:—*Apld.* *Thomas v. Brown* (1876), 1 Q. B. D. 714. *Refd.* *Sarat Chunder Dey v. Gopal Chunder Lala* (1892), 56 J. P. 741; *Henderson v. Williams*, [1895] 1 Q. B. 521; *Fracls, Timos v. Carr* (1900), 82 L. T. 698; *Pearl Mill Co. v. Ivy Tannery Co.*, [1919] 1 K. B. 78.

1035. —.] —*CAIRNCROSS v. LORIMER*, No. 1227, *post*.

1036. —.] —A. was induced by his broker to send him blank forms of transfer, which the broker filled up with numbers & descriptions of shares different from those of the co. intended by A., being shares in defts.' co., & by means of a duplicate key, which he had procured to be made without the knowledge of A., obtained certificates from a box of A.'s necessary to perfect the transfer; & he also forged the names of the attesting witnesses. In an action against the co. for damages, & for a *mandamus* to restore pltf.'s name to the register:—*Held*: the acts of pltf. were not such as estopped him from showing that the deed of transfer was a forgery.

What I consider the fallacy of the judgment of *WILDE, J.* in the present case is, that he lays down the rule in general terms, "that if one has led others into the belief of a certain state of facts, by conduct or culpable neglect calculated to have that result, & they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that state of affairs did not exist." This is very nearly right, but in my opinion not quite, as he omits to qualify it, by saying that the neglect must be in the transaction itself, & be the proximate cause of the leading the party into that mistake; & also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, & not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy (*BLACKBURN, J.*).—*SWAN v. NORTH BRITISH AUSTRALASIAN CO.*

(1863), 2 H. & C. 175; 2 New Rep. 521; 32 L. J. Ex. 273; 10 Jur. N. S. 102; 11 W. R. 862; 159 E. R. 73, Ex. Ch.

*Annotations*:—*Consd.* *Johnson v. Credit Lyonnais Co.* (1877), 3 C. P. D. 32. *Distd.* *Baxendale v. Bennett* (1878), 3 Q. B. D. 525. *Consd.* *Coventry v. G. E. Ry.* (1883), 11 Q. B. D. 776; *Merchants, etc. of Staple of England v. Bank of England* (1887), 21 Q. B. D. 160; *Seton v. Lafone* (1887), 19 Q. B. D. 68; *Bell v. Marsh*, [1903] 1 Ch. 528; *Longman v. Bath Electric Tramways*, [1905] 1 Ch. 646. *Refd.* *Re Bahia & San Francisco Ry.* (1868), L. R. 3 Q. B. 584; *Hunter v. Walters, Curling v. Walters, Darnell v. Hunter* (1871), 7 Ch. App. 75; *Halifax Union v. Wheelwright* (1875), L. R. 10 Exch. 183; *Arnold v. Cheque Bank, Same v. City Bank* (1876), 1 C. P. D. 578; *Dickson v. Reuter's Telegram Co.* (1877), 3 C. P. D. 1; *Ortigosa v. Brown* (1877), 47 L. J. Ch. 168; *Hall v. West-End Advance Co.* (1883), Cab. & El. 161; *Bank of England v. Vagliano*, [1891] A. C. 107; *Favell v. Wright* (1891), 64 L. T. 85; *Brocklesby v. Temperance Bldg. Soc.* (1893), 2 R. 594; *Scholfield v. Londesborough*, [1896] A. C. 514; *Lewis v. Clay* (1897), 77 L. T. 653; *Spooner v. Browning, Todd & Whish* (1897), 77 L. T. 685; *Union Credit Bank v. Mersey Docks & Harbour Board, Same v. Same & North & South Wales Bank*, [1899] 2 Q. B. 205; *Farquharson v. King*, [1901] 2 K. B. 697; *Rimmer v. Webster*, [1902] 2 Ch. 163; *Kepitigalla Rubber Estates v. National Bank of India*, [1909] 2 K. B. 1010; *Carlisle & Cumberland Banking Co. v. Bragg*, [1911] 1 K. B. 489; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777; *Brandon v. Michelham* (1919), 35 T. L. R. 617. *Mentd.* *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704; *France v. Clark* (1884), 26 Ch. D. 257; *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20.

1037. —.] —*CARR v. LONDON & NORTH WESTERN RY. CO.*, No. 1020, *ante*.

1038. Representation must reach alleged representee.]—Deft. was the licensee of a public-house at which meals were served. In 1917, an agreement was entered into between deft. & the general manager of the owners & a third person, whereby the latter became the tenant of the licensed premises & deft. was released from all obligations under the tenancy. The licence, however, was not transferred, & deft.'s name remained painted up over the doorway. During the continuance of the new tenancy liquor as well as food was sold on the premises. Pltfs., during this period, supplied fish, fruit & vegetables to the tenant. The accounts were not fully met, & pltfs. on discovering that deft. was the licensee, which discovery was made after the goods had been supplied, sought to make him liable for the price on the ground that the tenant was either the agent of deft., by operation of law, or that deft. was estopped from denying such agency:—*Held*: as between himself & pltfs., deft. was not estopped from setting up the true state of affairs, because, whatever misrepresentations were made, they did not reach pltfs. nor cause them to act to their detriment.—*MACFISHERIES, LTD. v. HARRISON* (1924), 93 L. J. K. B. 811; 88 J. P. 154; 40 T. L. R. 709; 69 Sol. Jo. 89.

1039. No defence to allege no reflection by representee about statement.]—(1) Applt. lent money to a limited co. upon the terms that he should have as collateral security fully paid shares in the co., & the co. handed to applt. certificates for 10,000 shares of £1 each. The certificates stated that he was the registered holder of the shares, & that on each of them the full amount had been paid. No money had in fact been paid upon the shares, which were issued from the co. direct to applt., but he did not know this & believed the representation that they were fully paid shares. An order having been made to wind up the co., applt. was placed on the list of contributories:—*Held*: since the co. had obtained the loan by a representation that the shares were fully paid, which applt. believed & acted upon, the co. & the liquidator were estopped from alleging that the shares were not fully paid, & applt. was

## Sect. 3.—By representation: Sub-sect. 1, A. &amp; B.

entitled to have his name removed from the list of contributories.

(2) I cannot myself think that, where an unequivocal statement is made by one party to another of a particular fact, the party who made that statement can get rid of the estoppel which arises from another man acting upon it by saying that if the person to whom he made the statement had reflected & thought all about it he would have come to see that it could not be true. Of course, if the person to whom the statement was made did not believe it, & did not act on the belief induced by it, there is no estoppel. But supposing he did believe it & did act on the belief induced by it, then it seems to me you do not get rid of the estoppel by saying, "If you had thought more about it you would have seen it was not true." The very person who makes a statement of that sort has put the other party off making further inquiry. He had produced on his mind an impression as a result of which further inquiry is thought to be unnecessary or useless. Therefore, I confess I do not think that it is legitimate to speculate what is the conclusion at which a man would have arrived if he had put together—pieced together—all the considerations that might have occurred to a reflective mind cogitating on the whole subject, & then to say that because he would have come to the conclusion that the statement made to him could not have been true, he is not entitled to act upon it as if it had been true, when in point of fact he did not enter into those considerations, but did believe it & did act upon it (LORD HERSCHELL).—BLOOMENTHAL v. FORD, [1897] A. C. 156; 66 L. J. Ch. 253; 76 L. T. 205; 45 W. R. 449; 13 T. L. R. 240; 4 Mans. 156, H. L.; *revsg.* S. C. *sub nom.* Re VEUVE MONNIER ET SES FILS, LTD., *Ex p.* BLOOMENTHAL, [1896] 2 Ch. 525, C. A.

*Annotations*:—As to (1) *Distd. Re African Gold Concessions & Development Co., Markham & Darter's Case*, [1899] 1 Ch. 414. *Consd. Gresham Life Assce. Soc. v. Crowther*, [1914] 2 Ch. 219. *Refd. Dixon v. Kennaway*, [1900] 1 Ch. 833.

**1040. Where all parties know the truth—No representation.**—On June 11, 1921, applt. co. recovered judgment against the debtor for a certain sum & costs. On Apr. 18, 1922, the debtor executed a document in the form of a memorandum of agreement for the benefit of his creditors. The agreement provided that it should not be registered either as a composition or deed of arrangement or otherwise, & contained a schedule of

creditors & their debts. At the date of the agreement there were five bkpcy. petitions pending against the debtor by creditors other than applt. co. As a result of negotiations between the debtor & the five creditors & in consideration of his entering into the agreement of Apr. 18, 1922, the five creditors agreed to the dismissal of their petitions & signed letters dated Apr. 17, 1922, which were all in the same form, & contained a statement that it was understood that it was not intended to register the agreement as a deed of arrangement, by which they respectively agreed that so long as the debtor complied with the terms of the agreement of Apr. 18, 1922, they would not bring any action against him in respect of their scheduled debts or attempt to set aside the agreement. On July 18, 1922, applt. co. signed a letter of assent in the same terms, which was also dated Apr. 17, 1922, & agreed to hand it over to the debtor on receiving from him a promissory note or bill of exchange of a third party for £300. This condition the debtor performed. The letter was not, however, handed over to the debtor owing to the refusal by him to pay to applt. co. an agreed sum for costs, a term which the ct. held formed no part of the original bargain. Applt. co. subsequently issued a bkpcy. notice against the debtor founded on its judgment debt. The registrar set the bkpcy. notice aside on the ground that applt. co. was bound by the agreement contained in the letter signed by it. On appeal:—*Held*: as the debtor & all the creditors who assented to the agreement knew from the terms of the instrument itself & from the statement contained in the letters signed by them that the agreement was void, & there was no representation that the agreement was valid, there was no question of estoppel, & applt. co. was not estopped from issuing a bkpcy. notice.—*Re A BANKRUPTCY NOTICE*, [1924] 2 Ch. 76; 93 L. J. Ch. 497; 131 L. T. 307; 68 Sol. Jo. 458; [1924] B. & C. R. 188, C. A.

## B. When Estoppel by Representation arises.

## (a) Representations of Fact.

**1041. Must be representation of existing fact.**—(1) Where a person possesses a legal right, a ct. of equity will not interfere to restrain him from enforcing it, though, between the time of its creation & that of his attempt to enforce it, he has made representations of his intention to abandon it. Nor will equity interfere even though the parties to whom these representations were made, have acted on them, & have, in full belief

PART VI. SECT. 3, SUB-SECT. 1.—  
B. (a).

**1041 i. Must be representation of existing fact.**—S. was the owner of land whereon certain goods were stored by P., who paid S. a rental for the occupation of the land. S. gave P. certificates in the following form: "S., Australian wharf received from P. for storage particulars of goods followed. This certificate is transferable by indorsement & must be presented when goods are applied for." P. having indorsed the certificates, lodged them with pltf. bank by way of security for advances, & the bank on the faith of such certificates advanced money to P.:—*Held*: the words "this certificate is transferable by indorsement" may be interpreted either as a promise that the party certifying will treat the property in the goods as transferred by the indorsement of the certificates, & that he will not deliver the goods except on the production of the certificates or partly

as a statement of what such person supposed the law of this country to be at the time concerning the effect of the indorsement, & partly as a promise that he would act up to that supposition; but as a promise no right of action could arise upon it if it were binding except to the promisee, P.; & as an intended statement of what the law was at the time it was not such a representation of an existing fact or state of facts as any *bona fide* holder for value was entitled to rely or act upon.—*COMMERCIAL BANK OF AUSTRALIA, LTD. v. SKINNER* (1895), 21 V. L. R. 368.—*AUS.*

**1041 ii.** —.]—In order to found an estoppel, a representation must be of an existing fact, not of a mere intention.—*HATFIELD v. CANADIAN PACIFIC RY. CO.* (1911), 17 W. L. R. 554.—*CAN.*

**1041 iii.** —.]—Pltf. represented to officials of deft. co. that a beach from which they desired to procure sand for the prosecution of a work upon

which they were engaged was public property & that everybody who required sand from the beach helped himself. Subsequently, & before this representation was acted upon, pltf. notified defts.' foreman that the beach was his property & that no sand was to be taken out until an arrangement was made to pay for it:—*Held*: the effect of the first representation was done away with by the subsequent notice & pltf. was not estopped from asserting his title.—*REID v. STANDARD CONSTRUCTION CO.* (1917), 51 N. S. R. 33.—*CAN.*

**1041 iv.** —.]—A representation which will estop the representer from afterwards setting up a state of affairs different from that represented must have been a representation of an existing fact.—*DUNN v. MOOSE JAW CITY*, [1921] 2 W. W. R. 881; 14 Sask. L. R. 445.—*CAN.*

**1041 v.** —.]—In 1871, M., the mtgee. of certain property, styling himself the owner of it, mtged. it to



in them, entered into irrevocable engagements. To raise an equity in such a case, there must be a misrepresentation of existing facts, & not of mere intention.

(2) It [estoppel *in pais*] is a principle equally of law & equity (LORD CRANWORTH, C.).—JORDEN *v.* MONEY (1854), 5 H. L. Cas. 185; 23 L. J. Ch. 865; 24 L. T. O. S. 160; 10 E. R. 868, H. L.; *reusq.* S. C. *sub nom.* MONEY *v.* JORDAN (1852), 2 De G. M. & G. 318, L. JJ.

*Annotations*:—As to (1) *Consd.* Piggott *v.* Stratton (1859), 1 De G. F. & J. 33; Citizens' Bank of Louisiana *v.* First National Bank of New Orleans (1873), L. R. 6 H. L. 352; Maddison *v.* Alderson (1883), 8 App. Cas. 467; Mills *v.* Fox (1887), 37 Ch. D. 153; Balkis Consolidated Co. *v.* Tomkinson, [1893] A. C. 396. *Apld.* Chadwick *v.* Manning, [1896] A. C. 231. *Refd.* Bushby *v.* Ellis (1853), 17 Beav. 279; Pulsford *v.* Richards (1853), 17 Beav. 87; Hutton *v.* Rossiter (1855), 7 De G. M. & G. 9; Loffus *v.* Maw (1862), 3 Giff. 592; Stephens *v.* Venables (No. 2) (1862), 31 Beav. 124; Gillman & Spencer *v.* Carbutt (1889), 37 W. R. 437; Licenses Insee. Corp'n. & Guarantee Fund *v.* Lawson (1896), 12 T. L. R. 501; *Re* Fickus, Farina *v.* Fickus, [1900] 1 Ch. 331; Whitechurch *v.* Cavanagh, [1902] A. C. 117; Cresswell *v.* Jeffreys (1912), 28 T. L. R. 413; *Re* A Bankruptcy Notice, [1924] 2 Ch. 76. *Generally Mentd.* Whitmore *v.* Mackeson (1852), 16 Beav. 126; Stone *v.* Godfrey (1854), 5 De G. M. & G. 76; Warden *v.* Jones (1857), 23 Beav. 487; Monypenny *v.* Monypenny (1858), 4 K. & J. 174; Smith *v.* Kay (1859), 7 H. L. Cas. 751; Goldicutt *v.* Townsend (1860), 28 Beav. 445; M'Askie *v.* M'Cay (1868), 16 W. R. 1187; Williams *v.* Williams (1868), 37 L. J. Ch. 854; Sterry *v.* Combs (1871), 25 L. T. 10; Cave *v.* Crew (1893), 68 L. T. 254.

1042. —.]—To a declaration in *sci. fa.* against a shareholder of a railway co., deft. pleaded, for defence on equitable grounds. That he was requested by pltf. to become a transferee of shares in the co., as the nominee of E. & M. & for their benefit & not for deft.'s benefit, & upon the representation of pltf. that if deft. would become such transferee he should incur no responsibility or liability whatever in respect of such shares; that deft. relying upon the said repre-

sentation did become a transferee of the shares in the declaration mentioned, as such nominee of E. & M. & for their benefit & not for deft.'s benefit, that deft. was induced by such representation, & not otherwise, to become, & in consequence thereof, became such transferee of the shares; that deft. never had any interest in the shares, or in the co., except as such nominee; that he never derived any profit, benefit, or advantage whatsoever from the shares or the co.; that the co. never commenced the railway, & the scheme had been & was entirely abandoned; that pltf. knew the circumstances under which deft. became such transferee, & stood by & suffered & permitted deft. to become such transferee upon the said representation, & he was now unjustly & inequitably & contrary to the said representation, & in fraud thereof, seeking to charge deft. & make him responsible & liable as a shareholder of the co. to him, pltf. On demurrer:—*Held*: the plea afforded no equitable or legal defence.

The allegation that "pltf. represented to deft. that he should incur no responsibility" is not the assertion of a fact, but the assertion of pltf.'s conclusion from a certain state of facts, & no person is precluded from asserting his conclusion from facts, though erroneous. If I say there are £5,000, in a co., I may afterwards be estopped from alleging the contrary, but if I say it is a good concern because £5,000 have been expended upon it, I am not estopped (BRAMWELL, B.).—BILL *v.* RICHARDS (1857), 2 H. & N. 311; 26 L. J. Ex. 409; 29 L. T. O. S. 184; 3 Jur. N. S. 520; 5 W. R. 650; 157 E. R. 129.

1043. —.]—The doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, & not to promises *de futuro*, which, if binding at all, must be binding as

S. In 1875 M. became the owner of such property by purchase. In 1877 such property was put up for sale in execution of a decree against M., & A. purchased it. S. subsequently sued M. & A. to enforce the mtge. of such property to him by M.:—*Held*: inasmuch as, if S. had at any time sued M. to enforce such mtge. after he had become the owner of the mtged. property & before A. had purchased it, M. would have been estopped from denying the validity of such mtge., & as there was nothing fraudulent in such mtge., & A. had purchased with a knowledge of the facts after M. had become the owner, A. was estopped from denying the validity of such mtge., & the mtged. property was liable in his hands to S.'s claim.—SEVA RAM *v.* ALI BAKSHI (1881), 1 L. R. 3 All. 805.—IND.

1041 vi. —.]—The principle of estoppel *in pais* arising from a person's conduct, has no application where the state of things which it was sought to conclude that person from denying was a future state of things.—M'EVoy *v.* DROGHEDA HARBOUR COMRS. (1867), 16 W. R. 34.—IR.

1041 vii. —.]—A party is not estopped from contradicting representations made by him if they are representations of mere legal consequences & not of facts.—HURREY *v.* BANK OF NEW SOUTH WALES (1883), 1 N. Z. L. R. C. A. 115.—N.Z.

1041 viii. —.]—A. requested B. to lodge money to A.'s credit at A.'s bank to meet certain cheques which A. had drawn; & B. undertook to do so. B. saw the manager of the bank, & the jury found that he informed him of what had taken place between him & A., & asked him to accept a store warrant instead of cash, as that would

be more convenient to him, B., & that the manager agreed to honour the cheques if the store warrant were deposited. The store warrant was deposited, but the cheques were afterwards dishonoured. A. had authorised nothing but the paying-in of money, & did not know until after the dishonour that a store warrant had been lodged instead of cash. Hearing of the dishonour, he saw B., who explained what he had done, & A. then expressed himself as satisfied with the course B. had taken. He then sued the bank for damages:—*Held*: there could be no estoppel, as there was no representation made to B. as agent for A., & no representation of any existing fact.—BANK OF NEW ZEALAND *v.* FLEMING (1899), 18 N. Z. L. R. 1.—N.Z.

1041 ix. —.]—Testator during his lifetime became surety for his son for the performance of a large railway contract. Fearing that he would be called upon as surety, & that his daughters would be left without anything, he conveyed certain lands to each of his daughters, including pltf. Afterwards he got them to convey the lands back to him again. In a letter to pltf., in reference to her conveying back the land, which had been conveyed to her, he said that she would have to sign the deed & return it to his lawyer, as he wanted to make out his will. He added, "Whatever I have, or may have, you all share alike." Testator had one son & three daughters. Pltf. conveyed the land back to testator. The conveyance was expressed to be in consideration of natural love & affection:—*Held*: the letter did not give rise to an estoppel, not being a representation of anything existing as a fact.—HIGGIE *v.* WILKINSON (1903), 23 N. Z. L. R. 74.—N.Z.

1041 x. —.]—If a man's conduct is such as to amount to a virtual representation that a certain state of facts exists, the ct. will not hesitate to hold him to such representation at the suit of the person to whom it was made & who has acted upon it.—UNION BANK (LIQUIDATORS) *v.* BEIT (1892), 9 S. C. 109.—S. AF.

1041 xi. —.]—In cases of estoppel a man must be taken to know that a representation is false if he consciously abstains from doing that which as a matter of business he would do & abstains because he would rather not know the truth.—ANGEHRN *v.* FEDERAL COLD STORAGE CO., LTD. (1908), T. S. 761.—S. AF.

1041 xii. —.]—To establish an estoppel by representation, the representation must be of an existing fact & not merely an expression of intention. A document reading, "We, the undersigned, hereby guarantee to indemnify . . . against any loss he may sustain through advancing certain moneys to J. H., in amounts against our names," is not a representation of an existing fact so far as any loss is concerned, & to that extent creates no estoppel.—MURMAN *v.* MINCHIN (1910), 10 H. C. 313.—S. AF.

1041 xiii. —.]—To establish an estoppel by representation, the representation must be of an existing fact & not merely an expression of intention.

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*v. COUCHMAN* (1853), 14 C. B. 100 ; 2 C. L. R. 53 ; 23 L. J. C. P. 36 ; 2 W. R. 59 ; 139 E. R. 42.

**1053. Effect of deed.]—**Claim, stating that defts. were carriers of passengers by railway, & pltf. was received by them as a passenger in an express train which by their negligence came into collision with an engine & he was injured. Defence, that after the collision pltf. accepted money from defts.' officer in satisfaction of his cause of action, & executed a release. Reply, that defts.' officer procured pltf. to execute the release by fraudulently representing to him for that purpose that his injuries were of a trivial & temporary nature, & that if they should afterwards turn out to be more serious than he then anticipated, he would still, though he had executed the deed, be in a position to obtain further compensation from defts., & that pltf. was thereby induced to execute the deed, & that after he had executed it his injuries turned out to be of a more serious nature than he had anticipated:—*Held*: the reply was good, as it contained a separate & independent statement that pltf. was induced to execute the deed in consequence of a fraudulent representation that his injuries were of a trivial & temporary character.

*Semble*: a fraudulent representation as to the effect of a deed may be relied upon as a defence to an action upon the deed.—*HIRSCHFELD v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1876), 2 Q. B. D. 1 ; 46 L. J. Q. B. 94 ; *sub nom.* *HIRSCHFELD v. LONDON, BRIGHTON & SOUTH COAST RY. CO.*, 35 L. T. 473.

**1054. Meaning of condition in policy.]—**During negotiations between the manufacturers & an agent of an insurance co. for the issue of a fire policy the manufacturers asked the agent whether the co.'s ordinary fire policy covered damage done by an explosion following a fire. The agent in reply quoted the terms of the condition mentioned above & informed the manufacturers that damage caused by an explosion resulting from a fire would be covered by the co.'s ordinary fire policy save that loss or damage as specified in the condition would be excepted. The manufacturers understood the qualification to refer only to an explosion due to hostile action, "loss or damage occasioned by foreign enemy" being one of the excepted risks in the condition:—*Held*: the representation by the agent was a representation, not of fact, but of law—namely, as to the meaning & effect of the condition—and, therefore, the insurance co. when sued on the policy was not estopped from contending by way of defence that the loss was caused by an explosion.—*Re HOOLEY HILL RUBBER & CHEMICAL CO. & ROYAL INSURANCE CO.*, [1920] 1 K. B. 257 ; *sub nom.* *HOOLEY HILL RUBBER & CHEMICAL CO., LTD. v. ROYAL INSURANCE CO., LTD.*, 88 L. J. K. B. 1120 ; 121 L. T. 270 ; 35 T. L. R. 483 ; *affd.* on other grounds, [1920] 1 K. B. 264, C. A.

*Annotation*:—*Mentd.* *Curtis's & Harvey (Canada) v. North British & Mercantile Insee.*, [1921] 1 A. C. 303.

**Whether actionable.]—***See MISREPRESENTATION & FRAUD.*

(c) *Ambiguous Representations.*

**1055. Statement must be clear & unambiguous.]—***Low v. BOUVERIE*, No. 5, *ante*.

**1056. —.]—***ONWARD BUILDING SOCIETY v. SMITHSON*, No. 734, *ante*.

**1057. —.]—**(1) In permitting its secretary to certify transfers of shares, a co. does not authorise the secretary to do more than give a receipt for certificates of shares which are actually lodged in the office. If the secretary gives a receipt or an

acknowledgment for certificates which have not been lodged, the co. is not estopped from setting up the true facts. Transfers of shares in a co. having been lodged with the co.'s secretary without the certificates for the shares, the secretary fraudulently certified upon the transfers that the certificates for the shares were in the co.'s office. The proposed transferee having brought an action against the co. for refusing to register him as the owner:—*Held*: the co. was not estopped from showing that the proposed transferor had no shares to transfer, & the action would not lie.

(2) It is an essential element that the person to whom the representation was made has suffered loss by acting upon it ; or, to put it in another way, has altered his position to his detriment by acting on the representation (*LORD ROBERTSON*).

(3) I have always understood that a representation to bind anybody as an estoppel must be a representation of an existing fact, or rather a representation as to some fact alleged to be in existence, must not consist of promises *de futuro* (*LORD MACNAGHTEN*).

(4) To support an estoppel the evidence ought to be clear & unambiguous. No representations can be relied on as estoppels if they have been induced by the concealment of any material fact on the part of those who seek to use them as such ; & if the person to whom they are made knows something which, if revealed, would have been calculated to influence the other to hesitate or seek for further information before speaking positively, & that something has been withheld the representation ought not to be treated as an estoppel (*LORD BRAMPTON*).—*WHITECHURCH (GEORGE), LTD. v. CAVANAGH*, [1902] A. C. 117 ; 71 L. J. K. B. 400 ; 85 L. T. 349 ; 50 W. R. 218 ; 17 T. L. R. 746 ; 9 Mans. 351, H. L. ; *reversg.* S. C. *sub nom.* *CAVANAGH v. WHITECHURCH (GEORGE), LTD.* (1900), 16 T. L. R. 303, C. A.

*Annotations*:—*As to* (1) *Expld.* *Lloyd v. Grace, Smith*, [1911] 2 K. B. 489. *Refd.* *Tendring Hundred Waterworks Co. v. Jones*, [1903] 2 Ch. 615 ; *Hambro v. Burnand* (1904), 9 Com. Cas. 251 ; *Ruben v. Great Fingall Consolidated*, [1904] 2 K. B. 712 ; *Platt v. Rowe* (*Trading as Chapman & Rowe*) & *Mitchell* (1909), 26 T. L. R. 49. *As to* (3) *Refd.* *Comitti v. Maher* (1905), 22 T. L. R. 121 ; *Fry v. Smellie*, [1912] 3 K. B. 282 ; *Brandon v. Michelham* (1919), 35 T. L. R. 617. *As to* (4) *Appld.* *Porter v. Moore*, [1904] 2 Ch. 367 ; *Doey v. L. & N. W. Ry.*, [1919] 1 K. B. 623. *Generally, Mentd.* *Anglo-American Oil Co. v. Manning*, [1908] 1 K. B. 536 ; *Malcolm, Brunker v. Waterhouse* (1908), 24 T. L. R. 854.

**1058. —.]—**Where a legacy is given upon a condition, an exor. who takes a beneficial interest in the legacy on the breach of the condition owes no duty to the legatee to give notice of the terms of the legacy. Testatrix appointed her son A. her exor. & bequeathed a leasehold house to her son B., then abroad, & directed that in case he should not return & claim it it should go to A. After the death of testatrix, A. wrote to B. : "A house has been left you & according to the will it is to be in my hands until you claim it" ; but he did not inform him of the gift over. B. died abroad without having claimed the house:—*Held*: A. was not estopped by the letter from claiming under the gift over, because there was no sufficiently precise representation that B. was absolutely entitled, & it was not proved that the non-return of B. was the consequence of the representation.—*Re LEWIS, LEWIS v. LEWIS*, [1904] 2 Ch. 656 ; 73 L. J. Ch. 748 ; 91 L. T. 242 ; 53 W. R. 393, C. A.

*Mentd.* *Re Turnbull, Skipper v. Wade* (1905), 49 Sol. Jo. 417 ; *Re Mackay, Mackay v. Gould*, [1906] 1 Ch. 25.

**Whether actionable.]—***See MISREPRESENTATION & FRAUD.*



Sect. 3.—By representation: Sub-sect. 1, B. (d)

(d) Representations in respect of ultra vires Acts.

1059. General rule.]—FAIRTITLE d. MYTTON v. GILBERT, No. 912, ante.

1060. —.]—(1) The directors of an unincorporated building society which had no borrowing powers borrowed money for the benefit of the society & gave to the lender as security the promissory notes of the directors. The society was afterwards incorporated under Building Societies Act, 1874 (c. 42), & acquired borrowing powers. Applt., who was the representative of the lender, applied to the society for repayment of the loan, but ultimately agreed to refrain from legal proceedings against the society on the directors giving him a deposit note for the amount due. The directors accordingly gave him a deposit note under the seal of the society, stating that the money was lent by applt. on the date of the deposit note, & he, thereupon, gave up to them the promissory notes above mentioned:—*Held*: the deposit note was not binding on the society.

(2) It is well established that a corporate body cannot be estopped by deed or otherwise from showing that it had no power to do that which it purports to have done (CAVE, J.).—*Re COMPANIES ACTS, Ex p. WATSON* (1888), 21 Q. B. D. 301; 57 L. J. Q. B. 609; 52 J. P. 742; *sub nom. Re SHEFFIELD PERMANENT BUILDING SOCIETY, Ex p. WATSON*, 59 L. T. 401; 36 W. R. 829, D. C.

Annotations:—As to (1) *Refd. Re Bottomgate Industrial Co-op. Soc.* (1891), 65 L. T. 712; *Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912] 2 Ch. 183. Generally, *Mentd. Sinclair v. Brougham*, [1914] A. C. 398.

1061. —.]—A local authority, being a public body with public duties, are not estopped from asserting a right to put an end to a nuisance by the fact that they had formerly permitted & encouraged the acts which cause the nuisance, it being beyond their power to make any binding agreement to permit such acts.—*ST. MARY, ISLINGTON, VESTRY v. HORNSEY URBAN COUNCIL*, [1900] 1 Ch. 695; 69 L. J. Ch. 324; 82 L. T. 580; 48 W. R. 401; 16 T. L. R. 286; 44 Sol. Jo. 327, C. A.

Annotations:—*Mentd. L. C. C. v. Acton U. D. C.* (1900), 17 T. L. R. 157; *East Barnet Valley U. C. v. Stallard* (1909), 79 L. J. Ch. 103; *Liverpool Corpn. v. Coghill*, [1918] 1 Ch. 307.

— Distinction between ultra vires acts & mere irregularities.]—See Nos. 1066, 1068, *post*.

1062. Waiver by vicar of rights—Public & not private rights.]—Claim: That pltf. was vicar of a parish; that a chapel was erected within it & endowed & consecrated for the administration of the sacraments & the performance of all other divine offices according to the rites of the Church of England; that pltf. as such vicar was entitled to nominate & present & had nominated & presented a clerk to the chapel, but another clerk had been licensed, instituted & admitted by deft. bishop on the nomination & presentation of certain other defts. who thereby hindered pltf. in the exercise of his right; & he claimed to have his right established & declared. Defence of the last-mentioned defts.: That certain freeholders had erected the chapel, & conveyed to the Ecclesiastical Comrs., & applied to them under Church Building Act, 1851 (c. 97), to declare the right of nomination to be in defts. who had endowed the chapel, &

that before making such declaration a copy of the application was, according to the Act, sent by the Comrs. to pltf., he being both patron & incumbent of the parish; that if he had ceased to be patron he stood by & knowingly allowed those defts. to endow the chapel & procure the same to be consecrated in the belief entertained by them as he well knew that he was patron, & that the sending of such copy to him was in fact a sending of a copy both to the patron & incumbent as required by the Act, & pltf. was, therefore, estopped from denying that he was patron; & that the right of nomination had been declared to be in those defts., who afterwards nominated. On demurrer to the allegation of estoppel:—*Held*: it was bad, because the rights of the vicar were not merely private but were accompanied by spiritual & other duties in which his parishioners were interested, & he could not therefore waive or divest himself of those rights & duties by the conduct imputed to him.—*MACALLISTER v. ROCHESTER* (BP.) (1880), 5 C. P. D. 194; 49 L. J. Q. B. 114; 42 L. T. 22, D. C.

Annotations:—*Mentd. Molloy v. Kilby* (1880), 15 Ch. D. 162; *Piller v. Roberts* (1882), 21 Ch. D. 198; *Eden v. Weardale Iron & Coal Co.* (1887), 34 Ch. D. 223.

1063. Agreement by public body with public duties permitting nuisance—Right of public body to terminate nuisance.]—*ST. MARY, ISLINGTON, VESTRY v. HORNSEY URBAN COUNCIL*, No. 1061, ante.

1064. Lease not in compliance with Municipal Corporations Act, 1882 (c. 50), s. 108.]—Deft. was in possession of certain premises, of which a lease for 300 years was granted in 1599 by pltf., the corpn. of Canterbury, & which would expire in 1899. In 1892 an arrangement was entered into between the parties, by the terms of which, in consideration of the surrender by deft. of the old lease, pltf. agreed to grant her a lease for her life free of rent. Deft. duly handed over the old lease, & received in exchange a lease for her life, which was in fact invalid by reason of not complying with sect. 108 of the above Act. In 1908 an action was brought by pltf. to recover possession of the property. Deft. set up that as she had surrendered the old lease in 1892, & the lease granted to her was invalid, Stat. Limitations began to run from that date, & that, as she had been in possession for more than twelve years since 1892, defts. were not entitled to recover possession of the premises:—*Held*: pltf. were not estopped from setting up the invalidity of the lease of 1892 or from denying the efficacy of the surrender of the lease of 1599.—*CANTERBURY CORPN. v. COOPER* (1909), 100 L. T. 597; 73 J. P. 225; 53 Sol. Jo. 301; 7 L. G. R. 908, C. A.

1065. Contract not under seal.]—Public Health Act, 1875 (c. 55), is not limited to contracts made for work to be done for or goods to be supplied to an urban authority, but applies to every contract made by an urban authority under any of the powers created by that Act. Pltf. deposited plans with defts. for erecting 36 houses on his land, which was in defts.' district & on one side adjoined a narrow highway, & at the instance of defts. altered his plans, & signed an agreement purporting to be made between himself & defts., whereby he agreed to remove his boundary fence & to throw a strip of land into the highway the

PART VI. SECT. 3, SUB-SECT. 1.—  
B. (d).

p. Action by former councillor in public interest.]—*M.*, who had been a member of a municipal council &, when such, had consented to the

purchase of a certain property under a scheme whereby a public loan had to be raised in a manner *prima facie* illegal, thereafter moved to have the council restrained from paying interest on the loan:—*Held*: the matter

being a public one in which the rate-payers were as much interested as *M.*, the latter was not estopped from proceeding.—*MABERLEY v. WOODSTOCK MUNICIPALITY* (1901), 18 S. C. 443.—*S. AF.*



whole length of his frontage so as to widen the highway to a uniform width of forty feet & defts. in consideration of his so doing agreed at their expense to make up & adopt the strip of land as a highway. Matters proceeded on the footing that the agreement was binding on both parties. Pltf. built his houses, & fulfilled his part of the agreement & gave possession of the strip of land to defts. who took possession of it, but did not make it up or adopt it as a highway. To an action by pltf. to compel defts. specifically to perform their part of the agreement could not be enforced against them because as the fact was, it was not sealed by them nor signed by any one on their behalf, & they relied on the above Act, & also on Stat. Frauds:—*Held*: defts. were not in any way estopped from relying on the fact that the contract was not under seal & therefore, was not binding upon them.—*HOARE v. KINGSBURY URBAN COUNCIL*, [1912] 2 Ch. 452; 81 L. J. Ch. 666; 107 L. T. 492; 76 J. P. 401; 56 Sol. Jo. 704; 10 L. G. R. 829.

*Annotation*:—*Mentd.* *Douglass v. Rhyl U. C.*, [1913] 2 Ch. 407.

*See, further*, CORPORATIONS, Vol. XIII., p. 381.

**1066. Irregularity—Absence of valid resolution.**—Pltf. declared against defts., a joint stock co. completely registered under 7 & 8 Vict., c. 110, on a bond, signed by two directors, under the seal of the co., whereby the co. acknowledged themselves to be bound to pltf. in £2,000. The plea set out the condition, which appeared to be for securing to pltf., who was a banker, such sum as the co. should, to the amount of £1,000, owe to pltf. on the balance of the account current, from time to time, & for indemnifying pltf. to that amount from losses incurred by reason of the account between pltf. & defts. The plea further set out clauses of the registered deed of settlement, by which it appeared that the directors were authorised, under certain circumstances, to give bills, notes, bonds or mtges.: & one clause provided that the directors might borrow on bond such sums as should, from time to time, by a general resolution of the co., be authorised to be borrowed. The plea averred that there had been no such resolution authorising the making of the bond, & that it was given without the authority of the shareholders. The replication set out the deed of settlement further, by which it appeared that the co. was formed for the purpose of carrying on mining operations & forming a railway. On demurrers to the plea & replication:—*Held*: pltf. was entitled to judgment, the obligee having, on the facts alleged, a right to presume that there had been a resolution at a general meeting, authorising the borrowing the money on bond.

*Semble*: such resolution would confer sufficient authority if it authorised the borrowing on bond of such sums as the directors might deem expedient, in accordance with the statute & deed, without otherwise defining the amount.—*ROYAL BRITISH BANK v. TURQUAND* (1856), 6 E. & B. 327; 25 L. J. Q. B. 317; 2 Jur. N. S. 663; 119 E. R. 886, Ex. Ch.

*Annotations*:—*Appld.* *Agar v. Athenaeum Life Assce. Soc.* (1858), 3 C. B. N. S. 725; *Athenaeum Life Insce. v. Pooley* (1858), 28 L. J. Ch. 119. *Consd.* *Re Athenaeum Life Assce. Soc.*, *Ex p. Eagle Insce.* (1858), 4 K. & J. 519; *Totterdell v. Fareham Brick Co.* (1866), L. R. 1 C. P. 674. *Expld.* *Fountain v. Carmarthen Ry.* (1868), L. R. 5 Eq. 316. *Appld.* *Re Land Credit Co. of Ireland, Ex p. O'voren*, *Gurney* (1869), 4 Ch. App. 460. *Apprvd.* *Re Bank of Hindustan, China, & Japan, Campbell's Case, Hippisley's Case, Alison's Case* (1873), 9 Ch. App. 1. *Distd.* *Re*

*County Palatine Loan & Discount Co., Cartmell's Case* (1874), 9 Ch. App. 691; *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366. *Appld.* *County of Gloucester Bank v. Rudry Morthyr Steam & House Coal Colliery Co.*, [1895] 1 Ch. 629. *Consd.* *Underwood v. Bank of Liverpool, Underwood v. Barclays Bank*, [1924] 1 K. B. 775. *Refd.* *Curtels v. Anchor Insce.* (1857), 2 H. & N. 537; *Balfour v. Ernest* (1859), 5 C. B. N. S. 601; *Commercial Bank of Canada v. G. W. Ry. of Canada* (1865), 3 Moo. P. C. C. N. S. 295; *Re London, Hamburg & Continental Exchange Bank, Zulueta's Claim* (1870), 5 Ch. App. 414; *East Holyford Mining Co. v. Costelloe* (1871), 19 W. R. 1010; *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417; *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869; *Melbourne Banking Corp. v. Brougham* (1878), 4 App. Cas. 156; *Re Briton Medical & General Life Asscn.* (1889), 5 T. L. R. 502; *Premier Industrial Bank v. Carlton Manufacturing Co. & Crabtree*, [1909] 1 K. B. 106; *Dey v. Pullinger Engineering Co.*, [1921] 1 K. B. 77. *Mentd.* *Prince of Wales Assce. v. Harding* (1858), E. B. & E. 183; *Guest v. Poole & Bournemouth Ry.* (1870), L. R. 5 C. P. 553; *Riche v. Ashbury Ily. Carriage & Iron Co.* (1874), L. R. 9 Exch. 224; *Yorkshire Ry. Wagon Co. v. Maclure* (1881), 30 W. R. 288; *Ward v. Royal Exchange Shipping Co.*, *Ex p. Harrison* (1887), 58 L. T. 174; *Re Hampshire Land Co.*, [1896] 2 Ch. 743; *Duck v. Tower Galvanizing Co.*, [1901] 2 K. B. 314.

**1067.** ———.]—Where a co. is empowered to acquire & hold real estate for the purposes of its business, the co., acting *bonâ fide*, must be the sole judge of what is required for the purposes of its business. But where a vendor sold property to a co. upon the faith of a document given to him by the officials of the co., which purported to be a copy of a resolution of the directors duly & regularly passed, the co. cannot afterwards be heard to say that the proper formalities had not been complied with, & that the alleged resolution was invalid, there being nothing to put the vendor on inquiry.—*MONTREAL & ST. LAWRENCE LIGHT & POWER Co. v. ROBERT*, [1906] A. C. 196; 75 L. J. P. C. 33; 94 L. T. 229; 13 Mans. 184, P. C.

**1068.** ——— *Company's seal affixed to mortgage—No quorum.*—The directors of a joint stock co. had power under their articles to fix the number of directors which should form a quorum. By a resolution they fixed three as a quorum. A meeting of directors, at which two only were present, authorised the secretary to affix the co.'s seal to a mtge., which was accordingly done by the secretary in the presence of the same two directors:—*Held*: as between the co. & the mtgees., who had no notice of the irregularity, the execution of the deed was valid.—*COUNTY OF GLOUCESTER BANK v. RUDRY MERTHYR STEAM & HOUSE COAL COLLIERY Co.*, [1895] 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 43 W. R. 486; 30 Sol. Jo. 331; 2 Mans. 223; 12 R. 183, C. A.

*Annotations*:—*Consd.* *Ruben v. Great Fingall Consolidated*, [1904] 1 K. B. 650; *Premier Industrial Bank v. Carlton Manufacturing Co. & Crabtree*, [1909] 1 K. B. 106. *Appld.* *Re Fireproof Doors, Umney v. The Co.*, [1916] 2 Ch. 142. *Consd.* *Underwood v. Bank of Liverpool, Underwood v. Barclays Bank*, [1924] 1 K. B. 775. *Refd.* *Re Bank of Syria, Owen & Ashworth's Claim* (1900), 83 L. T. 547. *Mentd.* *Poole v. Downes* (1897), 76 L. T. 110; *Duck v. Tower Galvanizing Co.*, [1901] 2 K. B. 314; *Stamford, Spalding & Boston Banking Co. v. Keeble* (1913), 82 L. J. Ch. 388; *Dey v. Pullinger Engineering Co.*, [1921] 1 K. B. 77.

Estoppel of companies generally, *see* COMPANIES, Vol. IX., pp. 287–290, Nos. 1783–1798, p. 299, No. 1854, Vol. X., pp. 775, 776, Nos. 4844–4856.

Doctrine of ultra vires generally, *see* COMPANIES, Vol. IX., pp. 604–613, Nos. 4035–4076, Vol. X., pp. 1163–1170, Nos. 8237–8308; CORPORATIONS, Vol. XIII., pp. 354–369, Nos. 922–1008.

(c) *Representation Induced by Party Complaining.*

**1069. General rule.**—*WHITECHURCH (GEORGE), LTD. v. CAVANAGH*, No. 1057, *ante*.

PART VI. SECT. 3, SUB-SECT. 1.—  
B. (e).

1069 i. *General rule.*—A railway co.

at different times served H. with several notices under Dominion Ry. Act, stating that portions of land owned by him were required for the co.'s

line. To each of the first two notices H. replied by a notice appointing an arbitrator, but stating such appointment to be expressly without prejudice

3.—*By representation: Sub-sect. 1, B. (e) & (f).]*

**1070.** ——.]—A person cannot rely by way of estoppel on a statement induced by his own misrepresentation, or by his concealment of a material fact the disclosure of which would have been calculated to make his informant hesitate or seek for further information before making the statement, or where the circumstances would have deterred a reasonable man from acting on it. Intending mtgees. of a trust fund induced a trustee to sign a memorandum that he had not received any notice of a prior charge, without informing him that the particular form of memorandum had been submitted to & was still under the consideration of his solrs., whose practice was to refuse to advise trustees to sign such documents, & also, though perhaps unintentionally, giving him the impression that he was signing it with their approval. The mtgees. were definitely informed before completion that the solrs. never advised trustees to sign the particular form of memorandum. Some time after completion it was discovered that the trustee had received & forgotten a notice of a prior charge:—*Held*: the mtgees. could not rely on the memorandum by way of estoppel.—*PORTER v. MOORE*, [1904] 2 Ch. 367; 73 L. J. Ch. 729; 91 L. T. 484; 52 W. R. 619; 48 Sol. Jo. 573.

*Annotation*:—*Refd.* *Doey v. L. & N. W. Ry.*, [1919] 1 K. B. 623.

**1071. Forged transfer—No estoppel in favour of transferee against company.]—**(1) C. owned stock in a co. His clerk, P., contracted to sell stock in the co. to S., who was the nominee of B. In order to carry out the contract, P. forged a transfer from C. to S., which was left by S. at the office of the co. for registration. The co. sent a letter to C. inquiring whether the transfer was correct: as they received no answer from him, they registered the transfer. B. borrowed money from a bank, & by way of security for the loan the stock was

to his right to insist that the co. had no right to take any part of his land. To co. served successive notices of desistment from all their three notices, & H. gave notice that he objected to the third notice of desistment, & claimed that the co. had no right to desist from their third notice of expropriation:—*Held*: after the co. had acted upon his expressed intention, & abandoned the notice to which he objected, it was too late for him to endeavour to insist upon its validity.—*Re HOOPER & ERIE & HURON Ry. Co.* (1888), 12 P. R. 408.—**CAN.**

**1069 ii.** ——.]—The owner of a four-wheeled vehicle used for purposes of trade, in respect of which a licence fee of £2 was payable under certain municipal regulations, represented to the municipal authorities that the vehicle was used for private purposes only, thereby inducing the acceptance of a payment of a licence fee of ten shillings. Upon discovery of the true position, action was brought for the balance of £1 10s.:—*Held*: as the acceptance of the payment of ten shillings was due to a misunderstanding arising from the representations made by the owner, the municipality was not estopped from requiring the balance.—**CAN.**

**PART VI. SECT. 3, SUB-SECT. 1.—**  
**B. (f).**

**1072 i.** *Representation must be or appear to be intended to be acted on.]—*N., being indebted to pltf., gave him a horse to be sold towards the satis-

faction of the debt. Pltf. swapped the horse with one H. for a colt, informed N. of the trade, fixed the value of the colt at \$5.40 more than the debt, & paid this amount to a creditor of N., in final settlement. H. afterwards became dissatisfied with the trade, insisted on pltf. giving back the colt, & applied to M., an attorney, who wrote pltf. Pltf. called on the attorney, & according to the evidence of the attorney, declared to him that the horse was N.'s. According to pltf.'s evidence, not contradicted, he stated to him the arrangement between himself & N. in reference to the horse, as above set out. On the same day, & previous to the interview, M., acting as attorney of other parties, had entered up a judgment against N., & the judge of the county ct. found that the attorney had, on the faith of pltf.'s statements that the horse was not his, but N.'s caused debt, the sheriff, to levy on it in pltf.'s possession, & that pltf. had abstained from looking after other property of N., who was a mere transient employee. Before any expenses had been incurred in keeping the horse, & before the sale, pltf. notified the sheriff that the horse was his:—*Held*: pltf. was not estopped from setting his ownership of the horse. The representation was not made with the intention that the execution creditor or the sheriff should act on it by seizing the horse, & it could not be reasonably inferred that such was the intention.—*MCKAY v. BONNETT* (1881), 2 R. & Q. 96.—**CAN.**

**1072 ii.** ——.]—In order to create an estoppel by conduct the representation must be made with the

transferred by S. at the request of B. to I. as trustee for the bank, & the co. registered I. as owner & issued a certificate accordingly. The money borrowed by B. was afterwards repaid by him to the bank, & the stock was held by I. as a bare trustee for B. The forgery was discovered, & the co. then refused to acknowledge I. as the holder of the stock. In an action brought by B. & I. to compel the co. to recognise their title:—*Held*: although I., as trustee for the bank, might have acquired a good title by estoppel against the co., yet that title ceased when the loan by the bank was paid off; & no estoppel existed in favour of B. against the co.; for B. in contracting, through S., to buy the stock belonging to C. had acted on the faith of the forged transfer, & had not relied upon any act of the co., & by sending the forged transfer to the co. had induced them to recognise his nominee as the holder; & the action would not lie.

(2) Effect & extent of estoppel discussed (*see* No. 1113, *post*).—*SIMM v. ANGLO-AMERICAN TELEGRAPH CO.*, *ANGLO-AMERICAN TELEGRAPH CO. v. SPURLING* (1879), 5 Q. B. D. 188; 49 L. J. Q. B. 392; 42 L. T. 37; 44 J. P. 280; 28 W. R. 290, C. A.

*Annotations*:—*As to* (1) *Expld. & Distd.* *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396; *Foster v. Tyno Pontoon & Dry Docks Co. & Renwick* (1893), 63 L. J. Q. B. 50; *Dixon v. Kennaway*, [1900] 1 Ch. 833. *Consd.* *Sheffield Corpn. v. Barclay*, [1905] A. C. 392. *Refd.* *Bank of England v. Cutler*, [1908] 2 K. B. 208; *Platt v. Rowe* (Trading as Chapman & Rowe) & Mitchell (1909), 26 T. L. R. 49. *As to* (2) *Refd.* *Dixon v. Kennaway*, [1900] 1 Ch. 833; *Ruben v. Great Fingall Consolidated*, [1904] 1 K. B. 650. *Generally, Mentd.* *Kingston-upon-Hull Corpn. v. Harding*, [1892] 2 Q. B. 494; *Smith v. Reynolds* (1892), 66 L. T. 808.

—.]—*See, generally, COMPANIES, Vol. IV., pp. 389, 390.*

**Whether actionable.]—***See MISREPRESENTATION & FRAUD.*

**(f) Representations Intended to be Acted on.**

**1072. Representation must be or appear to be**

intention that another party should act upon it, & he must have been induced to do so.—*McMANUS v. BLAKENEY* (1885), 25 N. B. R. 216.—**CAN.**

**1072 iii.** ——.]—A co. was estopped from availing itself of the benefit of a condition which it led the insured to believe need not be complied with.—*MARGESON v. COMMERCIAL UNION ASSURANCE CO., LTD.* (1898), 31 N. S. R. 337; *reversd.* 29 S. C. R. 601.—**CAN.**

**1072 iv.** ——.]—*BROWN v. LAURENCE* (1901), 40 N. S. R. 370.—**CAN.**

**1072 v.** ——.]—A clerk of one of the departments of Dominion Govt. forged several cheques upon the bank account kept by the department with defts., & deposited the forged cheques to his own credit with other banks, third parties. The cheques went through the clearing house, & were paid by defts. The forgeries were not discovered for some months; the clerk who executed them was the person intrusted with the duty of checking the bank account & examining the pass-book. In an action on behalf of the Crown to recover the amount of the forged cheques, which had been charged by defts. against the department's accounts, defts. contended that the right to recover was barred by the omission or neglect by officers of the Govt. of duties which the ordinary customer owes to his bank:—*Held*: the third party banks were justified in assuming that deft. bank could best determine whether the signatures were genuine or not, & it was a fair inference that deft. bank would know from bank usage that the third party banks would



intended to be acted on.]—FREEMAN v. COOKE, No. 1019, *ante*.

1073. —.].—[There is no] ground for saying that deft. is estopped by his own representations which were not made with any intention that they should be acted upon or with any view to deceive pltf. (*per* CUR.).—NICHOLSON v. HARRISON (1856), 27 L. T. O. S. 56; 4 W. R. 459.

1074. —.].—When a party has practised a deception with a view to a particular end, which has been attained by it, he cannot be allowed to deny its materiality. The *onus probandi* that the end was not so attained lies on the party who used the deception.—SMITH v. KAY (1859), 7 H. L. Cas. 750; 30 L. J. Ch. 45; 11 E. R. 299, H. L.; *affg.* S. C. *sub nom.* KAY v. SMITH (1856), 21 Beav. 522.

*Annotations*:—*Apld.* Gordon v. Street, [1899] 2 Q. B. 641. *Refd.* King v. Anderson (1874), 23 W. R. 196. *Mentd.* Ayleford v. Morris (1873), 8 Ch. App. 484.

1075. —.].—CARR v. LONDON & NORTH WESTERN RY. CO., No. 1020, *ante*.

1076. —.].—SETON v. LAFONE, No. 11, *ante*.

1077. —.].—If a patentee sells the patented article & the purchaser uses it he does not infringe, because the law implies a licence by the patentee to the purchaser to sell or deal with the article as he pleases, unless at the time of the purchase the patentee imposed a condition. If a purchaser buys from a licensee to whose licence the patentee has attached conditions, nothing turns, so far as licence as distinguished from estoppel is concerned, on the question whether the purchaser knew of the conditions or not. If a person innocently uses a patented invention, not knowing that there is a patent, he is none the less an infringer; & if he buys from a licensee not knowing that there are limits to the licence, he is equally an infringer. In this case, however, the patentee may be estopped from suing in certain circumstances, as, for instance, if he has acted in such a way as to lead the purchaser to suppose that the licence is not limited.—BADISCHE ANILIN UND SODA FABRIK v. ISLER, [1906] 2 Ch. 443; 75 L. J. Ch. 749; 95 L. T. 273; 22 T. L. R. 710, C. A.

rely on such knowledge & take the fact of payment by deft. bank as equivalent to a representation that the cheques were genuine, & would be likely to act upon it. Deft. bank might, therefore, properly be held liable on the ground of estoppel.—R. v. BANK OF MONTREAL (1906), 11 O. L. R. 595; 7 O. W. R. 638; *affd.* 38 S. C. R. 258.—CAN.

1072 vi. —.].—In an action for the recovery of title deeds in the possession of deft., upon which he claimed a lien, the judgment at the trial in favour of deft., was reversed, & judgment ordered to be entered for pltf. Deft. alleged that title deeds were deposited with him by J. to secure the performance by J. of a certain agreement between them. J. had applied to P., pltf.'s assignor, for a loan of \$1,000, & it was arranged between J., P., & deft., that P. should be given a mtge. upon the property covered by the title deeds to secure the loan, & that that mtge. should be a first charge upon the land:—*Held*: deft.'s own evidence showed that he led P. to believe that he would be safe in lending the money to J.; & deft. was, therefore, estopped from setting up any right which would cut out the mtge. taken by P. to secure repayment of the loan; & there was never any agreement between J. & the deft. that the latter should have a lien.—STOREY v. GALLAGHER (1911), 16 W. L. R. 220.—CAN.

1072 vii. —.].—*Held*: a representation made by pltf. that his father was the owner of crop did not estop pltf. from asserting that the grain seized

was his, because it did not appear that the representation had anything to do with inducing the seizure.—VOUSDEN v. HOPPER (1911), 16 W. L. R. 294; 4 Sask. L. R. 11.—CAN.

1072 viii. —.].—Pltf. purchased from F. all the merchantable timber & trees growing upon land described with the right for pltf., their servants, etc., to enter for the purpose of cutting down & removing the same. Pltf. on their part agreed to cut & remove the timber & trees within the period of four years from the date of the agreement. A dispute arose as to deft.'s ownership of a portion of the land included in the agreement & an action for trespass was brought against pltf. by the person claiming ownership of the disputed portion, pending the settlement of which pltf. were told by F. that their operations would have to cease. The action was determined in favour of F. & the period of four years mentioned in the agreement having expired pltf. claimed an extension of time & this being refused brought their action against the exor. of F. to enforce such extension:—*Held*: pltf. having been led by the conduct & words of deceased to believe that he would not insist upon his strict rights under the contract, with reference to the time limit for completion of their operations, a case was made out for the equitable interference of the ct.—THOMPSON v. JOHNSON (1919), 52 N. S. R. 317; 50 D. L. R. 361.—CAN.

1072 ix. —.].—A lumber property was conveyed to the person under whom

1078. —.].—Applt.'s deceased father was the owner of property in respect of which the resp. council served a notice under Public Health Act, 1875 (c. 55), requiring "the exors." of deceased to sewer & pave the road on which the property abutted. The notice was received by applt., who, at an interview with resps.' clerk, repudiated liability solely on the ground that by virtue of a deed which had been made between his father & an adjoining proprietor the latter had agreed to keep the road in good repair. Correspondence passed between applt. & resps. on the subject, resps.' letters being addressed to "the exors.," or to "the trustees," of applt.'s father, & applt. in one of his letters in reply described himself as trustee of his father's will. Applt. was not in fact his father's exor., but resps., believing that he was, carried out the sewerage & the paving work, & took proceedings to recover the cost from applt. The justices made an order upon applt. to pay the amount, & an appeal from this order was dismissed by quarter sessions on the ground that applt. had induced resps. to believe, & was estopped from denying, that he was his father's exor. Quarter sessions, however, stated a case for the opinion of the High Ct., in which there was no finding that applt. intended resps. to believe that he was his father's exor., or that resps. believed applt. to have this intention:—*Held*: the appeal would be allowed & in the absence of such findings, applt. was not estopped from denying that he was his father's exor.—PIERSON v. ALTRINCHAM URBAN COUNCIL (1917), 86 L. J. K. B. 969; 116 L. T. 314; 81 J. P. 149; 15 L. G. R. 228, D. C.

1079. —.].—A receiving order having been made against the debtor, his debts were paid in full with certain exceptions which included one due to K. & one due to B. K. held a mtge. as security, & the debtor, having made an application to rescind the receiving order, asked K.'s solr. to write a letter saying that K. was satisfied with the security. K.'s solr. replied declining to say so but adding that K. did not seek to prove against the estate for any possible deficiency. Eventually

defts. claimed as security for advances made to enable pltf. to complete the purchase of the property, upon which a balance remained due, & to carry on lumbering operations. It appeared that pltf. had fully paid off & discharged all advances made on his account, & he claimed a reconveyance of the property which was resisted by defts., who claimed that they were entitled to hold the property until the lumbering operations had been fully completed. The written agreement was somewhat uncertain as to this, but pltf. alleged, & the trial judge found, that, before the agreement was executed, pltf. was assured by the party by whom the advances were made that the meaning & intention of the agreement was that defts. should hold the lumber on the property until they were paid their advances with interest. It also appeared from the evidence that pltf. was a man of limited education, while the person by whom the advances were made had the agreement drawn up by his own solr., & that pltf. relied upon the assurance given him as to its meaning:—*Held*: (1) defts. were bound by the representation made & pltf. was entitled to the reconveyance claimed; (2) a representation made under the circumstances stated would estop the person making it, & those claiming under him, from setting up the contention that the meaning of the agreement differed from the representation made at the time it was entered into.—BLACK v. MCKEAN & CO., LTD. (1921), 54 N. S. R. 245; 56 D. L. R. 160; *affd.* 62 S. C. R. 290.—CAN.



## Sect. 3.—By representation: Sub-sect. 1, B. (f)

the debtor was adjudicated bkpt. Afterwards the debt due to K. was assigned to R., & later the debtor arranged for his mother's exors., of whom he was one, to buy all outstanding debts except those due to R. & to B. Subsequently a proof was put in by R.:—*Held*: R., who was in no better position than K., was estopped from putting in the proof.—*Re WICKHAM* (1917), 34 T. L. R. 158; [1917] H. B. R. 272.

**1080.** —.]—To create an estoppel *in pais* by reason of a representation made negligently, the representation must be such as is calculated to make the person to whom the representation is made believe in a certain state of facts, & he, in consequence thereof, must act under the strength of that belief. A consignor delivered to the pltf. railway cos. fourteen drums of carbolic acid to be delivered to a consignee but, by mistake of the railway cos. & their representation made negligently to deft. that the drums were a consignment of creosote delivered to them for consignment to deft., such delivery in fact having been made, the drums were delivered to & accepted by deft., who used six of them before the mistake was discovered. The consignee claimed the value of the six drums of carbolic acid from the cos., who paid him, & the cos. & the consignee then sued deft. in the county ct. for the amount so paid either as money paid to the use of deft. or as damages for the conversion of the drums. Deft. contended that pltf. were estopped by the representation, & the county ct. gave judgment for deft. finding as a fact that he had not been negligent in receiving the drums, & holding that in consequence there was no wrongful conversion. On appeal:—*Held*: pltf. were not estopped by the representation, deft. having contributed to the mistake by his negligence.—*LANCASHIRE & YORKSHIRE RY. CO., LONDON & NORTH WESTERN RY. CO. & GRAESER, LTD. v. MACNICOLL* (1918), 88 L. J. K. B. 601; 118 L. T. 596; 31 T. L. R. 280; 62 Sol. Jo. 365, D. C.

**1081.** —.]—Pltf. sold certain goods to P., who paid pltf. the price & then resold the goods to defts. at a small profit, & received from defts. a cheque in payment. The goods were delivered by pltf. to P. & by P. to defts., & defts. two days after paying P. for the goods, rejected them.

PART VI. SECT. 3, SUB-SECT. 1.—  
B. (g) i.

**1082 i.** *Representation must have been acted on.*—Some of pltf.'s goods having been seized & sold along with those of his wife under a distress warrant issued by the deft. H. to his co-deft., for the purpose of levying an amount due by the wife for rent of certain premises, from which, before the seizure, all the goods had been removed with the fraudulent intention of evading payment of the rent, pltf. brought this action for damages. When the bailiff made the seizure pltf. forbade him to do so, but he did not at any time inform H. or the bailiff that he claimed some of the goods to be his; & after the seizure his attorney wrote several letters to H., demanding that the goods be given up, & referring to them as belonging to pltf.'s wife:—*Held*: defts. had failed to prove that they had been induced to do anything, by reason of what pltf. had said or done, or omitted to do.

ii. —.]—A vendor of land who wilfully misstates the position of the boundary line & thereby leads the purchaser to believe that he is acquiring

P. passed on the rejection to pltf., who accepted the rejection. Meanwhile, defts. had issued a writ against P. claiming the return of the money which they had paid P. for the goods. P. gave defts.' solrs. two cheques, one for the amount claimed & one for the costs, & obtained from the solrs. a letter addressed to defts., stating that they had received the cheques from P. & asking that the goods be delivered to him. P. handed this document to pltf. & they repaid to him the price of the goods plus a sum for the costs of the writ. One of the cheques given by P. to defts.' solrs. was dishonoured, & shortly afterwards a receiving order was made against P. Defts. claimed a lien on the goods, or the right to retain them until they had been repaid the price paid by them to P. for the goods:—*Held*: on the rejection of the goods by the buyers & the acceptance of that rejection by the sellers, the property in the goods reverted in the sellers, who were entitled to maintain an action against defts. for conversion.

I also think, without basing my judgment on the point, that pltf. would be entitled to succeed on an estoppel, as the document [which was given by defts.' solrs. to P.] was given to P. with the intention that he should act on it & get his money back from pltf. Pltf. paid money on the faith of that document, & would be entitled to recover back from defts. the money so paid (*SHEARMAN, J.*).—*LYONS (J. L.) & CO. v. MAY & BAKER, LTD.*, [1923] 1 K. B. 685; 92 L. J. K. B. 675; 129 L. T. 413.

**Negligent representation.**—See Nos. 11, 1080, *ante*.

**Representation acted on.**—See Sub-sect. 1, B. (g), *post*.

**Whether actionable.**—See MISREPRESENTATION & FRAUD.

## (g) Representations Acted on.

## i. In General.

**1082. Representation must have been acted on.**—*FREEMAN v. COOKE*, No. 1019, *ante*.

**1083.** —.]—*CORNISH v. ABINGTON*, No. 1031, *ante*.

**1084.** — — **By person to whom made.**—A person who is not a partner, as between the proprietor & himself, is not so towards third parties, although the latter may have been told by the

truth of this representation, intentionally made on his part, which also had been acted on by the mtgee.; & it made no difference that the son had not had a fraudulent intention.—*SARAT CHUNDER DEY v. GOPAL CHUNDER LAHA* (1892), 1 L. R. 20 Cal. 296; L. R. 19 Ind. App. 203. **IND.**

**1082 v.** —.]—To create an estoppel it is not sufficient to say that it may well be doubted whether pltf. would have acted in the way he did but for the way in which defts. had acted. It must be found that pltf. would not have acted as he did. It must be found that defts. by the "declaration, act or omission intentionally caused or permitted another person to believe a thing to be true & to act upon such belief."—*NARSINGDAS v. ITAHIMANBHAI* (1904), 1 L. R. 28 Bom. 440.—**IND.**

**1082 vi.** —.]—To found an estoppel there must be a representation by word or conduct on the part of the person against whom the estoppel is sought to be raised that a certain state of facts existed which did not exist; & that the person claiming the benefit of the estoppel acted on the face of that representation.—*DE HART v. DE JONGH* (1903), T. S. 260.—**S. AF.**

a strip not included in the deed, is stopped from afterwards claiming such strip as his own property.—*ZWICKER v. FEINDEL* (1899), 29 S. C. R. 516.—**CAN.**

**1082 iii.** —.]—A policy holder in deft. co. was induced to refrain from making payment of a premium note by the representation of deft.'s superintendent that the policy was void on account of the inclusion, contrary to the rules of the co., of an unpaid balance of a previous premium in the note than current. There was no ground for the representation, as no such rule was indorsed upon or referred to in the policy. In an action by beneficiary to recover amount of the policy:—*Held*: the representation made by deft.'s superintendent was calculated to have the effect of leading a reasonable & prudent man not to pay the premium, & the representation having been believed & acted upon, all the elements of estoppel were present, & pltf. was entitled to recover.—*PARKER v. CAPITAL LIFE INSURANCE CO.* (1915), 48 N. S. R. 404; 51 S. C. R. 462.—**CAN.**

**1082 iv.** —.]—Where a son had represented that the *hiba* gave a right to his mother to mtgee.:—*Held*: neither he nor his representative in estate could be allowed to deny the

proprietor that he is, & although he may have performed what are ordinarily the functions of a partner, & may have told others that he is one, they not having communicated the same to the person who seeks to make him responsible.—*EDMUNDSON v. THOMPSON & BLAKEY* (1861), 2 F. & F. 566; 31 L. J. Ex. 207; *sub nom.* *EDMANSON v. THOMPSON & BLAKEY*, 5 L. T. 428; 8 Jur. N. S. 235.

**1085.** —.]—*CARR v. LONDON & NORTH WESTERN RY. CO.*, No. 1020, *ante*.

**1086.** —.]—In an action to recover penalties against deft. for having contrary to the Queensland Constitution Acts of 1867 sat in the Legislative Assembly as a member thereof & voted therein; it appeared that M. & Co. had in 1878 “for & on behalf of the owners of the ship S.” but contrary to the express direction of deft., one of such owners, concluded a charterparty with the local Govt.; that such charterparty was made in pursuance of an agreement between M. & Co. & the Govt. to supply ships of a particular description to carry emigrants which agreement did not provide for any privity of contract between the owners of such ships & the Govt.; that M. & Co. were the general agents of deft. to charter ships in which he held shares & that one of the firm was registered as managing owner of the S. & that it was neither alleged nor proved that the Govt. ever knew that M. & Co. or any member of that firm had general authority to bind deft. & had acted upon the belief that such general authority continued unrestricted:—*Held*: under such circumstances the Govt. could not have held deft. bound to them, & consequently, he was not disqualified under the Act.

*Qu.*: whether in the absence of any notice to the Govt. of such special restriction, the general authority of the agent if known to the Govt. would have sufficed to bind deft. so as to disqualify him under the Act.

There is no evidence that the Govt. or their agent ever knew that the firm or any individual of it had general authority to bind deft., & acted upon the belief that such general authority continued unrestricted. It is not, therefore, shown that the circumstances were such that the Govt. could have held deft. bound to them (*LORD BLACKBURN*).—*MILES v. MCILWRAITH* (1883), 8 App. Cas. 120; 52 L. J. P. C. 17; 48 L. T. 689; 31 W. R. 591, P. C.

**1087.** —.]—*CROPPER v. SMITH*, No. 902, *ante*.

**1088.** — **Representation made under mistake.**]

—Where a person's acts or declarations induce another to act in a particular way, he will be bound by the consequences if injurious to that other, though he may himself have been under a mistake, & may have had no intention to mislead or deceive.—*SARAT CHUNDER DEY v. GOPAL CHUNDER LALA* (1892), 56 J. P. 741; 8 T. L. R. 732, P. C.

**1089.** — **Notwithstanding other inducements.**]

—*OLIVER v. BANK OF ENGLAND*, No. 7, *ante*.

**1090.** —.]—There could be no estoppel where the truth was known to both parties (*per CUR.*).—*MOHORI BIBEE v. DHARMODAS GHOSE* (1903), 19 T. L. R. 295, P. C.

*Annotation*:—*Refd.* *Leslie v. Sholl*, [1914] 3 K. B. 607.

**1091.** —.]—*Re LEWIS, LEWIS v. LEWIS*, No. 1058, *ante*.

**1092.** —.]—Defts. sold oil to certain merchants. The merchants sold a portion of this oil to pltf., giving them delivery orders addressed to defts. & directing the latter to deliver to pltf. or their order “ex our contract.” Pltf. presented these orders to defts., who either sent word that they were in order, or retained them without com-

ment, & in either case entered in their books the names of pltf. While the merchants were punctual in their payments to defts. the latter regularly delivered oil on these orders to pltf. or their sub-purchasers. The merchants fell into arrear with their payments, & defts., claiming to exercise their right of lien as unpaid sellers, refused to make any further deliveries against the merchants' delivery orders. Pltf. claimed a declaration that they were entitled to delivery of the goods undelivered & to damages for non-delivery. They based this claim on the ground (*inter alia*) that defts. were estopped from denying that they had in their hands oil to answer the delivery orders, having made representations to that effect, on the faith of which pltf. purported to have altered their position by making advances to the merchants & by purchasing from them oil which pltf. had subsequently sold to sub-purchasers, to whom therefore they were liable to make deliveries or to pay damages:—*Held*: pltf. had failed to prove facts necessary or sufficient to establish a case of estoppel, as the evidence showed that pltf. regularly made the advances or purchases before making any inquiries as to whether the delivery orders would be executed, & had not, therefore, altered their position on the faith of any answers to such inquiries.—*MORDAUNT BROTHERS v. BRITISH OIL & CAKE MILLS, LTD.*, [1910] 2 K. B. 502; 79 L. J. K. B. 967; 103 L. T. 217; 54 Sol. Jo. 654; 15 Com. Cas. 285.

*Annotation*:—*Refd.* *Poulton v. Anglo-American Oil Co.* (1910), 27 T. L. R. 38.

**1093.** —.]—*MACFISHERIES, LTD. v. HARRISON*, No. 1038, *ante*.

— **To prejudice of representee.**—*See* Subsect. 1, B. (g) ii., *post*.

**1094. Duration of representation—Notice to representee of true facts.**—The sheriff having a writ commanding him to arrest A., took B., who represented herself to be the person named in the writ:—*Held*: though B. might be estopped by her misrepresentation from suing the sheriff for the original taking, he could not justify detaining her after he had notice that she was not the real party.—*DUNSTON v. PATERSON* (1857), 2 C. B. N. S. 495; 26 L. J. C. P. 267; 29 L. T. O. S. 199; 22 J. P. 23; 3 Jur. N. S. 982; 140 E. R. 509.

**1095. Power of representor to withdraw representation.**—By a deed of settlement of Aug. 7, 1832, a farm was conveyed to A. for life, subject to a term of 1,000 years, with power to lease for three lives, with a remainder over which ultimately became vested in B. & C. The term of 1,000 years was created for the securing a sum of £3,000, & was at the time of such settlement vested in two trustees, one of whom was A., the tenant for life. In exercise of the leasing power, A. granted a lease of the farm for three lives, under which lease pltf. became tenant, subject to the rent thereby reserved, & which rent was paid by pltf. to B. & C., or to R. & D., their attorneys, upon their coming into possession of the property. Subsequently, R. & D., as the attorneys for B. & C., wrote to pltf. stating that the legal estate under the term for 1,000 years was in J., & directing him to pay the rent to J.; & in consequence of that communication, pltf. allowed J. to recover judgment against him in an action for rent under the lease. B. & C. afterwards distrained for rent as due to them; whereupon pltf. brought replevin, & a case was stated by the county ct. judge for the opinion of this ct.:—*Held*: as the term of 1,000 years had, as to one moiety, merged in A. & B., & C. had therefore a right to distrain for a moiety of the rent, the effect of the representation



**Sect. 3.—By representation: Sub-sect. 1, B. (g) i. & ii.]**

by R. & D. would not estop B. & C. from recovering rent which pltf. had not paid in consequence of such representation, or had not made himself liable to pay under the judgment obtained against him by J.

*Qu.*: whether the representation by R. & D. was binding on B. & C. as an estoppel, they being married women & consequently incapable of appointing attorneys.

There is nothing to prevent the party who made the representation from afterwards saying, "I was mistaken in the representation I made to you & so far as you have not yet acted upon the faith of it I retract it & require you to act as if the representation had never been made (WILLIAMS, J.).—WHITE v. GREENISH (1861), 11 C. B. N. S. 209; 8 Jur. N. S. 563; 142 E. R. 776; *sub nom.* GREENISH v. WHITE, 31 L. J. C. P. 93.

*Annotation*:—*Refd.* Bateman v. Faber, [1898] 1 Ch. 144.

**Whether actionable.**—*See* MISREPRESENTATION & FRAUD.

**ii. To Prejudice of Representee.****1096. Representee must have been prejudiced.]**

—(1) A bkpt. who assists in the sale of his own

**PART VI. SECT. 3, SUB-SECT. 1.—B. (g) ii.**

**1096 i. Representee must have been prejudiced.]**—On the evidence:—*Held*: at the time when a certain certificate was given by A. he had refused to act any longer as, & had therefore ceased to be, architect, & as pltf. had not acted to his prejudice on the faith of the certificate, deft. was not estopped from asserting A. had ceased to be architect.—HOARE v. MCCARTHY (1916), 22 C. L. R. 296.—AUS.

**1096 ii. —.**—*In an action upon a policy of fire insurance defts. raised the defence that pltf. had not complied with a condition of the policy requiring a claim to be made within a certain time after the happening of the loss & providing that, unless that was done, no amount should be payable under the policy. Pltf. pleaded to this defence waiver & estoppel. The jury found that defts. had represented to pltf. that they did not intend to rely upon the fact that the claim was made too late:—Held: from defts.' conduct at the trial it should be taken that they did not contest with reference to the plea of estoppel the question whether pltf. had been induced by the representation to act upon it & had altered his position to his prejudice, & therefore, as there was evidence to support the jury's finding, the facts necessary to support the plea of estoppel were established.—CRAINE v. COLONIAL MUTUAL FIRE INSURANCE CO., LTD. (1920), 28 C. L. R. 305.—AUS.*

**1096 iii. —.**—*Deft., sued as maker of a note by the indorser had before the indorsement admitted his making to pltf., & induced pltf. to take it:—Held: the subscribing witness need not be called, as deft. was estopped.* PERRY v. LAWLESS (1849) 5 H. C. R.

**1096 iv. —.**—*To constitute an estoppel in pais, there must be a representation made with the intention that it should be acted upon, which representation is acted upon by the party to whom it is made, in the belief that it is true & by which he is prejudiced.—GIBERSON v. TORONTO CONSTRUCTION CO. (1910), 40 N. B. R. 309; 9 E. L. R. 535.—CAN.*

**1096 v. —.**—*The other defts. being directors of deft. co., having indorsed note & induced pltf. to enter into & perform the agreement in consideration of which the note was given, were*

*goods under the commission, for the purpose of protecting his property & seeing that it is sold to the best advantage, is not thereby estopped from disputing the validity of the commission.*

(2) Neither is he so estopped by giving notice to his lessors of a farm that he is a bkpt. & is willing to deliver up the lease, which they accept, his assignees not being parties or privies to the transaction.

(3) The express admission of a party to the suit, or an admission implied from his conduct, is evidence, & strong evidence, against him; but he is at liberty to show that any such admission was misunderstood or untrue, & he is not estopped or concluded by it, unless it has had the effect of altering the condition of some third person; where it has such an effect, the party is estopped from disputing its truth as against that person, & those claiming under him, & that transaction, but as against strangers he is not so estopped.

(4) It is a well-established rule of law, that estoppels bind parties & privies only, not strangers.—HEANE v. ROGERS (1829), 9 B. & C. 577; 4 Man. & Ry. K. B. 486; 7 L. J. O. S. K. B. 285; 109 E. R. 215.

*Annotations*:—*As to* (3) *Consd.* Londesborough's Case (1854), 4 De G. M. & G. 411. *Apld.* Newton v. Liddiard (1848), 12 Q. B. 925. *Refd.* Stratford & Moreton Ry. v.

v. STAMCO, LTD. (1915), 8 W. W. R. 574; 22 D. L. R. 629.—CAN.

**1096 x. —.**—*A representation which will estop the representor from afterwards setting up a state of affairs different from that represented must have been acted upon by the party to whom it was made & in the manner intended, & the party to whom it was made must thereby have altered his position to his prejudice.—DUNN v. MOOSE JAW CITY, [1921] 2 W. W. R. 881; 14 Sask. L. R. 445.—CAN.*

**1096 xi. —.**—*Estoppel cannot be pleaded unless it appears that the party pleading it has suffered injury by acting on the representations made.—HURREY v. BANK OF NEW SOUTH WALES (1883), 1 N. Z. L. R. C. A. 115.—N.Z.*

**1096 xii. —.**—*Pltf. in the ct. below sued defts., as partners, or as holding themselves out as partners, with one M. for the goods supplied to M. The magistrate gave judgment for defts. Pltf. then sued defts. in the Supreme Ct., in the same capacity, in respect of what was practically the same transaction; & in the alternative, as having represented to him, pltf., that they had put money into M.'s business, which would be treated as capital & stand between M.'s creditors & loss, but which they had, contrary to their representations, taken out of the business to pltf.'s loss. At the trial pltf. abandoned the allegation of partnership:—Held: the representations made were merely statements as to M.'s business position, & did not amount to a promise to pay; in such case, in the absence of fraud, there was no liability, except by estoppel, even if the representations were untrue; & even if the representations had amounted to a promise, in order to fix defts. with liability it must appear that the goods were supplied on the faith of such promise, which was inconsistent with the position first taken up by pltf.—HARTY v. WATSON (1895), 13 N. Z. L. R. 385.—N.Z.*

**1096 xiii. —.**—*A party was the tenant of premises belonging to his son; he concurred with his son in stating that his rent was £20, & thereby induced an heritable loan to be made on the subjects:—Held: liable to the heritable creditor, in a subsequent action of mails & duties, for a rent of that amount, though he alleged the*

*estopped from disputing the validity of the transaction or setting up that deft. co. had not power to give the note.—KNECHTEL FURNITURE CO. v. IDEAL HOUSE FURNISHERS (1910), 19 Man. L. R. 652.—CAN.*

**1096 vi. —.**—*Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, & induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring as against the latter a different state of things as existing at the same time.—HATFIELD v. CANADIAN PACIFIC RY. CO. (1911), 17 W. L. R. 554.—CAN.*

**1096 vii. —.**—*Estoppel is not raised by correspondence showing that deft. co. entertained the belief that it was liable for work done by pltf. where pltf. was in fact employed by another co. not assuming to act for or on behalf of deft. co. unless it is also shown that pltf. changed his position to his prejudice in reliance upon deft. co.'s conduct & letters.—DOMINION TRANSPORT CO. v. GENERAL SUPPLY CO. (1914), 26 O. W. R. 837; 7 O. W. N. 55; 20 D. L. R. 431.—CAN.*

**1096 viii. —.**—*The principle of estoppel is applicable only where the one claiming the benefit of it has been induced, by the conduct of the party against whom estoppel is alleged, to alter its position to its detriment.—Re RETAIL MERCHANTS' ASSOCN., LTD. (1914), 27 W. L. R. 50.—CAN.*

**1096 ix. —.**—*B. bank being in a position to sue S. on certain promissory notes was requested to take an assignment of a mtge. on the assets of S. as security & refrain from suing on the notes. B. bank thereupon invited a report from O. bank as to the stability of S. In reply O. bank wrote a letter which constituted in effect a statement that S. was solvent, though the bank knew that S. was insolvent & had already obtained from S. an assignment of practically all its assets. The O. bank then attacked the mtge. as a fraudulent preference:—Held: the O. bank was estopped from alleging that S. was insolvent at the time of the giving of the mtge., inasmuch as the B. bank had relied upon the statement contained in the letter referred to & had abstained from taking active measures by suing upon the notes.—BANK OF OTTAWA*



Stratton (1831), 2 B. & Ad. 518; *Graves v. Key* (1832), 3 B. & Ad. 313; *Ex p. Chambers* (1835), 1 Deac. 197; *Pickard v. Sears* (1837), 6 Ad. & El. 469; *Freeman v. Cooke* (1848), 2 Exch. 654; *Jorden v. Money* (1854), 5 H. L. Cas. 185; *Simpson v. Accidental Death Insce.* (1857), 2 C. B. N. S. 257; *Richards v. Johnston* (1859), 4 H. & N. 660; *Maloney v. Pink* (1923), 130 L. T. 500. *As to* (4) **Consd.** *Londesborough's Case* (1854), 4 De G. M. & G. 411. **Refd.** *Richards v. Johnston* (1859), 3 H. & N. 660. **Generally, Mentd.** *Dickinson v. Valpy* (1829), 5 Man. & Ry. K. B. 126.

**1097.** —.]—Certain timber which was deposited in the name of A., the importer, in the West India Docks, was sold by him to B. B. afterwards contracted to sell the timber to C., who accepted a bill for the amount, B. giving him an invoice of the timber, & a delivery order. The dock co. refused to deliver the timber except upon an order from A. C. became bkpt. without having obtained such an order; & the bill was dishonoured:—**Held:** there had been no constructive delivery to C. so as to put an end to B.'s lien on the timber for the price & B. was not estopped, by having given a delivery-order from disputing the operation of such order as a constructive delivery of the timber.

The only ground upon which pltf. can rest their case is that giving the delivery order by deft. acts as a sort of estoppel to deft., & that it is not competent to him afterwards to deny its validity. If the situation of the parties had been altered in consequence, possibly that might have been so. But no such alteration took place (*COLTMAN, J.*).—**LACKINGTON v. ATHERTON** (1844), 7 Man. & G. 360; 8 Scott, N. R. 38; 13 L. J. C. P. 140; 3 L. T. O. S. 57; 8 Jur. 407; 135 E. R. 151.

**1098.** —.]—**FREEMAN v. COOKE**, No. 1019, *ante*.

**1099.** —.]—A party to a cause who is proved to have made admissions may defeat their effect by showing that they were made under a mistake of law, provided that no person has been induced by them to alter his condition.

The general doctrine that the party is at liberty to prove that his admissions were mistaken or untrue, & is not estopped or concluded by them unless another person has been induced by them to alter his condition, is applicable to mistakes in respect of legal liability as well as in respect of fact (*LORD DENMAN, C.J.*).—**NEWTON v. LIDDIARD** (1848), 12 Q. B. 925; 6 Ry. & Can. Cas. 42; 18 L. J. Q. B. 53; 12 L. T. O. S. 213; 13 Jur. 255; 116 E. R. 1117.

**1100.** —.]—**HOWARD v. HUDSON**, No. 25, *ante*.

**1101.** —.]—To a declaration for not delivering certain timber trees bought by pltf. from deft., deft. pleaded that pltf. fraudulently felled &

removed from the land certain other more valuable trees not comprised in the contract as pltf. well knew, exceeding in number & value the undelivered trees, & fraudulently represented them to be, & substituted them for the undelivered trees, & had kept & converted them to his own use:—**Held:** the plea was bad.

It has been stated that most probably this case will go into a ct. of error. I think there is no case at all for deft. He relies on a trespass on the part of pltf., under pretence of a sale. There is no allegation in the plea, that the contract was rescinded, & there is no estoppel by standing by, because the position of Sir Robert has not been changed. The plea is simply that pltf. fraudulently pretended that these were the trees purchased, & cut & carried them away. Sir Robert may have, & I hope he will have, adequate redress, for pltf. was a gross trespasser (*JERVIS, C.J.*).

An estoppel in pais admits the truth but stops the other side from alleging it (*MAULE, J.*).—**LEWIS v. CLIFTON** (1854), 14 C. B. 245; 2 C. L. R. 1350; 23 L. J. C. P. 68; 22 L. T. O. S. 259; 18 Jur. 291; 2 W. R. 230; 139 E. R. 101.

**Annotation:**—**Mentd.** *Wilkin v. Reed* (1854), 15 C. B. 192.

**1102.** —.]—The doctrine that a right of action once vested can be only divested by a release, or by accord & satisfaction, is exploded, & a parol composition agreement is a good answer by the debtor to an action for his original debt by a creditor who has agreed. A parol agreement between a single creditor & his debtor to accept a composition is no defence to an action by the former. In order that such agreement may be a valid defence, the other creditors or some of them must join in it with the debtor & with each other. At a meeting of deft.'s creditors, his accountant's clerk showed pltf., one of the creditors, a composition agreement, signed by several creditors. Pltf. asked if L. had signed, & on being answered in the negative, said he would not sign till L. had signed. The clerk understood this to mean that he promised to sign if L. signed, & procured L.'s signature to the paper. Pltf. subsequently refused to sign, & brought an action for his whole claim. Deft. pleaded a composition agreement:—**Held:** supposing pltf. induced L. to sign on the faith of a promise to sign if L. would sign, pltf. was not estopped from bringing this action, since deft. had not been caused by such promise to alter his position.—**BOYD v. HIND** (1857), 1 H. & N. 938; 26 L. J. Ex. 164; 28 L. T. O. S. 358; 3 Jur. N. S. 566; 5 W. R. 361; 156 E. R. 1481, Ex. Ch.

**Annotations:**—**Refd.** *Slater v. Jones* (1873), L. R. 8 Exch. 186; *Lewis v. Leonard* (1880), 5 Ex. D. 165; *West Yorkshire Darracq Agency v. Coleridge*, [1911] 2 K. B. 326.

premises to be worth less, & to have been let to him for less.—**M'NIVEN v. HUNTER** (1836), 14 Sh. (Ct. of Sess.) 685.—**SCOT.**

**1096 xiv.** —.]—Where a co. issues a certificate for shares which were not paid for, but are represented by such certificate as fully paid up & such certificate comes into the hands of a *bona fide* holder, for or without value, who, ignorant of the true facts, takes the certificate, relying on the representation that the shares were fully paid, the co. is thereafter estopped from denying against such holder that the shares were not paid up, & on liquidation, he cannot be made a contributory in respect to the same.—**Re ROSEMOUNT GOLD MINING SYNDICATE, LTD.** (IN LIQUIDATION) (1905), T. H. 169.—**S. AF.**

**1096 xv.** —.]—A co. will be estopped from claiming payment for shares from persons whom the directors,

acting within the apparent scope of their authority, have led into honestly buying the shares by representing such shares to have been fully paid-up; & upon the winding-up of the co. the liquidators will similarly be estopped.—**Re REYNOLDS' VEHICLE & HARNESS FACTORY, LTD.** (1906), 23 S. C. 703.—**S. AF.**

**1096 xvi.** —.]—To prove a course of dealing which would estop a principal from denying an authority, which, in fact, he never conferred on his agent & which could not be legally implied from the nature of the agency, it is not sufficient to show that pltf. may possibly have been misled, but pltf. must show that the course of dealing was of such a nature that it could reasonably have been expected to mislead, & that it did in fact mislead him.—**STRACHAN v. BLACKBEARD & SON** (1910), App. D. 282.—**S. AF.**

**1096 xvii.** —.]—Resps. recovered

judgment on a bill of exchange against applts. who were not the drawees thereof. On appeal, resps. contended that applts. were estopped from setting up the defence that they were not the drawees because they in their plea alleged that they undertook to pay the bill upon certain conditions:—**Held:** in the absence of evidence of prejudice or that resps.' position had been altered through the act of applts., a case of estoppel had not been established.—**RABKIN & HOFFMAN v. NATIONAL BANK OF SOUTH AFRICA, LTD.** (1915), C. P. D. 545.—**S. AF.**

**q. When estoppel ceases to operate.]**—Estoppel by representation ceases to operate as soon as the person to whom the representation is made is placed in as advantageous a position as he would have occupied had such representation not been made to him.—**DE RENZY v. AILFELD** (1890), 9 N. Z. L. R. 94.—**N.Z.**

*Sect. 3.—By representation: Sub-sect. 1, B. (g) ii.*

—.]—CARR *v.* LONDON & NORTH WESTERN RY. CO., No. 1020, *ante*.

1104. —.]—WHITECHURCH (GEORGE), LTD. *v.* CAVANAGH, No. 1057, *ante*.

1105. —.]—FARQUHARSON BROTHERS & CO. *v.* KING & CO., No. 1021, *ante*.

1106. —.]—A solr. was instructed by pltf. to investigate the title to & prepare the conveyance of property which pltf. had contracted to buy. The solr. was himself the owner of adjoining property, & had in fact, encroached & built part of his greenhouse on the property comprised in the conveyance to pltf., & had acquired a title by adverse possession to the encroached land. The fact of the encroachment was not known either to pltf. or to the solr., though the solr. might have discovered it by testing the measurements of the property on investigating the title. Pltf., who had no notion at the time that he was buying any part of the encroached land, subsequently discovered the facts & brought an action claiming the encroached land as against the solr.'s representatives. On appeal:—*Held*: assuming the solr.'s conduct to have amounted to a representation on which an estoppel could be founded, still the action could not be maintained by pltf., since he had in no way acted to his detriment on the faith of the alleged representation.

The neglect, if neglect there be, must be in the transaction itself, & be the proximate cause of the leading the party into that mistake (COLLINS, M.R.).—BELL *v.* MARSH, [1903] 1 Ch. 528; 72 L. J. Ch. 360; 88 L. T. 605; 51 W. R. 325; 47 Sol. Jo. 296, C. A.

1107. —.]—Defts. by a proposal of insurance requested pltf., a mutual insurance assocn. registered under Companies Acts, to insure defts.' steamship & to enter defts. in the register of members of the assocn. The proposal was accepted, defts. were entered in the register of members, & a policy was issued by pltf. to defts. By rule 32 of the rules of the assocn. members were liable to claims for losses & also for special contributions for deferred claims; &, by rule 35, a member was liable to contribute in respect of an insurance effected by him to all claims arising out of losses happening at & after noon on the day of the commencement of the insurance. By rule 41, a ship which was "mortgaged by a member shall not be or be considered as insured so far as his shares are concerned, & a ship insured which shall after an insurance thereon is effected be mortgaged by a member shall not continue to be or be considered as insured so far as his shares, as aforesaid, are concerned against losses which shall happen to the ship after the mtge., unless & until the mtgee., or other persons to be approved by the directors, guarantees the payment of all contributions which are or may become due to the co. in respect of the insurance of the ship & the directors in their discretion accept such guarantee. In the event of a ship insured being mortgaged by a member after an insurance thereon is effected, such member shall give notice, in writing, of the mtge. & the date thereof to the secretary, & shall be liable to contribute in respect of the insurance to all claims arising out of losses happening before noon of the day following that on which such notice, as aforesaid, shall be given." By rule 42, nothing in rules 35 & 41, amongst others, was to prejudice or affect the liability of the members for the special contributions mentioned in rule 32. At the date of the proposal the steamship was in

fact mortgaged, but pltf. had no knowledge of this, & never received any notice thereof, nor had they any such guarantee as that mentioned in rule 41. An action was brought for calls made by pltf. on defts. under rule 42 for claims for losses & special contributions:—*Held*: defts. were liable, inasmuch as by their proposal & its acceptance they became members of the assocn., & although, having failed to comply with rule 41, which assumed that where a ship was mortgaged at the time they joined the assocn. they would give notice thereof, their ship was not protected, that did not relieve them from liability as members for the special contributions & losses sued for.

*Semble*: (FARWELL, L.J.) if a man induces a co. to be at risk during the whole of the year on an untrue statement, he is estopped from setting up the untruth of that statement.—NORTH EASTERN 100 A. STEAMSHIP INSURANCE ASSOCN. *v.* RED S.S. CO. (1906), 22 T. L. R. 692; 12 Com. Cas. 26.

1108. —.]—Shippers of goods at a foreign port chartered a ship to carry the goods to London. The charterparty provided that the master should sign bills of lading in the form indorsed on it. That form contained the clauses "shipped in good order & condition & to be delivered in the like good order & condition" & "quality & measure unknown" & incorporated the American "Harter Act" which imposed upon shipowners & masters the duty of delivering to shippers of merchandise bills of lading stating (*inter alia*) "the apparent order & condition" of the merchandise delivered for carriage. The goods in question were damaged before shipment & the damage was apparent. The master, however, took them on board & gave the shippers a bill of lading in the form indorsed on the charter. Before delivery of the goods in London, the shippers sold them to purchasers there, who thereupon became indorsees of the bill of lading to whom the property in the goods passed. On presentation of the bill of lading & shipping documents the purchasers paid the contract price of the goods to the shippers & the goods having been delivered in their damaged condition in London, the purchasers, in arbn. between themselves & the shippers obtained an award against the latter for damages representing the difference between the price paid by the purchasers & the value of the goods when delivered. The purchasers did not sue the shippers who were a foreign firm, on that award but now sued the owners of the ship for damages for not delivering the goods in good order & condition:—*Held*: the shipowners were bound by the representation of the master in the bill of lading that the goods were shipped in good order & condition, &, there being sufficient evidence that the purchasers had altered their position & acted to their own prejudice on the faith of that representation, the shipowners were estopped from denying the truth of it, & were liable in damages to the purchasers for not delivering the goods in good order & condition.—COMPANIA NAVIERA VASCONZADA *v.* CHURCHILL & SIM, SAME *v.* BURTON & CO., [1906] 1 K. B. 237; 75 L. J. K. B. 94; 94 L. T. 59; 54 W. R. 406; 22 T. L. R. 85; 50 Sol. Jo. 76; 10 Asp. M. L. C. 177; 11 Com. Cas. 49.

*Annotations*:—*Folld.* Martineaus *v.* Royal Mail Steam Packet Co. (1912), 106 L. T. 638. *Consd.* The Tromp, [1921] P. 337. *Refd.* Hogarth Shipping Co. *v.* Blyth, Greene, Jourdain, [1917] 2 K. B. 534; New Chinese Antimony Co. *v.* Ocean S.S. Co., [1917] 1 K. B. 664; Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575.

Bills of lading generally, *see* SHIPPING.

1109. —.]—By an agreement under seal,



dated Sept. 1, 1892, between the predecessors in title of applt. & the Wallasey Local Board, the predecessors in title of resps., reciting the approval of the latter of a plan for the erection of certain buildings on the land of the former, the predecessors in title of applt. agreed to set back every part of the proposed buildings 20 feet from the existing footpath, & when required by the Board, to give up so much land as they should require for the purpose of making the road of the stipulated width, & also to make up at their own expense so much of the road as abutted on the frontage of the said land. All the powers of the board became vested in resps. Applt., before purchasing the said land, made written inquiries of the clerk of resps. whether the streets & roads adjoining the land had been adopted by the local authorities, to which the clerk replied in writing that the road in which the land was situated was a highway repairable by the inhabitants at large. After applt. had completed the purchase of the premises, resps. served upon him a notice, requiring him to carry out the works mentioned in the agreement of Sept. 1, 1892. By Wallasey Local Board Act, 1890, s. 32, "every undertaking or agreement in writing given by or to the board . . . by any owner on the passing of plans . . . or otherwise in connection with the property of such owner shall be binding on the owner of the property for the time being & his successors in title & upon the board & may be enforced by either party in any ct. of summary jurisdiction by a penalty. . . ." Applt. failed to comply with the said notice, & upon an information under the said sect. for failing to do so was convicted by the justices. Applt. contended that the agreement of Sept. 1, 1892, created an interest in and & was void as offending against the rule against perpetuities; that by reason of the letter of the clerk of resps. they were estopped from enforcing the agreement; & that sect. 32 of the local Act did not apply:—*Held*: even if the agreement were void for remoteness, sect. 32 of the local Act made it binding upon applt., & there was no evidence of estoppel.—*CRANE v. WALLASEY CORPN.* (1912), 107 L. T. 150; 76 J. P. 326; 10 L. G. R. 523, D. C.

**1110.** —.]—To constitute an estoppel there must be an untruth stated, or an act done, whereby another person is prejudiced or induced to act to his prejudice (*AVORY, J.*).—*KERSHAW v. SMITH (ALFRED JOHN) & CO., LTD.*, [1913] 2 K. B. 455; 82 L. J. K. B. 791; 108 L. T. 650; 77 J. P. 297; 11 L. G. R. 519, D. C.

**1111.** —.]—By certain military regulations officers in the Royal Air Force were on demobilisation entitled to a gratuity varying in amount according to circumstances. If their names were on a certain list, called the Emergency List, they were only entitled to a gratuity at a lower rate than if they were not on that list. Deft. was a demobilised officer of the Royal Air Force. Pltfs., who acted as Govt.'s agents for the payment of gratuities to demobilised officers of that force, in ignorance of the fact that deft. was on the Emergency List, but also in forgetfulness of the regulation which provided that the gratuities of officers on the Emergency List should be paid at the lower rate, & not appreciating the materiality of an officer being on that list, paid deft. his gratuity at the higher rate to which he would have been entitled if he had not been on that list. More than a year afterwards, & before notice of the mistake, deft. spent the money. In an action to recover back the excess payment as money paid under a mistake of fact:—*Held*: pltfs. could not recover on the grounds that pltfs.' mistake was not a mistake of fact causing the payment, & as deft. had been led by pltfs.' conduct to believe that he might treat the money as his own, & in that belief had altered his position by spending it, pltfs. were estopped from alleging that it was paid under a mistake.—*HOLT v. MARKHAM*, [1923] 1 K. B. 504; 92 L. J. K. B. 406; 128 L. T. 719; 67 Sol. Jo. 314, C. A.

*Annotation*:—*Mentd. Ord v. Ord.* [1923] 2 K. B. 432.

**1112.** —.]—*MACFISHERIES, LTD. v. HARRISON* No. 1038, *ante*.

**Whether actionable.**—*See MISREPRESENTATION & FRAUD.*

### C. Effect and Extent of Estoppel.

**1113. General rule.**—An estoppel may be said to exist, where a person is compelled to admit that to be true which is not true, & to act upon a theory which is contrary to the truth (*BRAMWELL, L.J.*).

An estoppel gives no title to that which is the subject matter of estoppel. The estoppel assumes that the reality is contrary to that which the person is estopped from denying, & the estoppel has no effect at all upon the reality of the circumstances. I speak not of that estoppel, which is said to arise upon a deed of conveyance or other deed of a similar nature. . . . I am speaking now of the estoppels which arise upon transactions in business or in daily life, & as it seems to me, these estoppels have no effect on the reality of the transaction. It may be that under some circumstances an estoppel will prevent a person from dealing in a particular manner with goods; for instance, if a person is estopped from denying that he has made a contract to deliver goods, & if the goods are still in his possession, in a suit to enforce performance of the alleged contract he may be obliged to hand over the goods, although, in fact, there was no contract, & he may be liable to act as if there had been a contract, & to fulfil his supposed obligation. But suppose that although a person is estopped from denying that he has made a contract to deliver goods, he has parted with the goods & has sold them to somebody else: it seems to me that although he may be estopped as against the person claiming delivery under the supposed contract, he cannot be compelled to deliver the goods, which, there being no contract, have legally passed to somebody else: owing to the estoppel he cannot deny that a contract was entered into, but he cannot fulfil it by delivering another person's goods; & therefore the only remedy against him is that he shall pay damages for not delivering the goods. In a similar manner a person may be estopped from denying that certain goods belong to another; he may be compelled by a suit in the nature of an action of trover to deliver them up, if he has them in his possession & under his control; but if the goods, in respect of which he has estopped himself, really belong to somebody else, it seems impossible to suppose that by any process of law he can be compelled to deliver over another's goods to the person in whose favour the estoppel exists against him: that person is entitled to maintain a suit in the nature of an action of trover against him; but that person cannot recover the goods, because no property has really passed to him, he can recover only damages. In my view estoppel has no effect upon the real nature of the transaction: it only creates a cause of action between the person in whose favour the estoppel exists & the person who is estopped (*BRETT, L.J.*).—*SIMM v. ANGLO-AMERICAN TELEGRAPH CO., ANGLO-AMERICAN TELEGRAPH CO. v. SPURLING*, No. 1071, *ante*.



Sect. 3.—By representation: Sub-sect. 1, D.]D. Who Bound by Estoppel.

1114. Parties.]—HEANE v. ROGERS, No. 1096, ante.

.]—MARKER v. MARKER, No. 308, ante.

1116. Privies.]—HEANE v. ROGERS, No. 1096, ante.

Statement made without authority—

**By chairman of infirmary committee—Not binding on guardians.]—**D., being a candidate for the post of medical officer to the H. infirmary, the appointment to which was in the hands of depts., as poor law guardians of St. P., a resolution, passed at a meeting of the infirmary committee, was approved of & adopted at a board meeting of the guardians on Dec. 6, "That D. be appointed medical officer for three months, at & for a sum of £100 & board & rations": & on Dec. 9, D. received a letter from the clerk to the guardians, announcing to him his appointment, & inclosing a copy of the above resolution. On Jan. 7, D. entered upon his duties as medical officer, & fulfilled them up to Mar. 25, when the three months expired, & he received £100 salary for that period of service. He continued on in the office, nothing being said or done on either side until Apr. 6, when a resolution was passed by the infirmary committee, "That the medical officer & other officers," naming them, "whose engagements expired at Lady-day should be employed monthly, at the several salaries assigned to them by the guardians." This monthly appointment was approved of by the Poor Law Board "until the infirmary should be transferred to the management of the C. L. District Board," which transfer it was expected would take place about Midsummer, but which did not, in fact, happen until Michaelmas. On May 24, at a meeting of the infirmary committee, a written notice from the board of guardians, signed by their clerk, was handed by the chairman of the committee to D., that his appointment of medical officer would terminate on June 24; the chairman at the same time verbally telling him that the notice was formal only, & that, if the infirmary were not transferred by June 24, the notice would go for nothing. On June 23, D. was informed by an official letter from the clerk to the guardians that his successor had been elected by the guardians, & would commence his duties about noon on the

24th. Thereupon D. retired from the office under protest against his illegal dismissal, & brought an action against the guardians to recover £100 for salary, & an equivalent for board & rations, for three months, in lieu of three months' notice.

At the trial there was a conflict of evidence as to whether D. had been informed of the resolution of Apr. 6, the clerk of the guardians stating that he had notified it to D., & D. averring that he was never informed of it:—*Held*: the verbal statement of the chairman of the infirmary committee at the time when the notice terminating the appointment was given to pltf., did not amount to an estoppel as against depts., the poor law guardians.

It has been argued that there was an estoppel arising upon what the chairman of the infirmary committee said when the notice determining the service was given to pltf. It seems to me, however, that that cannot be made the ground of an estoppel against depts., because the person who made that statement had no authority from them to make any such statement, & there is no evidence of any such authority (PIGOTT, B.).—DYTE v. ST. PANCRAS BOARD OF GUARDIANS (1872), 27 L. T. 342; 36 J. P. 375.

*Annotations*:—*Mentd.* Austin v. St. Matthew, Bethnal Green (1874), 29 L. T. 807; Wood v. East Ham U. D. C. (1907), 71 J. P. 129.

1118. Strangers.]—D. was arrested, at the suit of pltf., in the county of H. & removed himself by *habeas corpus cum causâ* into the custody of the marshal. D. then petitioned the Insolvent Debtors' Ct., which ordered him to be discharged, & to have the benefit of 7 Geo. 4, c. 57, as to pltf.'s debt, at the end of fifteen months from filing his petition, & in the meantime, to be confined within the walls of the K. B. prison: & the ct. issued a warrant to the marshal for D.'s discharge at the end of that time, directing also his confinement within the walls of the said prison. Afterwards, while in custody, D. was brought by *habeas corpus cum causâ* before the Central Criminal Ct., to plead to an indictment for misdemeanour; he there pleaded not guilty, traversed to the next sessions, & was committed to Newgate, & afterwards bailed. The keeper of Newgate then, without any fresh warrant, redelivered him to the marshal, who received him into custody, & from that custody D. escaped before the expiration of the fifteen months. In an action by pltf. against the marshal for this escape:—*Held*: the marshal

PART VI. SECT. 3, SUB-SECT. 1.—D.

1116 i. Privies.]—A purchase by a mtgee., at a sale in execution of a decree upon his mtge., of the right, title, & interest of the mtgor, who has been estopped from asserting a title to the property as against certain parties, does not place such mtgee. in a better position as regards the estoppel.—PORESHNATH MUKERJEE v. ANATHNATH DEB (1882), I. L. R. 9 Calc. 265; L. R. 9 Ind. App. 147.—IND.

1116 ii. —.]—Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to the representations made by any one except that other person.—RANGA RAU v. BHAVAYAMMI (1894), I. L. R. 17 Mad. 473.—IND.

1116 iii. —.]—In execution of a money decree certain property was purchased. The property was subject to a mtge., but not a mtge. executed by the judgment debtor, although the judgment debtor would himself have been estopped from denying liability under the mtge. on account of his conduct in the mtge. transaction:—*Held*: the purchaser was equally

bound as the judgment debtor inasmuch as the right, title & interest of the judgment debtor had passed to the purchaser, & his purchase was therefore subject to the mtge.—PRAYAG RAJ v. SIDHU PRASAD TEWARI (1908), I. L. R. 35 Calc. 877.—IND.

r. — *Suits between representatives of former plaintiff & defendant.*]—Where A. sued B. for moneys alleged to be due under certain documents, & B. pleaded that the demands had been included in a settlement of accounts, embodied in a document which he set forth in his answer, & the suit was dismissed, on the ground that, being included in the settlement, the demands no longer existed as causes of action:—*Held*: A.'s representative was not estopped from disputing the document in a subsequent action brought by him against the representative of B.—TIRUMALA RAU (SAHIB) v. PINGALA SUNKARA RAU (1863), 1 Mad. 312.—IND.

1118 i. Strangers.]—*Re SMITHER'S ESTATE* (1882), 3 R. & G. 306; 2 C. L. T. 606.—CAN.

1118 ii. —.]—Pltf., wife of the

execution debtor, claimed horses & cattle seized on debtor's farm under depts.' execution. Upon the trial of an interpleader issue it appeared that pltf. had money of her own before her marriage, & that with that money she, after her marriage, bought cattle; part of the increase of these cattle she exchanged for other cattle & for horses, & in that way acquired the animals seized. The evidence showed certain isolated instances of dealings by the husband with some of the animals; amongst others, that he placed a chattel mtge. upon some of them with his wife's consent:—*Held*: pltf.'s consent to some of the animals being chattel-mortgaged was no estoppel as against any one but the mtgee.—SIMPSON v. DOMINION BANK (1910), 13 W. L. R. 1.—CAN.

1118 iii. —.]—Estoppel must be taken as being purely personal, & does not bind any one claiming by an independent title.—DHARAM KUNWAR v. BALWANT SINGH (1912), I. L. R. 34 All. 398.—IND.

1118 iv. —.]—ISWARAM PILLAI v. SONNIVAVERU TARAGAN (1913), I. L. R. 38 Mad. 753.—IND.

was not liable, D. not being legally in custody at the time of the escape, & the marshal not being estopped, as between pltf. & himself, from denying the legality of the custody.—*CONTANT v. CHAPMAN* (1842), 2 Q. B. 771; 2 Gal. & Dav. 191; 114 E. R. 300; *sub nom.* *COUTANT v. CHAPMAN*, 11 L. J. Q. B. 141; 6 Jur. 666.

1119. —.]—*Mandamus* to complete a railway pursuant to an Act incorporating Land Clauses Act, 1845 (c. 18). Return (*inter alia*), that the undertaking was one to be carried into effect by means of a capital to be subscribed by the promoters, & that the capital had not been subscribed for under a contract, pursuant to sect. 16 of the above Act, nor could defts. then or at any time procure it to be so subscribed for. Plea, by way of estoppel, that defts. had taken the lands of a third party named, on part of the line, in exercise of the compulsory powers. On demurrer:—*Held*: the plea of estoppel was bad, as the matter disclosed by it was *res inter alios acta*.—*R. v. AMBERGATE, ETC., RY. CO.* (1853), 1 E. & B. 372; 22 L. J. Q. B. 191; 20 L. T. O. S. 246; 17 Jur. 668; 118 E. R. 475.

1120. —.]—*RICHARDS v. JOHNSTON*, No. 1145, *post*.

1121. —.]—On an interpleader issue with regard to goods taken in execution, where the evidence shows that claimant had not any interest in nor the possession of the goods at the time of seizure, but they belonged to a third person, the execution creditor is entitled to succeed. On an interpleader issue between the execution creditor & a claimant the facts were as follows: claimant, having let the goods afterwards taken in execution for hire, became bkpt. He did not inform the trustee in bkpcy. that he owned these goods, & the hire of the goods, being unaware of the bkpcy., continued to pay claimant money for the hire of them. The goods, while in the possession of the hirer, were taken in execution under a judgment against him. Upon the above facts:—*Held*: assuming the execution debtor to be estopped from denying that the goods were claimant's, such estoppel did not bind the execution creditor, & claimant had no title to the goods as against the execution creditor, who was, therefore, entitled to judgment on the issue.—*RICHARDS v. JENKINS* (1887), 18 Q. B. D. 451; 56 L. J. Q. B. 293; 56 L. T. 591; 35 W. R. 355; 3 T. L. R. 425, C. A.

*Annotations*:—*Mentd.* *Japp v. Campbell* (1887), 57 L. J. Q. B. 79; *Usher v. Martin* (1889), 21 Q. B. D. 272; *Jennings v. Mather*, [1901] 1 K. B. 108; *Peake v. Carter*, [1916] 1 K. B. 652.

*Infants.*—*See* INFANTS.

1122. Married woman.—Party to fraud by husband.]—B., a married woman, shortly after her marriage, at the instigation of her husband, & under a threat of desertion by him, signed a document purporting to make over to him a reversionary interest in personal estate to which she was entitled on the death of her mother. This document was entirely in her own handwriting. It purported to bear date two days before her marriage, & was signed by her in her maiden name. The husband afterwards entered into a contract with C. to sell the reversionary interest to him for £450. This purchase was not completed on the

day fixed, & on July 7, 1858, the husband filed a bill against C. & the wife. This bill alleged that the wife refused to concur in an assignment of the reversionary interest to C., & it prayed a declaration that pltf. had, by the document executed by his wife, become absolutely entitled to the reversionary interest, & for specific performance by C. of his agreement for purchase. Appearances for both defts. were entered by a solr. who practised on his own account, but who was also a clerk to the solr. who filed the bill, to whom C. had also formerly been a clerk. On July 14, C. put in an answer to the bill, without oath or signature. No answer was required from the wife, & none was put in by her. No evidence was filed by pltf. On July 17, the cause was heard as a short cause, & a decree was taken by consent, declaring that pltf. was, under the document executed by his wife before her marriage, absolutely entitled to the reversionary interest. The agreement for sale to C. was afterwards abandoned. On Aug. 20, 1858, the reversionary interest was put up for sale by the husband at a public auction, & was then purchased by a reversionary interest society for £400. At this time the husband was in prison for debt, & the wife was aware that an attempt was being made to raise money upon the reversionary interest. Before the purchase was completed the wife, at the instance of the solrs. of the purchasers, signed a letter addressed to one of the trustees of the fund, in which she stated that she had, before her marriage, assigned her interest to her husband. The reversionary interest having fallen into possession, & having been paid into ct., the reversionary society petitioned that it might be paid out to them. The Master of the Rolls ordered the fund to be retained in ct., & the dividends to be paid to B. Upon appeal:—*Held*: B., having been party to a fraud, was bound by her own representations, & could not claim the fund as against purchasers for value, who had no notice of the fraud, & who had made every inquiry that they could be reasonably expected to make.—*Re LUSH'S TRUSTS* (1869), 4 Ch. App. 591; 38 L. J. Ch. 650; 21 L. T. 376; 17 W. R. 974, L. J. *Annotations*:—*Mentd.* *Arnold v. Woodhams* (1873), L. R. 16 Eq. 29; *Cahill v. Cahill* (1883), 11 App. Cas. 420.

—.]—*See, generally*, HUSBAND & WIFE.

1123. Assignee.]—*Re WICKHAM*, No. 1079, *ante*.

1124. Trustee in bankruptcy.]—A judgment creditor issued execution against the goods of a debtor on June 26, 1914. A claim was made to the goods by the debtor's wife acting on instructions from the debtor, who was the real owner of the goods. The judgment creditor, on the faith of the representation that the goods belonged to the debtor's wife, entered into an agreement between July 10 & 17, whereby certain pictures were to be withdrawn from the execution, sold, & the proceeds paid to the judgment creditor. The sale took place on July 17, & on July 21 the creditor had notice of an available act of bkpcy., & of the petition on which the receiving order was subsequently made. The proceeds of the sale, which realised £349 13s., were paid to the creditor as to £184 8s. 3d. between Aug. & Dec. 1914, & as to £165 4s. 9d. after Mar. 17, 1915, the date of the receiving order. On a motion by the trustee in

1118 v. —.]—For the purpose of securing registration of transfer of certain property to a co., two of the directors, as trustees on behalf of the other directors, made the necessary sworn declarations & stated therein that the full purchase price of the property was 10,000 shares in the co. In an action by the liquidators of the

co. against the directors of malfeasance in allotting 60,000 shares in payment for the property:—*Held*: as the declaration had been made to a third party, it created no estoppel as between the parties to the action, & the directors were entitled to prove that the actual purchase price had been 60,000 shares & not 10,000.—

*FARRAR v. GELDENHUIS MAIN REEF GOLD MINING CO., LTD. (IN LIQUIDATION)* (1908), T. H. 16.—S. AF.

1. Municipal councils.—*Successive councils.*—*EAST MISSOURI TOWNSHIP v. HORSEMAN* (1858), 16 U. C. R. 583.—CAN.



**Sect. 3.—By representation: Sub-sect. 1, D., E. & F.]**

bkpcy. against the creditor for repayment of the £349 13s. :—*Held*: the goods were the property of bkpt., & the trustee was not bound by the arrangement made by the creditor with bkpt.'s wife, & was not estopped from asserting his title by relation back to the moneys.—*Re EVANS, Ex p. SALAMAN*, [1916] H. B. R. 111.

*Annotation*:—*Mentd. Re Fairley*, [1922] 2 Ch. 791.

—[.]—*See, further*, BANKRUPTCY, Vol. V., pp. 611, 729, Nos. 5763, 6324–6353.

**E. Who may take Advantage of Estoppel.**

**Not party to whom representation not made.]—***See* No. 1084, *ante*.

**Not party inducing representation complained of.]—***See* Sub-sect. 1, B. (e), *ante*.

**F. Equitable Estoppel by Representation.**

**1125. Whether different from estoppel at law—Duty of representor to “make good” representation.]—**It is an old head of equity, that if a representation is made to a man, going to deal on the faith of it in a matter of interest, the person making the representation, knowing it false, shall make it good; & the jurisdiction assumed by cts. of law in such cases will not prevent relief in equity.—*EVANS v. BICKNELL* (1801), 6 Ves. 174; 1 Coop. temp. Cott. 480; 31 E. R. 998, L. C.

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*Jorsey* (1861), 1 John. & H. 721; *Sharples v. Adams* (1863), 32 Beav. 213; *Dowle v. Saunders* (1864), 2 Hom. & M. 242; *Re Tichener* (1865), 35 Beav. 317; *Newton v. Newton* (1868), L. R. 6 Eq. 135; *Keith v. Burrows* (1876), 1 O. P. D. 722; *Schroeder v. Mendl* (1877), 37 L. T. 452; *Northern Counties of England Fire Insce. v. Whipp* 1884, 26 Ch. D. 482; *Manners v. Mow* (1885), 29 Ch. D. 725; *Moore v. Knight* (1890), 63 L. T. 831; *Taylor v. Russell*, [1891] 1 Ch. 8; *Re Ingham, Jones v. Ingham*, [1893] 1 Ch. 352; *Brocklesby v. Temperance Bldg. Soc.*, [1895] A. C. 173; *Walker v. Linom*, [1907] 2 Ch. 104.

**1126. ———.]—**The jurisdiction to enforce specific performance with compensation for defects on a vendor, in cases where the contract is silent as to compensation, rests on the equitable estoppel that where a vendor has represented & contracted to sell an estate as his own, & the purchaser has relied on the representation, the vendor cannot afterwards be heard to say he has not the entirety.—*RUDD v. LASCELLES*, [1900] 1 Ch. 815; 69 L. J. Ch. 396; 82 L. T. 256; 48 W. R. 586; 16 T. L. R. 278.

*Annotations*:—*Refd. Rutherford v. Acton-Adams*, [1915] A. C. 866. *Mentd. Halkett v. Dudley*, [1907] 1 Ch. 590.

—[.]—*See, further*, SETTLEMENTS; SPECIFIC PERFORMANCE.

—[.]—Where a trustee was charged in respect of a misrepresentation to a purchaser; having notice; & alleging only, that he did not recollect the fact, this was a more proper subject for equity than law: at least there was a concurrent jurisdiction.—*BURROWES v. LOCK* (1805), 10 Ves. 470; 32 E. R. 927.

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**1128. ———.]—***JORDEN v. MONEY*, No. 1041, *ante*.

**1129. When equitable estoppel arises—General rule.]—**Where a party, by misrepresentation, draws another into a contract, such party may be compelled to make good the representation, if that be possible, but if it be impossible, the

**PART VI. SECT. 3, SUB-SECT. 1.—E.**

**t. Privies.]—**A privity exists between an execution creditor & a purchaser at a ct. sale, the latter representing the former in so far as he had a right to bring the property to sale in execution of his decree. Thus, when the plea of estoppel is available to a decree holder, it is likewise available to the purchaser at the execution sale, as his representative or as one claiming under him.—*KRISHNABHUPATI DEVU v. VIKRAMA DEVU* (1894), 1 L. R. 18 Mad. 13.—*IND.*

**a. Bonâ fide holder of forged instrument.]—**The bonâ fide holder for value of a forged hundi, to whom, after it had been dishonoured, it had been transferred by endorsement by the payees, who at the time of endorsement knew that the hundi was forged, sued the payees on the hundi, to

recover the amount he had paid them for it:—*Held*: the payees were estopped from setting up the forgery of the hundi as a bar to the suit.—*BISSEN CHAND v. RAJENDRO KISHORE SINGH* (1883), 1 L. R. 5 All. 302.—*IND.*

**PART VI. SECT. 3, SUB-SECT. 1.—F.**

**1127 i. Whether different from estoppel at law.]—**Pltf. was a director of a mining co. when a call was made & notice of it given, & afterwards when notice was given to certain shareholders, including himself, that unless the call was paid by a certain date their shares would be forfeited. He did not pay the call, & a few days after the date fixed by the last notice he resigned his position as director. Subsequently the directors passed a resolution that pltf.'s shares being forfeited, should be sold, & they afterwards removed his

name from the register. At this time the shares were unsaleable, but four months afterwards they became of considerable value, when pltf. claimed them & tendered all calls. The directors then passed a resolution declaring the calls forfeited. Pltf. brought an action for wrongful removal of his name from the register:—*Held*: while the conduct of pltf. might have formed a good equitable plea if he had sought equitable relief it did not amount to an estoppel in law, to prevent his disputing the right of defts. to remove his name from the register.—*GREENWOOD v. CROWN PRINCE GOLD-MINING CO.*, 1 J. R. N. S. 41.—*N.Z.*

**b. When equitable estoppel arises—Extinguishment of charge.]—**An owner of property made a grant therefrom of an annuity, with a proviso that, in case of failure to pay the same, the



person deceived may avoid the contract. The same principle applies, though the party, at the time, believed the statement to be true, if in the due discharge of his duty, he ought to have then known otherwise.

Third parties, who by false representations induce others to enter into contracts, are estopped from afterwards falsifying their statement, & if necessary, may be compelled to make them good. But the false statement of one, not a party to the agreement entered into on the faith of it, is not a ground for avoiding it.

Misrepresentations may be either by a suppression of the truth or an assertion of what is false; but to be the ground for avoiding the contract, the representation must be one "*dans locum contractui*," or such, that it is reasonable to infer, that in its absence the party deceived would not have entered into the contract.

The ground on which this relief is asked is that principle of equity which declares, that the wilful misrepresentation of one contracting party, which draws another into a contract, shall, at the option of the person deceived, enable him to avoid or enforce that contract. The basis of this, as well as of most of the great principles on which the system of equity is founded, is the enforcement of a careful adherence to truth, in all the dealings of mankind. The principle itself is universal in its application to these cases of contract. It affects not merely the parties to the agreement, but it affects also those who induce others to enter into it. It applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if in the due discharge of their duty, they ought to have known, or if they had formerly known & ought to have remembered, the fact which negatives the representation made. This principle applies to all representations made, on the faith of which other persons enter into engagements, so that whether the representation were true or false, at the time when it was made, he who made it shall not only be restrained from falsifying it thereafter, but shall, if necessary, be compelled to make good the truth of that which he asserted (ROMILLY, M.R.).—PULSFORD *v.* RICHARDS (1853), 17 Beav. 87; 22 L. J. Ch. 559; 22 L. T. O. S. 51; 17 Jur. 865; 1 W. R. 295; 51 E. R. 965.

*Annotations*:—*Refd.* Jennings *v.* Broughton (1853), 17 Beav. 234. *Mentd.* Bushby *v.* Ellis (1853), 17 Beav. 279; Gordon *v.* Street, [1899] 2 Q. B. 641.

**1130.** — — —.]—The doctrine of equitable estoppel by representation is a wholly different thing from contract, or promise, or equitable assignment, or anything of that sort. The foundation of that doctrine, which is a very important one, & certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to

grantee & her heirs should be entitled to take possession of the property. He subsequently mtgd. the same property, by an instrument which set out that it was his absolutely. After this he paid the annuity till the death of the grantee, whose heir he was. The mtgees. obtained a decree upon their deed, & in execution thereof the property was attached & sold, & the decree-holders obtained possession. The heirs of the mtgor. sued the decree-holders for recovery of possession & for arrears of the annuity, claiming under the terms of the grant:—*Held*: the charge merged & was extinguished, & as the grantor had professed to transfer the property to the mtgees. unim-

cumbered, he was bound to give it over to them free from incumbrance, & it would not lie in his mouth nor in the mouths of his heirs, to set up the charge against the mtgees. & their vendees.—RADHEY LAL *v.* MAHESH-PRASAD (1885), 1 L. R. 7 All. 864.—IND.

*c. Application of doctrine of equitable estoppel*—*To agreement to abide by decision of referee*—*Agreement carried out.*]—In a suit for possession of land, pltf. & defts. applied that a pleader might be appointed as comr. to ascertain who held the land on either side of the khal in dispute, & agreed that, if pltfs. were found in possession of such land, they should get a decree;

existing facts, which being stated would affect the contract, & without reliance upon which, or without the statement of which, the party would not enter into the contract, & which being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representations had not been made; then the person making those representations shall, so far as the powers of a ct. of equity extend, be treated as if the representations were true, & shall be compelled to make them good. But those must be representations concerning existing facts (LORD SELBORNE, C.).—CITIZENS' BANK OF LOUISIANA *v.* FIRST NATIONAL BANK OF NEW ORLEANS (1873), L. R. 6 II. L. 352; 43 L. J. Ch. 269; 22 W. R. 194, II. L.

*Annotations*:—*Apld.* Mills *v.* Fox (1887), 37 Ch. D. 153. *Consd.* Lovett *v.* Lovett, [1898] 1 Ch. 82; Gresham Life Assce. Soc. *v.* Crowther (1914), 111 L. T. 887. *Refd.* Williams *v.* Pinckney (1897), 67 L. J. Ch. 34; Coleman *v.* North (1898), 47 W. R. 57. *Mentd.* Coxon *v.* Gorst, [1891] 2 Ch. 73; Rainford *v.* Keith & Blackman Co. (1905), 74 L. J. Ch. 531; Ratner *v.* London Joint City & Midland Bank (1922), 38 T. L. R. 253.

**1131.** — Representation of fact—No demand or incumbrance in existence.]—Injunction was granted to restrain deft. from recovering a demand from one of the pltfs., he having represented to the agent of the other pltfs., on a treaty of marriage with his daughter, that there was no such demand existing.—NEVILLE *v.* WILKINSON (1782), 1 Bro. C. C. 543; 28 E. R. 1289.

*Annotations*:—*Consd.* Scott *v.* Scott (1787), 1 Cox, Eq. Cas. 366; Jorden *v.* Money (1854), 5 H. L. Cas. 185; Bold *v.* Hutchinson (1855), 20 Beav. 250. *Refd.* Dalbiac *v.* Dalbiac (1809), 16 Ves. 116; *Ex p.* Carr (1814), 3 Ves. & B. 108; Bentley *v.* Mackay (1862), 31 Beav. 143; Mills *v.* Fox (1887), 37 Ch. D. 153. *Mentd.* Wilmot *v.* Woodhouse (1793), 4 Bro. C. C. 227; Eastabrook *v.* Scott (1797), 3 Ves. 456; Osborne *v.* Williams (1811), 18 Ves. 379; Vauxhall Bridge Co. *v.* Spencer (1821), Jac. 64; Warden *v.* Jones (1857), 23 Beav. 487; Evans *v.* Wyatt (1862), 31 Beav. 217; Luxmore *v.* Clifton (1867), 17 L. T. 460.

**1132.** — — —.]—BURROWES *v.* LOCK, No. 1127, *ante*.

— *Restrictions in lease.*]—Deft. held two plots of building land, B. & C., under a lease which contained a covenant to build the houses not less than thirty feet apart, the effect of which was to secure to houses on plot B. a sea view over plot C. H. having entered into a treaty with deft. for an underlease of B., made inquiries of deft. as to what could be built on the land in front. Deft. replied that he, deft., could not build on C. closer than thirty feet, as his lease did not allow it. H. after having inspected the original lease took an underlease of B., containing a covenant by deft. that he, his exors., administrators & assigns, would observe the lessee's covenants in the original lease. Deft. afterwards surrendered his lease to the ground landlord, took a new lease not containing the old restrictions, & commenced building on C. in a way which would obstruct the sea view from

while if deft. was found in possession the suit should be dismissed. Accordingly, a comr. was appointed, & pltf.'s suit was decreed in accordance with the comr.'s report. From this decision defts. appealed:—*Held*: the agreement between the parties to abide by the decision of the comr. on the fact of possession was a valid agreement, & when that agreement was given effect to & carried out, it would be inequitable to allow defts. to resile from it, & they were estopped in equity from so doing.—BAHIR DAS CHAKRAVARTI *v.* NOBIN CHUNDER PAL (1901), 1 L. R. 29 Calc. 306.—IND.

*d Necessity for showing sufficiency*

### 3.—By representation: Sub-sect. 1, D., E.

§ 349 158. :—*Re* Evans, *Ex p. SALAMAN*, [1916] H. B. R. 111.

Annotation:—*Mentd.* *Re* Fairley, [1922] 2 Ch. 791.

—[See, further, BANKRUPTCY, Vol. V., pp. 611, 729, Nos. 5763, 6324–6353.]

#### E. Who may take Advantage of Estoppel.

Not party to whom representation not made.]—*See* No. 1084, *ante*.

Not party inducing representation complained of.]—*See* Sub-sect. 1, B. (e), *ante*.

#### F. Equitable Estoppel by Representation.

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b. When equitable estoppel arises—*Extinguishment of charge.*]—An owner of property made a grant therefrom of an annuity, with a proviso that, in case of failure to pay the same, the



person deceived may avoid the contract. The same principle applies, though the party, at the time, believed the statement to be true, if in the due discharge of his duty, he ought to have then known otherwise.

Third parties, who by false representations induce others to enter into contracts, are estopped from afterwards falsifying their statement, &, if necessary, may be compelled to make them good. But the false statement of one, not a party to the agreement entered into on the faith of it, is not a ground for avoiding it.

Misrepresentations may be either by a suppression of the truth or an assertion of what is false; but to be the ground for avoiding the contract, the representation must be one "*dans locum contractui*," or such, that it is reasonable to infer, that in its absence the party deceived would not have entered into the contract.

The ground on which this relief is asked is that principle of equity which declares, that the wilful misrepresentation of one contracting party, which draws another into a contract, shall, at the option of the person deceived, enable him to avoid or enforce that contract. The basis of this, as well as of most of the great principles on which the system of equity is founded, is the enforcement of a careful adherence to truth, in all the dealings of mankind. The principle itself is universal in its application to these cases of contract. It affects not merely the parties to the agreement, but it affects also those who induce others to enter into it. It applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if in the due discharge of their duty, they ought to have known, or if they had formerly known & ought to have remembered, the fact which negatives the representation made. This principle applies to all representations made, on the faith of which other persons enter into engagements, so that whether the representation were true or false, at the time when it was made, he who made it shall not only be restrained from falsifying it thereafter, but shall, if necessary, be compelled to make good the truth of that which he asserted (ROMILLY, M.R.).—PULSFORD v. RICHARDS (1853), 17 Beav. 87; 22 L. J. Ch. 559; 22 L. T. O. S. 51; 17 Jur. 865; 1 W. R. 295; 51 E. R. 965.

*Annotations*:—*Refd.* Jennings v. Broughton (1853), 17 Beav. 234. *Mentd.* Bushby v. Ellis (1853), 17 Beav. 279; Gordon v. Street, [1899] 2 Q. B. 641.

**1130.** ———.]—The doctrine of equitable estoppel by representation is a wholly different thing from contract, or promise, or equitable assignment, or anything of that sort. The foundation of that doctrine, which is a very important one, & certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to

existing facts, which being stated would affect the contract, & without reliance upon which, or without the statement of which, the party would not enter into the contract, & which being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representations had not been made; then the person making those representations shall, so far as the powers of a ct. of equity extend, be treated as if the representations were true, & shall be compelled to make them good. But those must be representations concerning existing facts (LORD SELBORNE, C.).—CITIZENS' BANK OF LOUISIANA v. FIRST NATIONAL BANK OF NEW ORLEANS (1873), L. R. 6 H. L. 352; 43 L. J. Ch. 269; 22 W. R. 194, H. L.

*Annotations*:—*Apld.* Mills v. Fox (1887), 37 Ch. D. 153. *Consd.* Lovett v. Lovett, [1898] 1 Ch. 82; Gresham Life Asso. Soc. v. Crowther (1914), 111 L. T. 887. *Refd.* Williams v. Pinckney (1897), 67 L. J. Ch. 34; Coleman v. North (1898), 47 W. R. 57. *Mentd.* Coxon v. Gorst, [1891] 2 Ch. 73; Rainford v. Keith & Blackman Co. (1905), 74 L. J. Ch. 531; Ratner v. London Joint City & Midland Bank (1922), 38 T. L. R. 253.

**1131.** ——— Representation of fact—No demand or incumbrance in existence.]—Injunction was granted to restrain deft. from recovering a demand from one of the plffs., he having represented to the agent of the other plffs., on a treaty of marriage with his daughter, that there was no such demand existing.—NEVILLE v. WILKINSON (1782), 1 Bro. C. C. 513; 28 E. R. 1289.

*Annotations*:—*Consd.* Scott v. Scott (1787), 1 Cox, Eq. Cas. 366; Jorden v. Money (1854), 5 H. L. Cas. 185; Bold v. Hutchinson (1855), 20 Beav. 250. *Refd.* Dalbiac v. Dalbiac (1809), 16 Ves. 116; *Ex p.* Carr (1814), 3 Ves. & B. 108; Bentley v. Mackay (1862), 31 Beav. 143; Mills v. Fox (1887), 37 Ch. D. 153. *Mentd.* Wilmot v. Woodhouse (1793), 4 Bro. C. C. 227; Eastabrook v. Scott (1797), 3 Ves. 456; Osborne v. Williams (1811), 18 Ves. 379; Vauxhall Bridge Co. v. Spencer (1821), Jac. 64; Warden v. Jones (1857), 23 Beav. 487; Evans v. Wyatt (1862), 31 Beav. 217; Luxmore v. Clifton (1867), 17 L. T. 460.

**1132.** ———.]—BURROWES v. LOCK, No. 1127, *ante*.

**1133.** ——— Restrictions in lease.]—Deft. held two plots of building land, B. & C., under a lease which contained a covenant to build the houses not less than thirty feet apart, the effect of which was to secure to houses on plot B. a sea view over plot C. H. having entered into a treaty with deft. for an underlease of B., made inquiries of deft. as to what could be built on the land in front. Deft. replied that he, deft., could not build on C. closer than thirty feet, as his lease did not allow it. H. after having inspected the original lease took an underlease of B., containing a covenant by deft. that he, his exors., administrators & assigns, would observe the lessee's covenants in the original lease. Deft. afterwards surrendered his lease to the ground landlord, took a new lease not containing the old restrictions, & commenced building on C. in a way which would obstruct the sea view from

grantee & her heirs should be entitled to take possession of the property. He subsequently mtgd. the same property, by an instrument which set out that it was his absolutely. After this he paid the annuity till the death of the grantee, whose heir he was. The mtgoes. obtained a decree upon their deed, & in execution thereof the property was attached & sold, & the decree-holders obtained possession. The heirs of the mtgor. sued the decree-holders for recovery of possession & for arrears of the annuity, claiming under the terms of the grant:—*Held*: the charge merged & was extinguished, & as the grantor had professed to transfer the property to the mtgoes. unin-

cumbered, he was bound to give it over to them free from incumbrance, & it would not lie in his mouth nor in the mouths of his heirs, to set up the charge against the mtgoes. & their vendees.—RADHEY LAL v. MAHESH-PRASAD (1885), 1 L. R. 7 All. 864.—IND.

*c. Application of doctrine of equitable estoppel*—To agreement to abide by decision of referee—*Agreement carried out.*]—In a suit for possession of land, plff. & defts. applied that a pleader might be appointed as comr. to ascertain who held the land on either side of the khal in dispute, & agreed that, if plffs. were found in possession of such land, they should get a decree;

while if deft. was found in possession the suit should be dismissed. Accordingly, a comr. was appointed, & plff.'s suit was decreed in accordance with the comr.'s report. From this decision defts. appealed:—*Held*: the agreement between the parties to abide by the decision of the comr. on the fact of possession was a valid agreement, & when that agreement was given effect to & carried out, it would be inequitable to allow defts. to resile from it, & they were estopped in equity from so doing.—BAHIR DAS CHAKRAVARTI v. NOBIN CHUNDER PAL (1901), 1 L. R. 29 Calc. 306.—IND.

*d Necessity for showing sufficiency*



3.—*By representation: Sub-sect. 1, F.; sub-sect. 2, A.]*

houses on B. belonging to pltf., who was the assignee of H.:—*Held*: even if by reason of the surrender the covenant was gone, pltf. was entitled to an injunction on equitable grounds, for what deft. had said to H. amounted to a representation, that deft. could not during the term of his lease build otherwise than in a particular way, which representation he was bound to make good.—*PIGGOTT v. STRATTON* (1859), 1 De G. F. & J. 33; 29 L. J. Ch. 1; 1 L. T. 111; 24 J. P. 69; 6 Jur. N. S. 129; 8 W. R. 13; 45 E. R. 271, L. C., L. JJ.

*Annotations*:—*Consd.* *Martin v. Douglas* (1867), 16 W. R. 268; *Low v. Bouverie*, [1891] 3 Ch. 82. *Refd.* *Tomkinson v. Balkis Consolidated Co.*, [1891] 2 Q. B. 614. *Mentd.* *Kendall v. Hill* (1860), 2 L. T. 717; *Traill v. Baring* (1864), 3 New Rep. 362; *Brabant v. Wilson* (1865), 35 L. J. Q. B. 49; *Tulk v. Metropolitan Board of Works* (1867), 8 B. & S. 777; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Spicer v. Martin* (1888), 14 App. Cas. 12; *Mackenzie v. Childers* (1889), 43 Ch. D. 265; *Wheaton v. Maple*, [1893] 3 Ch. 48; *Kennard v. Ashman* (1894), 10 T. L. R. 213; *Wilkes v. Spooner*, [1911] 2 K. B. 473.

1134. ——— *Right to property.*—Upon an application by M., a female infant, for leave to marry her future husband & to execute a settlement, proposals were carried in which it was stated that she was entitled as tenant in tail to real estate, including freehold property in London, & it was thereby proposed to disentail the whole of the property & vest the same, with certain exceptions, in trustees. A similar statement was made in an affidavit filed in support of the application by the trustees of the deed under which M. derived her title. At that date M. had no interest in the London property, it having been taken by the London School Board & the purchase-money paid into ct. In consequence of the above statements, which were made through inadvertence, a disentailing deed was executed, with the sanction of the ct., which included the property in question, but did not include the fund in ct. After the marriage M. disentailed the fund, & claimed it against the trustees of the marriage settlement. In an action by the trustees for rectification:—*Held*: M. was precluded by the representations made on her behalf from setting up any title to the fund adversely to the trustees.—*MILLS v. FOX* (1887), 37 Ch. D. 153; 57 L. J. Ch. 56; 57 L. T. 792; 36 W. R. 219.

*Annotations*:—*Mentd.* *Re Monckton's Settlement*, *Monckton v. Monckton*, [1913] 2 Ch. 636; *Re E. D. S.*, [1914] 1 Ch. 618.

1135. ———.]—*GRESHAM LIFE ASSURANCE SOCIETY v. CROWTHER*, No. 1002, *ante*.

Representations of fact generally, *see* Sub-sect. 1, B. (a), *ante*.

1136. ——— *Representations of intention—Not to exercise power.*—A father, during the treaty for the marriage of his daughter, represented that she would become entitled, on the decease of her parents, to one-third share of certain trust funds, subject to the exercise of a certain power of

*of cause.*—*Re FRENCH* (1913), 23 W. L. R. 940; 11 D. L. R. 379; 4 W. W. R. 461.—*CAN.*

e. ———.]—A lessor is not restrained by any rule of equity from bringing a suit to evict a tenant, the term of whose lease has expired merely by reason of that tenant's having erected permanent structures on the land leased, such building having been within the knowledge of the lessor, & there not having been any interference on his part to prevent it. To raise an equitable estoppel the lessor precluding him from on the determination of the

tenancy, for possession, the tenant should show facts sufficient to justify the legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. Acquiescence by the lessor in this case was a legal inference to be drawn from such facts as were found. The onus of establishing sufficient cause for an equitable estoppel had not been discharged by the tenant in this instance.—*BENI RAM v. KUNDAN* (1899), 1 L. R. 21 All. 496; App. 58; 3 C. W. N.

appointment vested in himself, but which power he did not intend to execute. The settlement recited that the intended wife was so entitled, "subject to any exercise" of the power. In truth, if the wife predeceased her parents, her share did not vest in her, but went to her issue. The father exercised the power to the prejudice of his daughter, & her issue. The wife predeceased her father, leaving issue. The father afterwards died:—*Held*: the father had precluded himself from executing the power, & this equity might be asserted by the issue of the marriage.—*WALFORD v. GRAY* (1865), 5 New Rep. 235; 11 L. T. 620; 11 Jur. N. S. 106; 13 W. R. 335; *affd.*, 6 New Rep. 76, L. C.

1137. ——— *Not to enforce rights.*—It is the first principle upon which all cts. of equity proceed, that if parties who have entered into definite & distinct terms involving certain legal results, certain penalties or legal forfeiture, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties (*LORD CAIRNS, C.*)—*HUGHES v. METROPOLITAN RY. CO.* (1877), 2 App. Cas. 439; 46 L. J. Q. B. 583; 36 L. T. 932; 42 J. P. 421; 25 W. R. 680, H. L.

*Annotations*:—*Consd.* *Birmingham & District Land Co. v. L. & N. W. Ry.* (1888), 40 Ch. D. 268; *Bruner v. Moore*, [1904] 1 Ch. 305; *Modern Transport Co. v. Dunerle S.S. Co.*, [1917] 1 K. B. 370. *Refd.* *Morrell v. Studd & Millington*, [1913] 2 Ch. 648; *Hartley v. Hymans*, [1920] 3 K. B. 475.

——— *To abandon claim.*—*CHADWICK v. MANNING*, No. 1047, *ante*.

Representations of intention generally, *see* Sub-sect. 1, B. (a), *ante*.

1139. *Application of doctrine of equitable estoppel—To volunteer.*—*LOVETT v. LOVETT*, No. 776, *ante*.

*Enforcement of doctrine of equitable estoppel—By specific performance.*—*See* SPECIFIC PERFORMANCE.

## SUB-SECT. 2.—BY STATEMENT.

### A. Verbal Statements.

1140. *As to tenancy—Date of commencement.*—Where a tenant on being applied to respecting the commencement of his holding, informs the party that it begins on a certain day, & notice to quit on that day is given at a subsequent time, he shall be bound by the information he so gave, & not be permitted to show that in fact it began at a different time.—*DOE d. EYRE v. LAMBLY* (1798), 2 Esp. 635, N. P.

*Annotation*:—*Refd.* *Doe d. Murrell v. Milward* (1838), 3 M. & W. 328.

## PART VI. SECT. 3, SUB-SECT. 2.—A.

1. *As to registration of agreement.*—The memorandum of assocn. of a co. registered under Co.'s Act, stated that the object of the co. was to purchase a certain invention & to adopt & carry into effect a certain agreement entered into between the inventors of the one part & B., on behalf of the co. of the other part. The memorandum also stated that the capital of the co. was £100,000 divided into 100,000 shares of £1 each, of which 90,000 should be deemed for all purposes fully paid up. It was

1141. —.J.—In trespass *quare clausum*, deft. pleaded *liberum tenementum*, & proved a conveyance from A. who had entered into an agreement to purchase from pltf., which, however, had never been performed:—*Held*: on proof that pltf. had, subsequently to the agreement & conveyance, spoken of himself as tenant to A. the jury were justified in finding the verdict for deft.—*GINGELL v. GIFFORD* (1846), 7 L. T. O. S. 63.

1142. —.J.—W. died intestate in 1798 seised of a house & land, leaving a widow & an only son, by her, J., fifteen years old. The widow continued to reside on the property, & about a year after the death of W., married deft., & resided with him on the premises, J. also remaining with them till 1805, when he went away, but occasionally returned for about a fortnight at a time till 1842. About that time deft. applied to the lessor of pltf. to advance £100 on mtge. of the property, & on that occasion the title deeds being produced, the solr. stated that it was necessary that J., being the heir-at-law of W., should execute the conveyance. Dft. accordingly brought J., who executed the mtge. & signed the receipt for the £100, which was received by deft.:—*Held*: a jury might well presume, on this state of facts, that deft. was tenant at will to J., & deft., by his conduct, had waived all right to set up Real

Property Limitation Act, 1833 (c. 27), to defeat the right of entry of J.

When it is said there is no estate by estoppel, the answer is that estoppel gives no interest in any case. If this man had said, I am your tenant, that would have been sufficient;—when he allows the other party to advance money & puts it into his own pocket on that supposition, it is quite as strong as any admission that could be made (LORD DENMAN, C.J.).—*DOE d. GROVES v. GROVES* (1847), 10 Q. B. 486; 16 L. J. Q. B. 297; 9 L. T. O. S. 72; 11 Jur. 558; 116 E. R. 185.

1143. As to handwriting.]—If a party on a bill, on being asked, if it is his own handwriting, answers, that it is, & will be duly paid, he cannot afterwards set up a defence of forgery of his name; for he has accredited the bill, & induced another to take it.—*LEACH v. BUCHANAN* (1802), 4 Esp. 226, N. P.

*Annotations*:—*Refd.* Sanderson v. Collman (1842), 4 Man. & G. 209; Brook v. Hook (1871), L. R. 6 Exch. 89.

1144. As to ownership of property.]—A bkpt., in his examinations before the comrs., stated that he had no interest in certain premises settled in trust, on his marriage, his wife at the time, admitting that she had the settlement but would not give it up, or allow it to be seen:—*Held*: those facts together with the lapse of twelve years, did not estop bkpt. from petitioning for

provided in the agreement referred to in the memorandum that these 90,000 paid up shares should be issued to the inventors as consideration for their sale to the co. of the invention F., who was solr. to the co. & had full notice of the circumstances under which the co. was formed, warned B., the managing director, that the shares should not be allotted till the agreement had been registered. Afterwards, both before & after allotment, B. informed F. that the agreement had been duly registered, & F. on the faith of this representation bought 3,500 paid-up shares, of which number he retained 1,400 up to the time of winding up the co., when for the first time he heard that the agreement had not been registered: *Held*: B.'s representation that the agreement had been registered estopped the liquidator from requiring F. to pay calls as holder of shares on which no cash had been paid.—*Re PHILLIP-STEPHEN PHOTO LITHO & TYPOGRAPHIC PROCESS CO., LTD., FERGUSSON'S CASE* (1891), 12 N. S. W. Eq. 11.—*AUS.*

1144 i. As to ownership of property.]—The admissions of a party made to a stranger to the suit are not conclusive upon him as an estoppel. Thus, where pltf. stated to R. that property in his possession belonged to his brother, & thereupon issued an execution & seized the property, for which pltf. brought trespass:—*Held*: as the statements to R. were not made in connection with the subject of the action, they were not conclusive on pltf.—*MURRAY v. JOHNSTON* (1849), 1 All. 409.—*CAN.*

1144 ii. —.J.—Action against the sheriff for seizing & selling goods. Pleas, not guilty, & not possessed. It appeared that pltf. had mtged. the property to M., & executions came into the sheriff's hands both against pltf., who was in possession of the goods & the mtgee. Pltf. told the sheriff that the goods were not his, but were under mtge. to M., & the sheriff seized & sold under the execution against M. The sale produced £312 5s., of which the sheriff applied £200 on the executions against M., being the amount due to him by pltf. on the mtge., which fell due two days after, & the balance he applied on the writs against pltf. Most of the property had been

bought in by pltf.'s brother-in-law, who gave his note for the purchase-money, & left the goods in possession of pltf., who afterwards paid the note. The jury found that the value of all the goods sold was £500, & of that portion which pltf. did not get back £200; & it was left to the ct., drawing such inferences as a jury might from the evidence to say whether pltf.'s action could be maintained, & if so whether he was entitled to the one sum or the other:—*Held*: pltf. was clearly not estopped from recovering, by having told the sheriff that the goods were not his, but mtged. to M. This judgment was subsequently appealed from & a new trial ordered.—*HENDERSON v. FORTUNE* (1859), 18 U. C. R. 520.—*CAN.*

1144 iii. —.J.—Ejectment on a condition of a re-entry for want of property to distrain. The bailiff had been sent to search the premises, & had also a demand in ejectment to serve if no property should be found on which to levy. He found nothing, but on passing a hovel he asked deft. if there was any property there, & deft. said there was not, & the bailiff did not search it, & served the demand in ejectment. On the trial deft. did not dispute his former denial that there was property, but proved that there was sufficient to satisfy half a year's rent. Pltf. contended that deft. was estopped from denying the truth of his statement to the bailiff. At the trial the judge held deft. was not estopped, & pltf. submitted to a non-suit. A rule nisi to set the non-suit aside & for a new trial was granted on the ground that deft. was estopped:—*Held*: deft. was not estopped but the rule should be made absolute on the ground that pltf. had a right to have the credibility of deft.'s testimony in contradicting his former statement submitted to a jury.—*STEWART v. McPHEE* (1863), 1 P. E. I. 236.—*CAN.*

1144 iv. —.J.—A. took a conveyance as trustee for B. B., in answer to a bill by a person claiming the property against both, was induced by A. to swear that he, B., had not any interest in the property. In a subsequent suit by B. against A.:—*Held*: B. was not precluded from showing the trust.—*WASHBURN v. FERRIS* (1871), 16 Gr. 76; 14 Gr. 516.—*CAN.*

1144 v. —.J.—Where in an action for recovery of lands by M., who had bought them at a sale under execution against J., it was objected that he had failed to prove that J. had at the time of such sale any title to the lands:—*Held*: the fact that in the course of certain prior proceedings had by M. on an execution against K., the wife of J., for the purpose of selling the lands, M. had then asserted that they belonged to her, did not estop M. from now as against J. & A., alleging that they belonged to J.—*McGEE v. KANE* (1887), 14 O. R. 226; *affd.*, Cass. Dig. 247.—*CAN.*

1144 vi. —.J.—In an action to recover damages for the removal of fixtures from property covered by several mtges., it was claimed by deft.'s counsel that pltf. H. was estopped, on account of certain transactions in relation to the fixtures in which they were treated as personal property & not as fixtures:—*Held*: there could be no estoppel in the absence of evidence that H. authorised the making of the representations by which it was claimed the estoppel was created.—*BROWNE v. BROOKFIELD* (1892), 24 N. S. R. 476.—*CAN.*

1144 vii. —.J.—Action to recover balance due for a threshing outfit sold & delivered by pluf. co. to defts., C. & E., under a written agreement signed by defts. which provided that promissory notes were to be given on approved security for the amounts payable at the dates mentioned. When the machinery had been delivered at defts.' farm, pltf.'s agent called there to take settlement for it. Defts. then signed the notes asked for & the agent demanded a lien on the farm as security for the notes, & relying on the representations of both defts. then made that the wife owned the land, accepted a lien on the land for the amount, signed by E. in the presence of C., & did not insist, as he might have done, that C. should also sign it. It appeared that the title to the land was then actually in C., & had remained so ever since. Renewal notes had been given by defts. & the original periods of credit considerably extended, & during this time C. wrote several letters in which E. was spoken of as the actual owner:—*Held*: C. was estopped by the representations he had made, & subsequently repeated, from denying



Sect. 3.—By representation: Sub-sect. 2, A.]

a renewed fiat to inquire into the conduct of the assignees & others, as to that property, in which bkpt. now stated that he had discovered that he had & always had a life interest.—*Ex p. HOLDER* (1833), 3 Deac. & Ch. 276; 2 L. J. Bey. 64.

**1145.** —.]—A sheriff who comes to seize the goods of a debtor under a writ of execution is not bound by an estoppel, which might have prevented debtor himself from claiming the goods. M., being the owner of goods procured H. to assign them by bill of sale to R., to secure an advance of money. R. took the goods *bonâ fide*, & upon the assurance of M. that the goods belonged to H. The goods were afterwards seized under a *fi. fa.* as the goods of M. On the trial of an interpleader issue between R. & the execution creditor the jury found that there had been no actual transfer of the goods from M. to H.:—*Held*: R. had acquired no title to the goods as against the execution creditor.—*RICHARDS v. JOHNSTON* (1859), 4 H. & N. 660; 28 L. J. Ex. 322; 33 L. T. O. S. 206; 5 Jur. N. S. 520; 157 E. R. 1000.

*Annotation*:—*Apld.* *Richards v. Jenkins* (1887), 18 Q. B. D. 451.

**1146.** —.]—H. & Co., the owners of certain copper ore, employed T. to convey it in T.'s barge from Liverpool to Birkenhead, & to deliver it there to L., to be crushed in his mills; L. having agreed to indemnify H. & Co., against all risk of such transit. The barge, with the ore on board, having afterwards, without any fault of T., sunk in the River Mersey, T. informed H. & Co., of the accident, & requested to be employed to raise the ore, when he was told that H. & Co., had nothing to do with it, & that he should see L., who had the management of it. L., when applied to by T. as to getting the ore up, said that he was insured with S. & that T. must, therefore, go to S. for orders. T. having, accordingly, obtained from S. directions to do the work, raised the ore, & afterwards, conveyed it to Birkenhead, & then claimed a lien on it as against H. & Co., for the expenses of raising it:—*Held*: H. & Co. had not estopped themselves from claiming the ore of T. as the true owners, since no representation had been made with their authority that any other person than themselves

that the land in question was E.'s property & from claiming it as his own as against plffs.—*JOHN ABELL Co. v. HORNBY* (1905), 15 Man. L. R. 450.—**CAN.**

**1144 viii.** —.]—The sheriff, having in his hands two writs of execution against the goods of deft., instructed his bailiff to make a seizure of deft.'s chattels. The bailiff went to deft.'s farm & found wheat standing in stook & oats not yet cut. Deft. was not there. The bailiff made out, signed in his name as bailiff, & handed to deft.'s wife, a notice or memorandum of seizure of the wheat under the executions. He then left the premises & did nothing further. On Oct. 8 deft. went to the sheriff's office told him that the oats were then cut & in stook, & orally admitted a seizure, to save expense. The sheriff then told deft. that the oats were seized under the executions, & took a bond, reciting the seizure, for the forthcoming of the oats when required:—*Held*: deft. himself was estopped by his conduct from setting up that the oats were not under seizure.

*VAIL*, (1913), 23 W. L. R.

10 D. L. R.

**1144 ix.** —.]—Action for rates

against applt. as owner of 8,912 acres. F. was at the time of making the assessment, & previously, the legal owner of 6,352 acres more or less of the land, for which he held a grant from the Crown. Applt., with others, was jointly interested with F. in the 6,352 acres, by reason of having advanced money on account of the purchase. The money was not secured by way of mtge., but in such a way as to constitute him part owner of the land. Applt. instructed the chairman of the highway board to substitute his name for that of F. in the assessment list, & he was rated by the board as owner of the land, & he had promised to pay the rate. The remaining 2,560 acres of land were proved to be land held by & in possession of certain aboriginal natives. The magistrate gave judgment for the amount claimed less the sum due for lands still held by native owners:—*Held*: applt. was estopped by his own act from saying that he was not the owner of the land to the extent of the acreage for which judgment was given.—*AITKEN v. BREMNER*, 3 J. R. N. S. 8.—**N.Z.**

**1144 x.** —.]—Where A., who was constructing a machine for B., being asked by C., who had recovered a judgment against B., whether he had on his premises any property belonging

was the owner.—*CASTELLAIN v. THOMPSON, THOMPSON v. CASTELLAIN* (1862), 13 C. B. N. S. 105; 1 New Rep. 97; 32 L. J. C. P. 79; 7 L. T. 424; 11 W. R. 147; 1 Mar. L. C. 259; 143 E. R. 41.

*Annotations*:—*Refd.* *The Solway Prince*, [1896] P. 120. *Mentd.* *Hingston v. Wendt* (1876), 1 Q. B. D. 367.

**1147.** —.]—Deft., having a quantity of barley in sacks lying in his granary which adjoined a railway station, sold eighty quarters of it to M. No particular sacks were appropriated to M., but the barley remained at the granary subject to his orders. M. sold sixty quarters of it to pltf., who paid him for them & received from him a delivery order addressed to the station-master, as was usual in such cases. Pltf. sent this order in a letter to the station-master, saying, "Please confirm this transfer." The station-master showed the delivery order & pltf.'s letter to deft., who said, "All right, when you get the forwarding note I will put the barley on the line." M. became bkpt.; & deft. as unpaid vendor, refused to deliver the barley when the forwarding note was presented to him by the station-master acting for pltf.:—*Held*: deft. was estopped by his statement to the station-master from denying that the property in the goods had passed to pltf., for, by making such statement, he induced pltf. to rest satisfied under the belief that the property had passed, & so to alter his position by abstaining from demanding back the money which he had paid to M.—*KNIGHTS v. WIFFEN* (1870), L. R. 5 Q. B. 660; 40 L. J. Q. B. 51; 23 L. T. 610; 19 W. R. 244.

*Annotations*:—*Consd.* *Simin v. Anglo-American Telegraph Co., Anglo-American Telegraph Co. v. Spurling* (1879), 5 Q. B. D. 188; *Henderson v. Williams*, [1895] 1 Q. B. 521; *Dixon v. Kennaway*, [1900] 1 Ch. 833. *Apld.* *Monarch Motor Car Co. v. Pease* (1903), 19 T. L. R. 148. *Refd.* *Joseph v. Webb, Joseph v. Lyons, Joseph v. Piddcock, Joseph v. Jones* (1881), Cab. & El. 262; *Kingston-upon-Hull Corpn. v. Harding*, [1892] 2 Q. B. 494; *Foster v. Tyne Pontoon & Dry Docks Co. & Renwick* (1893), 63 L. J. Q. B. 50; *Sheffield Corpn. v. Barclay* (1902), 8 Com. Cas. 49; *Colley v. Overseas Exporters* (1919), Ltd. (1921), 126 L. T. 58.

**1148.** —.]—*FLATAU & Co. v. SAWYER* (1892), 8 T. L. R. 656.

— *After delivery to carrier.*—In an action against common carriers for not delivering goods according to contract, the person whose property the goods are is *primâ facie* the person

to B., pointed out the machine to C., & informed him it had been paid for in land, & further actively assisted C. in securing the property, & was present at a subsequent sale by auction of the property & made no claim thereto, & allowed C. to become the purchaser:—*Held*: A. was estopped from denying that the machine was B.'s, & from setting up the want of a sufficient appropriation to & assent by B.—*KINCAID v. MCGILL*, 1 J. R. 74.—**N.Z.**

*g. As to equity of redemption.*—Pltf. brought ejectment on Sept. 6, 1865, claiming under a mtge. from W., the then deft., in whose place M. was allowed to defend as landlord, claiming under a mtge. from W. to M. assigned to him. The mtge. to M. was given on Nov. 9, 1861, & that to pltf. on Mar. 21, 1864. On Sept. 21, 1865, M. by deed reciting an interlocutory decree in chancery in respect to the foreclosure of W.'s mtge. to him conveyed to M. as W.'s appointee, & on Nov. 9, 1865, by a decree in the same suit, this mtge. was foreclosed. It was contended that the mtge. to M. had merged in the inheritance, & could not be set up against pltf. It was proved that deft., in Apr. or May, 1865, asserted that he had got a deed of the equity of redemption from W.:—



with whom the contract is made; & declarations made by him subsequent to the delivery to the carrier, that the goods belong to another person, are not of themselves sufficient to prevent him recovering in such action.

The simple question for you to decide is, with whom was the contract entered into? Do you think that it was a contract entered into by plffs. jointly, or by one of them only? Are you satisfied that Mullinson was the agent of the two plffs., or of one only? Defts. say all these goods belong to George Bower, the uncle. If that be so, it may raise a question whether the contract was not made with him. The person whose property the goods are, is *primâ facie* the party with whom the contract is made. The declarations of plffs. are only evidence, & not proofs. If the representations made at the time of the delivery to the carrier were, that the goods were not theirs, but their uncle's, then I agree that they would have estopped themselves from saying they were not their uncle's, but here, the representations were not made until afterwards. The question is simply, whether you think these goods really belonged to George Bower (PARKE, B.).—MULLINSON v. CARVER (1843), 1 L. T. O. S. 59, N. P.

1150. As to status—Feme sole—Not estopped from setting up coverture.]—A woman who has declared herself to be a *feme sole*, & as such has executed deeds & maintained actions, if herself sued as a *feme sole*, is not estopped from setting up the defence of coverture.—DAVENPORT v. NELSON (1814), 4 Camp. 26, N. P.

1151. — Feme covert—Estopped from suing as feme sole.]—Pltf. hired a house of deft., representing herself at the time to be a *feme covert*, & upon the faith of the like representations, she obtained goods from various tradesmen:—Held: her assertions that she was a *feme covert* estopped her from suing as a *feme sole* in respect of a trespass committed by deft. under colour of a distress for rent.—LANGFORD v. FOOT (1832), 2 Moo. & S. 349.

Compare No. 1214, *post*.

— That representor trader.]—See No. 1158, *post*.

1152. As to payment—Direction to pay rent to new landlord.]—DOWNS v. COOPER, No. 1031, *ante*.

1153. — Of bill of exchange.]—A judgment had been given by A. for securing eight bills of exchange drawn by deft. & accepted by A. Five of the bills had been paid; the sixth had been indorsed to pltf., & the remaining two were in the hands of deft. A. became insolvent six months after pltf. had given deft. notice of the dishonour of the sixth bill. Deft. assigned to pltf., as trustee for A.'s creditors, the judgment, & also the two bills of exchange in his hands, & released A. A year afterwards pltf. gave deft. a consent to satisfaction being entered upon the judgment against A., alleging at the time that the two bills assigned to pltf. as trustee were the only two remaining unpaid at the time of the

assignment. Deft., accordingly, entered satisfaction upon the judgment. Afterwards, in an action by pltf. against deft. upon the sixth bill:—Held: pltf. was precluded as against deft. from denying that the sixth bill had been paid.—WEST & GREEN v. ELMORE (1852), 18 L. T. O. S. 207.

—.]—A., the indorsee of a bill of exchange, resident abroad, indorsed it to defts., his agents in London, for the purpose of collection. Defts. indorsed the bill to plffs., & sent it to them for the same purpose, & they forwarded it to their agents. Plffs., under a misunderstanding, informed defts. that the bill had been paid, & sent them a cheque for the amount. Thereupon, defts. intimated the same to A., & credited him with the amount of the bill:—Held: plffs. were estopped by the representation which they had made to defts., & upon which defts. had acted.—DEUTSCHE BANK (LONDON AGENCY) v. BERIRO & Co. (1895), 73 L. T. 669; 12 T. L. R. 106; 1 Com. Cas. 255, C. A.

1155. — Of premiums.]—Plffs. chartered the Voltorno to R. & Co. under a time charter which provided that the charterers were to insure the hull, etc., in the owners' name for £40,000 all risks & £20,000 total loss only. R. & Co. instructed defts., who were insurance brokers, to effect those policies & also policies on disbursements & freight of the Voltorno. Defts., at the request of R. & Co., wrote to plffs. informing them of the insurances for £40,000 & £20,000, & added, "We have received instructions from R. & Co. to hold the above policies to your order, which we hereby undertake to do, subject to our lien on same for unpaid premiums, if any":—Held: defts. were estopped from setting up against plffs. a general lien for premiums due from R. & Co. in respect of policies on the Voltorno other than those for £40,000 & £20,000.—FAIRFIELD SHIPBUILDING & ENGINEERING CO., LTD. v. GARDNER, MOUNTAIN & Co., LTD. (1911), L. T. 288; 27 T. L. R. 281; 11 Asp. M. L. C. 591.

1156. Admission of money in hands.]—Deft. held land in trust to receive the rents & pay £50 half-yearly to pltf.'s wife, & the residue, deducting for repairs, land tax, etc., to pltf. Deft. left word for pltf. at a bank, where he had been accustomed to pay in such residue to pltf.'s use, that he would pay pltf. £10 on his giving deft. a receipt for £27; pltf. did not offer the receipt, & the £10 not being paid, he sued deft. for it as money had & received, & on an account stated. Deft. offered to prove that, at the time of his proposal to pay £10, he had laid out more than £27 in repairs, but the evidence was rejected. Pltf. having obtained a verdict for £10, & deft. moving to enter a nonsuit:—Held: upon the evidence, deft. might be taken to have admitted a balance of £10 in his hands to pltf.'s use, & if so, he could not, in defence, either set up his character of trustee, or offer evidence to show that the balance did not exist.—ROPER v. HOLLAND (1835), 3 Ad. & El. 99; 1 Har. & W. 167; 4

Held: this might refer to the equity as created by the second mtge., & deft. was not estopped from denying W.'s title to mtge. in fee in 1864.—MCKAY v. MCKAY (1865), 25 U. C. R. 133.—CAN.

h. As to return of horse—Subject of bailment.]—Pltf. bailed a horse to deft. to be returned to him at a certain time. Before the time elapsed, deft., not requiring the horse any longer, returned it to H., who was in pltf.'s employment both at the time of

bailment & return, & who told deft. that pltf. had sent him for the horse. H. was known to deft., & to others generally, as being in the employment of pltf. as a general manager of his business. In trover for the horse. About two months after the return of the horse deft. met the pltf. & told him that he had delivered it to H. Pltf. neither approved nor disapproved of this. Three years after this action was brought:—Held: pltf. was estopped by his conduct from come

plaining of the delivery to H.—BOUCHETTE v. ANDERSON (1876), Temp. Wood. 64.—CAN.

k. As to payment.]—A release of mtge. was prepared by a solr. who was not employed by the mtgee. for that purpose, & after execution was delivered to E. with instructions not to deliver it up until payment of the amount secured. E., in violation of her instructions, handed the release to the solr. who eventually returned it, but obtained payment from deft.,

**Sect. 3.—By representation: Sub-sect. 2, A. & B.**

(a). 1

Nev. & M. K. B. 668; 4 L. J. K. B. 156; 111 E. R. 351.

**Annotations:—**Refd. *Edwards v. Bates* (1844), 2 Dow. & L. 200; *Pardoe v. Price* (1844), 13 M. & W. 267; *Bartlett v. Dimond* (1845), 14 M. & W. 49; *Bond v. Nurse* (1847), 10 Q. B. 244; *Pardoe v. Price* (1847), 16 M. & W. 451; *Edwards v. Lowndes* (1852), 1 E. & B. 81; *Howard v. Brownhill* (1853), 23 L. J. Q. B. 23; *Topham v. Morcraft* (1858), 4 Jur. N. S. 611. **Mentd.** L. & N. W. Ry. v. Glyn (1859), 1 E. & E. 652; *Kennedy v. Broun* (1863), 13 C. B. N. S. 677.

**1157. As to trading—Place of trading.]—**A debt. who applies to deprive a pltf. of costs, under a local ct. of requests Act, is bound to bring his case distinctly within the terms of the Act. By a ct. of requests Act, exclusive jurisdiction was given to a local ct. up to £5 in certain actions, including trover, where debt. or debts., "resided or kept any house or shop, etc., or was in any way working, trading or dealing, within a given district." By another sect., "where any debt or damages shall be due or owing or demanded from two or more persons jointly by reason of their being partners in trade or otherwise jointly concerned," service of the summons may be made upon one of such persons. In trover against A. & B. brought in the Ct. of Common Pleas, pltf. recovered £5 damages. An application was made on behalf of A. alone, who was resident within the jurisdiction, to deprive pltf. of costs. He produced an affidavit from B., which stated that at the time of issuing the writ, he was trading within the jurisdiction. It appeared from the affidavits on the other side, that before action brought B., who had kept a shop within the jurisdiction, had shut it up & had left the place, but that he returned afterwards. It also appeared that A. had stated that B. had left the place:—**Held:** A. was estopped, by his statement, from contending that B. was trading within the jurisdiction.—*ROBINSON v. SEARSON* (1843), 6 Man. & G. 762; 1 Dow. & L. 756; 7 Scott, N. R. 523; 13 L. J. C. P. 7; 2 L. T. O. S. 170; 134 E. R. 1099; *sub nom.* *SEARSON v. ROBINSON*, 7 Jur. 1088.

**1158. — Statement that representor a trader.]—**A man, not a trader, fraudulently contracted a debt, representing himself to the creditor to be a trader; he subsequently became a trader, & the debt was proved under his bkpey. One of the Comrs. refused him a certificate. Upon appeal:—**Held:** having represented himself as a trader in the transaction, he could not be heard to say that he was not so for the purpose of protecting himself from the consequences.—*Re LESLIE, Ex p. LESLIE* (1856), 25 L. J. Bcy. 37; 27 L. T. O. S. 225; 2 Jur. N. S. 822; 4 W. R. 706, L. JJ.

**1159. As to residence.]—**Deft. ordered goods of a tradesman, & at the time stated that he lived at M., Westminster, where the goods were delivered, & frequent interviews were had with debt., on the subject of payment. A writ was

who purchased the property covered by the mtge., of the amount secured by the mtge. & absconded from the province without having paid over to F. the amount received by him. The evidence showed that F. never employed M. to act for her in any capacity, & that M. did not assume or pretend to act as her agent:—**Held:** pltf. was not estopped by statements made by E., in conversation with debt. & third persons, from which debt. was led to believe that F. was aware that the money had been placed in the hands of M. & that she looked to him for payment.—*ROSS v. SUTHERLAND* (1899), 32 N. S. R. 243.—CAN.

**1161 i. Admission as to debt.]—**Pltf. held a judgment against C. & was about to sue R. & M., whom he understood to be C.'s partners. Before doing so he consulted one of debts., by whom he was informed that there was a balance of some \$2,700 due from debts. to C. for work performed for debts. on a railway under a contract, & debts. suggested that this amount might be made available to satisfy pltf.'s claim if there was a garnishee law. Pltf.'s attorney, on the strength of this representation, issued garnishee process, when debts. pleaded denying that there was any debt due:—**Held:** debts. were estopped by their repre-

served on debt., in an action for the price of the goods, in which he was described as at M., Westminster, & no objection was made to that description. A verdict having been obtained by pltf. for the amount of the debt, debt. applied to the ct. for leave to enter a suggestion on the roll, to deprive pltf. of costs, on the ground that the debt was under £5, & that debt. resided at Wandsworth, within the jurisdiction of a ct. of requests:—**Held:** debt. was bound by his own representation as to his residence, on the faith of which the credit had been given.—*BANKS v. NEWTON* (1847), 4 Dow. & L. 632; 2 New Pract. Cas. 156; 2 Saund. & C. 1; 16 L. J. Q. B. 142; 8 L. T. O. S. 370, 395; 11 Jur. 208; *reversd.* on other grounds, 11 Q. B. 340.

**Annotation:—***Mentd.* *Scott v. Bennett* (1871), L. R. 5 H. L. 234.

**Statement not made with object of evading service of summons.]—**A shopkeeper informed an inspector under Sale of Food & Drugs Act, 1899 (c. 51), on the purchase of a sample that the shop was his private address & he lived there. As a fact he resided elsewhere, & summonses were served by a police officer on the wife of the tenant of one of the flats in the building of which the shop formed the ground floor. The shopkeeper had no knowledge of any proceedings until after he had been convicted:—**Held:** the service was bad & the shopkeeper was not estopped from setting up such bad service, as there was no evidence that he made the statement to the inspector for the purpose of avoiding service.—*R. v. LILLEY, Ex p. TAYLOR* (1910), 104 L. T. 77; 75 J. P. 95, D. C.

**Annotations:—***Mentd.* *R. v. Rhodes, Ex p. McVittie, R. v. Mullin, Ex p. Same* (1915), 85 L. J. K. B. 830; *R. v. Braithwaite*, [1918] 2 K. B. 319.

**1161. Admission as to debt.]—**The firm of J., as agents of pltf., supplied goods to the firm of S. upon the footing of the latter becoming debtors to pltf. They also supplied the same firm with other goods on their own behalf. They made no distinction in their accounts between the goods supplied by them as agents of pltf., & those which they supplied on their own behalf. E. was a partner in both firms:—**Held:** communications made by the firm of J. to pltf., admitting a large debt to be due from the firm of S., & undertaking that E. would use his influence as a partner with S. to secure its reduction, upon the faith of which communication pltf. forbore to sue S., precluded that firm from treating their debt to pltf. as one which had been liquidated by the appropriation of the payments made by them to the firm of J. in order of date.—*WICKHAM v. WICKHAM* (1855), 2 K. & J. 478; 69 E. R. 870.

**Annotations:—***Mentd.* *Re Deane & Youle, Ex p. Goldsmid* (1856), 25 L. J. Bcy. 26, n.; *Sutton v. Grey* (1893), 69 L. T. 354; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778.

**1162. As to existence of agreement or licence.]—***CORNISH v. ABINGTON*, No. 1034, *ante*.

**1163. As to value—Of salvaged property.]—**The

sentations from denying their indebtedness to C.—*SHANLY v. FITZRANDOLPH* (1882), 2 R. & G. 199; 1 C. L. T. 705.—CAN.

**1. As to proceeding with appeal.]—**After pltf. had obtained a decree & under it, in execution, arrested his judgment debtor, the latter filed a petition in ct. agreeing not to prefer any appeal against the judgment obtained by pltf., & the judgment creditor at the same time agreed to release the judgment debtor from arrest & to take payment of the sum decreed to him by instalments. An order was passed by the ct. embodying this



value stated by the owners of salved property in proceedings before comrs. is not conclusive upon the salvor, even though assented to at the time.—*THE HOPE* (1866), 14 W. R. 467.

**1164. As to policy—Denial of insurance.]**—By a time charter which amounted to a demise of the ship it was provided “that the owners shall pay for the insurance on the vessel.” It was also provided that in the case of the steamer in certain events putting into any port other than ports for which she was bound, “the charterers are covered as to expenses as the owners are by their insurance.” The policy effected by the owners without communication to the charterers, whose name did not appear in it, was expressed to be “as well in their own names as for & in the name & names of all & every other person or persons to whom the subject-matter of this policy does or shall appertain in part or in all.” During the currency of the charter party the ship came into collision with another vessel, & was held solely to blame. The charterers were compelled to pay damages to the owners of the other vessel. In the collision action the charterers stated that they had no insurance on the ship, & the action proceeded on the footing that the owners intended to insure their own interests only. In an action by the charterers against the insurance co. to recover their loss caused by the collision:—*Held*: the charterers were not persons intended to be covered by the policy, to which they were strangers, & they were precluded by their own statements in the collision action from asserting that they had adopted or ratified the policy.—*BOSTON FRUIT CO. v. BRITISH & FOREIGN MARINE INSURANCE CO.*, [1906] A. C. 336; 75 L. J. K. B. 537; 94 L. T. 806; 54 W. R. 557; 22 T. L. R. 571; 10 Asp. M. L. C. 260; 11 Com. Cas. 196, H. L.

*Annotations*:—*Mentd.* *Kynance Sailing Ship Co. v. Young* (1911), 104 L. T. 397; *Reliance Marine Insce. v. Duder*, [1913] 1 K. B. 265; *Graham Joint Stock Shipping Co. v. Motor Union Insce.*, *Same v. Merchants' Marine Insce.*, *Same v. Scottish Metropolitan Assee.* (1922), 38 T. L. R. 753; *Samuel v. Dumas*, *Graham Joint Stock Shipping Co. v. Merchants' Marine Insce.* (No. 2), [1923] 1 K. B. 592.

arrangement. The judgment debtor, in contravention of this arrangement, preferred an appeal:—*Held*: the judgment debtor, having induced the decree holder to believe & having expressly undertaken that he would not prefer an appeal, & having by the representation & undertaking procured his own release from arrest, was estopped from acting contrary to his deliberate representation & undertaking.—*PROTAP CHUNDER DASS v. ARATHOON* (1882), 1 L. R. 8 Cal. 455; 10 C. L. R. 443.—*IND.*

**m. As to effect of deed.]**—The five defts. were the directors of a building society. In the year 1883 they executed an instrument which was in terms a bond given to pltf. bank by the society as principal, & by defts. as sureties. The instrument was executed at the office of the society, in the presence of the manager of pltf. bank & defts., first by the attaching of the seal of the society & the signing of two directors & the managing director, & then by each of defts. signing. The evidence was that they first refused to sign, that the manager of the bank made certain statements, & that eventually they did sign. The jury found, on issues submitted to them, that the statements made by the bank manager were to the effect that if defts. signed they would sign as directors of the society only, for the purpose of binding the society & not themselves personally; that these statements were made in

the belief that they were true, & without the intention of misleading, but with the intention & effect of inducing the execution of the bond by defts.:—*Held*: the bank was estopped by the conduct of its agent from suing on the bond as that of defts. as individuals.—*BANK OF AUSTRALASIA v. ADAMS* (1889), 8 N. Z. L. R. 119.—*N.Z.*

**n. As to payment of rent.]**—Pltf. co. was in liquidation, two liquidators having been appointed. The liquidators' clerk, without instructions, admitted a set-off claimed by deft. against the co., particulars of which were entered in the co.'s books, & shortly after came to the knowledge of the liquidators:—*Held*: a statement to deft. by one liquidator that the co. would pay deft.'s rent, for which the co.'s landlord, & not the co. itself, was liable to deft. did not amount to an estoppel as against the co., but could only be effectual as a contract, & as such was not binding without the sanction of the other liquidator.—*DUNEDIN CO-OPERATIVE MEAT SUPPLY CO., LTD. v. HUDSON* (1890), 9 N. Z. L. R. 163.—*N.Z.*

**o. As to period of time—Availability of railway ticket.]**—J. purchased from the C. S. A. R. a return ticket issued on & dated Dec. 3. The ticket contained a printed notice on the back to the effect that it was issued subject to the regulations contained in the tariff book. One of the regulations provided that forward journeys must

**1165. As to burdens on property—Statement that farm not subject to tithe—Action by representor to recover tithe.]**—Upon the sale of a farm pltf. innocently represented to deft. who was the purchaser, that the farm was subject to vicarial tithe only, & the purchase price was arranged upon this basis. The conveyance to deft. contained no mention of title or any recital concerning it. Subsequently pltf. discovered that the farm was subject to lay tithe & that he was the lay impropriator. He, thereupon, instituted proceedings against deft. for the recovery of the lay tithe:—*Held*: having represented that the farm was subject only to vicarial title before the purchase by deft. pltf. was estopped from recovering the lay tithe from him.—*MANSEL-LEWIS v. LEES* (1910), 102 L. T. 237; *sub nom.* *MANSEL-LEWIS v. REES*, 54 Sol. Jo. 327, D. C.

*Annotation*:—*Refd.* *Brandon v. Michelham* (1919), 35 T. L. R. 617.

## B. Statements in Writing.

### (a) In General.

**1166. Admission in writing—Made under mistake.]**—In *assumpsit* for money had & received, an admission in writing was in evidence, by deft., “I undertake to pay you £50 which I hold of O., & have by him been authorised to pay you.” Deft. called O. as a witness, who proved that deft. had been indebted to him, & he had been indebted to pltf., but that he had never authorised deft. to pay pltf.:—*Held*: this was an answer to pltf.'s case, & deft. was not estopped by the admission.—*PIERCE v. EVANS* (1835), 2 Cr. M. & R. 294; 1 Gale, 265; 5 Tyr. 1042; 4 L. J. Ex. 306; 150 E. R. 128.

*Annotation*:—*Mentd.* *Camillo Tank S.S. Co. v. Alexandria Engineering Works* (1921), 38 T. L. R. 134.

**1167. — Of executorship.]**—S., being named as one of the exors. of B.'s will, did not prove the will, but, in answer to an inquiry who were B.'s exors., wrote a letter saying that he & others were the exors.: a creditors' suit was instituted for the administration of B.'s estate, to which S., together with the exors. who had proved the will,

be commenced on the date of issue. The tariff book could have been seen by J. on application to the ticket clerk. J. read the words on the ticket, but did not read the regulations. The return half contained the words “Available as advertised on poster bills.” J. after reading the ticket, asked the clerk for what period it was available, & was told two months. J. did not use the forward half till subsequent to Dec. 3, & on the day he commenced his journey his luggage was booked by a luggage clerk on production of the said ticket:—*Held*: J. was bound by the regulations, & neither the statement of the ticket clerk nor the conduct of the luggage clerk created an estoppel against the C. S. A. R., & that of the ticket after Dec. 3.—*CENTRAL SOUTH AFRICAN RYS. v. JAMES* (1908), T. S. 221.—*S. AF.*

## PART VI. SECT. 3, SUB-SECT. 2.—B. (a).

**p. Petition to municipality to cut road.]**—A. & B. were owners of adjoining blocks of land fronting a certain road. A. & B. signed a petition to the local municipality to cut down this road. A. purchased B.'s land on behalf of a syndicate, & also another piece of land forming together a rectangular block. The municipality subsequently proceeded with the work & cut down the road about four feet thereby injuring the land. Pltf., who had acquired all rights in the land, then brought an action for



**Sect. 3.—By representation: Sub-sect. 2, B. (a), (b) (c).]**

was made a debt. S. put in a separate answer, denying that he had acted as exor., but at the same time raising a substantial defence against pltf.'s alleged debt:—*Held*: S. had accepted the office of exor., & was properly made a party, & the common administration decree would be made against him as well as the exors. who had proved the will.—*VICKERS v. BELL* (1864), 4 De G. J. & Sm. 274; 3 New Rep. 624; 10 L. T. 77; 10 Jur. N. S. 376; 12 W. R. 589; 46 E. R. 924, L. JJ.; *affg. S. C. sub nom. VICKERS v. BELL, BELL v. VICKERS* (1863), 9 L. T. 600.

*Annotations*:—*Apld. Rayner v. Koehler* (1872), L. R. 14 Eq. 262; *Re Lovett, Ambler v. Lindsay* (1876), 3 Ch. D. 198. *Refd. Coote v. Whittington* (1873), L. R. 16 Eq. 534.

.]—*See, further, EXECUTORS.*

**1168.** —.]—W., having entrusted P., his solr., with a sum of £7,700 for investment on mtge. on his behalf, was informed by P.'s clerk, in conversation, that "P. proposed to invest the money on mtge. of leasehold property at Camden Town at 5 per cent.," & subsequently received a letter from P. stating that "the money was put on 5 per cent. mtge. as arranged by my clerk with you." On P.'s death it was found that no mtge. existed in favour of W., but that P. had advanced £100,000 to a firm of builders on a mtge. of their leasehold property at Camden Town:—*Held*: P. & those claiming under him were bound by the representation made by him, & were estopped from denying that the £7,700 formed part of the £100,000 so invested.—*MIDDLETON v. POLLOCK, Ex p. WETHERALL* (1876), 4 Ch. D. 49; 46 L. J. Ch. 39; 35 L. T. 608; 25 W. R. 94.

*Annotations*:—*Mentd. Bradley v. Riches* (1878), 9 Ch. D. 189; *Re Mawson, Ex p. Harcastle* (1881), 44 L. T. 523; *Montagu v. Sandwich* (1886), 54 L. T. 502; *London & Westminster Bank v. Turquand* (1888), 4 T. L. R. 454.

**1169.** — **Admission of assets.**—Admission of assets is merely a question of evidence, & an exor. may bring evidence to show that his admission was the result of a mistake in the account. But where an exor. had passed his residuary account,

damages against the municipality:—*Held*: the fact that A. had signed the petition with regard to one piece of land did not bind him by consent as to any other piece of land afterwards acquired by him, & as B. had transferred the land before the work was done her consent by signing the petition did not amount to an estoppel to bind successors in title.—*ADAMS v. BRUNSWICK CORPN.* (1894), 20 V. L. R. 455.—**AUS.**

**q. Sale of goods—Safe—By instalments—Safe not property of purchaser—Until all instalments paid.**—Pltf., a manufacturer of safes at Toronto, agreed to sell a safe to T., paint his name upon it, & send it to him at St. John by railway that it was to be paid for by instalments in two years, but that no title to it was to pass to T. till the whole price was paid, until which time the safe was to be on hire; & on default of any of the payments, pltf. was to be at liberty to retake possession of the safe. T. gave his notes for the price of the safe according to agreement; his name was printed on the door of it, & pltf. sent it to St. John by railway addressed to T., with a bill of lading or way bill. There was a covering over the safe, which prevented T.'s name upon it from being seen until the covering was taken off. While the safe remained in the railway warehouse T. transferred it to debt., to whom he was indebted, delivering to

him the bill of lading or way bill, & he thereupon paid the freight upon it from Toronto & took possession of it, not knowing that T.'s name was painted on it. The first note given by T. not having been paid, pltf. demanded the safe from debt., who refused to give it up, claiming to own it:—*Held*: even if the painting of T.'s name on the safe & sending it to him would amount to a representation that it was his property, on which a purchaser from him might act, debt., when he took possession of the safe, did not know that T.'s name was on it, & therefore was not induced to purchase it by any representation of pltf., the bill of lading not being in evidence, & pltf. was not estopped from showing that T. had no right to sell it.—*TRUMAN v. BAIN* (1885), 25 N. B. R. 298.—**CAN.**

**r. Promise to pay off mortgage—Insolvency of mortgagor.**—Pltf. paid off a first mtge. on certain lands, & procured its discharge, taking a new mtge. to himself for the amount of the advance in ignorance of the fact of the existence of a second mtge. Shortly afterwards on ascertaining this fact, he notified debt., the holder, that he would pay it off, & debt., relying thereon, took no steps to enforce his security. Subsequently, on the property becoming depreciated & the mtgor. insolvent, pltf. brought an action to have it declared that he was entitled to stand in the position of

stating that a legacy was "retained in trust" out of the residue:—*Held*: he was not entitled to show that he had since discovered that the account had proceeded on a mistake, & there were not in fact assets for the legacy.—*BREWSTER v. PRIOR* (1886), 55 L. T. 771; 35 W. R. 251; 3 T. L. R. 205.

**1170.** —.]—Although a residuary account signed by an exor. is *prima facie* evidence of receipt of the moneys credited in the account, it is evidence which is open to explanation, & the acknowledgment is not conclusive against him in favour of a debtor to the estate.—*MILLER v. DOUGLAS* (1886), 56 L. J. Ch. 91; 55 L. T. 583; 35 W. R. 122.

.]—*See, further, EXECUTORS.*

**1171. Recital—Instrument not under seal.**—*CARPENTER v. BULLER*, No. 959, *ante*.

— **Instrument under seal.**—*See Part V., Sect. 4, sub-sect. 3, ante.*

**1172. Negligence of representor—In not informing himself as to truth of statement.**—*HOBBS v. NORTON* (1682), 2 Cas. in Ch. 128; 22 E. R. 879; *sub nom. HOBBS v. NORTON*, 1 Vern. 136.

*Annotations*:—*Consd. Crofts v. Middleton* (1855), 2 K. & J. 194; *Low v. Bouverie*, [1891] 3 Ch. 82. *Refd. Bovey v. Smith* (1682), 1 Vern. 144; *Burrowes v. Lock* (1805), 10 Ves. 470; *Re Overend, Gurney, Ex p. Oakes & Peck* (1867), L. R. 3 Eq. 576.

**Neglect of duty to third party or public generally.**—*See Sub-sect. 4, A., post.*

**(b) In Accounts.**

**Agents' accounts.**—*See AGENCY, Vol. I., pp. 441, 442, 445–447, Nos. 1310–1320, 1343–1360.*

**Entries in bank pass-books.**—*See BANKERS, Vol. III., pp. 243 et seq.*

**Re-opening settled accounts.**—*See EQUITY, Vol. XX., pp. 271 et seq.*

**Actions for money had & received.**—*See CONTRACT, Vol. XII., pp. 545, 546, Nos. 4525–4536.*

**(c) In Pleadings.**

*See, generally, PRACTICE; PLEADING.*

**1173. Declaration or statement of claim—How far binding.**—*HEDEN v. WOLFE* (1621), Palm.

first mtgeo.:—*Held*: pltf. by his acts & conduct had precluded himself from asserting such right.—*MCLEOD v. WADLAND* (1893), 25 O. R. 118.—**CAN.**

**s. Recital in deed—Action for dower.**—The deed of conveyance of land recited that the vendor was "seized of, or otherwise well entitled to, the property intended to be sold, for an estate of inheritance in fee simple"; & it purported to convey such an estate. In a suit for dower by the vendor's widow against the heirs of the purchaser:—*Held*: although, as between pltf. & debts., there was no estoppel which could prevent debts. from proving that the estate sold was other than an estate in fee simple, yet, as the purchaser bought the property as & for all estate of inheritance & paid for it as such, the recital was *prima facie* evidence against the purchaser & persons claiming through him that the estate conveyed was what it purported to be, it being an admission by conduct of parties which amounted to evidence against them.—*SARKIES v. PROSONOMYK DOSSEE* (1881), L. L. R. 6 Calc. 794; 8 C. L. R. 76.—**IND.**

**PART VI. SECT. 3, SUB-SECT. 2.—B. (c).**

**1173 i. Declaration or statement of claim—How far binding.**—Action on a judgment recovered against an exor. The declaration set out a judgment recovered, alleged the issuing

153; 81 E. R. 1023; *sub nom.* WOLFE v. HEYDON, Hut. 30; *sub nom.* HAYTON v. WOLFE, Cro. Jac. 614.

*Annotation*:—*Mentd.* Wangford v. Wangford (1704), Freem. K. B. 520.

**1174. ——— Actions for goods sold & delivered—Plaintiff estopped from disavowing sale.]**—In an action for goods sold & delivered, evidence is not admissible on the part of pltf. which tends to invalidate the sale.—FERGUSON v. CARRINGTON (1828), 3 C. & P. 457; Dan. & Ll. 198, N. P.; *subsequent proceedings* (1829), 9 B. & C. 59.

*Annotations*:—*Refd.* Bradbury v. Anderton (1834), 1 Cr. M. & R. 486; Strutt v. Smith (1834), 1 Cr. M. & R. 312; Selway v. Fogg (1839), 5 M. & W. 83. *Mentd.* Kingsford v. Merry (1856), 1 H. & N. 503.

**1175. ——— Contract & tender in compliance therewith pleaded—Plaintiff not estopped from setting up another tender not in compliance with contract.]**—Where the declaration shows substantially a contract, & a tender in compliance with it, pltf. is not estopped from contending for the true interpretation of the contract by the fact that he has also set out in his declaration an alternative case of a tender which would not have been a compliance.—McCONNEL v. MURPHY (1873), L. R. 5 P. C. 203; 28 L. T. 713; 21 W. R. 609, P. C.

**1176. ——— Omission by defendant to traverse allegation.]**—A declaration against a witness for not attending a trial pursuant to a *subpœna* alleged that pltf. had a good cause of action in that suit, & that the testimony of deft. was material evidence for pltf. Pleas, first, not guilty; secondly, that pltf. could have proceeded to trial without the testimony of deft. Evidence was tendered on behalf of deft. at the trial, for the purpose of showing that pltf. had not a cause of action in the original suit:—*Held*: as deft. had not traversed the allegations, that pltf. had a good cause of action, & that the evidence was material, those allegations were admitted, & deft. was consequently estopped from giving the evidence tendered.—NEEDHAM v. FRASER (1845), 1 C. B. 815; 3 Dow. & L. 190; 14 L. J. C. P. 256; 5 L. T. O. S. 199; 9 Jur. 734; 135 E. R. 764.

*Annotations*:—*Mentd.* Couling v. Cox (1848), 6 C. B. 703; Cornett v. Hooker (1850), 15 L. T. O. S. 69; Marshall v. York, Newcastle & Berwick Ry. (1851), 11 C. B. 398.

**1177. Particulars of claim—How far binding—Action to recover bet—Plaintiff estopped from proving rescission of bet before event.]**—Where the particulars of demand stated that the action was brought to recover a bet lost by R.:—*Held*: pltf. was bound by his particular, & could not show he had rescinded the bet before the event.—DAVENPORT v. DAVIES (1836), 1 M. & W. 570; 2 Gale, 119; Tyr. & Gr. 931; 5 L. J. Ex. 214; 150 E. R. 562.

*Annotations*:—*Mentd.* Mearing v. Hellings (1845), 14 M. & W. 711; Harris v. Montgomery (1851), 11 C. B. 393.

**1178. ——— Claim for single rent—Recovery of double rent under special count.]**—A count for use & occupation may be joined in a

of a *fi. fa.*, & a return of *nulla bona*, & suggested a *devastavit*. Plea, that in that action deft. pleaded *plene administravit*; that pltf. replied lands, on which judgment was given that the lands were assets in the hands of deft. as exor. Deft. then averred that the lands were sufficient, & that pltf. had not proceeded against them. Demurrer to pleas on the ground that, where judgment has been recovered & a *devastavit* is shown, it is not a sufficient reason to excuse deft. from personal liability, that pltf. has obtained a judgment to recover the

lands of testator:—*Held*: the replication of lands was a full admission of the truth of the plea of *plene administravit*; & pltf. by his replication in his former action being estopped from setting up a *devastavit* now, deft. was at liberty to show the true state of the case to save himself from personal liability.—HOGAN v. MORRISSEY (1864), 14 C. P. 441.—CAN.

**1173 ii. ———.]**—Where a party alleges the legal effect & operation of an instrument, he is bound by such allegation.—FOSTER v. BEALL (1869),

declaration with a count for double value, under 4 Geo. 2, c. 28, s. 1; & although the particulars should state the claim under the common counts to be for “the single rent of the premises mentioned in the first count,” pltf. is not thereby estopped from recovering double the yearly value of the premises, under the special count.—HOLLINGS v. KINGSBURY (1848), 12 L. T. O. S. 146.

**——— Claim to property—In interpleader proceedings.]—See INTERPLEADER.**

**1179. Defence—How far binding—Plea of no award—Defendant estopped from setting up award.]**—When a deft. pleads no award he is estopped from taking any exception which supposes an award made.—HINTON v. BRAINE (1876), 1 Freem. K. B. 526; 89 E. R. 394; *sub nom.* HINTON v. CRANE, 3 Keb. 675.

**1180. ——— Defence reciting deed—Defendant estopped from denying deed.]—EVANS v. POWEL (1696), Holt, K. B. 198; Comb. 377; 90 E. R. 1008.**

*Annotation*:—*Refd.* Lainson v. Tremere (1834), 1 Ad. & El. 792

*See Nos. 700–704, ante.*

**1181. ——— Plea of non assumpsit in action by administrator—Defendant estopped from impeaching plaintiff's title.]**—In *assumpsit* by administrator upon promises laid to intestate with a profert of the letters of administration, & *non assumpsit* pleaded deft. cannot, upon the production of the letters of administration object that they are not properly stamped, for the plea admits that pltf. is administrator.—THYNNE v. PROTHEROE (1814), 2 M. & S. 553; 105 E. R. 488.

*Annotations*:—*Mentd.* Rogers v. James (1816), 7 Taunt. 147; Howard v. Prince (1847), 10 Beav. 312.

**1182. ——— Averment that defendant “entered & was possessed” of premises—Defendant not estopped from disputing plaintiff's title to part of premises.]**—Where in his plea deft. sets forth a lease, & then avers that “he entered & was possessed” of the premises thereunder, this will not estop him from proving, that, when he so entered he found some part of the said premises in the possession of a third party under an adverse title.—HOLGATE v. KAY (1844), 1 Car. & Kir. 341.

**1183. ——— Admission as to title—Defendant not estopped from proving contrary.]**—E. covenanted that he, in his lifetime, or his heirs, exors. or administrators, within three months after his death, would pay a sum of £3,000. He died, having devised certain real estate to trustees in trust for E., for life, with remainders over, & other real estate to the same trustees for payment of debts. The trustees, under an order of ct., conveyed the estate to new trustees, H. & T., who became the legal personal representatives of testator, & E., the tenant for life, mortgaged his estate:—*Held*: an admission in their answer that testator was seised of the legal estate would not estop defts. from proving the contrary.—COOPE v. CRESSWELL (1866),

15 Gr. 244.—CAN.

**1173 iii. ———.]**—By resolution deft.'s appointed pltf. their “permanent land commissioner” at a certain salary. The secretary of the co. wrote a letter to pltf. informing him of the appointment & at his request affixed the corporate seal to the letter. Pltf. sued in *assumpsit* for wrongful dismissal:—*Held*: by his pleading he was estopped from setting up the hiring as under seal.—BELCH v. MANITOBA & NORTH-WESTERN RY. CO. (1887), 4 Man. L. R. 198.—CAN.



*Sect. 3.—By representation: Sub-sect. 2, B. (c) & (d).]*

2 Ch. App. 112; 36 L. J. Ch. 114; 15 L. T. 427; 15 W. R. 242, L. C.

*Annotations:—Mentd.* Pears v. Laing (1871), L. R. 12 Eq. 41; British Mutual Investment Co. v. Smart (1875), 10 Ch. App. 567; *Re* Hollingshead, Hollingshead v. Webster (1888), 37 Ch. D. 651; *Re* Hyatt, Bowles v. Hyatt (1888), 38 Ch. D. 609; *Re* England, Steward v. England, [1895] 2 Ch. 100; Edwards v. Walters, [1896] 2 Ch. 157; Astbury v. Astbury, [1898] 2 Ch. 111; *Re* Chant, Bird v. Godfrey, [1905] 2 Ch. 225; *Re* Lacey, Howard v. Lightfoot, [1907] 1 Ch. 330; *Re* Atkinson, Proctor v. Atkinson, [1908] 2 Ch. 307; Road v. Price, [1909] 2 K. B. 724.

].—Pltf. claimed to be entitled, as heir-at-law of J., who made his will & died in 1774, to real estate of which J. was owner at the time of his death. Defts. A., B. & C. were in possession of part of the estate, & defts. D. & E. of another part. Paragraph 7 of the statement of claim was as follows: "Defts. are, or claim to be, the present trustees of the said will, & as such trustees have for a long time past been in receipt of the rents & profits of the said real estate." Defts. A., B. & C. put in a statement of defence traversing paragraph 7, & pleading Stat. Limitations. Defts. D. & E. put in no defence, but gave notice of motion that the action be dismissed. D. & E. filed affidavits denying that they were trustees of J.'s will, & alleging the conveyance of

the legal estate in 1824. A., B. & C. gave a similar notice of motion, but filed no affidavit:—*Held*: A., B. & C., having put the point in issue by their defence, could not now be allowed to say that it was one which ought not to be in issue at all.—*FLETCHER v. BETHOM* (1893), 68 L. T. 438; 41 W. R. 621; 3 R. 589.

#### (d) In Receipts.

**1185. General rule.]**—A receipt does not of itself create an estoppel of any sort or kind (*VAUGHAN WILLIAMS, L.J.*).—*OLIVER v. NAUTILUS STEAM SHIPPING CO.*, [1903] 2 K. B. 639; 72 L. J. K. B. 857; 89 L. T. 318; 52 W. R. 200; 19 T. L. R. 607; 47 Sol. Jo. 671; 5 W. C. C. 65; 9 Asp. M. L. C. 436, C. A.; *revisg.* (1902), cited, [1903] 1 K. B. at p. 435.

*Annotations:—Consd.* Page v. Burtwell, [1908] 2 K. B. 758; *Wright v. Lindsay* (1911), 5 B. W. C. C. 531. *Reid.* Huckle v. L. C. C. (1910), 26 T. L. R. 580; *Howell v. Bradford* (1911), 104 L. T. 433. *Mentd.* Thompson v. North Eastern Marine Engineering Co., [1903] 1 K. B. 428; *Mahomed v. Maunsell* (1907), 1 B. W. C. C. 269.

**1186. —.]**—Formerly it was thought at common law, if the receipt clause was in a deed, there was an estoppel, & that if it was not in the deed there was no estoppel. It has long been clearly recognised, however, that there is no estoppel in the one case any more than in the other (*LUSH, J.*).—*BURCHELL v. THOMPSON*, [1920]

**1184 i. Defence—How far binding.]**—W., a workman, sustained an injury arising out of & in the course of his employment. P., his employer, was insured against liability both under Workmen's Compensation Act, & at common law. W. received certain payments from the insurance co. in respect of compensation, but swore that he believed the money came from an insurance fund established by applt. W. issued a writ, claiming at common law damages for negligence. The issues raised in the action were, whether W. had exercised his option under Compensation Act, s. 6 (6), to claim that act in lieu of proceeding at common law, if not, whether applt. P., had been guilty of negligence, & whether resp't. had been guilty of contributory negligence. At the trial, the jury brought in a general verdict for applt. W. then applied to the Adelaide Local Ct. to record an agreement alleged to have been made between him & P. prior to the trial of the action, of an admission of liability under Compensation Act & to pay W. compensation at the rate of £1 per week. P. objected to the registrations on the grounds that if the agreement had been come to it was spent & inoperative, & that by bringing an action at common law. W. had exercised the option given him by Compensation Act, & could no longer claim compensation thereunder. The special magistrate found that the agreement had been made & had it recorded. W. made an application to the local ct. for redemption of the weekly payment which was objected to by W. on the grounds stated above, but subject thereto he consented at the hearing to an award of £245:—*Held*: applt. was not estopped by his pleading that deft. had claimed & accepted payments under the Act from denying that there was an agreement under the Act.—*PERRY v. WOOLCOCK*, [1917] S. A. L. R. 216.—*AUS.*

**1184 ii. —.]**—Deft. being sued as a corpn. & appearing & pleading as such in bar to the action, is estopped at the trial from disputing its existence as a body corporate, & its ability to contract in that capacity.—*SEELYE v. LANCASTER MILL CO.* (1841), 1 Kerr, 377.—*CAN.*

**1184 iii. —.]**—Deft. held precluded from taking advantage of

defects in his own pleading.—*KILROY v. SIMPKINS* (1876), 26 C. P. 281.—*CAN.*

**1184 iv. —.]**—An acceptance which had been discharged by an agreement between the drawer & the acceptor, was subsequently put in suit by the cashier of a bank to which it had been indorsed, & the acceptor was obliged to pay the same. He then brought action against the drawer to recover the amount so paid, alleging that the acceptance was indorsed as mentioned:—*Held*: deft. having neglected to reply to the paragraph in the statement of claim, alleging the indorsement, was estopped from denying it.—*COX v. SEELEY* (1896), (1875–1908), 1 Cout. Dig. 1059.—*CAN.*

**1184 v. —.]**—In an action in England the owners of a vessel, in answer to a claim for £800 disbursements made by a sub-agent employed by the ship's husband at the port of discharge, pleaded, *inter alia*, that the sub-agent had in his hands a sum of £12,640 of freight. The jury returned a general verdict in favour of the owners. In a subsequent action in Scotland by the ship's husband against the owners, they pleaded compensation in respect of the same sum of freight, alleging that it must be held to have been paid over by the sub-agent to the ship's husband. No change of circumstances had taken place between the dates of the two actions:—*Held*: the owners were not barred by their pleadings in the first action from maintaining their plea of compensation in the second.—*LINDSAY (M'GREGOR'S TRUSTEE) v. COX* (1883), 10 R. (Cl. of Sess.) 1028.—*SCOT.*

**t. Consent rule—How far binding.]**—The lessor of pltf. & another person, each named J. M., applied for different lots of land; by mistake, the grant intended for the lessor of pltf. got into the possession of the other J. M., who conveyed to deft. In ejectment, the consent rule described the land as "granted to J. M., & by him conveyed to deft.":—*Held*: the object of the consent rule was only to settle the local situation of the premises, & pltf. was not estopped by the admission from giving proof of his title.—*DOE v. ROBICHEAU* (1849), 1 All. 419.—*CAN.*

**a. —.]**—The estate of B.,

deceased, was being administered in this action commenced in May, 1892, & V. brought into the master's office in 1901 a claim for goods supplied to the exor., H., between July, 1890, & Mar. 1892, for use in carrying on the hotel business of deceased under authority conferred by his will. V. had, in May, 1893, sued the exor. in a county ct. for the price of the goods in question, but the county ct. judge dismissed the action on the ground urged by deft. that he was not personally liable, but that the claim should be against the estate. The exor. claimed in the administration proceedings that the estate was insolvent, but in Apr. 1894, an order was made by consent for the transfer of all the assets to him personally upon his undertaking to pay or settle with all the creditors of the estate & paying \$1,200 into the hands of trustees for the benefit of the children of deceased & certain costs, & this order was carried out on both sides:—*Held*: the exor. was estopped by the course he had taken in the county ct. suit from disputing the validity of the claim against the estate.—*BRAUN v. BRAUN* (1902), 14 Man. L. R. 346.—*CAN.*

**b. Bill filed in Ontario—Whether admission that court has jurisdiction.]**—Pltfs. having filed their bill in Ontario, must be taken to admit that the ct. has jurisdiction in respect of the matters therein embraced; & the practice of the ct. requiring it, & a method having been provided for service of process out of the jurisdiction, pltfs. were bound to follow the practice if the objection were taken.—*EXCHANGE BANK v. SPRINGER, EXCHANGE BANK v. BARNES* (1881), 29 Gr. 270.—*CAN.*

#### PART VI. SECT. 3, SUB-SECT. 2.—B. (d).

**c. Whether conclusive.]**—C. & W. stored goods with J. who admitted their right. C. & W. sold some of the goods to P. The goods sold to P. were not identified or set apart. J. signed a document thus worded, "Received for storage on the conditions on the back hereof from P." The goods sold to P. were sold by him to B. & Co. & P. left the colony without paying C. & W. An action was brought by B. & Co. against J. for the stored goods sold to B. & Co.:—*Held*: the admission of the right of P. made by J.



2 K. B. 80; 89 L. J. K. B. 533; 122 L. T. 758; 36 T. L. R. 257; 64 Sol. Jo. 68, 307; [1920] B. & C. R. 7, C. A.

*Annotation*:—*Mentd. Commercial Credit Co. of Canada v. Fulton*, [1923] A. C. 798.

**1187. Whether conclusive—As to value of freehold.**—A landlord received 50s. a year for his freehold but the tenant always had receipts given him for 30s. in order to be taxed in that proportion & to deceive the assessors. Plea that the benefit of this proceeding resulted to the tenant & was done to favour him for which reason the landlord ought not to suffer by it:—*Held*: good.—*BEDFORD COUNTY CASE, BLACKWELL'S CASE* (1785), 2 Lud. E. C. 448.

**1188. — As to title of payee.**—A receipt, dated 1849, produced from the custody of the owner of part of the Earl's estate, & expressed to be for £6 for one year's rent of parish land:—*Held*: in the circumstances he was not estopped by such receipt from disputing the title of the parish.—*A.-G. v. STEPHENS* (1855), 6 De G. M. & G. 111; 25 L. J. Ch. 888; 2 Jur. N. S. 51; 4 W. R. 191; 43 E. R. 1172; *sub nom. A.-G. v. STEPHENS PUTNEY CHARITY*, 26 L. T. O. S. 189; 20 J. P. 70, L. C.

*Annotations*:—*Mentd. Brown v. Wales* (1872), L. R. 15 Eq. 142; *Searle v. Cooke* (1890), 43 Ch. D. 519.

**1189. — Receipt obtained by fraud.**—The solr., acting as the agent of deft., obtained the receipt by a gross fraud. In such a case, there could be no estoppel (*LORD ESHER, M.R.*).—*CLARK v. DAWLER* (1891), 7 T. L. R. 602, C. A.

in the receipt to him, could not be used by B. & Co.—*BECKX v. JONES* (1863), 2 W. W. & A.B. 313.—*AUS.*

**d. —.**—An agent of a co., who knew that he had no authority to receive premiums which were overdue, without obtaining a declaration of health, advised & induced the co. to accept the premiums without the declaration, by non-disclosure of material facts within his knowledge, & by false statements made for the benefit of assured:—*Held*: in so doing he acted as the agent of the assured & the co. could refuse to be bound by his act, & therefore was not estopped by non-disclosure of material facts within his knowledge, & by the receipt of premiums under such circumstances, from setting up a lapse of the policy.—*JOHANSON v. CITY MUTUAL LIFE ASSURANCE SOCIETY*, [1904] S. R. Q. 288.—*AUS.*

**e. —.**—Deft., by a policy of fire insurance dated Sept. 7, 1909, agreed to pay pltf. for losses caused to his property by fire after payment of the premium. The policy provided that if any fraudulent device should be used by pltf. to obtain any benefit under the policy the policy should be forfeited. On Sept. 6, pltf. signed & handed to H. an insurance agent, a proposal for the insurance, pltf. subsequently received a receipt from defts. dated Sept. 6, for the premium which he had not in fact paid. The policy stated that pltf. subsequently having paid defts. the premium, defts. agreed with pltf. that if the property insured should be destroyed by fire after payment of the premium, defts. would make good the loss. On Sept. 6, defts. sent pltf. a demand for payment of the premiums, & renewed their demand by letter on Nov. 10, & Dec. 9, enclosing an account. On Dec. 14, the property was destroyed by fire. On Dec. 15, pltf. gave H. a cheque dated Dec. 13, for the amount of the premium, which H. handed to defts. on the same day & which defts. refused to accept:—*Held*: defts. were not estopped from showing that the premium had not been paid,

before the fire.—*NEWIS v. GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPN.* (1910), 11 C. L. R. 620.—*AUS.*

**f. —.**—Where receipts & discharges are given, by the crew of a vessel, they are not to be taken in the admiralty as conclusive; & where settlements & receipts are made under undue influence, without free consent, they do not bar an equitable claim for compensation beyond what the crew have received.—*Re THE JANE* (1846), 1 S. V. A. R. 256.—*CAN.*

**g. —.**—A receipt by A. for flour in store for B., given & accepted, is not conclusive upon the party accepting it from B.—*MAIR v. HOLTON* (1848), 4 U. C. R. 505.—*CAN.*

**h. —.**—A. gave receipts to B. for 7,500 barrels of flour as in store for them at C., subject to his order. B. drew on pltfs. through the Bank of Montreal at C. to whom he handed these receipts, & the bank agent there forwarded the bills, with a certificate that he held such receipts, to the head office in Montreal, where pltfs. accepted & paid them. Pltfs. having received from defts. only 7,308 barrels sued them as for false & fraudulent representations to B. that they had received in store for him 7,500 barrels, which representations they alleged defts. knew by the course of trade would be relied upon by persons dealing with B., & on the faith of which pltfs. made advances to the full value of the quantity. The jury were directed that as between themselves & pltfs. defts. were bound by their receipts, & liable in this action, though the error arose from mistake only:—*Held*: a misdirection; that their attention should have been drawn to the nature of defts.' business, & the object of these receipts, & they should have been asked to say whether the error in the case arose from mistake or a design to deceive, or from such negligence as might lead to the conclusion of fraud.—*MCLEAN v. BUFFALO & LAKE HURON RY. CO.* (1864), 23 U. C. R. 448.—*CAN.*

**k. —.**—Pltf. assigned to deft. his

**1190. Whether bar to claim for further payments.**—(1) The captain of a whaler was a joint owner of the vessel. A seaman about to sail on a whaling voyage signed articles of agreement, not to sue any of the owners for wages except one, who was the captain, & the only owner party to the articles. The other owners sold the cargo when brought home, received the proceeds, & the managing owner settled the wages with the seaman:—*Held*: the seaman could not sue any owner not named in the articles.

(2) On settling with the seaman for his wages, the owner claimed to make deductions for insurance, & interest on advances made to him on account of wages. The owners' clerk proved these charges to be usual. The seaman remonstrated against them, but eventually accepted the balance offered him minus the deductions, & signed a receipt as for his whole wages:—*Held*: by having so done he was estopped from recovering from the owners the sums thus deducted.

(3) A seaman stipulated, that instead of receiving monthly wages, he should have a ninetieth share of the net proceeds of the cargo to be obtained on a whaling voyage. The owner charged him with insurance on his share, though the freight had never been insured; the seaman remonstrated but finally took the balance minus the deductions, & signed a receipt as for his whole wages:—*Held*: he was estopped from recovering back the item for insurance as money had & received to his use, & the owner need not plead a set-off in order to insist on that

interest in a certain lease by deed, containing a receipt for the consideration money, \$350. This deed was placed in K.'s hands to hold till deft. deposited this sum. K. delivered it to deft. on his promise that he would pay, & deft. afterwards paid him \$75, saying he would hand him the balance as soon as he obtained it. On being asked again he said he had the money, but that pltf. should pay part of the expense of a bond which he had to give respecting the title. Pltf. then sued upon the common counts, for the purchase-money of land & on an account stated:—*Held*: he was estopped by the receipt under seal, & could not recover on either count.—*SPARLING v. SAVAGE* (1865), 25 U. C. R. 259.—*CAN.*

**i. —.**—Certain bars & bundles of iron came by ship from G. to M. consigned to pltf. His agent gave to defts.' agent an order to get it from the ship, & afterwards received from the latter a receipt, specifying the number of bars & bundles & the gross weight, but with a printed notice at the top of it that "rates & weight, entered in receipts or shipping bills will not be acknowledged." All the iron received by defts. for pltf. was delivered at G., but there was a very considerable deficiency in the weight. So far as appeared, the iron had not been weighed either on being taken from the ship or afterwards:—*Held*: defts. were not estopped by their statement of weight in the receipt, & were not liable to pltf.—*HORSEMAN v. GRAND TRUNK RY. CO.* (1871), 31 U. C. R. 535.—*CAN.*

**m. —.**—*WESTERN ASSURANCE CO. v. PROVINCIAL INSURANCE CO.* (1880), 5 A. R. 190.—*CAN.*

**n. —.**—The evidence in this case showed that applt. never entered into a contract to take fifty shares, that the receipt given for a dividend of ten per cent. on the amount actually paid, was not an admission of his liability for the larger amount, & he therefore was not estopped from showing that he was never in fact

*Sect. 3.—By representation: Sub-sect. 2, B. (d) &*

deduction, for the seaman was a joint adventurer.—*M'AULIFFE v. BICKNELL* (1835), 2 Cr. M. & R. 263; 1 Gale, 232; 5 Tyr. 1035; 4 L. J. Ex. 225; 150 E. R. 114.

—.]—*See, further, CONTRACT, Vol. XII., p. 496, Nos. 4049–4059; MASTER & SERVANT.*

**1191. Boat receipt—In form of bill of lading.**—T., a corn factor, was in the habit of sending oats by a canal from Longford to Dublin, to the care of his agents at the latter place, to be forwarded by them to Liverpool or London. On Feb. 2, he sent to pltf.s., his factors, two receipts signed by the masters of two canal boats, 604 & 54, dated Jan. 31, resembling bills of lading in their language, & expressing that the two cargoes of oats had been shipped at Longford for pltf.s. At the date of these receipts, boat No. 604 was completely loaded & boat 54 partially so. T. at the same time informed pltf.s. that he had valued against them on account of these cargoes. On Feb. 7, pltf.s. returned for answer, that they had accepted the bills. These bills were afterwards paid by them. Deft., who was the creditor of T. sent an agent to Longford, for the purpose of obtaining from T. some oats, that had not arrived according to the agreement. On Feb. 6, T. being pressed by deft.'s agent, agreed to transfer to him the cargoes of the two boats: & on Feb. 9,

sent from Longford to deft.'s agent, who was then at Dublin, a boat receipt similar in form to those of pltf.s.' entitling deft. to the cargo of the boats Nos. 604 & 54. The agent received these receipts on Feb. 9, & on the arrival shortly after of the boats Nos. 604 & 54, took possession of their cargoes, which were afterwards sold by deft.:—*Held*: (1) pltf.s. had a complete title to the cargo of boat No. 604, at least on Feb. 7, the day of their accepting the bill; (2) as on Jan. 31, there were no oats on board the boat No. 54 no specific chattels were held for pltf.s.; (3) no appropriation took place until Feb. 9, when the master signed the boat receipts for the oats then on board boat 54, & thereby made himself deft.'s agent for the purpose of holding these oats; (4) pltf.s. were, therefore, entitled to the cargo of boat 604, & deft. to that of boat 54.—*BRYANS v. NIX* (1839), 4 M. & W. 775; 1 Horn & H. 480; 8 L. J. Ex. 137; 150 E. R. 1634.

*Annotations:—As to (3) Refd. Evans v. Nichol* (1841), 3 Man. & G. 614. *Generally, Mentd. Jenkyns v. Usborne* (1844), 7 Man. & G. 678; *Gattorno v. Adams* (1862), 12 C. B. N. S. 560; *British & India Steam Navigation Co. v. De Mattos, De Mattos v. British & India Steam Navigation Co.* (1864), 4 New Rep. 67; *Meyerstein v. Barber* (1866), L. R. 2 C. P. 38; *Re Wiltshire Iron Co., Ex p. Pearson* (1868), 3 Ch. App. 443.

**1192.** —.]—Where a merchant, in Newcastle, who was in the habit of consigning goods to his agents, pltf.s., in London for sale, & of drawing upon them to certain amounts, had

holder of fifty shares in the capital stock of the co.—*COTÉ v. STADACONA INSURANCE CO.* (1881), 6 S. C. R. 193.—*CAN.*

**o.** —.]—A condition in a policy of life insurance provided that if any premium, or note give therefor, was not paid when due, the policy should be void. A note given, payable with respect, in payment of a premium, provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note, it was partly paid & an extension was granted, & on a part payment being again made a further extension was granted. The last extension was overdue, & the balance on the note was unpaid at the death of assured. A receipt by the co., given at the time of taking the note, was for the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof." While the note was running the policy was assigned for value, with the assent of the co., to pltf., to whom the receipt was delivered by assured:—*Held*: the co. were estopped by the receipt, & by the extensions of the time for payment to the assured, from setting up against pltf. that the policy was void for non-payment of the premium.—*WOOD v. CONFEDERATION LIFE ASSOCN.* (1901), 35 N. B. R. 512.—*CAN.*

**p.** —.]—Pltf.s. having during the course of construction given a receipt for payments which they had never received:—*Held*: they were estopped from claiming such amount against the owner.—*COUGHLIN v. NATIONAL CONSTRUCTION CO., McLEAN WING* (1909), 14 B. C. R. 339.—*CAN.*

**q.** —.]—Receipt given through mistake of the facts acknowledging the receipt of more rent than actually was received does not estop the landlord.—*SUTCLIFFE v. BENNETT* (1914), 14 E. L. R. 128; 47 N. S. R. 474.—*CAN.*

**r.** —.]—Written receipt for money not actually received. McD., was pltf.'s agent at Marquis, & M., deft.'s manager there. Part of McD.'s duty was to deposit with deft. money received in the course of his employ-

ment, for which defts.' manager gave receipts. On Jan. 23, 1913, McD. went to the bank after banking hours & paid M. \$300 in cash, gave him his personal cheque for \$276:70 & said that he had, the day before, deposited \$150. M. gave three receipts, & being asked the same day by pltf.s.' manager, told him that McD. had deposited between \$500 & \$600. The next day, M. found that the cheque was worthless, & that no deposit of \$150 had been made, & consequently gave pltf.s. credit for \$300 only. Pltf.s., on the strength of the receipts, settled with their agent, McD.:—*Held*: defts. were not estopped from denying that the money shown by the receipts had not been deposited.—*SASKATCHEWAN & WESTERN ELEVATOR CO. v. BANK OF HAMILTON* (1914), 29 W. L. R. 262; 7 W. W. R. 100; 7 Sask. L. R. 131; 18 D. L. R. 411.—*CAN.*

**s.** —.]—P., on the faith of a personal unmarked cheque, subsequently dishonoured, of the agent of D., gave a receipt for freight charges. The agent used the receipt as evidence of his having paid such charges & secured money from D., on the faith of such receipt:—*Held*: P. was estopped from denying that the money had been actually received by him.—*CANADIAN PACIFIC RY. CO. v. CONTINENTAL OIL CO.* (1915), 52 S. C. R. 605.—*CAN.*

**t.** —.]—A minor who, representing himself to be a major & competent to manage his own affairs, collected rent & gave receipts therefor, was estopped by his conduct from recovering again the money once paid to him, by instituting a suit through his guardian.—*RAM RATUN SINGH v. SHEW NANDAN SINGH* (1901), I. L. R. 29 Calc. 126; 6 C. W. N. 132.—*IND.*

**a.** —.]—Certain bales of cloth tendered to the East Indian Railway Co. for transit were in due course delivered to the consignee, who granted "clear receipt" for them. Subsequently the consignee discovered that some pieces of cloth out of the bales were missing, the same having been lost while in the custody of the railway co. In a suit brought by the consignee for compensation:—*Held*: bailer, who,

in the absence of any agreement on the subject, has given the bailee a receipt for the goods bailed, is not, *ipso facto*, precluded from proving that the goods were in reality damaged or deficient in quantity when delivered to him.—*EAST INDIAN RY. CO. v. SISPAI LAL* (1911), I. L. R. 39 Calc. 311.—*IND.*

**b.** —.]—Pltf. was a customer of deft. bank. A clerk of pltf. intending to pay money into the bank to the credit of pltf., by mistake filed in the name of another person in the pay-in slip as that of the person to whose credit the money was being lodged. In the tag attached to the paying-in slip for the purpose of being returned by the teller as a receipt pltf.'s name had, however, been correctly filled in by pltf.'s clerk. The teller did not notice the difference between the pay-in slip & the tag or receipt, & stamped & initialled the latter & returned it to pltf.'s clerk. The money was, however, credited by the bank, in accordance with the pay-in slip, to the person named in the pay-in slip, & not to pltf. This was on July 22. On July 24, a cheque drawn by pltf. on July 19 was presented & dishonoured. If the money paid in on July 22 had been credited to the pltf. there would have been sufficient funds to meet the cheque:—*Held*: the deft. bank was not estopped by the acknowledgment contained in the receipt from denying that the sum paid in on July 22, was paid to pltf.'s credit.—*BANKS v. BANK OF NEW ZEALAND* (1903), 22 N. Z. L. R. 572.—*N.Z.*

**c.** —.]—*BAIRD v. MOUNT* (1874), 2 R. (Ct. of Sess.) 101; 12 Sc. L. R. 88.—*SCOT.*

**d.** —.]—A deposit receipt was granted by a bank bearing that a sum of money had been received from A. & B., "payable to either or the survivor of them." In an action by B. with concurrence of A. against the bank for payment of the sum in deposit-receipt, the bank averred that the money truly belonged to A., & pleaded that they were entitled to retain it in security of a debt of larger amount due to them by A.:—*Held*: the defence stated was irrelevant, & the bank was bound in respect of the express terms of their deposit-receipt to make pay-



overdrawn his account, & advised his agents that he would ship them twenty tons of alkali to cover his draft, did accordingly ship the alkali on board a ship of defts., who were wharfingers between Newcastle & London, & received from defts.' servant, the captain of the ship, a boat receipt, to the effect that the goods were to be delivered to pltfs.:—*Held*: defts. were estopped from denying pltfs.' title in the goods upon their arrival in London.—*EVANS v. NICHOL* (1841), 3 Man. & G. 614; 4 Scott, N. R. 43; 11 L. J. C. P. 6; 5 Jur. 1110; 133 E. R. 1286.

*Annotation*:—*Mentd.* Kerford v. Mondel (1859), 28 L. J. Ex.

**Receipts generally.**—*See* CONTRACT, Vol. XII., pp. 494–496, Nos. 4028–4059.

(c) *In Other Documents.*

**1193. Affidavit—By petitioning creditor.**—If the assignees of a bkpt. suing petitioning creditor for money of bkpt.'s which he has got into his hands, accidentally show that, on a statement of accounts between debt. & bkpt., the balance due from the latter is less than sufficient to sustain the commission, debt. nevertheless is estopped from taking advantage of that fact to defeat the action, by his affidavit of debt, made to support the commission.—*HARMAR v. DAVIS* (1817), 7 Taunt. 577; 1 Moore, C. P. 300; 129 E. R. 231. *Annotation*:—*Appld.* Ledbetter v. Salt (1828), 4 Bing. 623.

**1194.** — — — — —.]—An affidavit that a party is indebted to deponent in the sum of £100 & upwards, & is become bkpt., is, as against deponent, conclusive evidence of the bkpcy.

The only question is, whether debt. is not estopped to say there was no prior commission, when he himself was the person who set that proceeding in motion. The point, however, has

ment to B.—*ANDERSON v. NORTH OF SCOTLAND BANK* (1901), 4 F. (Ct. of Sess.) 49.—*SCOT.*

**e.** — — — — —.]—The first debt., B., being a bonded warehouseman at Port Elizabeth, received into bond 40 cases of cigars from W., who afterwards wishing to send them in bond by rail to Johannesburg, obtained from B. the cases & the rail notes which B. had prepared for the carriage of the goods by rail. W. misappropriated the cases with cigars to his own use & brought 39 other cases to the railway station marked with different marks, except one case, to which he directed the attention of the railway officials, saying that it contained another case inside. The officials neglected to check all the marks & signed the railway receipts, which had been previously prepared by B., as being correct. The 39 cases were sent to Johannesburg, where there was no one to receive them, & on their being subsequently opened they were found to contain only rubbish. Debt., B., being sued with two sureties on the bond which he had given to the Govt. for the due warehousing of all goods delivered into his warehouse, claimed as damages the amount of the loss sustained by them through the misrepresentation made by the railway officials on the receipt signed by them:—*Held*: as the initial act which enabled W. to perpetrate the fraud was the delivery to him by B. of the cigars & rail notes, the Govt. was not estopped from denying the correctness of the receipts which the railway officials, induced thereto by the production of the rail notes, had given to W.—*COLONIAL GOVERNMENT v. BONNER* (1904), 21 S. C. 477.—*S. AF.*

**f.** — — — — —.]—Pltf. was paid a sum of \$250 by a benefit insurance society in connection with the railway, though a distinct organisation, of which J.—VOL. XXI.

deceased was a member. Pltf. gave a receipt stating that the railway co. was relieved from all liability. Deceased's certificate did not profess to be an insurance against accidents, & the railway co. were no party to the receipt:—*Held*: the receipt formed no bar to the action against defts. nor was there any right to deduct the amount received from the benefit society from the sum pltf. was entitled to as damages.—*FARMER v. GRAND TRUNK RY. CO.* (1891), 21 O. R. 299.—*CAN.*

**g.** — — — — —.]—A workman in the employment of a firm of engineers, who were fitting up engines in a ship which was lying in a dry dock, fell from a gangway connecting the ship with the shore & was injured. He raised an action of damages in the sheriff ct. against his own employers, the builders of the ship, & the shipcarpenters who had put up the gangway. This action was dismissed for want of jurisdiction. The workman accepted two small sums from his own employers & from the builders, acknowledging receipt from former as "in full of expenses incurred in connection with his alleged claim for damages" & discharging the latter "in consideration of this payment of & from all claims of reparation & for payment of legal & other expenses now or hereafter competent to me." He then raised action for £500 against shipcarpenters:—*Held*: he was not barred from doing so by these payments or the terms of his discharge to builders & engineers.—*CAMPBELL v. MORRISON* (1891), 19 R. (Ct. of Sess.) 282; 29 Sc. L. R. 251.—*SCOT.*

**PART VI. SECT. 3, SUB-SECT. 2.—B. (e).**

**h. Affidavit—Ownership of property.**—An erroneous statement in an affidavit, made *bonâ fide* but without

been decided in *Harmar v. Davis*, No. 1193, *ante*, where, although it appeared upon a balance of accounts between petitioning creditor & bkpt., that the balance due from bkpt. was not sufficient to constitute a petitioning creditor's debt, yet petitioning creditor was holden to be by his affidavit estopped to take advantage of that fact. In this case petitioning creditor has done that, & he cannot dispute his own proceeding.—*LED-BETTER v. SALT* (1828), 4 Bing. 623; 1 Moo. & P. 597; 130 E. R. 909; *sub nom.* LEDBETTER v. SCOTT, 6 L. J. O. S. C. P. 147.

**1195.** — — — — —.]—**Ownership of goods.**—A party on taking the benefit of Insolvent Act, swore that certain goods, described in her schedule, belonged to the creditors of her deceased husband: but afterwards brought an action to recover them, claiming them as her own:—*Held*: the fact of her so swearing, & afterwards setting up a right to the goods in herself, was an inconsistency for the consideration of the jury, but such oath did not estop her from asserting her claim.—*THORNES v. WHITE* (1835), Tyr. & Gr. 110.

**1196.** — — — — —.]—*MILLS v. FOX*, No. 1134, *ante*.

**1197.** — — — — —.]—**Age of deponent.**—The ct. will not supersede a fiat issued against an infant, where he has held himself out as an adult & made a declaration on oath to that effect.—*Re BATES, Ex p. BATES* (1841), 2 Mont. D. & De G. 337; 11 L. J. Bey. 4.

*Annotations*:—*Refd.* R. v. Robinson (1867), 10 Cox, C. C. 467; *Re Jones, Ex p. Jones* (1881), 45 L. T. 193.

**Bill of lading.**—*See* SHIPPING.

**1198. Bill of sale—Ownership of goods.**—The bill of sale is decisive. The possession of the goods is evidence of property. B. must be taken to have been the owner of the goods. He is

full knowledge of the facts, does not operate as an estoppel against the party making it.

In an affidavit filed in an action, F. stated erroneously but *bonâ fide* that M. was in his lifetime seized of the lands of T., & she also accounted in the action for £35, rent received by her thereout. On this affidavit the chief clerk found that M. was seized of the lands, & by an order made on further consideration, M.'s real estate was ordered to be sold if the personalty should prove insufficient to pay his debts. The personalty was insufficient, but the lands of T. were not sold, as in fact M. had no title to them. No further steps were taken in the administration action, & the vendor remained in possession & receipt of the rents & profits. The lands having been sold by her to the tenants under Land Purchase Acts:—*Held*: the vendor was not estopped by the administration proceedings; she had acquired as against H. a title to the lands under Real Property Limitation Act, 1874 (c. 57), s. 1, & consequently she was entitled to the residue of the purchase-money.—*MOUNT-CASHELL'S ESTATE*, [1920] 1 I. R. 1.—*IR.*

**1198 i. Bill of sale—Ownership of goods.**—F. claimed to be the owner of a horse that S. had given her for the board of herself & child. S., being indebted to H., left the province, & H., seized the horse as the property of S. under an absconding debtor's warrant. While the horse was in the possession of the sheriff under the warrant, negotiations were had with H. by persons professing to be acting for F., & a bill of sale of the horse was given to H., & the horse was returned to F. The amount secured by the bill of sale not having been paid, H. seized the horse under the bill of sale, & F. brought an action against H.



*Sect. 3.—By representation: Sub-sect. 2, B. (e).]*

estopped to say otherwise since he executed the bill in question (LORD KENYON).—PHILLIPS v. KAMER (1795), 1 Esp. 355, N. P.

*Annotation:—Mentd.* Clifford v. Hunter (1827), 3 C. & P. 16.

**1199.** ———.]—The grantor of a bill of sale described the goods in the schedule thereto as his own, though in fact the true owner was pltf., his wife. The bill of sale was given as security for a loan to the grantor from deft., & at the time of its execution the wife made a statutory declaration that the goods were those of her husband. One firm of solrs. acted for all the parties in this transaction. On a claim by the wife to the goods:—*Held*: (1) she was estopped from denying that the goods were those of her husband, & of thus showing that the bill of sale was void as against deft. under Bills of Sale Act, 1882 (c. 43), s. 5; (2) the wife was not entitled to say that she should have had independent legal advice, & having acted without it, she was not estopped from claiming the goods.—WESTEN v. FAIRBRIDGE, [1923] 1 K. B. 667; 92 L. J. K. B. 577; 129 L. T. 221; 67 Sol. Jo. 403; [1923] B. & C. R. 86.

———.]—*See, generally*, BILLS OF SALE, Vol. VII., pp. 3 *et seq.*

**Bond.** —*See* Part V., Sect. 2, sub-sect. 3, *ante*.

**1200. Catalogue — Ownership of goods.**—The statement in a catalogue that a horse was the property of a particular person was a material representation, as it was to a certain extent a guarantee as to the character of the sale. . . . D. held out the auctioneer as being his agent & allowed pltf. to act on the faith of it. D. was estopped from saying that the representation was not made on his behalf (LORD ALVERSTONE, C.J.).—V. v. DEVENISH (1904), 20 T. L. R. 385.

*Annotation:—Mentd.* Said v. Butt, [1920] 3 K. B. 497.

**1201. Conditions of sale—No objections to be**

for a conversion of the horse. On the trial, the judge told the jury that the only question was, who was the owner of the horse at the time it was taken, & that pltf. was not estopped by the bill of sale from recovering in the action:—*Held*: the direction was right.—HANNAY v. FRASER (1905), 37 N. B. R. 39.—CAN.

**1200 i. Catalogue — Ownership of goods.**—Where by a written agreement a purchaser buys all the furniture in a building, & is shown a catalogue of the number of articles in the building, this is a representation which estops the vendor & entitles the purchaser to a reduction of the price if all the articles mentioned in the catalogue are not delivered.—DALY v. MARSHALL (1885), 4 N. Z. L. R. 28.—N.Z.

**k. Conditions of sale — Description of property.**—M. & B., owners of village lots, were in possession of an adjoining water lot in a lake, the title being in the Crown & to which, according to the practice of the Crown Lands Department, they had a right of pre-emption. On it they erected a mill on cribwork built on the bottom of the lake. A mtge. to R. of the village lots & other lands was intended to comprise the water lot & mill which were omitted by mistake of the solr. who prepared the instrument. M. & B. afterwards executed separate instruments in the form of a chattel mtge. purporting to mtge. chattel property & the mill to other persons. M. & B. became insolvent, assigned for the benefit of creditors & the assignee sold at auction all their property including the mill, by sale subject to printed conditions, one of which was that as all the information relating to title was set

out in the schedules, stock list & inventory, the vendor would not warrant the correctness of the same & that no other claims existed "but the purchaser must take subject to all claims thereon, & whether herein mentioned or not, & subject to all exemptions in law." These conditions were signed by the purchasers, to whom the assignee executed a conveyance. Before the sale the assignee had procured the two last above mentioned mtges. executed by M. & B. to be paid off by a person who advanced the money & he took an assignment to himself after the sale paying the amount of the purchase-money. The conveyance to the purchasers at the sale purported to be made in pursuance of all powers contained in these mtges. R., mtgee. of the village lots, brought action to have his mtge. rectified so as to include the water lot & mill property omitted by mistake. The purchasers at the auction sale set up the defence of purchase for valuable consideration without notice:—*Held*: the purchasers at the sale could not set up want of notice in themselves & their immediate grantors without showing that the original mtgees., in whose shoes they stood, were also purchasers for valuable consideration without notice; & by the condition of sale which they signed the purchasers incapacitated themselves from setting up this defence.—UTTERSON LUMBER CO. v. RENNIE (1892), 21 S. C. R. 218.—CAN.

**l. Contract of sale — Objection to title.**—In ejectment pltf. claimed through a deed from M. to J.; deft. claimed through a purchase at sheriff's sale under execution against M. After the sheriff's sale J. entered into an

taken.]—The conditions of sale represented, that a deed under which M. claimed an interest in the estate was a forgery, & that the vendor had made his affidavit to that effect, & therefore, that the purchaser should not take any objection to the title by reason of that deed. The purchaser afterwards refused to complete the purchase brought an action for his deposit, & obtained a verdict, the jury declaring the deed to be genuine. In this state of circumstances:—*Held*: the purchaser was precluded from rescinding the contract, on the ground that the statement of pltf. turned out to be untrue.—CATTELL v. CORRAIL (1839), 3 Y. & C. Ex. 413; 160 E. R. 763; *previous proceedings, sub nom.* CORRAIL v. CATTELL, 4 M. & W. 731.

*Annotation:—Mentd.* *Re* Scott & Alvarez's Contract, Scott v. Alvarez, [1895] 2 Ch. 603.

Conditions of sale generally, *see* AUCTIONS & AUCTIONEERS, Vol. III., p. 15.

**1202. — Recovery of annual payments.** Certain annual payments were made by the owners of property to the incumbents of five parishes up to the year 1853, when they ceased to make them, & legal proceedings were threatened. In 1858, pending the dispute, the property was sold: & in the particulars of sale, which were approved of by the incumbents, the payments were mentioned, but it was said that they were believed not to be legally recoverable. In 1861 the incumbents filed an information & bill, & succeeded in establishing their claim:—*Held*: they were estopped from demanding arrears previous to the filing of the bill.—A.-G. v. NAYLOR (1863), 1 Hem. & M. 809; 3 New Rep. 191; 33 L. J. Ch. 151; 10 L. T. 406; 10 Jur. N. S. 231; 12 W. R. 192; 71 E. R. 354.

*Annotation:—Mentd.* *Re* Herbage Rents, Greenwich Charity Comrs. v. Green, [1896] 2 Ch. 811.

**1203. Contract of sale—Extent of acreage.**—The owner of an estate agreed to sell it for £250,000, representing it to contain 1,530 acres. The pur-

chaser at such sale, by which D. covenanted to convey the land to J. on payment of \$743 within five weeks; the agreement to be void on non-payment. The money was not paid. D. conveyed to M., with whom J. made an agreement, that on his paying M. \$1,200 within a year M. would convey to him; that J. might sell within the year, & should have all he could get above \$1,200; & that M. should have possession, which J. accordingly gave to him. After this J. conveyed to pltf.:—*Held*: neither agreement estopped pltf. from objecting to the title derived under the sheriff's sale or from setting up his legal title.—MORRISON v. STEER (1871), 32 U. C. R. 182.—CAN.

**m. — Filed statement.**—A garnishee-summons was served on the garnishee on Mar. 18, 1909. On Apr. 6, 1909, the garnishee filed a statement showing that she was indebted to deft. in the sum of \$2,652 for purchase money of land, under an agreement made on Oct. 28, 1908, but that by an agreement made on Apr. 5, 1909, after service of the garnishee-summons, no instalments would be due until Nov. 1, 1909, when \$150 & interest would be due & payable. Pltf., garnishing creditor, apparently accepted that statement, & after Nov. 1, 1909, moved for an order that the garnishee pay \$150 into ct.:—*Held*: the garnishee was estopped from setting up another state of facts from that disclosed by her filed statement, & pltf. was entitled to judgment against the garnishee for \$150 & interest.—BEAUCHAMP v. MESSER (1910), 13 W. L. R. 404; 3 Sask. L. R. 59.—CAN.

chaser agreed to sell it to a co. for £350,000. It appeared that the estate contained less than 1,100 acres. One of the articles of the contract provided that the estate as to the extent of acreage should be taken to be conclusively shown by certain deeds:—*Held*: this was merely a conveying condition as to identity, & coupled with the representation as to the acreage, it did not estop the co. from rescinding on the ground of deficiency in acreage.—*ABERAMAN IRONWORKS v. WICKENS* (1868), 4 Ch. App. 101; 20 L. T. 89; 17 W. R. 211, L. C.

*Annotations*:—*Refd.* Fleming v. Lee, [1901] 2 Ch. 594. *Mentd.* Fenwick v. Bulman (1869), L. R. 9 Eq. 165; Goodford v. Stonehouse & Nailsworth Ry. (1869), 38 L. J. Ch. 307; Torrance v. Bolton (1872), L. R. 14 Eq. 124; Mycock v. Beatson (1879), 13 Ch. D. 384.

*Conveyance.*—See Part V., *ante*.

**1204. Declaration—As to value of goods.**—*Declaration not part of contract.*—Pltf. delivered to defts., a railway co., some horses to be carried on their railway, & at their request signed a declaration that the value of the horses did not exceed £10 per horse, & that, in consideration of the rate charged for their conveyance, he thereby agreed that the same were to be carried entirely at the owner's risk. In the course of the journey the horses were injured in consequence of the defective state of the truck in which they were carried. In an action against the railway co., they paid £25 into ct. The horses were in fact worth more than £10 each; & if taken at their real value, £40 was the measure of pltf.'s damage; if at £10 each, £25 covered pltf.'s claim:—*Held*: the declaration of the value of the horses was no part of the contract, but a statement which formed the basis of the intended contract, & by which it was to be regulated & governed, & therefore, it was not competent to pltf. to deny the truth of the statement, & prove that the real value of the horses exceeded £10 each.—*MCANCE v. LONDON & NORTH WESTERN RY. CO.* (1864), 3 H. & C. 343; 4 New Rep. 467; 34 L. J. Ex. 39; 11 L. T. 426; 29 J. P. 148; 10 Jur. N. S. 1058; 12 W. R. 1086; 159 E. R. 563, Ex. Ch.

*Annotation*:—*Refd.* Lebeau v. General Steam Navigation Co. (1872), L. R. 8 C. P. 88.

**1205. — By party to marriage.**—The declaration by a party to the marriage, he being a Protestant, that he was a Roman Catholic, would not operate as an estoppel against him (*LORD WENSLEYDALE, C.*).—*YELVERTON v. LONGWORTH* (1864), 4 Macq. 745; 11 L. T. 118; 10 Jur. N. S. 1209; 13 W. R. 235, H. L.

*Annotations*:—*Refd.* R. v. Fanning (1866), 10 Cox, C. C. 411. *Mentd.* Hill v. Hibbit (1870), 25 L. T. 183; Dysart Peerage Case (1881), 6 App. Cas. 489; Cooper v. Cooper (1888), 13 App. Cas. 88.

*Deed.*—See Part V., *ante*.

**1206. Delivery order—Property in goods.**—Defts. sold to C. 350 barrels of flour, being part of a larger number lying in their warehouse. The barrels sold were not, however, specifically ascertained or set apart. C. obtained from pltf. an advance upon the flour so purchased, & gave them

a delivery order for the same, which pltf. presented, & lodged at deft.'s warehouse, where, upon inquiry by pltf.'s clerk, at the time of the lodgment of the order, whether "it was all in order"; the answer given by a clerk of deft.'s was, "Yes." In an action of trover:—*Held*: under these circumstances, although no property passed to C., or to pltf., defts. were, nevertheless, estopped from disputing that it had.—*WOODLEY v. COVENTRY* (1863), 2 H. & C. 164; 2 New Rep. 35; 32 L. J. Ex. 185; 8 L. T. 249; 9 Jur. N. S. 548; 11 W. R. 599; 159 E. R. 68.

*Annotations*:—*Expld. & Apld.* Knights v. Wiffen (1870), L. R. 5 Q. B. 660. *Refd.* Dixon v. Kennaway, [1900] 1 Ch. 833.

**1207. — — — — —.**—Defts. sold to B. & Co. 100 tons of zinc, unappropriated, upon certain terms of payment, giving them at the time of the contract four several documents to the following effect: "We hereby undertake to deliver to your order indorsed hereon, 25 tons merchantable sheet zinc off your contract of this date." Upon the faith of these documents pltf. bought of B. & Co. & paid for, fifty tons of the zinc mentioned in the contract. B. & Co. having failed, & the contract price being unpaid, defts. refused to deliver the zinc:—*Held*: the giving of these delivery orders or "undertakings" did not estop defts. from setting up, as against the vendees of B. & Co. their right, as unpaid vendors, to withhold delivery.—*FARMELOE v. BAIN* (1876), 1 C. P. D. 445; 45 L. J. Q. B. 264; 34 L. T. 324.

**1208. — — — — —.**—*GILLMAN, SPENCER & CO. v. CARBUTT & CO., No. 1046, ante.*

—*See, further, SALE OF GOODS.*

**1209. Delivery ticket.**—A delivery ticket issued by defts., a railway co., in respect of goods they had undertaken to carry, contained the name of T. described therein as a porter. The ticket was signed by "C. & H., agents." The goods were stolen by T. whilst under the care of C. & H., with whom defts. had entered into a sub-contract for the carriage of the goods. In an action against defts. for the loss of the goods:—*Qu.*: whether the ticket estopped defts. from denying that T. was their servant. *Semble*: it would not.—*MACHU v. LONDON & SOUTH-WESTERN RY. CO.* (1848), 2 Exch. 415; 5 Ry. & Can. Cas. 302; 17 L. J. Ex. 271; 11 L. T. O. S. 226; 12 J. P. 744; 12 Jur. 501; 154 E. R. 554.

*Annotations*:—*Mentd.* Reddie v. N. W. Ry., Hobbit v. Same (1849), 13 Jur. 659; Bristol & Exeter Ry. v. Collins (1858), 7 H. L. Cas. 194; Way v. G. E. Ry. (1876), 35 L. T. 253; Doolan v. Mid. Ry. (1877), 2 App. Cas. 792; Stephens v. L. & S. W. Ry. (1886), 18 Q. B. D. 121; Western Electric Co. v. G. E. Ry. (1914), 30 T. L. R. 416.

**1210. Deposition—By creditor in bankruptcy proceedings.**—Where a creditor, holding bills of exchange, proves their amount as his debt, with a statement that he holds the bills as security, & any of the bills are subsequently paid by the other parties to them, the amounts so paid must be deducted from the proof & the dividends; or if the dividends have been paid upon the whole of

**1205 i. Declaration—By party to marriage.**—*Semble*: a declaration made by parties, in order to the celebration of a marriage, & to the person who was to celebrate it, & by which he was induced to celebrate it, that they were competent to contract a valid marriage, would, on an indictment for bigamy against the party making such a representation, conclude that person from denying the truth of the representation so made, in order thereby to invalidate the marriage.—*R. v. BURKE* (1843), 5 L. L. R. 549; 3 Craw. & D. 96.—*IR.*

*n.* — *As to other insurance*

*policy.*—A policy of fire insurance contained a condition that if the insured were not the sole & unconditional owner of the property, the policy should be void. At the time the policy was issued there was a mtge. on the property for a small amount, the existence of which was not disclosed to the insurance of co. by pltf., who insured as owner:—*Held*: pltf. was not under the circumstances arising at the trial, estopped by his admission in the declaration from claiming that there was no other insurance.—*TEMPLE v. WESTERN ASSURANCE CO.* (1901), 21 C. L. T. 427; 31 S. C. R. 373.—*CAN.*

*o.* — *Of liability of land to execution.*—Deft. husband who in a written statement to pltf. stated that certain land was liable to execution, is estopped from subsequently claiming same to be exempt as a homestead.—*CODVILLE & CO. v. HAYGARTH* (1909), 10 W. L. R. 35.—*CAN.*

*p.* — *As to ownership of goods.*—Pltf.'s husband applied to deft. bank for a loan & submitted a statement of his affairs which included cattle & horses really belonging to his wife. His wife, the husband & bank manager being present, also signed the statement, which included a memorandum



3.—*By representation: Sub-sect. 2, B. (c).]*

the proof without such deduction, the assignees are not thereby concluded; for the Lord Chancellor will order them to be refunded.

It makes no difference whether the bills have been deposited without indorsement, or have been indorsed by the bkpt. to the creditor.—*Re MOULSON, Ex p. BURN* (1814), 2 Rose, 55, L. C.

*Annotations:—* **Refd.** *Re Peirson & Sammon, Ex p. Sammon* (1832), 1 Deac. & Ch. 564; *Re Bentley, Ex p. Brunskill* (1835), 4 Deac. & Ch. 442; *Re Beaumont & Holt, Ex p. Carr* (1837), 2 Deac. 273; *Re Morris, James v. London & County Banking Co.*, [1899] 1 Ch. 485.

**1211. Invoice.**—Pltf. bought a quantity of hemp by auction at the rooms of defts., who were brokers in Liverpool. Defts. delivered an invoice in their own name as sellers. On payment being made by pltf., defts. gave him an order on C. & D. for the goods, which on presentation was refused, & pltf. could not obtain delivery of the goods:

*Held*: defts. were bound by the representation in the invoice, & could not offer evidence to show that they sold as agents for C. & D.—*JONES v. LITLEDALF* (1837), 6 Ad. & El. 486; 1 Nev. & P. K. B. 677; Will. Woll. & Dav. 240; 6 L. J. K. B. 112 E. R. 186.

*Annotations:—* **Expld. & Distd.** *Holding v. Elliott* (1860), 5 H. & N. 117. **Apld.** *Royal Exchange Assce. v. Moore* (1863), 2 New Rep. 63. **Refd.** *Higgins v. Senior* (1841), 8 M. & W. 834; *Fleet v. Murton* (1871), L. R. 7 Q. B. 126; *Corless v. Sparling* (1873), 21 W. R. 876; *Southwell v. Bowditch* (1876), 45 L. J. Q. B. 630. **Mentd.** *Johaston v. Osborne* (1840), 11 Ad. & El. 549.

**1212. ———.**—The fact of a tradesman delivering an invoice or account in which goods are described as bought from him, does not operate as an estoppel, so as to prevent his showing that he was not in truth the seller. Therefore, where in an action for not delivering the agreed quantity of ale purchased by pltf., & for improperly packing it, the proof on the part of pltf. consisted of an invoice of the sale, made out by deft., & delivered to pltf. with a printed heading, "Bought of J.," deft., & payment of the amount charged was shown to have been subsequently made to deft.:—*Held*: deft. was not estopped from proving that the ale was bought by pltf. from a third person.—*HOLDING v. ELLIOTT* (1860), 5 H. & N. 117; 29 L. J. Ex. 134; 1 L. T. 381; 8 W. R. 192; 157 E. R. 1123.

**1213. Licence—To assign—Licencor described as reversioner.**—(1) In 1881, before the coming into operation of the Conveyancing Act, 1881, s. 41, leasehold premises were mortgaged by way of sub-demise to N. for the residue of a newly created term of sixty years, less the last three days thereof. In 1892 the mtgor. purported to underlet the premises to G. & Co. for 21 years at a rent of £140, & the deed contained a covenant

not to sublet without the consent of the landlord. In 1895 N. foreclosed the mtgor. but did not get in the last three days of the term, & thenceforward G. & Co. paid the rent to N. until his death in 1899. Subsequently G. & Co. sublet the premises under a licence given by N.'s exors., who therein described themselves as being the reversioners on the underlease of 1892. Pltf., who claimed through N.'s exors., brought an action against G. & Co. & their sub-lessee to recover possession of the premises upon the footing that the underlease was not binding upon him:—*Held*: he was estopped as against both defts. from denying that he was the reversioner on the underlease.

(2) We propose now to deal with the question whether estoppel will enable defts. successfully to defend this action. If the conduct of pltf. enables defts. to do so, we do not trouble ourselves about the exact form of the pleadings (*per Cur.*).—*KEITH v. GANCIA (R.) & Co., LTD.*, [1904] 1 Ch. 774; 73 L. J. Ch. 411; 90 L. T. 395; 52 W. R. 530; 20 T. L. R. 330; 48 Sol. Jo. 329, C. A.

**1214. Negotiable Instrument—Status—"Widow."**—In an action on a promissory note, to which deft. pleaded her coverture only, the note was signed by deft. "widow":—*Held*: such representation did not bind her by way of estoppel.—*CANNAM v. FARMER* (1849), 3 Exch. 698; 151 E. R. 1026.

*Annotations:—* **Refd.** *White v. Greenish* (1861), 11 C. B. N. S. 209; *Wright v. Leonard* (1861), 11 C. B. N. S. 258.

*Compare* Nos. 1150, 1151, *ante*; *BILLS OF EXCHANGE*, Vol. VI., pp. 95, 96, Nos. 676–679.

**1215. Return—Under 1 & 2 Geo. 4, c. 87, of corn "sold & delivered."**—(1) If A. sells corn to B., who buys on speculation, & the corn is landed at the warehouse of C., the granary-keeper of B., who is told that he is to hold it on the account of A., A. has a sufficient property in it to enable him to maintain trover against C.

(2) A return made by A., in such case, under above Act of such corn as sold & delivered to B., is not conclusive evidence against A. of an absolute unconditional sale & delivery so as to bar him of his right to recover it out of the hands of C.—*WOODLEY v. BROWN* (1821), 1 C. & P. 593, N. P.; *subsequent proceedings* (1825), 2 Bing. 527.

**1216. Writ of capias ad satisfaciendum—Amount for which execution leviable.**—Pltf., having, at the trial of this cause, obtained a certificate for speedy execution "for the sum recovered by the verdict," taxed the costs, signed judgment, & took out a *ca. sa.* on the proper day but indorsed the *ca. sa.* for the former sum only. Deft., on being taken in execution for the former sum, paid the debt, & was discharged out of custody afterwards, & when the ordinary time for execution had

certifying that the livestock shown in the statement belonged to her husband. The bank made the loan & later made further advances to the husband. On the occasion of a later advance the bank required & obtained from the husband a chattel mtge. to secure his whole indebtedness at the time, which mtge. included the cattle & horses above mentioned:—*Held*: the wife was estopped from setting up her title to the goods as against the bank which made its advances & took its security on the faith of her statement.—*PIPER v. CANADIAN BANK OF COMMERCE*, [1922] 1 W. W. R. 121.—**CAN.**

**1211i. Invoice.**—Pltf. in Melbourne sold to defts. in Sydney a quantity of potatoes at a specified price "f.o.b.," Melbourne, to be shipped to Sydney per steamer leaving M. Dec. 3, 1898. The potatoes were shipped on the day

named, & on the same day pltf. posted an invoice for the potatoes, together with a letter advising shipment by the particular steamer & notifying that the bill of lading & a draft for the price had been sent to pltf.'s bankers. The invoice stated that the potatoes were branded T. in circle, whereas in fact they were branded G. in diamond, as was correctly set forth in the bill of lading & the ship's manifest. On arrival at Sydney, defts. finding no potatoes on board branded T., concluded, without consulting the bill of lading or the manifest, that the potatoes had not been shipped, & some days afterwards, when they knew the true facts, they refused to take the potatoes:—*Held*: the negligent representation in the invoice as to the brand, did not estop pltf. from alleging that they had delivered the potatoes in accordance with the contract.—**GLASS-**

**FORD, COOK & Co. v. MOORE & Co.** (1899), 25 V. L. R. 430. —**AUS.**

**q. Negotiable instrument—Payee not real vendor—Whether real vendor may be proved.**—K., having previously bought a threshing outfit from pltf., upon which he still owed them a large amount, made a sale of it to deft. As a matter of convenience this sale was carried out by deft. signing an order for the purchase & making a note for the price in favour of pltf. Deft. resisted payment of the note on the ground that the consideration for it had wholly or partly failed, & that he had not got all the goods ordered or an engine of the quality ordered, & contended that the documents relied on were conclusive evidence that the sale had been made by pltf. & that they were estopped from denying it:—*Held*: pltf. were not estopped from showing that it was K. who had made



arrived, pltf. took out another *ca. sa.* for the costs. Deft. having been taken in execution on this second writ:—*Held*: he was entitled to be discharged, as it appeared on the face of the writs that he had been before taken in execution for the same sum.

*Semble*: the certificate "for the sum recovered by the verdict" entitled pltf. to speedy execution for the costs also; but if not, or if speedy execution is granted for part only of the sum recovered, a pltf. ought to state specially these facts in the first writ, or he will be debarred from taking out a second writ upon the same judgment.—SMITH v. DICKENSON (1843), 1 Dow. & L. 155; 12 L. J. Q. B. 314; 1 L. T. O. S. 260, 261; 7 Jur. 560; *subsequent proceedings* (1844), 5 Q. B. 602.

**Policy of insurance—Admission of seaworthiness.**—*See* INSURANCE.

—**Statement of value.**—*See* INSURANCE.

—**Acknowledgment of receipt of premium.**—*See* INSURANCE.

**1217. Proposal of agreement—Of "the board."**

Pltf. was manager of, & held shares on which calls were payable in the co., of which defts. were four directors; the board was to consist of seven directors, three to be a quorum; previous terms had been proposed between pltf. & defts., & not agreed to, but at a meeting held Aug. 28, 1856, at which defts. were present a resolution was passed & sent to pltf. that the board being most desirous to come to an amicable termination of the misunderstanding which appeared to prevail, were willing to accept pltf.'s resignation, & to pay him the proportion of salary due & applicable to the time of his services, or say, in round numbers, £150, & at the same time the members of the board would jointly relieve him of his shares, & guarantee him against any calls thereon, requiring an answer by Sept. 4, which was the then next board day, or the directors would not be bound by the terms offered. Pltf. on Sept. 2, replied: "I do not wish to make any further difficulty, but to come to an amicable arrangement. I accept your offer, though I cannot with any sincerity say I think it liberal, or indeed a fair compensation. It may be arranged as speedily as you can wish; in fact, I accept the offer as one to be carried out; & then, on receiving the guarantee as to the shares, in which I presume your chairman, Mr. C., concurs, I advise that the sum fixed is paid into my account, etc.; my resignation shall be at once forwarded." At a meeting held by the co. on Sept. 4, all defts., except B., were present, when pltf.'s last letter was read, & a resolution was passed & sent to pltf., that having heard his letter read, they accepted his resignation, & required the secretary to get the guarantee prepared by the solr., & to take other steps to carry out the negotiation. On Oct. 3, pltf. was informed by the secretary that

the consideration of his agreement was adjourned till the following day, & at an extraordinary board meeting on Oct. 23, at which defts. were present, it was resolved pltf.'s resignation be accepted, & the terms of arrangement referred to the solr. of the co.:—*Held*: (1) there was a binding agreement made, & pltf. having been afterwards compelled to pay calls, he was entitled to be reimbursed in this action against defts. for their not giving the guarantee according to the contract; (2) although it was not shown affirmatively that all the members of "the board" concurred, yet, if they were not bound by three, being a quorum, defts. held out that it was an agreement of "the board" & they were, therefore, estopped from saying that only four were parties to the agreement.—BARKER v. ALLAN (1859), 5 H. & N. 61; 29 L. J. Ex. 100; 1 L. T. 167; 6 Jur. N. S. 23; 8 W. R. 127; 157 E. R. 1101.

**1218. — Representations as to value.**—

Where the vendor of a reversionary interest represented its value in the proposals for the sale of it, & the purchaser adopted that representation, the vendor was afterwards precluded from saying that it was sold at an undervalue.—PERFECT v. LANE (1861), 3 De G. F. & J. 369; 31 L. J. Ch. 489; 6 L. T. 8; 8 Jur. N. S. 547; 10 W. R. 197; 45 E. R. 921, L. JJ.

*Annotation*:—*Mentd.* Lord v. Jeffkins (1865), 35 Beav. 7.

**1219. Rate book—Estimated rental.** On the hearing of an appeal to quarter sessions against a poor rate in which the assessment committee contended that they were entitled to give evidence that the gross estimated rental inserted in the rate book was too low, they stated as facts which they could prove that in the years 1900 & 1906 by agreement between the applt. co. & the assessment committee the net ratable value was fixed at a certain figure, to which 50 *per cent.* was added, the sum so arrived at to be deemed the gross estimated rental & inserted as such in the rate book. The recorder at quarter sessions held that the assessment committee were not entitled to call evidence to show that the gross estimated rental was too low, & that the above allegations of fact, if proved, would not amount to an estoppel upon the co. from relying upon that decision. A div. ct. held that his decision was right upon both points:—*Held*: (1) as a general principle of law, the assessment committee were bound by the amount of the gross estimated rental appearing in the rate book, & were not entitled to call evidence before quarter sessions to show that the gross estimated rental had been fixed too low; (2) the alleged facts, if proved, would be evidence of an estoppel against applt. co. & the case must go back to quarter sessions to hear evidence of the alleged facts.—HENDON PAPER WORKS CO. v. SUNDERLAND ASSESSMENT COMMITTEE, [1915] 1

the sale & as the evidence established this, deft. had no remedy against pltf. for any defects in the threshing outfit & must pay the amount of the note.—CASE THRESHING MACHINE CO. v. WERMIGER (1907), 17 Man. L. R. 52.—CAN.

r. —.]—The drawer & indorser of a bill having written a letter asking indulgence & promising to settle it, not entitled to plead, that when he wrote this letter, he was ignorant of the legal effect of non-notification of dishonour, so as to enable him to found on alleged non-notification as a defence against payment.—TURNBULL v. HILL (1831), 1 Sh. (Ct. of Sess.) 456.—SCOT.

s. —.]—A. addressed the following letter to a bank agent & gave it to B. for the purpose of enabling

B. to raise money with it: "Should B. present his acceptance to you at four months after date for £30 sterling, I shall indorse the same on presentation"; A. lived at some distance & granted the letter merely because a bill-stamp could not at the time be got, for drawing a bill upon; B. took the letter & his own acceptance, dated on the following day, for £30, at four months to the bank, who discounted the acceptance; the bank did not cause the acceptance to be presented to A. for indorsation nor did they take any protest when it was dishonoured, but they sent notice to A. within fourteen days thereafter:—*Held*: according to the *bonâ fide* import of the letter, A. was bound to pay & could not effectually plead, either that the terms of his letter had

not been literally fulfilled or that there had not been due negotiation.—WATT v. NATIONAL BANK OF SCOTLAND (1839), 1 Dunl. (Ct. of Sess.) 827; 11 Fac. Coll. 900.—SCOT.

t. —.]—*Semble*: a person who draws a bill for his own accommodation is not entitled to plead against an onerous indorsee that the bill was not duly presented to the acceptor for payment.—SHEPHERD v. REDDIE (1870), 8 Macph. (Ct. of Sess.) 619; 42 Sc. Jur. 316.—SCOT.

a. *Proposal for insurance—Negligence.*—Where a man capable of reading & writing chooses to sign a proposal for insurance the answers in which are expressed to be the basis of the contract, without reading it, & one of the answers which he thus

*Sect. 3.—By representation: Sub-sect. 2, B. (c).]*

K. B. 763; 84 L. J. K. B. 476; 112 L. T. 146; 79 J. P. 113; 13 L. G. R. 97, C. A.

*Annotations:—As to (1) Consd.* Redhough Colliery v. Gateshead Assmt. Com., [1924] 1 K. B. 369. *Refd.* Gateshead Union Assmt. Com. v. Redhough Colliery (1924), 88 J. P. Jo. 780. *As to (2) Refd.* Fowler (Leeds) v. Hunslet Assmt. Com., [1917] 1 K. B. 720. *Generally, Mentd.* Davis v. Pontypridd Union Assmt. Com., Rhondda Overseers & Rhondda U. C. (1916), 85 L. J. K. B. 1545.

causes to be represented to the co. as his answers is untrue in fact, there is no valid contract, & the policy issued in pursuance of that proposal is void; & that is so even where the person who fills up the proposal form is the agent of the insurer, for the proposer by signing the proposal adopts & makes his own all the material statements contained therein, & if he signs it without taking the trouble to read it he is estopped by his negligence from setting up that he did not know what it contained.—*ROKKYER v. AUSTRALIAN ALLIANCE ASSURANCE CO.* (1908), 28 N. Z. L. R. 305.—**N.Z.**

**1220 i. Registry of ship.]—Held:** it was incompetent on the part of the person, who, from the certificate of registry, appeared to be the owner of a ship, to adduce evidence to the effect of contradicting the certificate by proving that he was not the real owner.—*MORRISON v. BLACK* (1843), 5 Durl. (Cl. of Sess.) 411.—**SCOT.**

**b. Return.]—A** sheriff having made return to a writ of attachment that he had seized certain property under pltf.'s attachment, & held it subject to that attachment till the debt & costs were paid, is estopped, while that return stands, from returning *nulla bona* to the execution issued on pltf.'s judgment.—*EVERITT v. LYNDIS* (1880), 20 N. B. R. 381.—**CAN.**

**c. —.]—In** an action against a sheriff for a false return, in which a verdict was given against him for the value of the goods:—*Held:* the sheriff was not estopped by his return from showing that the goods were not the property of pltf., but were the property of C., the absconding debtor.—*ROBINSON v. SHIRREFF* (1885), 25 N. B. R. 68.—**CAN.**

**d. —.]—A** sheriff's return to an execution is only an estoppel in the particular action in which the execution issued.—*MILLER v. WELDON* (1871), 2 Han. 188.—**CAN.**

**e. Acceptance of patent — True ownership.]—Pltf.** claimed title through B. to land which the City claimed to have been owned by R. & by him dedicated as a street. Previous to any patents B. had owned south of a creek & R. north of it. By the Dominion survey a straight line was run disregarding the sinuosities of the creek, & both parties accepted patents according to this survey. Previous to the patents B. owned the land in question. Under the patents R. owned it. B.'s patent was issued in Mar. 1875, R.'s in May, 1878. B. sold to pltf. in 1871 & got some papers which were afterwards given up & a new deed executed in May, 1872. The description in this deed by mistake only covered a portion of the land. In 1873 or 1874 B. gave pltf. a memorandum showing what land should have been conveyed, & on Nov. 6, 1877, executed a proper conveyance. On the other hand R., assuming to own the land in question prior to his patent, in Aug. 1874, registered a plan including this property upon which it appeared as a street. R. shortly after obtaining his patent & in July, 1878, conveyed the land to B.:—*Held:* B. & pltf. as his assignee were not estopped by the patents from setting up the true ownership.—*WRIGHT v. WINNIPEG CITY* (1886), 3 Man. L. R. 349.—**CAN.**

**f. Acknowledgment — Duress.]—Pltf.,** in 1901, gave deft. a quit-claim deed of the land in question as security for a debt. Deft. afterwards paid the money required to procure title to the land from the railway co., but up to about May, 1903, he recognised the right of pltf. to redeem the land on payment of what was then against it, viz. about \$900. Shortly afterwards, deft. drove out to pltf.'s farm & told him that if he wanted the farm he would now have to pay \$2,000 for it. In the following Nov. pltf. went to deft.'s office & received from him a letter written by deft., addressed to pltf.'s wife, offering to sell the farm to her upon certain conditions, for \$2,000, & deft. at the same time induced pltf. to sign a letter agreeing to leave the place & all his improvements if the option to purchase was not exercised before Nov. 1, 1904. When this last letter was signed, pltf. was told by deft. that he must sign it or leave the place. Pltf. was then, to the knowledge of deft., in distressed circumstances financially:—*Held:* this transaction was, on its face, most unfair & extortionate; & having been obtained by duress, the acknowledgment could not be allowed to stand in the way of pltf.'s rights to redeem, which, up to that time, had clearly not been extinguished.—*WINTHROP v. ROBERTS* (1907), 6 W. L. R. 476; 17 Man. L. R. 220.—**CAN.**

**g. — Mistake.]—An** acknowledgment of the title of another made by a person already in possession of land, & who has not been let into possession by that other, does not estop him from afterwards disputing that title where the acknowledgment had been made under a mistake, even though it may have amounted to an attornment to the other as tenant.—*PEARCE v. BOULTON, BOULTON v. R.* (1902), 21 N. Z. L. R. 464.—**N.Z.**

**h. Answer to interrogatories.]—**Defts.' ship had been sailing as a British ship for years & had been *de facto* registered as such. Defts. had omitted to register an alteration in their ship, & had, in answer to interrogatories, admitted that the ship was a British ship:—*Held:* defts. were estopped from denying that the ship was a British ship, & it would be against public policy to allow them to do so.—*PONTING v. HUDDART, PARKER & CO., LTD.* (1897), 22 V. L. R. 644.—**AUS.**

**k. Agency—Variation in terms of contract.]—In** a memorandum submitted by defts., but not signed by them, they offered to give pltf. co. the sole agency for the sale of a legal work for five years from the publication of Vol. 1., which was in Nov. 1907, or for one year after publication of the last volume of the set, which ever should be the longest period. Pltf. co. wrote in reply to this, stipulating, among other things, for the sole agency "for five years from the date of publication." Defts. cabled their acceptance of pltf. co.'s modified terms, & wrote pltf. co. a letter confirming the cable message, but adding, "The terms between us are now as set out overleaf":—*Held:* pltf. co. was estopped by its conduct from denying that the variations, if any, mentioned in the "overleaf" became a part of the contract & from denying that it accepted any variation therein expressed.—*CANADA LAW BOOK CO. v.*

**1220. Registry of ship.]—Applt.,** a native of the Ionian Islands, purchased an American ship, & upon a declaration that he was a British subject, obtained from the British Consul at Cuba a provisional registry of the ship as British. The ship was afterwards seized & condemned for a breach of Slave Trade Acts. Upon a preliminary objection taken on appeal to the jurisdiction of the ct. below on the ground of the national character of

*BUTTERWORTH & CO.* (1913), 23 W. L. R. 505; 9 D. L. R. 321.—**CAN.**

**l. — Letter not repudiating liability.]—Action** by a firm of brokers against a barrister to recover \$5,538.75, in respect of certain shares bought for the latter. The purchases were made by one M. in the name of deft., who was out of the country at the time, & were absolutely unauthorised. When deft. returned & discovered the purchases he repudiated them to the solr. of pltf's. Later on being pressed by pltf's. in correspondence to admit liability, he wrote: "It may be that you are right in thinking that I am personally responsible & as to this I am not expressing an opinion." Pltf's. claimed that this letter amounted to an estoppel or ratification on the part of deft.:—*Held:* although the letter in question was disingenuous it did not import liability.—*WIGGIN & ELWELL v. BROWNING* (1912), 23 O. W. R. 128; 4 O. W. N. 155; 7 D. L. R. 274.—**CAN.**

**m. Agreement not to distrain.]—M.** received from pltf's. certain articles of furniture, under the following written memorandum signed by her: "Received from Messrs. F. & Son the following articles of furniture for which I am to pay, etc. The furniture to remain the property of F. & Son till paid for in full, & in the event of non-payment F. & Son can take the furniture back." Deft., M.'s landlord, before the furniture was delivered, signed the following written memorandum: "The bearer M. being about to purchase some furniture from F. & Son, & my rent being guaranteed, I hereby agree not to take the furniture so to be provided by F. & Son, for any rent that may become due":—*Held:* deft. was estopped from distraining on the furniture so supplied.—*WALLACE v. FRASER* (1877), 2 R. & C. 337; 2 S. C. R. 522.—**CAN.**

**n. Bonded certificate.]—S.,** the proprietor of a bonded store, received goods from S. & Co., & gave them the usual bonded certificates. S. & Co. sold a portion of these goods to W., who resold to I. & S., at I.'s request, transferred into I.'s name the quantity purchased by him; & marked an equivalent portion of the certificates accordingly. The goods represented by these certificates had not been selected or earmarked in any way:—*Held:* S. was bound to deliver to I. the goods mentioned in the certificates, & was estopped from denying I.'s right to their possession, though S. & Co. had endeavoured to exercise their right of stoppage *in transitu* & had given S. notice not to deliver.—*ISAACS v. SKELLORN* (1870), 1 V. R. 46.—**AUS.**

**o. Certificate.]—Pltf's.** contracted to execute for defts. certain specified works, & also all such additional works as should be deemed necessary by defts.' principal or resident engineer. The contract deed provided that no extra works should be made without an order in writing, signed by the principal engineers or engineer, or by the resident engineer; that such extra works should be valued by such engineers or engineer, having regard to the schedules of prices in the specification, & that the decision of such engineers or engineer should be final as to the value of such extra works;



the owner of the ship & cargo:—*Held*: the registry, flag, & pass of a ship carried with them the presumption that they were true & correct, & the owner was estopped from proving that he was

not a British subject, & consequently that the registry of the ship was void.—*DIONISSIS v. R., THE LAURA* (1865), 3 Moo. P. C. C. N. S. 181; 6 New Rep. 321; 12 L. T. 685; 2 Mar. L. C. 225;

that if any extra works should be ordered, the contractors should send in accounts thereof within one month; & that in default of their doing so, defts. should not be bound to pay for them. That defts. should not be bound to pay for any works, except upon the production of a certificate signed by some principal or resident engineer; & that the principal engineers or engineer for the time being should be the exclusive judges of the execution of the works, & of everything connected with the contract; & that the certificates under their or his hands or hand should be binding & conclusive on both parties. In an action for the price of certain extra works:—*Held*: the engineers having given a certificate for the extra works, defts. were precluded from setting up as defences to the action that the extra works had not been ordered in writing & that no accounts had been sent in for them, as required by the deed.—*CONNOR & OLLEY v. BELFAST WATER COMRS.* (1871), 1 R. 5 C. L. 55.—*IR.*

p. —.—.]—A contractor agreed to form a line of road for a corpn. on the terms of an agreement which provided that the work should be done in accordance with plans & specifications, & to the satisfaction of the corpn.'s engineer. On the completion of the work, the engineer, in a memorandum to the secretary of the corpn., stated that he had passed the contract. The work was not done in compliance with the conditions:—*Held*: a certificate by the engineer that the work had been performed to his satisfaction would have been binding on the corpn., & that it made no difference that the agreement did not state in words that the certificate should be final & conclusive.—*KNOX v. PATUTAH ROAD BOARD* (1892), 11 N. Z. L. R. 496.—*N.Z.*

q. —.—.]—It is no part of a building inspector's duty to inquire as to the title of goods supplied for the building; & where a builder contracts to supply certain goods, & does not, but procures another person to supply them, the owner of the building is not estopped by any certificate under the hand of the inspector from suing on the breach of contract.—*BAUCHOP v. POIR CHALMERS CORPN.* (1892), 11 N. Z. L. R. 527.—*N.Z.*

r. —.—.]—A contract provided that the contractor should be liable in certain sums as liquidated damages if the architect should certify in writing that the works could reasonably have been completed within the stipulated time & that such damages might be deducted by the employer from any moneys due to the contractor, subject, however, to delays arising from "fire, general strikes or combinations of workmen, or other causes over which the contractor could not in any possibility have control." The architect gave a final certificate to the contractor that a certain sum was due to him, & thereafter gave a certificate to the building owner, in terms of the contract, that the work could reasonably have been completed by a certain date long prior to the date of actual completion:—*Held*: the building owner was not precluded by the fact of the architect having given a final certificate to the contractor in which no regard was had to the claim for liquidated damages for delay, from raising a claim against him for liquidated damages for delay.—*HENDRICKS & SOKER v. ATKINS* (1903), 20 S. C. 310; 13 C. T. R. 517.—*S. AF.*

s. *Consignment note—Residence of*

*consignee.*]—Pltf. signed a paper requesting defts. to forward certain goods received from him at T., to I., "subject to their tariff & under the conditions stated on the other side." On the other side, headed "General notices & conditions of carriage," the co. "gave public notice," that in certain events specified they would not be responsible. Pltf. was at I. when the goods, except the missing box sued for, arrived there, & remained until some time in the month following:—*Held*: he was resident there within the condition, & having named himself as the consignee at that place, he was estopped from denying such residence.—*LA POINTE v. GRAND TRUNK RY. CO.* (1867), 26 U. C. R. 479.—*CAN.*

t. *Fictitious contract of hiring—Whether real terms barred.*]—Deflt. agreed to pay pltf. the sum of \$150 as wages or compensation for his services on a fishing voyage, & afterwards induced him to sign articles for the purpose of inducing other men to join the vessel as sharesmen:—*Held*: pltf. was not debarred, by the fact of signing articles, from showing that that was not the real contract made between himself & deflt., but that it was made for another & different purpose.—*SMITH v. HAUGHN* (1905), 38 N. S. R. 153.—*CAN.*

a. *Medical certificate—Recurrence of incapacity.*]—The employers of a workman paid him compensation for injuries under an unrecorded agreement until Oct. 20, 1908, when they refused to make any further payments on the ground, disputed by the workman, that the incapacity had ceased. The parties having on Dec. 3, 1908, applied for a remit to a medical referee, the referee reported that the incapacity ceased on Oct. 20, 1908. The workman acquiesced in the non-payment of compensation until May 8, 1909, at which date he alleged that he had again become incapacitated owing to the same injury. No application was ever made by the employers for an order to end the compensation. In an application to the sheriff by the workman against his employers for an award to fix the amount of compensation due in respect of the alleged supervening incapacity:—*Held*: the medical referee's certificate did not bar the application.—*KING v. UNITED COLLIERIES, LTD.*, [1910] S. C. 42.—*SCOT.*

b. *Memorandum of agreement—Misdescription of party.*]—Defts. requested K., pltf., to make inquiries for & obtain information about a bismuth mine, & promised him as remuneration for such services a share in the property in the event of their buying it. Pltf. upon making inquiries heard of a bismuth mine which had been placed in the hands of C., an agent, for sale, & introduced the property to defts. A memorandum of agreement was then made by K. & C. of the one part & defts. of the other part, whereby it was agreed that in consideration of K. & C. introducing the property defts. would give C. £1,000 cash, & to K. a one-tenth share in the mine & any adjoining property they might acquire, in the event of a purchase being effected. In the memorandum K. & C. were described as agents for the vendors. In a suit for specific performance brought by K.:—*Held*: K. was not estopped from denying that the description of himself in the memorandum as agent for the vendors was true, & evidence was admissible to show that there was no such agency.—*KING v. FLATAU* (1891), 12 N. S. W. Eq. 167.—*AUS.*

c. *Notice of action for compensation—Injury aggravated since delivery of notice.*]—*Held*: as pltf.'s injuries had resulted much more seriously after the notice was given than she anticipated, she was not precluded by the terms of the notice from claiming & recovering in the action a larger amount.—*JYVESON v. WINNIPEG* (1906), 16 Man. L. R. 352.—*CAN.*

d. *Registry book.*]—Resps. made application at the office of the Comrs. of Mines for a licence to search for coal areas. The application contained a good description of the property in respect of which the licence was desired, & was accompanied by the necessary fee. Subsequently one of the appets. received a letter from the Deputy Comr., stating that he could not find the starting point, & asking for additional information. A letter was sent in reply, in which the starting point was stated incorrectly, & as a different point from that mentioned in the original application:—*Held*: appets. were not estopped, & could not be bound, by an entry made in the registry book of the office, after the receipt of the letter sent in reply to the letter of the Deputy Comr., & they could not, as the result of such entry, lose the title that they had acquired by a good application.—*Re BARRINGTON* (1902), 35 N. S. R. 426.—*CAN.*

e. *Release—Obtained by fraud.*]—In an action for an account of land transactions in which pltf. & deflt. were jointly interested & for payment of the amount due to pltf., deflt. set up payment in full & a release signed by pltf.:—*Held*: pltf. was overreached, & induced to sign the release & accept the payment made to him in ignorance of the real state of the accounts, & in ignorance of the fact that deflt. had received a large sum from a certain source; deflt. was guilty of fraudulent concealment or non-disclosure, & pltf. was not estopped, by reason of his acceptance of the money & signing the release, from requiring deflt. to account.—*CORELLI v. SMITH* (1913), 23 W. L. R. 381; 10 D. L. R. 382; 4 W. W. R. 114.—*CAN.*

f. *Share certificate.*]—Where shares in a limited co. are purchased from a person having no title thereto on the faith of a certificate issued by the co. that the vendor is the duly registered holder thereof, the purchaser is entitled as against the co. to damages, & also to retain all dividends paid to him before he receives notice that the co. refuses to recognise his title to the shares.—*DAILY TELEGRAPH NEWSPAPER CO. v. COHEN* (1905), 5 S. R. N. S. W. 520.—*AUS.*

g. —.—.]—A co. may, by issuing share certificates as fully paid, be estopped from alleging that the shares are not paid up in cash, not only as against a transferee of shares, but as against an original allottee, if the circumstances are such that the allottee was entitled to assume that the shares had been paid for.—*Re BONANG GOLD MINING CO., LTD., CHIPPENDALE'S CASE* (1897), 18 N. S. W. Eq. 141.—*AUS.*

h. —.—.]—Where, by statute & the bye-laws of a joint-stock co., certain of its officers are empowered to sign stock certificates, & a certificate under seal is signed by such officers in favour of a person who had agreed to change his position on receipt of the shares it represents & who is declared therein to be the holder of such shares, the co. is estopped from denying that it was issued by its authority even if one of the



*Sect. 3. By representation: Sub-sect. 2, B. (c): sub-sect. 3, A. & B.]*

16 E. R. 68; *sub nom.* R. v. THE LAURA, 13 W. R. 369, P. C.

*Annotation:—Mentd.* Cassanova v. R., The Ricardo Schmidt (1866), L. R. 1 P. C. 115.

—*See, generally, SHIPPING.*

#### SUB-SECT. 3.—BY CONDUCT.

##### A. In General.

**1221. General rule.]—**PICKARD v. SEARS, No. 1032, *ante*.

**1222. —.]—**FREEMAN v. COOKE, No. 1019, *ante*.

**1223. —.]—**If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, & that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms (BLACKBURN, J.).—SMITH v. HUGHES (1871), L. R. 6 Q. B. 597; 40 L. J. Q. B. 221; 25 L. T. 329; 19 W. R. 1059.

*Annotations:—Refd.* Lovell & Christmas v. Wall (1911), 101 L. T. 85. **Mentd.** Pope & Pearson v. Buenos Ayres New Gas Co. (1892), 8 T. L. R. 758; Ewing & Lawson v. Hambury (1900), 16 T. L. R. 140; Scott v. Coulson, [1903] 1 Ch. 453; Pocahontas Fuel Co., Incorporated v. Ambatielos (1922), 27 Com. Cas. 148.

**1224. —.]—**CARR v. LONDON & NORTH WESTERN RY. CO., No. 1020, *ante*.

**1225. As to position of party estopped—In penal action.]—**In many cases a man may be estopped by his own acts from contesting his situation, even in a penal action (LORD KENYON).—WILLIAMS v. PULLEY (1791), Peake, 71 N. P.

**1226. —.]—**Parties to a sale, though not parties to the contract, may so conduct themselves as to be estopped from saying that they were not bound to act as if they had been parties to the contract.—CROSSE v. GENERAL REVERSIONARY & INVESTMENT CO. (1853), 3 De G. M. & G. 698; 2 Eq. Rep. 579; 22 L. T. O. S. 229; 43 E. R. 274, L. C.

**1227. As to consent of party estopped.]—**It is a rule of universal law, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, & that he will offer no opposition to it, although it could not have been lawfully done without his consent, & he thereby induces others to do that from which they

officers signing it was acting fraudulently for his own purposes in doing so.—MACKENZIE v. MONARCH LIFE ASSOCN. CO. (1911), 21 O. W. R. 98; 45 S. C. R. 232.—CAN.

**k. —.]—**Where a certificate of shares in proper form has been issued, but the affixing of the co.'s seal was unauthorised, such certificate must be held to be void, & the issue does not operate as a warranty of genuineness or estop the co. from denying the validity of the certificate.—FIRE VALLEY ORCHARDS, LTD. v. SLY (1914), 20 B. C. R. 23.—CAN.

**l. —.]—**Where shares in a co. had been allotted to resp. under a contract in writing which had not been registered, & a certificate had been granted to him which stated that the shares were fully paid:—*Held*: on the winding-up of the co., the liquidator was not estopped from denying that the shares were not fully paid up & claiming that resp. should be placed on a list of contributories for

the full amount of the shares.—MECCA CAFES, LTD. (IN LIQUIDATION) v. WEBNER (1904), 21 S. C. 227; 14 C. T. R. 360.—S. AF.

**m. —.]—**Circumstances in which the defender, having accepted shares in *bonâ fide* reliance on the statements in the certificates that they were fully paid, the co. might be barred from maintaining that they were not fully paid.—PENANG FOUNDRY CO., LTD. v. GARDINER, [1913] S. C. 1203.—SCOT.

**n. Slander.—Letter of apology admitting untruth—Whether bar to plea of justification.]—Held: defender in an action of damages for slander was not barred from pleading *veritas* by a previous letter of apology admitting that statements to the same effect were false & undertaking not to repeat**

**o. Surrender of portion of term.]—**Deft. had a lease of premises for five years from Dec. 22, 1902, with an option of a further term of five, upon

otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have given faith to his words, or to the fair inference to be drawn from his conduct. In such cases proof of positive assent or concurrence is unnecessary; it is enough that the party had full notice of what was being done, & the position of the other party is altered.—CAIRNCROSS v. LORIMER (1860), 3 L. T. 130; 7 Jur. N. S. 149; 3 Macq. 827, H. L.

*Annotations:—Consd.* Sarat Chunder Dey v. Gopal Chunder Lala (1892), 8 T. L. R. 732. **Mentd.** Lang v. Purves (1862), 15 Moo. P. C. C. 389.

**1228. As to character of land.]—**A presumption that land has acquired a particular character may arise from the acts of parties during a long period, so as to estop persons claiming under those parties from denying that it has acquired that character.—HOLMES v. SAYER MILWARD (1878), 47 L. J. Ch. 522; 38 L. T. 381; 26 W. R. 608.

**1229. Conduct not intended to induce belief.]—**CORNISH v. ABINGTON, No. 1034, *ante*.

**1230. Where position of party setting up estoppel not altered.]—**LEWIS v. CLIFTON, No. 1101, *ante*.

**Admissions by conduct.]—See, generally, EVIDENCE.**

**How far admissible.]—See, generally, EVIDENCE.**

##### B. Acceptance of Benefit.

**1231. Under judgment or order.]—**On motion at chambers, to set aside judgment & execution for irregularity, on the alleged ground that the judgment had been signed pending a summons for time to plead, which summons pltf.'s attorney denied having received, the judge made an order setting aside the judgment & execution without costs, but not embodying any decision as to the irregularity: & he added a direction that deft. should bring no action. Deft. protested against this addition, but served the order upon the sheriff, who thereupon gave up the goods:—*Held*: deft., having thus far availed himself of the order, could not apply to the ct. to rescind that part which forbade bringing an action.—PEARCE v. CHAPLIN (1846), 9 Q. B. 802; 1 New Pract. Cas. 525; 16 L. J. Q. B. 49; 8 L. T. O. S. 161; 10 Jur. 966; 115 E. R. 1483.

*Annotations:—Folld.* Hayward v. Duff (1862), 12 C. B. N. S. 361. **Consd.** Wilcox v. Odden (1864), 15 C. B. N. S. 837.

**1232. —.]—**(1) A party who has acted on a judge's order cannot afterwards apply to the ct. to set it aside.

(2) Where a party accepts costs under a judge's order, which, but for the order would not at that

the stipulation that he should give six months' notice in writing of his intention to exercise the option. Deft. gave the notice, but did not sign it. He, however, remained in possession after the expiry of the first five years; but on Feb. 8, 1908, wrote & signed a letter agreeing to "take off" two years from his lease:—*Held*: the landlord was entitled to possession after Dec. 23, 1910; there was a surrender by operation of law; & the letter of Feb. 8 created an estoppel.—GREENWOOD v. BANCROFT (1912), 20 W. L. R. 816; 2 D. L. R. 417.—CAN.

#### PART VI. SECT. 3, SUB-SECT. 3.—A.

**1229 i. Conduct not intended to induce belief.]—**In trespass, pltf. proved deft. had gone on the land by his permission, & afterwards disputed his title:—*Held*: deft. was not estopped from giving evidence to disprove the licence, & to show that he entered under a claim of right.—HAZEN v. BRYSON (1854), 3 All. 101.—CAN.

**p.** —.]—Assenting to a devise & going into possession of land under the will, estops parties from setting up a new title in other party.—DOE

*Sect. 3.—By representation: Sub-sect. 3, B.]*

son could not insist on retaining possession of the premises adversely to the devisees beneficially interested under the will; but that the latter were entitled to require that the property should be sold & distributed according to the directions of testator.

The ct. will not permit deft. to obtain possession under the operation of a will, & afterwards say that he had acquired the property under a different title (WOOD, V.-C.).—*HAWKSBEER v. HAWKSBEER* (1853), 11 Hare, 230; 23 L. J. Ch. 521; 68 E. R. 1259.

*Annotations:—Expld. Paine v. Jones* (1874), L. R. 18 Eq. 320. *Refd. Dalton v. Fitzgerald*, [1897] 2 Ch. 86.

**1242. — Validity of other dispositions disputed.]—**A., being tenant by curtesy of certain premises, devised them by his will to trustees to his daughter R. for life, with remainder to his grandson W. Upon the death of testator, R. entered into possession of the premises purported to be devised, & paid for some years certain annuities charged by the will upon the premises, & was suffered by the heir-at-law to remain in possession undisturbed for more than twenty years. W. conveyed his remainder to pltf. R., after she had been in possession more than twenty years, conveyed the premises in fee to deft., who, upon her death, took possession. Pltf., the assignee of W., the remainderman, having brought ejectment:—*Held*: R. having entered under the will, deft. claiming through her was estopped as against all those in remainder from disputing the validity of the will, & pltf. was entitled to recover.

A person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will (MELLOR, J.).—*BOARD v. BOARD* (1873), L. R. 9 Q. B. 48; 43 L. J. Q. B. 4; 29 L. T. 459; 22 W. R. 206.

*Annotations:—Consd. Paine v. Jones* (1874), L. R. 18 Eq. 320. *Apprvd. & Folld. Dalton v. Fitzgerald*, [1897] 2 Ch. 86. *Expld. Re Anderson, Pegler v. Gillatt*, [1905] 2 Ch. 70. *Refd. Re Coole, Coole v. Flight*, [1920] 2 Ch. 536.

*See, generally, EQUITY, Vol. XX., pp. 243 et seq.*

**1243. — Title subsequently acquired by possession.]—**Testator, by his will of Apr. 12, 1824, devised all his property of which he might be possessed at the time of his decease to A., his wife, & B. upon trust for A. for life, with remainders over. Subsequently to the date of his will a conveyance was made to testator of certain freehold property to the usual uses to bar dower. Testator died in Dec. 1830, without having republished his will, leaving A. surviving him who thereupon, B. having disclaimed, entered into possession of all her husband's property, including the after-acquired freehold estate.

In a suit instituted in 1852, for the administration of testator's estate A. in her answer admitted in effect that the after-acquired property was subject to the trusts of the will.

Having subsequently discovered that this property did not pass under the will, A. in 1853, conveyed the reversion in fee expectant on her own life to a purchaser for value, she having claimed to have acquired the fee simple of such after-acquired property for her own benefit by right of adverse possession, & the property eventually passed through various hands. A. died in 1858:—*Held*: A. prescribed for her own

benefit & not for those entitled under the trusts of the will, & she was not estopped from denying that the after-acquired property passed under the will.—*Paine v. Jones* (1874), L. R. 18 Eq. 320; 43 L. J. Ch. 787; 30 L. T. 779; 22 W. R. 837.

*Annotations:—Consd. Dalton v. Fitzgerald*, [1897] 2 Ch. 86. *Folld. Re Anderson, Pegler v. Gillatt*, [1905] 2 Ch. 70. *Refd. Re Coole, Coole v. Flight*, [1920] 2 Ch. 536.

**1244. — —.]—**T. S. by will gave his real & personal estate to his brother J. with full power to sell & dispose thereof by deed, writing, will or otherwise, & appointed him sole exor., but in case J. should not dispose of the said real & personal estate or any part thereof & not otherwise, testator gave the same, or such part thereof as he should not dispose of, to J. H. for life, with remainders over; & appointed another exor. Testator made various dispositions with special reference to the alternative of the survivorship of himself or J.; J. died in testator's lifetime. On testator's death in 1803 J. H., claiming as tenant for life under the will, entered into possession of the real estate & remained in possession till his death in 1869. He also received the income of the personal estate from testator's personal representatives till 1863, when they transferred the capital to him on his indemnifying them. By a deed executed in 1842 the then personal representative had declared that he held the personal estate upon the trusts thereof contained in the will "or such of the same trusts as were then capable of taking effect." J. H. having by will devised his real & personal estate to defts., pltf. who claimed to be entitled to T. S.'s real & personal estate under his gift in remainder after J. H.'s life estate brought an action to establish their title against defts. alleging that J. H. had acknowledged his title as tenant for life only:—*Held*: J. H. was not estopped from setting up a statutory title to the real estate by his having wrongfully claimed to enter as tenant for life, or by his acknowledgment that he was in possession only as tenant for life.—*Re STRINGER'S ESTATE, SHAW v. JONES-FORD* (1877), 6 Ch. D. 1; 46 L. J. Ch. 633; 37 L. T. 233; 25 W. R. 815, C. A.

*Annotations:—Consd. Dalton v. Fitzgerald*, [1897] 2 Ch. 86. *Refd. Re Anderson, Pegler v. Gillatt*, [1905] 2 Ch. 70. *Mentd. Re Lowman, Devenish v. Pester*, [1895] 2 Ch. 348; *Re Fowler, Fowler v. Fowler*, [1917] 2 Ch. 307.

**1245. — —.]—**By her will a married woman gave certain real property, of which she was competent to dispose, to her husband for life, with remainder over. By a codicil she purported to devise in the same way certain other property, to which she had a good title but which she was not competent to devise. Her husband entered on both properties, & remained in possession for more than twenty years:—*Held*: those claiming under the husband were not estopped from denying testatrix's power to dispose of the second property, & had a good title by adverse possession against the heir & those claiming in remainder under the codicil.—*Re ANDERSON, PEGLER v. GILLATT*, [1905] 2 Ch. 70; 74 L. J. Ch. 433; 92 L. T. 725; 53 W. R. 510.

*Annotation:—Folld. Re Coole, Coole v. Flight*, [1920] 2 Ch. 536.

**1246. — —.]—**At the time of her marriage in 1881 to C. testatrix was entitled to two freehold houses, over which she had no power of disposal by will; & she also had a long leasehold interest

d. *ARMSTRONG v. BRIDGES* (1825–1897), N. B.

g. — *Entry of tenant for life.]—*Where a person enters as tenant for

life under a will, which purports to be an exercise of a power to appoint lands, whether rightfully as a proper appointee or wrongfully under a void appointment, he is not estopped from

saying as against the remainderman that the devise over to him is void as being an invalid exercise of the power.—*Re TENNENT'S ESTATE*, [1913] 1 L. R. 280.—IR.



in certain other premises, of which she acquired the freehold reversion in 1883. By her will, made in 1888, she devised the latter premises to trustees upon trust for sale, & to divide the proceeds of sale between A. P. & G. P.; & she bequeathed the residue of her personal estate to C., & she devised the residue of her real estate, over which she had a disposing power, to C. for life, with remainder over. On her death in 1897 C., a solr. as sole surviving trustee, paid the estate duty on the two freehold houses, & entered into & remained in possession of, the houses until his death in 1917:—*Held*: C. had acquired a good statutory title to the two freehold houses, & there was nothing to show that he had been guilty of a concealed fraud within the meaning of sect. 26 of Real Property Limitation Act, 1833 (c. 27), & his representatives were not estopped from saying that the houses did not pass under the will of testatrix.—*Re COOLE, COOLE v. FLIGHT*, [1920] 2 Ch. 536; 89 L. J. Ch. 519; 124 L. T. 61; 36 T. L. R. 736; 64 Sol. Jo. 739.

*See, generally, LIMITATIONS OF ACTIONS.*

**1247. Under Order in Council—Inaccurate recital.**—Applt. co. built a dam across a navigable river which flowed out of a lake in Ontario. In doing so the co. was exercising a power conferred by an Ord. in Council made under a Dominion Act which had adopted the terms of a grant made by the province to the co. The Ord. in Council recited that the Chief Engineer of the Public Works Department had reported that the co.'s Act of incorporation made the co. liable for all damage to lands caused by its works. The Act of incorporation did not so provide. The dam caused the level of the water in the lake to rise, so that lands bordering upon it, & forming part of the lands reserved for Indians, were flooded & damage thereby caused:—*Held*: the co. was liable for the damage caused, first, because the grant, upon its true construction, did not authorise the co. to raise the level of the water so as to cause damage; secondly, because the co., having taken the benefit of the Ord. in Council, must be taken to have accepted the recital as being correct.—*ONTARIO & MINNESOTA POWER CO. v. R.*, [1925] A. C. 196, P. C.

**1248. Possession taken of premises & furniture.**—Deft. agreed verbally with pltf. to take a house & purchase the fixtures at a valuation to be made by two brokers. An inventory of the furniture & fixtures was accordingly made, described generally as "An inventory of the fixtures, etc.," with the gross amount placed at the foot thereof. In an action for goods sold & delivered with a count on an account stated:—*Held*: deft. having taken possession of & enjoyed the furniture & fixtures, & paid part of the sum determined by the brokers, to be due for the same, he was liable on the account stated for the remainder, & could not afterwards object to pltf.'s defective title to the house.—*SALMON v. WATSON* (1819), 4 Moore, C. P. 73.

*Annotation*:—*Reid. Bates v. Townley* (1848), 12 Jur. 606.

**1249. Waiver of right to hold to bail.**—Deft., in a suit by assignees of a bkpt., was told, at an interview with the attorney for the assignees, that his attorney had proposed that he should admit every fact, except the merits, provided pltf. would waive their right of holding him to bail; & he was asked, whether that proposal was made with his authority. He replied, that it was; & that he was ready to carry it into effect, as the only question he wished to try was, whether he was liable on the undertaking he had given:—*Held*: having received advantage from the ad-

mission, in the waiver of the right to hold to bail, he could not afterwards withdraw it, & insist upon proof of the bkpcy.—*DAVIES v. BURTON* (1829), 4 C. & P. 166, N. P.

**1250. Taking out execution.**—Where there are two demises in ejectment, & a verdict is found for the lessor of pltf. on one demise, with leave to take out immediate execution, & with leave reserved to move the ct. above to enter a verdict on the second demise, if the ct. should think the evidence sustained it, pltf. is not estopped, by reason of having taken out execution, from making the application to enter a verdict on the other demise.—*DOE d. BANK OF ENGLAND v. CHAMBERS* (1836), 4 Ad. & El. 410; 6 Nev. & M. K. B. 539; 1 Har. & W. 749; 5 L. J. K. B. 123; 111 E. R. 841.

*Annotation*:—*Mentd. Deffell v. White* (1866), L. R. 1 C. P. 144.

**1251. Invalid partition.**—A husband seised in right of his wife concurred with the other tenants in common in a partition of estate & mines, but no fine was levied. He died in 1828; after which his widow acquiesced in the arrangement, & took the benefit of it. She & her lessee afterwards proceeded to get coal under the land awarded to other parties, & defended that proceeding, on the ground that the husband's acts were invalid, & that the parties were still tenants in common of the whole. The ct. restrained her by injunction.—*MADEN v. VEEVERS* (1842), 5 Beav. 503; 12 L. J. Ch. 38; 49 E. R. 673.

*Annotation*:—*Mentd. A.-G. v. Chambers* (1849), 12 Beav. 159.

**1252. Patent worked in partnership.**—Pltf. & deft. had worked in partnership an alleged patent of deft.'s:—*Held*: pltf. by so doing had not debarred himself from disputing the patent after the termination of the partnership.—*AXMANN v. LUND* (1874), L. R. 18 Eq. 330; 43 L. J. Ch. 655; 31 L. T. 119; 22 W. R. 789.

*Annotations*:—*Mentd. Halsey v. Brotherhood* (1880), 15 Ch. D. 514; *Challender v. Royle* (1887), 36 Ch. D. 425.

**1253. Receipt of insurance premiums.**—Defts. were a limited co., for the mutual insurance of ships belonging to members. In Dec. 1868, pltf. became equitable mtgee. of the ship H., D. being registered owner; no copy of the rules [of the co.] were ever given to pltf. & he had no knowledge of the provisions until after the loss of the vessel:—*Held*: defts. were precluded from saying pltf. who was the owner of the ship was not a member of the society, after having accepted an insurance & taken premiums & other payments from him.—*EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY* (1876), 1 Q. B. D. 563; 44 L. J. Q. B. 67; 34 L. T. 457; 3 Asp. M. L. C. 154, Ex. Ch.

*Annotation*:—*Mentd. Trainor v. Phoenix Fire Assce.* (1891), 65 L. T. 825.

**1254. —.**—Pltf. effected an insurance with an insurance co. through their agent against liability to his workmen. Pltf. was, to the knowledge of the agent, a joiner & builder. The agent filled in a proposal form, which was stated to be the basis of the contract, & in which pltf. was described as a joiner. Pltf. did not read the form, but when the policy arrived he objected to his being described as a joiner, & refused to take up the policy with that description in it, & the agent obtained the sanction of the chief clerk of the insurance co.'s branch office for the district to alter the policy by inserting the words "& builder" after the word joiner. This was accordingly done, & pltf. paid the first premium, & he continued to pay the premiums which were forwarded to the co. No communication was made to the

*Sect. 3.—By representation: Sub-sect. 3, B. & C.*

head office of the co. of the addition to the policy. A workman in his employment having been injured by an accident, pltf. had to pay him compensation, & sued to recover the amount from the co. under the policy:—*Held*: by receiving the premiums, the co. were precluded from denying the agent's authority to alter the contract.—*HOLDSWORTH v. LANCASHIRE & YORKSHIRE INSURANCE CO.* (1907), 23 T. L. R. 521.

*Annotation*:—*Mentd.* *Paxman v. Union Assce. Soc.* (1923), 39 T. L. R. 424.

**1255.** —.]—*PEARL LIFE ASSURANCE CO. v. JOHNSON, SAME v. GREENHALGH*, No. 830, *ante*.

*See, generally, INSURANCE.*

**1256. Freight received.**—A co. owned a line of steamers called the "M. Line," running between New York & London. A. was in the habit of shipping goods on steamers running on this line. A. shipped goods in a steamer at New York, & received a bill of lading made out in the ordinary form given by the co. for goods shipped on their steamers, save that it had the words "extra steamer" added after the words "M. Line of steamships." At London an overside release for the goods was signed & given by the co.'s agents to A., & the freights received by them from A.:—*Held*: the co. were estopped from saying that the contract of shipment was not made with them.—*HERMAN v. ROYAL EXCHANGE SHIPPING CO. & PATTON, JUNR., & CO.* (1884), 1 Cab. & El. 413.

**1257. Under deed of arrangement.**—Where a debtor by executing a deed of arrangement obtains an advantage, such as escape from bkpcy. proceedings, & by his subsequent conduct leads the trustee to believe that he has accepted the deed, he will be estopped from subsequently denying the validity of the deed.—*Re WILSON*, [1916] 1 K. B. 382; 85 L. J. K. B. 329; 32 T. L. R. 75; 60 Sol. Jo. 90; [1916] 2 H. B. R. 17, D. C.

*Annotations*:—*Consd.* *Re A Bankruptcy Notice*, [1924] 2 Ch. 76. *Mentd.* *Re Lee, Ex p. Grunwaldt*, [1920] 2 K. B. 200.

**1257 1. Under deed of arrangement.**—One, S., died in 1905, leaving him surviving two daughters & two cousins who were separated, both from him & from each other. These four persons entered into an agreement whereby they divided S.'s property between them in equal shares. One of the cousins sold the share so acquired. The other cousin died leaving three sons, who succeeded to the share of their father. On the death of one of the daughters, her husband claimed possession of her share in the property of her father, & in this he was resisted by the three sons of the deceased cousin who claimed title in themselves:—*Held*: defts., though not parties to the agreement by which the property of S. was divided, yet had received the benefit of it on the death of their father & could not be permitted to question its validity.—*BAHADUR SINGH v. RAM BAHADUR* (1922), 1 L. L. R. 45 All. 277.—*IND.*

**1259 i. Receipt of money secured by deposit of securities.**—A manufacturing co. which had borrowed money from pltf. bank on the security of goods alleged to have been manufactured by it was estopped from objecting, on the ground that the goods could not be legally pledged, to their seizure & removal by the bank.—*MERCHANTS BANK OF CANADA v. WINNIPEG FUR CO.*, [1918] 1 W. W. R. 351.—*CAN.*

**r. Invalid sale at instance of heirs—Lapse of time.**—In ejectment by the sons-in-law & daughters of an intestate, to recover possession of lands sold under an invalid *fi. fa.*, it having

appeared that the former, being tenants for life, had suggested & urged the sale in question for their own benefit; & that the party, a creditor of the estate of the intestate, for whose benefit the intended conveyance on such sale was made, had changed his position, & had assigned the judgment under which the sale took place, for the benefit of one of the male pltf.s., & at his request:—*Held*: an estoppel *in pais* which barred the male pltf.s., particularly after the lapse of nearly, if not quite, twenty years, from disputing the validity of said conveyance; & the bar was not removed by their having joined their wives with them in the action in which the validity of such conveyance was questioned.—*INGALLS v. REID* (1865), 15 C. P. 490.—*CAN.*

**s. Possession taken of estate.**—Where a party had entered into an informal agreement with another, settling certain disputed claims, & containing a submission to an arbiter relative to others, & made payment in terms of the agreement, got into possession of an estate on the faith thereof & acted on the submission:—*Held*: although the submission failed from ambiguity, he was not entitled to insist in an action of repetition of the payments & otherwise, on the assumption that the agreement was not binding.—*STIRLING v. KER* (1830), 8 Sh. (Ct. of Sess.) 911.—*SCOT.*

**t. Acceptance of composition by creditor.**—Deft., a trader, being in insolvent circumstances, wrote to pltf., a creditor, giving him a statement

**1258.** —.]—A debtor executed a deed of arrangement by an attorney. The attorney also purported to make the affidavit which must be made "by the debtor" under Deeds of Arrangement Act, 1914 (c. 47), s. 5 (1). The petitioning creditor assented in writing to the deed. The debtor subsequently applied to the Ct. of Bkpcy. under sect. 23 of the Act, to declare the deed void, but the Ct. of Appeal held that the Ct. of Bkpcy. had no jurisdiction to entertain the application. The debtor immediately began an action in the K. B. Div. against the trustee under the deed, & the petitioning creditor shortly afterwards presented a petition in bkpcy. against the debtor, & obtained a receiving order:—*Held*: the petitioning creditor was not estopped by his assent to the deed from petitioning; he had not by his conduct prevented the debtor from paying his debt; the petition was not an abuse of the process of the ct., & the receiving order was rightly made.—*Re WILSON, Ex p. JONES* (1916), 85 L. J. K. B. 1408; 114 L. T. 969; [1916] H. B. R. 70, C. A.

*Annotation*:—*Mentd.* *Re Lee, Ex p. Grunwaldt*, [1920] 2 K. B. 200.

**1259. Receipt of money secured by deposit of securities.**—In 1914 a Russian bank had its head office in Petrograd & a branch office in London, the manager of which was authorised by a power of attorney to transact business for & bring actions in the name of the bank. By the direction of the Petrograd office the London branch deposited with a London bank certain Brazilian & Chinese Govt. bonds to be held to the order & on account of a French bank as security for a banker's credit opened by the French bank for the benefit of the Russian bank. In & after 1918 the Soviet Govt. of Russia by various decrees & orders nationalised banking in Russia by taking over the assets, share capital, & management of all private banks, & vesting them in a State bank, then in a People's bank, & ultimately in a Govt. department. Subsequently the manager of the London branch agreed with the French bank to pay off the amount

of his account & informing him of his intention to make some arrangement with his creditors, to which pltf. replied expressing no dissent, & again, that he was satisfied if there was no preference given. In the meantime deft. had effected a fresh arrangement with his creditors for a composition, on his representation that pltf. would accept it, without which the whole arrangement would have fallen through, & deft. must have gone into insolvency. Deft. on the same day, by letter, informed pltf. of the arrangement; to which pltf. replied without expressing dissatisfaction. Afterwards, without dissent, he received the instalments of the composition sent to him, & on the receipt of the last instalment he acknowledged it as a payment of "the last instalment of your indebtedness to me":—*Held*: pltf. must be deemed to have accepted the composition with the other creditors, & therefore that he could not sue deft. for the balance.—*MITCHELL v. MITCHELL* (1876), 27 C. P. 160.—*CAN.*

**a. Acceptance of payment under illegal contract.**—Where a subject made a payment to a citizen of an enemy state under a contract made before the outbreak of war, & such citizen accepted the same:—*Held*: having accepted such payment the latter could not thereafter on the restoration of peace repudiate the transaction as illegal.—*EASTERN RAND EXPLORATION CO., LTD. v. NEL* (1903), T. S. 42.—*S. AF.*

**b. Enjoyment of right—Right secured by challenged documents.**—A



due to the latter on the banker's credit in return for the bonds. The amount was paid, but the French bank refused to release the bonds. In an action brought in the name of the Russian bank by the manager of the London branch against the French bank & the London bank for the return of the bonds, defts. by their defence alleged that pltf. bank had ceased to exist, & disputed the authority of the London branch manager to bring the action:—*Held*: defts. were estopped by their conduct from disputing the authority of the London branch manager.—**RUSSIAN COMMERCIAL & INDUSTRIAL BANK v. COMPTOIR D'ESCOMPTE DE MULHOUSE**, [1925] A. C. 112; 93 L. J. K. B. 1098; 40 T. L. R. 837; 68 Sol. Jo. 811, H. L.

*Annotation*:—**Mentd.** Banque International de Commerce de Petrograd v. Goukassow (1924), 93 L. J. K. B. 1084.

**Acceptance of benefit—On election.**—*See* Subsect. 3, F., *post*.

### C. Ac

#### (a) In General.

**1260. What constitutes.**—**CROFTS v. MIDDLETON**, No. 747, *ante*.

**1261.** —.—.]—If by "acquiescence" is meant a course of conduct which amounts to active & intelligent consent, I think it very likely that many of those shareholders could not be held to have actively or intelligently consented to what was going on. But what I think is the real question to be looked at in any case of this kind is this: Had the shareholders notice of the way in which the affairs of the co. were being conducted, & its property was being managed, & of the rights & interests which were being created with regard to the stock of the co.? If they had that notice, & if they were content not to oppose those acts which they knew were every day being done, then

party making use of a right which he only had under documents challenged by him, to the effect of having them reduced, was barred from insisting that they should be set aside.—**MILL v. MONTROSE MAGISTRATES** (1825), 1 Wils. & S. 570.—**SCOT**.

**c. Transfer of land to facilitate mortgage—Title of transferee.**—**Deft.** C. homesteaded certain land in Oct. 1880. He was a clerk in pltf.'s employ, & being desirous of obtaining a loan from pltf. upon the land, conveyed it to deft. W. on Jan. 1, 1883. At that time he had no recommendation for patent. On Jan. 26, 1883, he purchased the land. On Jan. 27, W. executed a mtge. to pltf. C. received the money, made payments on accounts of interest, & asked time for other payments. The patent issued to C. on June 9, 1883, & afterwards W. reconveyed to C., who was in reality, always the owner of the land. Upon a bill to foreclose the mtge.:—*Held*: C. was, by his conduct, estopped from saying that W. had no title at the date of the mtge., & from claiming title in himself under the patent.—**MANITOBA INVESTMENT ASSOCIATION v. WATKINS** (1887), 4 Man. L. R. 357.—**CAN.**

**d. Payment of reduced rent—Conditional upon performance of covenant.**—A lease of premises for a term of years contained covenants by the lessee not to assign the premises without the landlord's consent, & not to sell wines, spirits, etc., thereon without the like consent. A rent was reserved of £8, reducible to £4 so long as the covenants were observed & performed. There were repeated breaches of the covenants by assignment without consent, & the property had for many years been sublet without such consent to a publican who held it in fact as

licensed premises. The landlord had always accepted the reduced rent, though it was alleged that he had notice of the user of the property as licensed premises. The owner of the lease agreed to sell the property to a purchaser, but the latter refused to complete on the ground that a good title had not been shown in accordance with the contract, & a vendor & purchaser summons was taken out to decide the question:—*Held*: the vendor after accepting the benefit of the reduced rent was estopped from denying his liability under the covenants, & was still bound by the covenant against alienation.—**ASHE v. HOGAN**, [1920] 1 L. R. 159; 54 L. L. T. 97.—**IR.**

**e. Postnuptial settlement—Adoption of settlement by wife after husband's death.**—By a postnuptial settlement in 1805, made between the husband, & the father & mother of the wife, & executed by the wife, although she was not named as a party to it, the husband created a jointure for the wife, & the father & mother appointed certain sums to the wife, & the husband covenanted to assign these sums to trustees, in trust to accumulate during the joint lives of husband & wife, & after the death of either, for the survivor for life, with power of appointment among the children, & in default of appointment, equally. The husband died in 1814, without having exercised the power of appointment. In 1815, the widow presented a petition for maintenance for the eldest son, & in this petition she referred to the settlement, as showing what she & the younger children were entitled to. She received her jointure, & the interest on the sums appointed, during her life. She died in 1868, having executed a testamentary disposition in the Scotch form, disposing of the

I think they are debarred in point of equity from coming forward at a later period for the purpose of undoing the rights & releases which had been created & given (**LORD CAIRNS, C.**).—**EVANS v. SMALLCOMBE** (1868), L. R. 3 H. L. 249; 37 L. J. Ch. 793; *sub nom.* **EVANS v. SMALLCOMBE, Re AGRICULTURISTS' CATTLE INSURANCE CO.**, 19 L. T. 207, H. L.; *affg.* S. C. *sub nom.* **Re AGRICULTURISTS' CATTLE INSURANCE CO., SMALLCOMBE'S CASE** (1867), L. R. 3 Eq. 769.

*Annotations*:—**Expld.** Houldsworth v. Evans (1868), L. R. 3 H. L. 263. **Refd.** Ashbury Ry. Carriage & Iron Co. v. Riche (1875), L. R. 7 H. L. 653; Hadley v. Hadley (1897), 77 L. T. 131. **Mentd.** *Re Agriculturist Cattle Insce.*, Dixon's Case (1869), 21 L. T. 288; Murray v. Bush (1873), 22 W. R. 280; Ho Tung v. Man On Insce. (1901), 71 L. J. P. C. 46.

**1262. Who bound—Purchaser from party acquiescing.**—A shareholder [in a railway co.], who had acquiesced in the recommencement of certain works, afterwards sold his shares to a purchaser, who objected to the further prosecution of the works:—*Held*: the purchaser was bound by the acquiescence of his vendor.—**FROOKS v. SOUTH WESTERN RY. CO.** (1853), 1 Sm. & G. 142; 21 L. T. O. S. 55; 17 Jur. 365; 1 W. R. 175; 65 E. R. 62.

*Annotations*:—**Dbtd.** London Trust Co. v. Mackenzie (1893), 62 L. J. Ch. 870. It would seriously affect the position of shareholders in limited cos., & the value of shares, if it were held that such equities against a transferor affect the rights of transferees for value without notice. In *Frooks v. S. W. Ry.* a doctrine of this kind was suggested, but it was applied to a very different state of facts, & the doctrine is doubted by **LINDLEY, L. J.**, in his *Company Law*, at p. 470 (**WRIGHT, J.**). **Mentd.** Burt v. British Nation Life Assoc. Assocn. (1859), 33 L. T. O. S. 74.

**1263. Application of doctrine—Legatee in possession.**—[I would not] have it supposed that I for one moment entertain the notion suggested at the bar in regard to the doctrine of laches, namely, that acquiescence & length of time does not apply

sums appointed as her absolute property:—*Held*: she must be held to have adopted the settlement, & it bound the sums appointed.—**KINGSTON v. BOOTH** (1870), 4 L. R. Eq. 589.—**IR.**

**f. Services of solicitor in court.**—**M.** was retained as solr. for the prosecution, but **W.**, who was in ct., was permitted to act:—*Held*: prosecutor having permitted **W.** to act, & having obtained the benefit of his services, was estopped from denying that **W.** was his solr.—**R. v. FERGUSON** (1891), 26 N. S. R. 154.—**CAN.**

### PART VI. SECT. 3, SUB-SECT. 3.—C. (a).

**1260 i. What constitutes.**—The acquiescence or leave & licence by which a person can be deprived of his legal rights, must be of such a nature & given under such circumstances as will make it fraudulent in him to set up these rights against another prejudiced by his acts.—**WRIGHT v. MITTEN** (1896), 34 N. B. R. 14.—**CAN.**

**1260 ii.** —.—.]—Acquiescence for a lengthy period of time can only be successfully relied on as an estoppel when the inference to be drawn from all the circumstances of the case is that pltf. either agreed to abandon his rights, or else had so acted as to induce other parties to alter their position on the reasonable faith that he had done so.—**UMHLEBI v. UMHLEBI'S ESTATE** (1905), 19 E. D. C. 237.—**S. AF.**

**1260 iii.** —.—.]—More quiescence may not be acquiescence; & the doctrine of acquiescence in injurious acts does not apply to acts done on lands not belonging to the party said to have acquiesced.—**BORTON v. HOWE** (1876), 3 C. A. 5; 2 J. R. 97.—**N.Z.**



*Sect. 3.—By representation: Sub-sect. 3, C. (a) & (b).]*

to the case of a legatee where a creditor seeks equity against the legatee, in the shape of calling upon him to refund his legacy (STUART, V.-C.).—PARTINGTON v. CARRINGTON (1859), 34 L. T. O. S. 69; 5 Jur. N. S. 1093.

**1264. — To dealings with shares of public companies.]—***Re NATIONAL PATENT STEAM FUEL CO., BARTON'S CASE, No. 1329, post.*

*See, generally, COMPANIES, Vol. IX., pp. 222.*

**1265. — Public functionaries.]—**Pltf. had brought forward his house, forming part of the street, beyond the line of frontage. The urban authority threatened to take summary proceedings under the Public Health Act, 1875 (c. 55). Pltf. brought an action claiming an injunction to restrain the threatened proceedings, on the ground that they were irregular under the Act; & also that the urban authority had been aware of, & had acquiesced in, the bringing forward of his building. A motion for an injunction was refused.

The doctrine of acquiescence is inapplicable to public functionaries.—KERR v. PRESTON CORPN. (1876), 6 Ch. D. 463; 46 L. J. Ch. 409; 25 W. R. 265.

*Annotations:—*Refd. Preston Corpn. v. Fullwood L. B. (1885), 53 L. T. 718; *Re McIntosh & Pontypridd Improvements Co.* (1891), 61 L. J. Q. B. 164. **Mentd.** Hedley v. Bates (1880), 42 L. T. 41; Barlow v. St. Mary Abbott's, Kensington, Vestry (1883), 31 W. R. 514; *Re Briton Medical & General Life Assco. Asscn.* (1886), 32 Ch. D. 503; *Grand Junction Waterworks Co. v. Hampton U. C.*, [1898] 2 Ch. 331; *Yabbicom v. King*, [1899] 1 Q. B. 444; *Merrick v. Liverpool Corpn.*, [1910] 2 Ch. 449.

*See, generally, PUBLIC AUTHORITIES.*

**To corporations.]—***See CORPORATIONS, Vol. XIII., p. 350, No. 884.*

**1266. Degree of acquiescence—Acquiescence to bar injunction & to bar claim distinguished.]—**Distinction between the effect of acquiescence, upon a motion for an injunction & on a demurrer. In the former case acquiescence merely prevents the special protection by injunction, but in the latter it must be such as to disentitle pltf. to any relief whatever.—GORDON v. CHELTENHAM & GREAT WESTERN UNION RY. CO. (1842), 5 Beav. 229; 2 Ry. & Can. Cas. 800; 49 E. R. 565.

*Annotation:—***Mentd.** Hood v. N. E. Ry. (1870), 19 W. R. 266.

*See, further, INJUNCTION.*

**1267. Effect of acquiescence—Plaintiff's remedy delayed.]—**A lease was granted of coals & ironstone for 300 years at a fixed rent & paying certain royalties not fixed, & the lease contained a stipulation that the working should not be delayed more than five years from the date of the lease; also, that as to three out of four of the mines, the lessees might either work or relinquish, but should not

underlet or assign without the consent of the lessor except to responsible persons. The mines were worked for 24 years, when the lessee died, & a suit was instituted to administer his estate & a receiver was appointed. The ironstone mine was then no longer worked, & ten years after, the working of the coal mines was also stopped. Rent continued to be received, & a correspondence ensued, not assuming a peremptory tone until fifteen years after the mines were shut up, the lessors having had knowledge of the abandonment all along. An action of ejectment was then brought, but restrained by reason of there being a receiver; & on summons for liberty to proceed with the action:—*Held*: the lessors had no right to prohibit the letting to responsible persons, & by acquiescence with knowledge of the breaches of covenant they had lost their right to proceed at law to recover possession immediately, but must give the lessees a reasonable time for restitution of the works; & the application for liberty to proceed at law was ordered to stand over for three months.—WHITEHEAD v. BENNETT (1861), 4 L. T. 818; 9 W. R. 626.

**1268. Must not be illegal.]—**Acquiescence & ratification must be founded on a full knowledge of the facts, & further, it must be in relation to a transaction to which effect may be given thereby.

Where the accounts of a bank in liquidation had been changed so as to represent the bank as a debtor in respect of a sum which had been borrowed by its manager for his own purposes:—*Held*: the doctrine of acquiescence & ratification by the liquidating authorities would not avail to render the bank liable to pay a debt which it never owed.

Acquiescence & ratification . . . must be in relation to a transaction which may be valid in itself & not illegal, & to which effect may be given as against the party by his acquiescence in & adoption of the transaction (*per* CUR.).—BANQUE JACQUES-CARTIER v. BANQUE D'ÉPARGNE DE LA CITÉ ET DU DISTRICT DE MONTREAL (1887), 13 App. Cas. 111; 57 L. J. P. C. 42, P. C.

**1269. As ratification of acts of agent.]—**A fire insurance society being an unincorporated assocn., had powers of giving to, or taking from, other offices policies by way of guarantee for the purpose of dividing the risk of insurance, & also under their powers entered into treaties with other cos. appointing them their agents in foreign lands, & agreeing to accept & enter upon the risk of one-eighth of every fire insurance policy of such cos. in force at the date of the treaty or effected or renewed after that date, & agreed to be on all risks simultaneously with the other cos., the other cos. agreeing to pay a proportion of the premiums, 20 per cent. commission to be allowed on such premiums to the agents for the expenses of con-

**1268 i. Must not be illegal.]—**Previous concurrence in an illegality cannot be relied upon by way of estoppel to a claim for discontinuance of the illegality.—BRADY v. S.A. TURF CLUB (1906), 23 S. C. 385.—S. AF.

**1269 i. As ratification of acts of agent.]—**If a person knows that others have for his benefit put themselves in a position of disadvantage from which if he speaks or acts at once they can extricate themselves, but from which after a lapse of time they can no longer escape, his mere inaction under such circumstances may be convincing evidence of ratification & adoption of acts done in his name, but without his authority.—CITY BANK OF SYDNEY v. McLAUGHLIN (1909), 9 C. L. R. 615.—AUS.

**1269 ii. —.]—**Pltf. went to British Columbia nine years before this action, leaving his wife here to whom he wrote & occasionally sent money. She procured debt. to indorse a note made by her for the price of furniture to carry on a boarding house, which she subsequently carried on with pltf.'s knowledge, & executed to debt. a chattel mtge. under seal in her own name on said furniture. The rent of the house being in arrear, & part of the mortgage money overdue the landlord distrained, & debt. enforced his mtge., & pltf.'s wife not dissenting but rather assenting, the goods were sold & the balance, after the payment of rent & mtge., was handed over to her. Pltf. thereupon sued debt. in trespass & trover:—*Held*: as by this action pltf. ratified

the conduct of his wife in purchasing the furniture, he should not be allowed to repudiate the mtge. which formed part of the whole arrangement.—HALPENNY v. PENNOCK (1873), 33 U. C. R. 229.—CAN.

**1269 iii. —.]—**Where there were acts of acquiescence on the part of debt. lodge sufficient to ratify & confirm a contract made by its agent:—*Held*: the lodge was estopped from denying the contract.—PULFORD v. LOYAL ORDER OF MOOSE (1913), 25 W. L. R. 368; 23 Man. L. R. 24.—CAN.

**1269 iv. —.]—**Deft. was indebted to pltf. for rent, & to pltf.'s agent for goods supplied. He gave the agent his promissory note, payable to the agent, for the sum of the two debts. The

ducting the agency. The fire assurance society having gone into liquidation, the chief clerk allowed the claim of another co. for sums due to them in respect of guarantee & treaty business:—*Held*: the treaty business was insurance business, being guarantee business carried on with a very unlimited faith in the agent, & the directors had by acquiescence ratified the acts of the manager of the agency department.—*Re NORWICH EQUITABLE FIRE ASSURANCE SOCIETY, ROYAL INSURANCE CO.'S CLAIM* (1887), 57 L. T. 241; 3 T. L. R. 781; *subsequent proceedings*, 58 L. T. 35.

See, generally, AGENCY, Vol. I., pp. 405 *et seq.*

(b) *Necessity for Knowledge.*

**1270. General rule.**—If A., tenant for life subject to forfeiture, remainder over to B., leave to C. for a term & afterwards apprehending that he has forfeited, acquiesce in B.'s claiming & receiving the rent from C., his exor. may, on showing that he acquiesced under a false apprehension, recover from C. the amount of the rent erroneously paid to B.

If money be paid to A. by the direction of B., it is a good payment to B.; but I can never agree that if money be paid to A. simply with the knowledge of B. it will be a payment to B. Suppose that one disseises another of an estate & continues in possession of the rents & profits with the knowledge of the disseisee, will anybody say that the disseisee shall not recover against the tenant? Knowledge will not do, there must be consent, direction, & authority (*BULLER, J.*).—*WILLIAMS v. BARTHOLOMEW* (1798), 1 Bos. & P. 326; 126 E. R. 930.

*Annotations*:—*Consd.* *Rogers v. Pitcher* (1815), 6 Taunt. 202. *Refd.* *Gregory v. Doidge* (1826), 3 Bing. 474; *Claridge v. McKenzie* (1842), 4 Scott, N. R. 796; *Doc d. Lord v. Crago* (1848), 6 C. B. 90.

**1271.** —.]—A party is not bound by acquiescence when ignorant of his rights.

Neither in bkpey., nor in any other proceeding, can it be right, nor is it consistent with the rules & practice of this ct., to consider a party bound by acquiescence, when not cognisant of his rights

agent discounted the note, & appropriated the whole amount. After the due date of the note the co. received from deft. two quarters' rent accrued after the date of the above transaction:—*Held*: the co. had acquiesced in the transaction, & must be treated as paid.—*NORTHERN LOAN & LAND CO. v. LICHTSCHINDL* (1888), 6 N. Z. L. R. 643.—N.Z.

**1269 v.** —.]—Where a principal, knowing the full circumstances of the signing of an agreement for sale & purchase of land by an agent on his behalf, does not notify the purchaser of his repudiation for nearly three years he is estopped by his acts & conduct from objecting to the agreement.—*WEST v. DILLICAR*, [1920] N. Z. L. R. 139.—N.Z.

PART VI. SECT. 3, SUB-SECT. 3.—  
C. (b).

**1270 i. General rule.**—The exors. of deceased under a provision of the will, paid out of the funds of the estate a sum for the board & maintenance of a daughter of deceased, the assets of the estate being insufficient to pay the claims of creditors:—*Held*: the exors. were not relieved by the fact that the widow of deceased, who was the principal creditor, was aware of the payments & made no objection, it appearing that she was not aware of the condition of the assets or of the insufficiency of the estate.—*Re RYER-*

*SON'S ESTATE* (1896), 29 N. S. R. 81.—CAN.

**1270 ii.** —.]—When A. stands by while his right is being infringed by B., in order to create an estoppel by acquiescence, A. must know of his own rights, & B. must expend money or do some act on the faith of his mistaken belief.—*HARVEY v. LAWRENCE* (1915), 32 W. L. R. 297; 9 W. W. R. 91; 25 D. L. R. 706.—CAN.

**1270 iii.** —.]—A widow was entitled to above £1,000 in name of *jus relictæ*, besides £20 of terce. Her husband had executed a settlement making very inferior provisions in her favour, & even these she was to forfeit in the event of a second marriage, which she made. After the lapse of ten years from the death of her first husband, during which time a series of actings by all parties had taken place, on the footing that the settlement was unchallengeable:—*Held*: competent to her to recur to her legal claims, in respect that any acts of alleged homologation were done in ignorance of her legal rights & therefore afforded no proof of a consent to surrender them.—*HOPE v. DICKSON* (1833), 12 Sh. (Ct. of Sess.) 222; 9 Fac. Coll. 140.—SCOT.

**1270 iv.** —.]—In a trust-deed for behoof of creditors, the agent of the trustor was appointed one of the trustees, & at the first meeting of trustees was appointed agent & factor in the trust. His accounts were regu-

(*per CUR.*).—*Re CHAMBERS, Ex p. CHAMBERS* (1835), 2 Mont. & A. 440; 1 Deac. 197.

*Annotations*:—*Refd.* *Re Bakewell, Ex p. Butler* (1842), 2 Mont. D. & De G. 731. *Mentd.* *Re Durrant, Ex p. Thirkill* (1836), 5 L. J. Bey. 40; *Re Newall, Ex p. Newall* (1838), 3 Deac. 333; *Re Prescott, Ex p. Prescott* (1840), 4 Jur. 852; *Re Scowcroft, Ex p. Rees* (1845), 6 L. T. O. S. 104.

**1272.** —.]—Testator by his will devised certain freehold property & the residue of his real estates. After his will, he became seised of other real estates, & then made a codicil, executed so as to pass freehold land, reciting the devises in his will, & revoking them, & then made a fresh devise without expressly referring to the after-acquired lands. After the death of testator, the widow, in whose favour the devise in the codicil was made, supposing she was entitled to the rents of the after-acquired lands, entered into possession thereof & received them to the time of her death:—*Held*: the heir-at-law of testator, although he had acquiesced in ignorance of his rights, was entitled to an account against her exor. of those rents & profits from the time of testator's decease.—*MONYPENNY v. BRISTOW* (1832), 2 Russ. & M. 117; 1 L. J. Ch. 88; 39 E. R. 339, L. C.

*Annotations*:—*Mentd.* *Hughes v. Turner* (1835), 3 My. & K. 666; *Yarnold v. Wallis* (1840), 4 Y. & C. Ex. 160; *Doc d. York v. Walker* (1844), 12 M. & W. 591; *Skinner v. Ogle* (1845), 4 Notes of Cases, 74; *Hughes v. Hosking* (1856), 11 Moo. P. C. C. 1; *Re Earl's Trust* (1858), 4 K. & J. 673; *Phillips v. Homfray* (1883), 24 Ch. D. 439.

**1273.** —.]—*MARKER v. MARKER*, No. 308, *ante*.

**1274.** —.]—*VYVYAN v. VYVYAN*, No. 1537, *post*.

**1275.** —.]—Acquiescence without full & sufficient knowledge & understanding of the circumstances of the case, in respect of which such acquiescence is alleged to be a bar, cannot be of any avail.—*PRIDEAUX v. LONSDALE* (1863), 4 Giff. 159; 1 New Rep. 565; 32 L. J. Ch. 317; 8 L. T. 109; 9 Jur. N. S. 488; 11 W. R. 531; 66 E. R. 661; *affd.* on other grounds, 1 De G. J. & Sm. 433, L. J.J.

*Annotations*:—*Mentd.* *Everitt v. Everitt* (1870), L. R. 10 Eq. 405; *Phillips v. Mullings* (1871), 7 Ch. App. 214; *Baker v. Loader* (1872), L. R. 16 Eq. 49; *Welman v. Welman* (1880), 15 Ch. D. 570.

larly rendered at meetings of the trustees & were examined & docketed by them as correct, the trustor being present & offering no objection to the trust management. The first account rendered by the agent was docketed as correct by the trustor himself, along with the trustees:—*Held*: in an accounting at the instance of the trustor, the facts alleged as inferring acquiescence & even the signing the docket not being proved to have taken place in the knowledge of his legal rights, the trustor was not barred from objecting to the agent's accounts.—*LAUDER v. MILLAR* (1859), 21 Dunl. (Ct. of Sess.) 1353; 31 Sc. Jur. 740.—SCOT.

**1270 v.** —.]—No doctrine is better settled in our laws than that a person cannot be held to have renounced his legal rights by acquiescence, unless it is clear that he had full knowledge of his rights & intended to part with them.—*WATSON v. BURCHELL* (1891), 9 S. C. 2.—S. AF.

**g.** — *Knowledge of agent.*—A policy of insurance on a grist mill covers not only the building, but also the fixed & movable machinery in it. Ptf. effected an insurance in defts.' co. on a grist mill. He stated in his application that there were no other insurances on the property, although there was an existing insurance on the fixed & movable machinery in the mill:—*Held*: the policy was void,



*Sect. 3.—By representation: Sub-sect. 3, C. (b) & (c).]*

**1276.** —.]—Where acquiescence is relied on it must be shown that the person acquiescing was aware of the thing in which he acquiesced, & of the effect of such acquiescence.—*STRANGE v. FOOKS* (1863), 4 Giff. 408; 2 New Rep. 507; 8 L. T. 789; 9 Jur. N. S. 943; 11 W. R. 983; 66 E. R. 765.

*Annotation:—Mentd.* *Wulff v. Jay* (1872), L. R. 7 Q. B. 756.

**1277.** —.]—A wife who in ignorance of her right in equity to enforce a pre-nuptial agreement, for a settlement accepted a settlement of a far inferior sum, is not by doing so bebarred from enforcing her claim to the full amount of property agreed to be settled upon her.—*GILCHRIST v. HERBERT* (1872), 26 L. T. 381; 20 W. R. 348.

**1278.** —.]—Trust funds were settled on trust for S. for life, with remainder as S. should appoint, with power for the trustees to invest on leasehold or chattel real securities. The trustees acting upon a valuation which the ct. held to be excessive & unreliable, invested part of the trust funds, during the lifetime of S., on separate sub-mtges. of eleven leasehold houses, which were unoccupied, & not completely finished, the amount of the advances exceeding one-half of the value of the property. S. died, having made a will which was held to operate as a good appointment of the trust funds; & on the application of the exors. of S. in that action, with the sanction of the chief clerk, the sub-mtges. were, in Dec. 1883, transferred by the trustees to the exors. In May, 1884, the exors., finding the security insufficient, sued the trustees:—*Held*: the exors., having taken the transfers in ignorance of the circumstances attending the investments, were not debarred from bringing the action by adoption or acquiescence.—*SMETHURST v. HASTINGS* (1885), 30 Ch. D. 490; 55 L. J. Ch. 173; 52 L. T. 567; 33 W. R. 496; 1 T. L. R. 335.  
*Annotation:—Mentd.* *Mara v. Browne*, [1895] 2 Ch. 69.

**1279.** —.]—A son remained in ignorance of his right to *legitim* for nearly three years after his father's death; & all parties acted as if *legitim* was not due:—*Held*: the son's claim to *legitim* was not barred by acquiescence.—*KINTORE (COUNTESS DOWAGER) v. KINTORE (EARL)* (1886), 11 App. Cas. 394, H. L.

**1280.** —.]—Where a person has once a right to rescind a contract he does not lose that right merely by acting upon the contract or delay in impeaching it, so long as he remains in ignorance of his right, & the position of the parties remains

substantially the same. The rule as to *restitutio in integrum* is that the person seeking relief by way of rescission cannot succeed if restitution is prevented by his own act or default.

Deft., a next of kin agent, discovered that certain real estate in New Zealand passed on the death of an intestate to two co-heiresses who were widows in poor circumstances unacquainted with business affairs, & aged 70 & 72 respectively. The property was of considerable value, & was in the hands of the public trustee at W., New Zealand, where an order had been obtained in favour of another claimant of the property whose claim had been prosecuted by deft. After obtaining from this claimant a promise not to communicate on the subject with the co-heiresses deft. had an interview with them at which he informed them that they were entitled to certain property, but he did not disclose its value. Deft. then induced them to sign two documents whereby they agreed that he was to have one-half of the property recovered. The women had no independent advice & were allowed no time for consideration. From the evidence it appeared that, though the documents did not so stipulate, deft. represented to the women & induced them to believe that he would recover the property for them, & also that if they once signed they could never escape from the contract. The agreement was made in May, 1889, & was never repudiated by the two women, who both died in 1893. From time to time they received payments in respect of the property on the footing of the agreement:—*Held*: the transaction ought not to stand having regard to the principles acted upon by cts. of equity, & the right to rescind had not been lost by delay & acquiescence on the part of the two women.—*REES v. DE BERNARDY*, [1896] 2 Ch. 437; 65 L. J. Ch. 656; 74 L. T. 585; 12 T. L. R. 412.

*Annotations:—Refd.* *Wedgerfield v. De Bernardy* (1908), 24 T. L. R. 497; *Ford v. Radford* (1920), 36 T. L. R. 658.  
*Mentd.* *Glegg v. Bromley*, [1912] 3 K. B. 474.

**1281.** —.]—*BANQUE JACQUES-CARTIER v. BANQUE D'EPARGNE DE LA CITÉ ET DU DISTRICT DE MONTREAL*, No. 1268, *ante*.

**1282.** — *Knowledge of unauthorised agent.*—E. mortgaged a policy of life assurance to F., & afterwards filed a petition for liquidation. He obtained his discharge on payment of 2s. in the pound on the unsecured debts, & in accordance with the arrangement all E.'s property was assigned to certain persons, except the equities of redemption in the securities held by secured creditors. Shortly after this, E. agreed with

as there was a double insurance on part of the property, insured by defts., & they were not estopped from setting up such further insurance by their agent's knowledge of it.—*SHANNON v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.* (1878), 2 A. R. 396.—*CAN.*

**h.** —.]—A party executed a trust-deed for behoof of creditors, which contained a power to appoint an agent & factor, but there was no power to appoint any of the trustees to the office. At the first meeting of trustees, A., the ordinary law-agent of the truster, who was nominated a trustee in the deed, was appointed agent & factor in the trust. Thereafter, at meetings of the trustees & truster, the accounts of the agent were submitted for consideration, & they were, down to a certain period, doctored & subscribed as correct, not only by the trustees but by the truster himself, who, as it appeared, knew generally of A.'s acting as agent in the trust:—*Held*: in the circumstances, the truster was not barred

from taking the objection, the alleged acts of acquiescence being done in ignorance of his legal rights.—*LAUDER v. MILLAR* (1859), 21 Dunl. (Ct. of Sess.) 1353; 31 Sc. Jur. 740.—*SCOT.*

—.]—Proprietrix of certain subjects handed the title deeds thereof to her law-agents, a nephew, at whose death it was discovered that he had utilised the title-deeds to obtain money for himself by means of a forged bond over the property. Previously proprietrix had asked another nephew, a brother of the law agent, to make inquiries, in the course of which he learnt that his brother had obtained money for himself on the security of his aunt's title-deeds. He refrained from communicating this to his aunt till after his brother's death, when she heard of the bond for the first time & at once repudiated her signature. In an action by her against the bondholders for reduction of the bond as a forgery & for delivery of the title-deeds, the defenders maintained that she had adopted the forged deed as

her own, or at least was barred by her actings from pleading that she had not adopted it:—*Held*: the knowledge of the nephew employed to make inquiries, which he had refrained from communicating, could not be imputed to the pursuer so as to bar her from subsequently repudiating the forgery.—*MUIR'S EXECUTORS v. CRAIG'S TRUSTEES*, [1913] S. C. 349; 50 Sc. L. R. 284; 1 S. L. T. 2.—*SCOT.*

**1.** — *Knowledge of broker.*—A. authorised a broker to buy shares for him, which the broker on Oct. 15 said he did: a transfer signed by the seller on Nov. 6, was afterwards signed by purchaser of same date, & retained by him, & the price paid by him to the broker. It afterwards turned out that the shares assigned were not those bought on Oct. 15, but others bought on Nov. 6, & that on Nov. 3, a call had been made on all the shares of the co., which fact had not been communicated to purchaser when he took the transfer, nor was he specially informed that the shares were not



D. as F.'s agent, for the purchase of F.'s interest on the policy, but this purchase was never carried out. Soon after this agreement D. informed E. that none of the incumbrancers would pay the premium for that year, & E., on the faith of his interest under the agreement, paid it. There was no evidence that D. had any authority to enter into any agreement on behalf of F., or that F. had any knowledge of the contract or of the payment by E. On the death of F. his extrix. brought an action to enforce the security, & the policy was sold for much less than the amount of the mtge. debt:—*Held*: E.'s belief that he had a valid contract for purchase, when he had not, did not give him any advantage as regarded the premium, as there was no evidence that F. knew of the alleged contract or of the payment of the premium, & on the evidence no request from F. to pay the premium could be inferred, & no equity could be held to have arisen against F. on the ground of acquiescence.—*FALCKE v. SCOTTISH IMPERIAL INSURANCE CO.* (1886), 34 Ch. D. 234; 56 L. J. Ch. 707; 56 L. T. 220; 35 W. R. 143; 3 T. L. R. 141, C. A.

*Annotations*:—*Mentd.* *Re Winn, Reed v. Winn* (1887), 57 L. T. 382; *Re Coventry & Nuneaton Tram. Co.* (1888), 4 T. L. R. 458; *Re Winchelsea's Policy Trusts* (1888), 39 Ch. D. 168; *Patten v. Bond* (1889), 60 L. T. 583; *Strutt v. Tippet* (1889), 61 L. T. 460; *Blyth v. Fladgate*, *Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 339; *Securities & Properties Corp'n. v. Brighton Alhambra* (1893), 62 L. J. Ch. 566; *Re Walker, Meredith v. Walker* (1893), 68 L. T. 517; *The Gas Float Whitton (No. 2)*, [1896] P. 42; *The Ripon City*, [1898] P. 78; *Keighley, Maxsted v. Durant*, [1901] A. C. 240; *Re National Motor Mail Coach Co., Clinton's Claim*, [1908] 2 Ch. 515; *Re McKerrell, McKerrell v. Gowan* (1912), 6 B. W. C. C. N. 153; *Re Phillips*, [1914] 2 K. B. 689; *Re Becket, Purnell v. Paine*, [1918] 2 Ch. 72.

**1283. — Conduct influencing third party.]—***SARAT CHUNDER DEY v. GOPAL CHUNDER LALA*, No. 1088, *ante*.

*See, further*, Sub-sect. 1, B. (f), *ante*.

#### (c) Particular Instances.

**1284. Consent to disposition of estate.]—**If a person consent to the disposition of an intestate's goods, & afterwards take out administration, he cannot maintain trover for them; for he is bound by his former consent.—*WHITEHAL v. SQUIRE*

those bought on Oct. 15. The price of the stock having fallen, purchaser refused to register himself as proprietor:—*Held*: the acceptance & signing of the transfer, & paying the price, did not infer acquiescence on purchaser's part in the purchase of of Nov. 6, in respect of his not being made acquainted with the fact of the call on Nov. 3, & that the shares were different.—*BLACK v. CULLEN* (1853), 15 Durl. (Ct. of Sess.) 646.—*SCOT*.

*m. Support of resolution by councillor—Ignorance of illegality.]—*A municipal council resolved to increase their overdraft, such increase being specially made to provide for the erection of a pavilion. A councillor, who had supported the erection of the pavilion & voted for the increased overdraft, applied for an interdict prohibiting further work on the pavilion, the erection of which had been proceeded with. He stated that at the time he voted for the increased overdraft he was not aware that the ratepayers, who had subsequently at a public meeting passed a resolution hostile to the scheme, were opposed to the project, nor was he then aware of the illegality of the method adopted of raising the necessary money:—*Held*: appct. was not, under the circumstances, estopped by his conduct from making the application.—*NEALE v. EAST LONDON MUNICIPALITY* (1913), 83 D. L. 297.—*S. AF*.

J.—VOL. XXI.

(1690), 3 Mod. Rep. 276; Carth. 103; Holt, K. B. 45; Skin. 274; 1 Salk. 295; 87 E. R. 183. *Annotations*:—*Reid*. *Mountford v. Gibson* (1804), 4 East, 441; *Mitchell v. Moorman* (1826), 1 Y. & J. 21; *Lacey v. Walrond* (1837), 3 Hodg. 215; *Morgan v. Thomas* (1853), 8 Exch. 302. *Mentd.* *Bailey v. Wilson* (1744), 9 Mod. Rep. 473; *Foster v. Bates* (1843), 13 L. J. Ex. 88.

**1285. —.]—**The mtgor. of a farm, by his will, devised the mortgaged property upon trust to allow his unmarried daughters to reside at & carry on the farm. In 1859, shortly after his death, the mtgees., in answer to inquiries made by them, were informed by the solr. of the exors. of the will that it was probable the daughters might carry on the farm; that the personal estate of the mtgor. had been valued, stating the amount, which was barely sufficient to satisfy the mtge. debts; & adding that the shares of the daughters therein would afford them sufficient means to carry on the farm. The solrs. of the mtgees. replied saying they should be glad to hear that the daughters were able to continue at the farm with comfort as well as advantage to themselves. The exors. proceeded to distribute the personal estate among the residuary legatees, including the daughters, who employed their shares in carrying on the farm, which they continued to carry on for over twenty years, duly paying to the mtgees. the interest on the mtge. In 1880 the interest ceased to be paid, & the mortgaged property proved insufficient to satisfy the amount due on the mtge. In 1885 the mtgees. brought an action against the residuary legatees to recover out of their shares of the assets of the mtgor. the amount due on the covenant in the mtge. for payment of the debt:—*Held*: the conduct of the mtgees. implied an assent on their part to the distribution of the personal estate among the legatees, & an intention to release their right to have it applied in satisfaction of their mtge. debt.—*BLAKE v. GALE* (1886), 32 Ch. D. 571; 55 L. J. Ch. 559; 55 L. T. 234; 34 W. R. 555, C. A.

*Annotations*:—*Consd.* *Re Eustace, Lee v. McMillan*, [1912] 1 Ch. 561. *Mentd.* *Re Fludyer, Wingfield v. Erskine*, [1898] 2 Ch. 562; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330.

#### 1286. Acquiescence in bankruptcy proceedings

#### PART VI. SECT. 3, SUB-SECT. 3.— C. (c).

**1284 i. Consent to disposition of estate.]—**The locus had been granted to pltf., whose father agreed to give him a deed of a property called S., provided pltf. would convey the locus to his sister, deft.'s wife. The father, to secure performance of this agreement, gave the deed of S. to his wife as an escrow, to be delivered to pltf. on his conveying the locus to his sister. A deed from pltf. to his father had been prepared in the latter's lifetime. After the father's death pltf. obtained the deed of S. from his mother, at the same time executing & delivering to her the deed to his father, on the understanding that in pursuance of the agreement he thereby resigned his title to the locus to his sister. The jury found for deft. Pltf. moved for a new trial:—*Held*: pltf. was estopped by his own acts from treating deft. as a trespasser.—*McKINNON v. McKINNON* (1852), 1 P. E. I. 59.—*CAN*.

*n. In validity of indorsement of bill of exchange by company.]—*It being desired to procure an overdraft from pltf. to a mining co., deft. & other directors agreed to lodge promissory notes of the shareholders as security for repayment. Deft. gave his promissory note to the co. payable to the co. or its order. The note was indorsed by two directors & the manager, &

with the seal of the co. In an action by pltf. as indorsees, against the maker:—*Held*: deft. was estopped from denying the competency of the co., to pass the property in the note by indorsement.—*BANK OF VICTORIA v. BROWN* (1875), 1 V. L. R. 47.—*AUS*.

*o. Acceptance of Crown grant without question.]—*A grantee of Crown lands, who has accepted the Crown grant without question for several years, cannot go behind the Crown grant nor adduce to show that it has a different meaning from that which it appears to have.—*GREEN v. COOKE* (1908), 9 S. R. N. S. W. 1.—*AUS*.

*p. In membership of organisation.]—*By the rules of an organisation it was provided that a candidate for admission should fill in a nomination form, pay an entrance fee, & should thereupon become a member. On proceedings in a ct. of petty sessions by the organisation to recover dues from deft. who was alleged to be a member the magistrate found that he, not having paid an entrance fee, was not a member:—*Held*: deft. was not estopped from denying that he was a member by an agreement by which he undertook to pay to the organisation a certain sum per fortnight off his arrears in addition to his ordinary contribution until his arrears had been cleared off.—*UNITED GROCERS TEA & DAIRY PRODUCE EMPLOYEES' UNION*

*Sect. 3.—By representation: Sub-sect. 3, C. (c).]*

—**By bankrupt.]**—*FLOWER v. HERBERT* (1751), 2 Ves. Sen. 326; 28 E. R. 210, L. C.

*Annotations:—*Refd. *Heane v. Rogers* (1829), 9 B. & C. 577; *Munk v. Clark* (1835), 5 L. J. C. P. 4.

**1287. — Soliciting votes of creditors for assignees.]**—If a trader, against whom a commission of bkpt. has issued, has acquiesced in it so far as to go to the different creditors, to solicit them to vote for particular persons as assignees, he cannot afterwards question the commission in an action for money had or received, against those persons, whether he is an object of the bkpt. laws or not.—*LIKE v. HOWE* (1806), 6 Esp. 20, N. P.

*Annotations:—*Distd. *Munk v. Clark* (1835), 2 Bing. N. C. 299. Refd. *Heane v. Rogers* (1829), 9 B. & C. 577; *Munk v. Clarke* (1833), 10 Bing. 102; *Freeman v. Cooke* (1848), 2 Exch. 654.

**1288. — By seeking protection from arrest.]**—(1) A bkpt. is precluded from disputing the commission against him, if he seek protection from arrest in consequence of that commission:

(2) Or if he apply for his certificate, even though he do not obtain it; for the application alone is an acquiescence under the commission.—*DENNETT v. KIRKPATRICK* (1826), 5 L. J. O. S. K. B. 67.

**1289. — Insisting on discharge from custody.]**—*Semble*: under 6 Geo. 4, c. 16, s. 59, a bkpt. in custody, by insisting on his discharge, previous to proof of a debt, does not estop himself from disputing the validity of the commission against him.—*MOTT v. MILLS* (1827), 3 C. & P. 197, N. P.

**1290. — Application for appointment of official assignees.]**—The fact of the supposed bkpt.'s applying to a comr. to appoint an official assignee for the purpose of protecting the property, is not a proof of the supposed bkpt.'s acquiescence in the commission, nor will it estop him from suing such assignee.—*MUNK v. CLARK* (1835), 2 Bing. N. C. 299; 2 Scott, 475; 5 L. J. C. P. 4; 132 E. R. 118; *previous proceedings* (1833), 10 Bing. 102.

*Annotation:—*Mentd. *Knight v. Turquand* (1836), 2 Gale, 187.

**1291. — Fiat superseded.]**—A party who has concurred in a former fiat that has been abandoned, is not thereby estopped from petitioning to supersede, by reason of his not being a trader.—*Re*

*EDWARDS, Ex p. EDWARDS* (1840), 1 Mont. D. & De G. 3; 9 L. J. Bcy. 11.

*Annotation:—*Mentd. *Re Stewart, Ex p. Stewart* (1849), 3 De G. & Sm. 557.

**1292. — Concurrence in sale of debtor's estate.]**—Debtors arranged with their creditors, appls., for the payment to them of 10s. in the pound by instalments, & to secure the payment of those instalments, they assigned all their estate & effect to trustees, to carry on the business until payment or until default in payment, of any instalment. The assignment provided, that if the proceeds of the trade were insufficient, the trustees were to convene a meeting of the creditors, & either to sell the estate & divide the proceeds, or wind up the estate in such manner as should be agreed on by three-fifths of the creditors. That arrangement was to be in satisfaction of the debts. The instalments were not all paid, & appls. concurred in a sale of the debtors' estate, after which the debtors obtained a certificate from the district comrs. under sect. 221 of Bkpcy. Law Consolidation Act, 1849 (c. 106). Appls. moved for an order to set aside that certificate, but failed:—*Held*: on appeal, the certificate was correct, & the appeal must be dismissed, appls. having by their own conduct precluded themselves from disputing the certificate.—*Re HARRISON, Ex p. FOSTER* (1860), 2 L. T. 481; 6 Jur. N. S. 664, L. JJ.

— **By creditor.]**—See *BANKRUPTCY*, Vol. IV., pp. 158 *et seq.*

— **By bankrupt.]**—See *BANKRUPTCY*, Vol. IV., pp. 337, 338, Nos. 3164, 3170.

**Acquiescence in act of bankruptcy.]**—See *BANKRUPTCY*, Vol. IV., pp. 126 *et seq.*, Nos. 1157–1198.

**Composition deeds—Position of creditors.]**—See *BANKRUPTCY*, Vol. V., pp. 1110 *et seq.*

**1293. Agreement with incumbent for compensation of tithes.]**—Where the occupier of land has entered into an agreement for a composition for tithes, he cannot set up as a defence to an action on such agreement, that the incumbent was simoniacally presented.—*BROOKSBY v. WATTS* (1815), 6 Taunt. 333; 2 Marsh. 38; 128 E. R. 1063.

**1294. Excess pay credited by army agent—Principal not notified after mistake discovered.]**—Where the paymaster of a regiment gave credit in a running account with an officer on a foreign

*OF VICTORIA v. LINAKER* (1916), 22 C. L. R. 176.—AUS.

q. *By candidate in irregular election.]*—*It. v. ADAMS* (circa 1850), 1 C. L. Ch. 203.—CAN.

r. *Assent to mortgage of cattle.]*—Pltfs., living with their father, assented to his mortgaging & delivering cattle to deft., as security for a debt due from him:—*Held*: in trover against deft., pltfs. were estopped from setting up title in the cattle.—*LYON v. PERKINS* (1852), 2 All. 375.—CAN.

s. *In sale & division of land.]*—It was doubtful whether pltf. took an estate in present under a deed or an estate in remainder after the death, of his father. If the latter. *Semble*: his acquiescence in the sale & division of the land during his father's life would not operate as an estoppel in pais.—*DOE v. BAXTER* (1855), 3 All. 232.—CAN.

t. *In demand for possession of land.]*—Deft. had been tenant to pltfs. at a yearly rent, payable quarterly, for a term which expired on June 1, 1859. About that time a new lease was agreed upon between them at an advanced rent, but none was executed owing to objections raised by deft. to the draft. Deft.

paid a year's rent, & another quarter having fallen due, pltfs. distrained, but they afterwards abandoned the proceeding, & on Sept. 17, 1860, pltfs.' attorney served a written demand of possession on deft., who told him that was just what he wished, & that pltfs. might have the place. He refused, however, to go at once with the attorney & give it up, saying that he wished first to remove some things. Nothing more was done, & pltfs., three weeks after having brought ejectment, deft., besides denying their title, claimed to hold as their tenant:—*Held*: pltfs. were entitled to recover, for deft., having denied their title could not insist upon notice to quit; & he was estopped by his offer to leave the place.—*CARTWRIGHT v. MCPHERSON* (1860), 20 U. C. R. 251.—CAN.

u. *In validity of patent.]*—During the existence of a licence, the licencor cannot dispute the validity of a patent obtained by him, & afterwards assigned by him for value to another.—*WHITING v. TUTTLE* (1870), 17 Gr. 454.—CAN.

a. —.]—The holder of patents for improvements in certain agricultural implements, agreed to assign to deft. the exclusive right to sell these implements, but not the manufacture them; &, in certain contingencies, he

also agreed to assign the patents themselves. In fact the patents were invalid, for want of novelty, & deft., having re-assigned any interest he had in the patents, claimed the right to manufacture the implements for his own benefit:—*Held*: owing to the agreement between the parties, & their dealings with each other thereunder, deft. was estopped from questioning the validity of the patents.—*GILLIES v. COLTON* (1875), 22 Gr. 123.—CAN.

b. *By heirs in continuance of deceased's business.]*—Heirs, being also next of kin, had been parties to the continuing of the business of deceased with his assets & those of his partner:—*Held*: they were precluded from objecting to payment by the estate of the losses incurred in continuing the business.—*LOVELL v. GIBSON* (1873), 19 Gr. 280.—CAN.

c. *Agreement by sheriff as to distrained property.]*—The sheriff, under pltf.'s execution, seized certain goods which had been distrained by a mtgee. Prior to the sale pltf. & the mtgee. agreed with the sheriff that he should sell the goods & hold the proceeds until it should be decided between pltf. & the mtgee. who was entitled to the same. After the sale the proceeds



station, for sums of money as increased pay & allowances to which, from a misconstruction of a general order, he supposed the officer was entitled & after having been apprised by the Board of Ordnance that such sums would not be allowed, suffered the officer to remain in ignorance of this fact for four years. In an action by the officer's personal representative, for pay remaining due:—*Held*: the paymaster was concluded by the account in which he had erroneously given credit for the increased allowances, & was not at liberty to set off the latter against the demand.—*SKYRING v. GREENWOOD* (1825), 4 B. & C. 281; 6 Dow. & Ry. K. B. 401; 107 E. R. 1064.

*Annotations*:—*Appld.* *Bate v. Lawrence* (1844), 2 Dow. & L. 83. *Consd.* *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603. *Distd.* *R. v. Blenkinsop*, [1892] 1 Q. B. 43. *Appld.* *Deutsche Bank (London Agency) v. Beriro* (1895), 73 L. T. 669; *Holt v. Markham*, [1923] 1 K. B. 504. *Refd.* *Higgs v. Scott* (1849), 7 C. B. 63; *R. v. Treasury Lords, Re Queen Dowager's Annuity* (1851), 20 L. J. Q. B. 305; *Cave v. Mills* (1862), 7 H. & N. 913; *Daniell v. Sinclair* (1881), 6 App. Cas. 181; *Miles v. Scotting* (1885), Cab. & El. 491; *Baker v. Courage* (1909), 101 L. T. 854. *Mentd.* *Parrott v. Anderson* (1851), 7 Exch. 93; *De Cordova v. De Cordova* (1879), 4 App. Cas. 692; *Vagliano v. Bank of England* (1889), 5 T. L. R. 489.

**1295. Lease granted in accordance with agreement.**—In 1804, A., tenant for life under a settlement with a power to grant leases for 21 years, concurred with B., the next tenant for life in an agreement to grant to the steward & solr. of A. a lease of part of the lands, etc., in settlement for 21 years absolute at a rent fixed upon a valuation, which omitted to estimate certain rights of common annexed to the lands, on the alleged ground that those rights were disputed by the copyholders of the manor. In 1809, B., having become tenant for life, on the death of A., executed a lease, according to the agreement.

In 1810, under an Act for inclosure of waste lands, a very large allotment of the waste was made, in respect of the lands leased, the rights of common having been admitted. B. died in 1816, when the reversion of the lands, subject to the lease, vested in C., who accepted the rent reserved till 1821, when he filed a bill to set aside the lease:—*Held*: the relief was barred by acts of confirmation & acquiescence.—*SELSEY v. RHOADES* (1827), 1 Bli. N. S. 1; 4 E. R. 774, II. L.

*Annotations*:—*Refd.* *Baker v. Read* (1854), 18 Beav. 398. *Mentd.* *Nicol v. Vaughan* (1832), 6 Bli. N. S. 104; *Nicol v. Vaughan* (1834), 7 Bli. N. S. 395; *Trevelyan v. Charter*

(1835), 4 L. J. Ch. 209; *Rudd v. Sewell* (1840), 4 Jur. 882; *Waters v. Shaftesbury* (1866), 14 L. T. 184; *Dunne v. English* (1874), L. R. 18 Eq. 524.

**1296. Application for discharge of debtor—Admission of debt.**—Where a party is in execution, & a third person engages that if he is discharged, he will have him forthcoming at any future period, in case it should appear necessary to pltf. to issue another execution, & an action is afterwards brought for the non-performance of such an agreement, deft. cannot set up the illegality of the first execution as an answer to the action.—*ATKINSON v. BAYNTUN* (1835), 1 Bing. N. C. 444; 1 Hodg. 7; 1 Scott, 404; 4 L. J. C. P. 127; 131 E. R. 1188.

*Annotation*:—*Mentd.* *Denton v. Godfrey* (1847), 11 Jur. 800.

**1297. Compromise on election of municipal officer.**—Where one, with a view to preserve peace, has been party to an arrangement for the election of another to a municipal office, the ct. will not allow him as relator, afterwards to question that election on *quo warranto*.—*R. v. JONES* (1837), as reported in Will. Woll. & Dav. 673; 1 Jur. 819.

*Annotation*:—*Mentd.* *R. v. Roberts* (1838), 7 Ad. & El. 433.

**1298. Concurrence in conditions of sale.**—Deft., who was an incumbrancer on an estate sold under the decree of the ct., & who had concurred in settling conditions of sale, describing such estate as to be sold free from incumbrances, was ordered to concur in carrying the sale into effect, & to execute the conveyance of the estate to the purchaser free from his incumbrance.—*TOMLIN v. HATFIELD* (1839), 9 L. J. Ch. 119.

**1299. Attendance of meetings of provisional committee—Knowledge of appointment of secretary.**—The secretary of a railway co., who had previously been a member of the provisional committee:—*Held*: entitled to maintain an action for his services as secretary against another committeeman, who having become so whilst pltf. was a member of the committee, continued to act after pltf. had been to his knowledge appointed secretary, & attended meetings at which pltf. had acted in that capacity.

Deft. is estopped by his own acts. Pltf.'s name was left out of the prospectus as a committeeman, & inserted as a secretary. Deft. continued a committeeman, knew of the alteration, &

were claimed by the mtgee., pltf., & by two prior execution creditors:—*Held*: the sheriff, after making such agreement, was not entitled to an interpleader order.—*BOSWELL v. PETTINGREW* (1878), 7 P. R. 393.—CAN.

**d. Verbal consent to sale by mortgagor.**—A chattel mtge. contained a proviso that in case the mtgor. should attempt to sell, etc., the mortgaged goods, or any of them without the mtg e.'s written consent, the mtgee. might enter & take the goods. The mtgor., without such written consent, sold a pair of horses, part of the mortgaged goods, to pltf., when deft., the mtgee., entered & took them, & after keeping them for four days returned them to pltf., who was not subsequently disturbed in his possession. Pltf. having sued deft. for the taking:—*Held*: he was entitled to recover, for the evidence, as set out in the case, showed that deft. either verbally consented to the sale or acted in such a manner as estopped him from denying that the property passed to pltf.—*LOUCKS v. MCSLOY* (1878), 29 C. P. 54.—CAN.

**e. Treating road as public highway.**—On an application to quash a bye-law closing up a road:—*Held*:

it was not open to appct. to object that the road in question was a private way over one C.'s land, because appct. himself had treated it as a public highway, & had caused C. to be convicted several times for obstructing it.—*Re VASHON & TOWNSHIP OF EAST HAWKESBURY* (1879), 30 C. P. 194.—CAN.

**f. Registrar receiving statutory fees—Estopped from denying purpose.**—In a suit against a registrar by a municipal corpn. for the proportion of fees to which the corpn. was entitled under R. S. O. 1877 (c. 111):—*Held*: having received the money in question under the above Act he could not deny that he received it for the purposes therein provided.—*HASTINGS COUNTY v. PONTON* (1880), 5 A. R. 543.—CAN.

**g. Attendance at illegal meeting.**—*Held*: the fact that pltf. had attended a meeting which had been illegally called, & had entered upon a defence before the council, did not preclude him from afterwards filing a bill impeaching the proceedings as irregular & invalid.—*MARSH v. HURON COLLEGE* (1880), 27 Gr. 605.—CAN.

**h. Adoption of corrected Crown survey indicating boundary in dispute.**—In a dispute between adjoining

proprietors as to boundaries:—*Held*: an owner who adopted a corrected survey made by the Crown by filing a plan indicating the boundary in dispute as therein laid down, was estopped as against his adjoining proprietor from setting up any other boundary.—*JOHNSTON v. CLARKE* (1884), 1 B. C. R., pt. 2, 56.—CAN.

**k. In validity of bye-law.**—Municipality estopped from denying the validity of a bye-law, which through inadvertence was not sealed or signed, for purchasing a road, which they dealt with as their own property, & subsequently passed a bye-law divesting themselves of the road.—*R. v. PERTH CORPN.* (1884), 6 O. R. 195.—CAN.

**l. —.**—The persons applying to quash a bye-law incorporating a portion of a township as a village had all voted at the municipal elections holden for the village as incorporated by the bye-law in question. One of them had been a candidate for the office of reeve, & another had been elected to the school board, but none of them had in any way promoted the passing of the bye-law, or had any part in the taking of the census objected to:—*Held*: appctas. were not estopped from moving to quash



**Sect. 3.—By representation: Sub-sect. 3, C. (c).]**

attended meetings after it had been made (PATTE-SON, J.).

I never thought that the question of partnership liability arose. I thought that deft. had bound himself by his own acts (COLERIDGE, J.).—DAY v. SHARP (1846), 7 L. T. O. S. 62.

**1300. Consent to taxation of costs on particular scale.]**—Deft. who procures a cause under £20 to be tried at the assizes, instead of before the sheriff, by consenting that the costs shall be taxed on the higher scale in case pltf. succeeds, cannot afterwards have leave to enter a suggestion to deprive pltf. of costs, upon showing that the action ought to have been brought in the county ct. But generally, where the case was clearly within the jurisdiction of the county ct., *qu.*: whether the ct. has any jurisdiction to refuse the suggestion.—GOSLING v. CONDER (1850), Rob. L. & W. 285; Cox, M. & H. 331; 19 L. J. Q. B. 323; 15 L. T. O. S. 141; 14 J. P. 369.

**1301. Moving resolution for promotion of Parliamentary Bill.]**—A local Act gave a right of appeal against any order of the comrs. to any person aggrieved by it. At a meeting of ratepayers it was resolved that the comrs. be empowered out of the town funds, raised under the Act, to prosecute an application to Parliament for a local Act. The application failed. The comrs. made an order for the payment of the expenses out of the town funds. The mover of the resolution empowering the comrs. to promote the bill appealed as a ratepayer against this order:—*Held*: he was precluded from appealing as aggrieved by an Act which he had sanctioned.—HARRUP v. BAYLEY (1856), 6 E. & B. 218; 25 L. J. M. C. 107; 2 Jur. N. S. 882; 119 E. R. 845; *sub nom.* R. v. HARROSS, 4 W. R. 461.

**1302. Restitutio in integrum rendered impossible.]**—Where a director avails himself of his position to make a private advantage out of transactions with his co., such transactions cannot be repudiated by the co. after they have, with knowledge of them, put it out of their power to restore matters to their original position.—GREAT LUXEMBOURG RY. CO. v. MAGNAY (No. 2) (1858), 25 Beav. 586; 31 L. T. O. S. 293; 4 Jur. N. S. 839; 6 W. R. 711; 53 E. R. 761.  
*Annotations*:—**Consd.** Bank of London v. Tyrrell (1859),

the bye-law.—*Re* FENTON v. SIMCOE COUNTY (1885), 10 O. R. 27.—**CAN.**

**m. In site for building.]**—On a motion for injunction by W., a ratepayer, against a town corpn. to restrain them from paying money to A. for a site for a post office, it was shown that a vote of the ratepayers had been taken as to which of two sites, one owned by the town & the other by A., should be chosen, that W. had taken an active part in support of the one owned by the corpn., & the majority of ratepayers had voted for the other. It was contended that W. was estopped by his conduct from maintaining the suit. W. having denied that he was aware that the site chosen was to be paid for by defts., & no sufficient proof of that fact having been given:—*Held*: he was not estopped.—WALLACE v. ORANGEVILLE TOWN (1884), 5 O. R. 37.—**CAN.**

**n. Creditor assenting to aid assignee in winding up estate—Estopped from denying validity of assignment.]**—A creditor attended a meeting of creditors after the execution of a deed of assignment, & assented to be appointed an inspector to aid the assignee in winding up the estate:—*Held*: he was estopped from afterwards denying

the validity of the assignment.—GARDNER v. KLOEPFER (1885), 7 O. R. 603.—**CAN.**

**o. In mistake.]**—The ct. refused to open up a rule alleged to have been made under a mistake, which had been acquiesced in for seven years.—*Re* GREENWOOD ESTATE (1891), 23 N. S. R. 262.—**CAN.**

**p. Acceptance of invalid shares in ignorance of ground of invalidity.]**—The acceptance of invalidity issued shares in ignorance of the ground of invalidity, & the subsequent sale of some of the shares so accepted, will not preclude repudiation.—TWIGG v. THUNDER HILL MINING CO. (1893), 3 B. C. R. 101.—**CAN.**

**q. In incapacity of party contracting.]**—A man cannot set up the incapacity of the party with whom he contracted in bar of an action by that party for breach of the contract.—MANITOBA MORTGAGE & INVESTMENT CO. v. DALY (1895), 10 Man. L. R. 425.—**CAN.**

**r. In injury to land.]**—A dam was constructed above the female pltf.'s land by defts. for the purpose of driving their logs, with the result that the stream widened its banks

27 Beav. 273. *Refd.* Kimber v. Barber (1872), 8 Ch. App. 16; Ladywell Mining Co. v. Brookes, Ladywell Mining Co. v. Huggons (1886), 55 L. T. 284.

**1303. Recognition of settlement of property under decree of court.]**—In 1813 a decree was made establishing the will of A., & referring it to the master to settle the proper deed to be executed by the trustees for the purpose of carrying into execution the directions of testator. The master, by his report in 1815, approved a settlement in which, although the will left the reversion of testator's real estates undisposed of, the reversion was limited to testator's two daughters, in equal moieties, according to their appointment. The matter was at the time fully brought to the attention of the trustees, & all the parties interested. The ct. directed the settlement to be executed by all proper parties, & it was accordingly executed by the trustees, & testator's two daughters, of whom C. was a married woman, no fine being levied, & D. had just attained 21. In 1882, C., in exercise of the power of appointment, purporting to be reserved to her by the settlement, appointed her moiety, to her husband, M., & died without having levied a fine, & without issue. Shortly after C.'s death, in 1822, D., by a codicil, in exercise of the powers under her father's will & the settlement, expressly confirmed the appointment made by C., & by a subsequent deed of Jan., 1823, which also recited the settlement, she gave to M., during her lifetime, the rents of C.'s moiety. These deeds were executed by D. acting under the advice of her own solr., & after she had left M.'s house, where she had previously resided. In 1834, D. married, & then, after taking legal advice, adopted the opinion that as the reversion had not been disposed of by the will, the limitation of it in the settlement was wrongly inserted, & the appointment by C. ineffectual. Deeds were executed for the purpose of enabling D. to deal with the entire reversion, which by her will in 1854, she appointed to her husband, N. After presenting a petition of re-hearing in 1855, which was directed to stand over until he had established by independent proceedings his title to relief, N., in 1857, filed a bill for the purpose of fastening a trust upon the legal estate of C.'s moiety, & avoiding the decree & settlement of 1815, so far as it affected to deal with the reversion of A.'s real estates:—*Held*: although the limitation of

where it flowed through pltf.'s property & caused injury to it. Pltf.'s husband had assisted in building the dam as an employee of defts., & at the time was the owner of the land now owned by pltf.:—*Held*: pltf.'s were not estopped from seeking to restrain by injunction further injury to the property & claiming damages for the injury done.—MITTEN v. WRIGHT (1895), 1 N. B. Eq. Rep. 171.—**CAN.**

**s. In misconduct of trustee.]**—Funds held by F. as trustee for C., were misappropriated by being deposited with the firm of F. F. & Co., of which F. was a member, & after being so kept on deposit for a period of upwards of six years, were lost in consequence of the failure of the firm. In an action against defts., who were sureties for F., to compel them to make good the funds so misappropriated & lost, the defence relied upon the knowledge of the misappropriation on the part of C., which knowledge was sought to be shown by the fact that payments of interest were made to C., from time to time, by cheque of the insolvent firm:—*Held*: knowledge on the part of C. that some part of the trust fund had been placed

the reversion contained in the settlement of 1815 was not authorised by A.'s will, it had been agreed to & inserted by all parties upon a deliberate family agreement; it had been distinctly recognised, adopted, & confirmed, by the deliberate & well informed acts of D.; & arrangements having been made & sanctioned upon the faith of the validity of the settlement & the limitations therein contained, D. had precluded herself from in any way questioning that family agreement which was so fully evidenced by her own acts, still less could those claiming under her succeed after a lapse of 23 years in fastening any trust in their favour upon the moiety appointed by C. to M.—*HEAD v. GODLEE, REYNOLDS v. GODLEE* (1859), John. 536; 29 L. J. Ch. 633; 6 Jur. N. S. 495; 8 W. R. 141; 70 E. R. 534.

*Annotations* :—*Mentd.* *Curtis v. Wormald* (1878), 10 Ch. D. 172; *Wise v. Piper* (1880), 41 L. T. 794.

**1304. Transfer of contract for work & supply of materials.]**—Where a contract to supply work & materials has been transferred, & the party entitled to the benefit of the contract has acquiesced in the transfer; & suffered the work to be completed by the transferee, such party cannot refuse payment on the ground of the informality or insufficiency of the act of transfer.—*FALLE v. LE SUEUR & LE HUGUET* (1859), 12 Moo. P. C. C. 501; 7 W. R. 707; 14 E. R. 1002, P. C.

**1305. By taking part in proceedings.]**—B. assigned a policy on his own life, effected in an insurance office having offices both in England & Scotland, to D. as a security for moneys advanced; & notice was given to the office of the assignment. B. & D. were both resident & carried on business in London; but the former had also a place of business in Scotland, where his estate became sequestered, & E. F. was appointed trustee for his creditors. On the death of B. proceedings were instituted in Scotland by F. against D. for an account; & he also sued out a writ of arrestment *jurisdictionis fundandæ causa* to attach the monies secured by the policy in the hands of the insurance co. D. appeared in this suit, but, before putting in any answer, commenced proceedings in chancery in England against F. & the insurance co. An order was made, on motion in this suit, in which F., the trustee, appeared, that the money should be paid into ct., but without prejudice to the Scottish proceedings. On motion

for decree, however, D. was declared entitled to a lien on the policy, & an account was directed to be taken of what was due to him under his assignment. The parties attended before the chief clerk, who, by his certificate, found that the sum due to D. exceeded the amount payable under the policy :—*Held* : the fund in ct. should be paid to D.

M., instead of immediately appealing against it [the decree] went before the chief clerk in obedience to it . . . whether or not he gave evidence before the chief clerk, he must be considered as having acquiesced in the inquiry; & the inquiry having taken place, if not with his sanction, at any rate without the resistance which might have been opposed to it . . . I think he cannot now be permitted to contend that the inquiry was improper (*LORD CAMPBELL, C.*).—*VENNING v. LOYD* (1859), 1 De G. F. & J. 193; 29 L. J. Ch. 152; 1 L. T. 277; 6 Jur. N. S. 81; 8 W. R. 117; 45 E. R. 332, L. C. & L. JJ.

*Annotations* :—*Mentd.* *Steele v. Stuart* (1863), 3 New Rep. 291; *Martin v. Powning* (1869), 4 Ch. App. 356.

**1306. Payment of income on share of property—Whether admission of right proportionate share of capital.]**—Testator directed that an estate should be settled on T. for life, with remainder to his sons successively in tail, remainder to his daughters successively, in tail, & that the settlement should contain a power to T. to charge the estate with any sum not exceeding £2,000 for the portions of his younger children. T. by deed charged the estate with the sum of £2,000 for the portions of his younger children, to be raised within three months after his decease, & to be equally divided between them. There were five younger children, daughters, two of whom died in T.'s lifetime minors & unmarried, another attained 21 & died in his lifetime, & two attained 21 & survived him. On the death of the father a moiety of the £2,000 was paid to one of the two surviving daughters, & interest on the other moiety was paid to the other surviving daughter for more than thirty years :—*Held* : this did not estop the owners of the estate from denying her right to receive so much as a moiety of the capital.—*REMNANT v. HOOD* (1860), 2 De G. F. & J. 396; 30 L. J. Ch. 71; 3 L. T. 485; 6 Jur. N. S. 1173; 45 E. R. 674, L. JJ.

*Annotations* :—*Mentd.* *Davies v. Huguenin* (1863), 1 Hem. & M. 730; *Henty v. Wrey* (1882), 21 Ch. D. 332.

by the trustee temporarily with F. F. & Co., awaiting investment on good security, would not be held to be knowledge, assent or acquiescence by C. in the misconduct of the trustee which led to the loss of the funds.—*BAYNE v. EASTERN TRUST CO., LTD.* (1897), 28 S. C. R. 606.—CAN.

**t. Items of accounts passed at partnership meetings.]**—A mining partnership is estopped from denying its legal liability for items of accounts passed at meetings of the partnership.—*GRAY v. MCCALLUM* (1897), 5 B. C. R. 462.—CAN.

**a. Abandonment of property—Acquiescence & voluntary execution of judgments.]**—Defts. severally contested a demand for judicial abandonment, on the ground that they were not partners. The judgments appealed from declared them to be partners. They then abandoned their property under reserve of exception taken to the judgments & of their recourse by appeal to the Supreme Ct. of Canada, & declared that the abandonment was consented to under these reserves & in order to avoid a *capias*, penalties, trouble, & costs. After a curator had been appointed, & while the estate was being realised & distributed, they

commenced proceedings for appeals to the Supreme Ct. of Canada. On motions to quash the appeals :—*Held* : the abandonment made was an acquiescence & voluntary execution of the judgments in question, & estopped defts. from further appeal, except on the question of costs.—*SCHLOMANN v. DOWKER* (1900), 20 C. L. T. 271; 30 S. C. R. 323.—CAN.

**b. Acceptance & registration of conveyance of land according to registered plan—Estoppel from objecting to validity of plan.]**—It is not open to deft., who has accepted & registered a conveyance of land according to a registered plan, to afterwards object, in an action respecting the title to the same land, to the validity of that plan.—*FOWLER v. HENRY* (1903), 10 B. C. R. 212.—CAN.

**c. Admission of prior contract of sale.]**—T. offered to purchase lands which the municipality had bid in at tax sale, & to pay therefor the amount of the arrears of taxes & costs. The council resolved to accept "the amount of taxes, costs & interest" against the lands & authorised the reeve & clerk to issue a deed at that price. An instrument, which was never delivered to T. was executed by the reeve &

clerk of the municipality, in the statutory form of conveyance upon a sale for taxes, reciting the above resolution, but without a reference to any contract in pursuance of the resolution, & about two months after the passing of the resolution upon receipt of another offer for the same lands, the council resolved to intimate to the person making the second offer "that the lot had been sold to T." :—*Held* : these circumstances could not be relied upon as an admission of a prior contract for sale.—*NORTH VANCOUVER DISTRICT v. TRACY* (1903), 34 S. C. R. 132.—CAN.

**d. Acceptance of instalment under beneficiary certificate.]**—Action on a beneficiary certificate dated Oct. 19, 1896, issued by defts., who were incorporated under the Benevolent Societies Act, 1877 (c. 167), to pltf., conditioned that he should comply with the constitution, rules, or orders governing, "or that might thereafter be enacted by defts. to govern, the order & its benefit funds," & by which defts. agreed that, on pltf. attaining the age of seventy, which he had done, they would pay out of the total disability fund, "in accordance with the laws governing such fund," sums



*Sect. 3.—By representation: Sub-sect. 3, C. (c).]*

**1307. Estates treated as merged over series of years.]**—Where circumstances lead to the conclusion that a merger, either equitable or legal, has taken place, but for a series of years the estates thus merged have been treated as existing, in a suit, all parties concurring, with the sanction & under the direction of the ct., they are precluded not only from disturbing what has been done, but from saying that it was not rightly done.—*BRANDON v. BRANDON* (1861), 31 L. J. Ch. 47; 5 L. T. 339; 9 W. R. 825.

*Annotation:—Consd. Thellusson v. Liddard*, [1900] 2 Ch. 635.

**1308. Membership of company acquiring business of former company—Whether estopped from disputing novation by creditor of former company.]**—A co. with limited liability was formed to carry on business of a previously existing bank with limited liability & the assets of the bank were handed over to the co., & the business was thenceforward carried on in the name of the co., which name differed but slightly from that of the bank. J. was a creditor of the bank in respect of a deposit at interest. No notice of the transfer of the business was sent to J., but the interest on his deposit was, in two successive half-years after the transfer, sent by the co. to J.'s agents, & this payment was accepted by them. The co. then stopped, & was ordered to be wound up. The letters in which the interest was sent to the agents were headed with the name of the co., & spoke of the deposit being with them. J. carried in a claim for his deposit against the co., & his claim was admitted by the official liquidator, & included in the chief clerk's certificate of the debts, & a dividend of 10s. in the pound was paid upon it. H. a contributory of the co., afterwards moved to have J.'s claim expunged:—*Held*: (1) J. had never accepted the co. as his debtors, & his claim must be expunged; (2) H. was not estopped by reason of his knowledge of the objects for which the co. was formed, & of the fact that the assets of the bank were handed over to the co. from disputing the claim of J.—*Re COMMERCIAL BANK CORPN. OF*

not exceeding a certain amount:—*Held*: pltf. was not estopped from insisting that the whole of the benefit was due, by reason of having accepted a cheque expressed to be for the full amount of the first instalment.—*DOIDGE v. ROYAL TEMPLARS OF TEMPERANCE* (1904), 22 C. L. T. 321; 4 O. L. R. 423; 1 O. W. R. 485.—CAN.

**e. Occupation of uncompleted house.]**—The occupation of an uncompleted house by the owner & the mortgaging of it for a sum to be paid to the contractor in accordance with one of the terms of the contract do not estop the owner from setting up against the lienholder that the house has not been completed & that, consequently, no more money is due under the contract.—*BLACK v. WIEBE* (1905), 15 Man. L. R. 260.—CAN.

**f. Agent associating himself with parties purchasing property—Estopped from claiming remuneration.]**—Pltf., agent of defts. for sale of property, having elected to associate himself with the parties who were proposing to purchase the property:—*Held*: he was estopped from claiming remuneration from defts. in connection with the sale made subsequently.—*FLEMING v. WITHROW* (1906), 38 N. S. R. 492; 1 E. L. R. 6.—CAN.

**g. Acceptance of part share of proceeds of sale of stock—No estoppel from claiming full share without proof**

*of compromise.]*—In an action to recover a balance alleged to be due for sales of stock in a co. of which pltf. & deft. were joint promoters, it was found by the trial judge, that an agreement was entered into between them for the sale of 50,000 shares of stock, & for an equal division of the proceeds after paying commissions, etc. Pltf.'s version of the transaction was supported by two letters written by deft., indicating a recognition on his part of the arrangement that the sales of stock & divisions of the proceeds were to be in equal proportions. In response to a demand made by pltf. for an account of sales, in which he credited himself with the larger proportion of the shares sold, & after deducting former payments, showed a balance in favour of pltf. of \$1,636.51, for which his cheque was handed to pltf.'s solrs. who gave their receipt therefor:—*Held*: in the absence of evidence to show that the amount so paid was paid or accepted as a compromise or settlement of their differences, pltf. was not estopped thereby from claiming payment of his full share of the proceeds of stock sold in accordance with the agreement.—*FLEMING v. HAYES* (1907), 42 N. S. R. 164; 4 E. L. R. 185.—CAN.

**h. Resolution of city council to reconvey lands.]**—After defts., a municipal corporation, had become purchasers of lands, within the city, sold

INDIA & THE EAST, JONES'S CLAIM (1868), 18 L. T. 668; 16 W. R. 958, L. JJ.

*Annotations:—As to (2) Reid. Re Smith, Knight, Ex p. Gibson* (1869), 4 Ch. App. 662. *Generally, Mentd. Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32.

**1309. Recognition of beneficial ownership of charity.]**—Where a charity had been in the undisputed enjoyment of property as beneficiaries for a long period of time, & during that time the persons in whom the legal estate was vested, by various acts & declarations, acknowledged the title of the charity as beneficial owners thereof:—*Held*: the parties in whom the legal estate was vested were estopped from setting up a title in themselves as beneficial owners of the estates adverse to the charity.—*A.-G. v. MERCERS' CO.* (1870), 22 L. T. 222; *sub nom. A.-G. v. MERCERS' CO., Re ST. PAUL'S SCHOOL*, 18 W. R. 448.

**1310. Acquiescence in user of way.]**—By indenture of lease of Sept. 23, 1878, A. demised to B. a public-house, "together with all ways, paths & appurtenances whatsoever to the said premises belonging or in any wise appertaining." At the rear of the premises, was a path across the garden to a doorway in the boundary wall which opened on to a private road, the property of A. On Oct. 1, 1878, A., pursuant to an agreement of Nov. 1867, granted to deft. a lease for 99 years of land which comprised the private road, & on Oct. 9 in that year deft. built up the doorway in the boundary wall. This way had, by special agreement between himself & his lessor [deflt.], for several years been used by H. a former tenant of the public-house whose tenancy had been determined in June, 1878:—*Held*: the way in question not being a way of necessity, did not pass to B., by the general words in the lease of Sept. 1878; & deflt. was not estopped from denying the existence of the alleged right of way by having allowed H. to use it whilst he was the occupier of the public-house.—*BRETT v. CLOWSER* (1880), 5 C. P. D. 376.

*Annotation:—Mentd. Angel v. Jay*, [1911] 1 K. B. 666.

*See, generally, EASEMENTS, Vol. XIX., pp. 53 et seq.*

**1311. Unlawful deductions from wages.]**—Pltf. was in the employment of defts., & on entering

for arrears of overdue taxes, & had obtained a certificate of title therefor, a resolution of the city council was passed agreeing that the land should be reconveyed to the former owner on payment of the taxes in arrear with interest & costs:—*Held*: defts. were not bound by the resolution, as the reconveyance of the lands could be made only under the authority of a bye-law as provided by the city charter.—*PONTON v. WINNIPEG CITY* (1908), 41 S. C. R. 18.—CAN.

**k. In validity of issue of shares.** A co. which has no power to draw, make, or indorse negotiable instruments, & nevertheless sells its own shares & takes promissory notes in payment thereof, which it indorses to a holder on due course, is estopped from denying that such shares were validly issued.—*MERCHANTS BANK OF CANADA v. MCLEOD* (1910), 15 B. C. R. 290.—CAN.

**l. In non-registered lease.]**—Where deflt., in ejectment proceedings, had accepted a lease from pltf. which was not registered:—*Held*: such lease was valid between the parties, & an estoppel could be raised upon it as against a mtge. subsequently made by deflt. & registered.—*YEO v. AHEARN* (1912), 12 E. L. R. 73.—CAN.

**m. In conventional line as boundary.]**—Elements of estoppel are supplied by evidence showing that former adjoining owners agreed upon



their service she signed an agreement by which she bound herself to conform to all the rules & regulations of the firm. One of the rules was that all the employees were to become members of the sick & accident club, & the rules of the club provided for a weekly subscription to the club funds proportioned to the wages of each contributor. A deduction was accordingly made each week from pltf.'s wages, & paid over to the fund. On leaving defts.' service pltf. sued to recover the amount of such deductions except so much as represented her contributions for medicine or medical attendance:—*Held*: the agreement signed by pltf. could not, by reason of the Truck Acts, be vouched by defts. to justify the deductions or as an authority by pltf. to pay the contributions on her behalf to the fund, but pltf. was precluded by her acquiescence in such payment from recovering the amount from defts.—*HEWLETT v. ALLEN & SONS*, [1892] 2 Q. B. 662; 62 L. J. Q. B. 9; 67 L. T. 457; 57 J. P. 260; 41 W. R. 197; 8 T. L. R. 793; 36 Sol. Jo. 730; 4 R. 77, C. A.; *affd.*, [1894] A. C. 383, H. L.

*Annotations*:—*Mentd.* Phillips v. London School Board, Cockerton v. Same, [1898] 2 Q. B. 447; Williams v. North's Navigation Collieries (1889), Ltd., [1906] A. C. 136.

**1312. Registration of assignment of premises—Nature of user of premises described in register.]—***Re SUMMERSON, DOWNIE v. SUMMERSON* (1899), [1900] 1 Ch. 112, n.; 69 L. J. Ch. 57, n.; 81 L. T. 819, n.

*Annotations*:—*Refd.* Hepworth v. Pickles, [1900] 1 Ch. 108. *Mentd.* Greenhalgh v. Brindley, [1901] 2 Ch. 324.

**1313. Conduct of second mortgagee conducing to further advance by first mortgagee—Estoppel as to priority.]—**In 1893 real property was conveyed to a bank by a customer, an ironfounder, to secure an account already opened & on which money was then due, the amount thereby secured being limited to £2,500. The bank then held securities to the amount of £1,000 in respect of the overdraft. In 1895 the same property was mortgaged by the customer to his sister to secure £3,500. That mtge. was made subject to the bank's mtge. The bank, on receiving notice of the second mtge., did not open a new account, but continued the current account as before.

& built a fence dividing the properties upon a line which indicated clearly that the adjoining owners being uncertain of the line had a surveyor run it out & by mutual consent built the dividing fence on the uncertain line indicated by the surveyor's stakes; that afterwards this fence was renewed by the parties, pltf. & deft., & those under whom they claimed, & that the fence so renewed was treated as the dividing line, & that pltf. built a wall on his side of the line by reason of such conventional line.—*JOLLYMORE v. ACKER* (1915), 49 N. S. R. 148.—*CAN.*

n. —.]—A conventional line made between adjoining land proprietors & used for or as a division of fields, use of timber, right of cattle to water, etc., obtains its validity as constituting an estoppel, & as evidence of the interpretation the parties put on their rights.—*KANEEN v. MELLISH* (1922), 70 D. L. R. 327.—*CAN.*

o. *In transfer of shares.]—*The action of directors in allowing the transfer of shares, making entries in the books & issuing to the transferee a certificate under the seal of the co., creates an estoppel against the co. which is binding on the liquidator.—*COMMERCIAL LOAN & TRUST Co. v. MACAW*, [1922] 3 W. W. R. 1129; 3 C. B. R. 373; [1923] 1 D. L. R.

744; 32 Man. L. R. 413.—*CAN.*

p. *In illegality of partnership.]—*A member of a partnership, illegal on account of non-registration, is estopped from raising the question of illegality in an action by the firm against him for money had & received.—*TUNG SANG WING FIRM v. CHOW CHUN KIT* (1910), 5 Hong Kong L. R. 238.—*HONG KONG.*

q. *Adoption of valuation.]—*A deft. to a suit, having adopted a certain valuation, cannot in the same suit object to that valuation.—*KRISTO INDRO SAHA v. HUROMONEE DOSSEE* (1873), L. R. 1 Ind. App. 84.—*IND.*

r. *Invoking jurisdiction of court.]—*Where a ct. on the application of a decree-holder made an order for execution, & such order was set aside, on appeal, on the ground that such ct. had no jurisdiction to entertain the application:—*Held*: the decree-holders, having invoked the jurisdiction of the ct., was estopped from calling in question an order subsequently passed by it, directing him to refund a sum realised under the order for execution.—*GOVIND VAMAN v. SAKHARAM RAMCHANDRA* (1878), I. L. R. 3 Bom. 42.—*IND.*

s. *Assent to delivery order.]—*A. contracted to buy from B. & Co. 180,000 bags for cash on delivery. Subsequently C. agreed with A. to

The customer thereafter paid moneys in to his account, which, if they had been appropriated in accordance with the rule in Clayton's Case, would have discharged on or about Jan. 6, 1896, the whole of the debt due to the bank on their security at the date of the notice. He also from time to time paid moneys in specifically to meet particular cheques. The bank persistently declined to allow him, even temporarily, to exceed the overdraft of £3,500, unless further securities were deposited for any excess, the second mtge. being once at least deposited for that purpose. His sister's husband, a solr., acted for him in the dealings with the bank & also had the entire management of his own wife's affairs, & acted as her agent in connection with her mtge. In 1899, the customer being insolvent, the bank sold the mortgaged property. The purchase money was only just sufficient to satisfy their debt, & was retained by the bank without any objection on the part of the second mtgee. The bank, also, at the request of her husband released a guarantee of £2,000 given to them by a brother of their customer in respect of the latter's account, & thereby the second mtgee. was released from a sub-guarantee of £1,000 given by her to her brother. In 1905 she commenced an action against the bank for (*inter alia*) an account on the footing that they were not entitled to the benefit of the security for advances made to their customer after notice of her mtge.:—*Held*: by her conduct in respect of the release of the guarantee pltf. was not estopped from denying the priority of the bank's mtge.

I concur with the Master of the Rolls in thinking that this course of dealing, having taken place as it did, & under the circumstances in which it did, cannot estop the Deeleys from relying on the acquisition of priority by their mtge. (*LORD ATKINSON*).—*DEELEY v. LLOYDS BANK, LTD.*, [1912] A. C. 756; 81 L. J. Ch. 697; 107 L. T. 465; 29 T. L. R. 1; 56 Sol. Jo. 734, H. L.; *revsd.*, [1910] 1 Ch. 648, C. A.

*Annotation*:—*Mentd.* Galula v. Pintus (1911), 104 L. T. 574.

—, generally, MORTGAGE.

**1314. Voluntary payment of insurance policy—Whether admission of liability on similar policy.]—**

advance R15,000 against 87,500 bags. B. & Co. gave delivery orders to A. although the goods remained unpaid for. A. then endorsed certain of the delivery orders over to C. On these orders the agents of B. & Co., at the request of A. wrote the following words: "The bearer of this will personally take delivery of each lot as required." C. took delivery of 50,000 bags, but B. & Co. refused to deliver to him the remainder on the ground that A. had not paid them according to the terms of his contract:—*Held*: although there had been no actual appropriation of any goods to A., yet as B. & Co., by their agents, had consented to the transfer, & had thereby induced C. to advance R15,000 on the delivery orders being endorsed & made over to him, it was not now open to them to repudiate the transfer, which they had, through their agent, been the means of confirming.—*GANGES MANUFACTURING Co. v. SOURJUMULL* (1880), I. L. R. 5 Calo. 669; 5 C. L. R. 533.—*IND.*

t. *Mortgagee accepting part of proceeds of former sale.]—*On Feb. 10, 1873, one S. mortgaged to pltf. an undefined one *biswa* share out of three *biswas* owned by him. On Mar. 20, 1877, J. & G. brought to sale, in execution of money decrees against S., two out of those three *biswas*, which two *biswas* were purchased by deft.

Sect. 3.—By representation: Sub-sect. 3, C. (c).]

By a policy of re-insurance, underwritten by deft., pltf. were insured against damage to plate glass caused directly by or arising from civil commotion or rioting. During the currency of the policy a large number of women in different parts of London simultaneously broke windows with hammers. Each woman, when arrested, went quietly to the police station; there was no disturbance in the street, & no public sympathy was shown for the women who broke the windows. No one of the women was charged with riot or unlawful assembly; the charge in each case was one of malicious injury, & each case was dealt with separately without any charge preferred of acting in concert with others:—*Held*: the fact that deft. had previously paid under another policy in the same words under similar circumstances did not estop him from raising the defence that the damage was not caused by civil commotion or rioting.—*LONDON & MANCHESTER PLATE GLASS CO., LTD. v. HEATH*, [1913] 3 K. B. 411; 82 L. J. K. B. 1183; 108 L. T. 1009; 29 T. L. R. 581; 6 B. W. C. C. N. 107, C. A.

*Annotations*:—*Mentd. Rogers v. Whittaker*, [1917] 1 K. B. 942; *Cooper v. General Accident, Fire & Life Assco. Corp.* (1922), 92 L. J. P. C. 168.

*See, generally*, INSURANCE.

**1315. Consent to demolition of building as obstructive.]**—Deft. council, on the representation of their medical officer of health were, purporting to act under sect. 38 of Housing of the Working Classes Act, 1890 (c. 70), threatening to pull down pltf.'s brick workshop, constructed & adapted to be used as a mechanics' & cycle makers' workshop, & for no other purpose, situate at the rear of, but separate from, pltf. shop & premises in P.-street. After meetings at which pltf. & adjoining owners of other adjacent premises were present, it was arranged the part of the workshop

should be pulled down, & that pltf. should cover in an agreed area adjoining it. Pltf. did not appeal from the order to pull down the premises, but gave notice of their desire to retain the site. They objected that the amount of compensation offered by defts. was inadequate, & defts. acts were *ultra vires*:—*Held*: pltf., having been parties to a bargain which involved part of their workshop being pulled down as an obstructive building, were estopped from saying that no part of the building was an obstructive building.—*JACKSON v. KNUTSFORD URBAN COUNCIL*, [1914] 2 Ch. 686; 84 L. J. Ch. 305; 111 L. T. 982; 79 J. P. 73; 58 Sol. Jo. 756.

**1316. Diminution of light.]**—An abstraction or diminution of light coming over adjoining property acquiesced in or consented to by the owner of the dominant tenement does not negative entirely his right to an easement of light in respect of the same openings over other adjoining property, though he does not acquire any further right entitling him to prevent the erection on that other property of a building which he could not have prevented had he not assented to the prior abstraction of light over the first adjoining property.—*BAILEY (W. H.) & SON, LTD. v. HOLBORN & FRASCATI, LTD.*, [1914] 1 Ch. 598; 83 L. J. Ch. 515; 110 L. T. 574; 58 Sol. Jo. 321.

*Annotation*:—*Consd. Slack v. Leeds Industrial Co-op. Soc.*, [1924] 2 Ch. 475.

*See, generally*, EASEMENTS, Vol. XIX., pp. 140 *et seq.*

**1317. Based on mutual mistake—Claim for compensation.]**—Pltf. was tenant from year to year of premises situate on an ancient tidal fleet or watercourse in the town of L., where he carried on business as a coaldealer, & for the purposes of his business had barges which at high tide floated alongside his premises. The fleet in the course of time had become offensive & injurious to the

The sale was confirmed on Apr. 23, 1877. Out of the proceeds of that sale a sum was appropriated by pltf. in part satisfaction of his mtge. On Apr. 16, 1877, pltf. sued the auction-purchaser for sale of one *biswas* in satisfaction of his mtge.:—*Held*: even if it could be shown, which it could not, that the particular *biswa* mortgaged to pltf. was one of those which had passed into deft.'s possession, pltf. was estopped by his previous conduct from suing to bring it to sale under his mtge.—*JHINKA v. BALDEO SAHAI* (1892), 1 L. R. 14 All. 509.—*IND.*

**a. Accepting trusteeship & acquiring property in that capacity—Estoppel from asserting adverse title.]**—No person who has accepted the position of a trustee & has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself.—*SRINIVASA MOORTHY v. VENKATA VARADA AYYANGAR* (1911), 1 L. R. 34 Mad. 257.—*IND.*

**b. Acceptance of will.]**—Where a Hindu mother purported to bequeath her husband's property to her daughter, with a proviso that if male children should be born to her, testatrix's, son, who survived her, they should succeed to the whole estate, & the daughter entered into possession under the will & carried out all its provisions, in a suit brought by the purchaser from the son's son against the purchaser from the daughter's son:—*Held*: the daughter (legatee) & her successor in title by her acceptance of the will were estopped from disputing the son's son's title.—*DURGA DAS KHAN v. ISHAN CHANDRA DEY* (1917), 1 L. R. 44 Calc. 145.—*IND.*

**c. In right to exercise option to purchase.]**—The correspondence between the parties proceeded on the assumption that pltf. though an assignee of the lessee was entitled to exercise the option of purchase under the lease:—*Held*: defts. having acquiesced in the same were estopped from disputing it.—*LADHABHAI LAKHMSI v. JAMSETJI JIJIBHOY* (1917), 1 L. R. 42 Bom. 103.—*IND.*

**d. Bond fide exchange of lands without registered deed—Whether estopped from recovery.]**—Pltf. & deft. exchanged adjacent plots of land each worth more than R100 by means of an unregistered deed on Mar. 7, 1908, both believing that they had effected a valid transfer. Possession was taken by each party, & deft. began to erect a costly building, placing a wall thereof in the land he had acquired in exchange. While the building was in progress, pltf. demanded & obtained R525 from deft. on the ground that the plot he parted with was found to be more in extent than deft.'s. After completion of the building pltf. brought this suit in 1911 for recovery of his plot, after removal of deft.'s building on it. Deft. pleaded that pltf. was estopped by his conduct from recovering the plot:—*Held*: pltf. was not estopped.—*RAMANATHAN v. RANGANATHAN* (1917), 1 L. R. 40 Mad. 1134.—*IND.*

**e. In dismissal from office.]**—A., the clerk to the town comrs. of B., having received three months' notice of dismissal, was directed by the comrs. to advertise for candidates for the vacancy; &, having issued advertisements pursuant to that order, he applied to the comrs. for re-election, but another candidate, P., was elected. A. alleged that the office was not one

from which he could be dismissed at the pleasure of the comrs., & that he was still clerk *de jure*, & obtained a conditional order for a *quo warranto*:—*Held*: A., by his conduct, had acquiesced in the dismissal, & was not entitled to a *quo warranto*.—*R. v. PETTIGREW* (1886), 18 L. R. Ir. 342.—*IR.*

**f. Accepting lower wages.]**—Pltf., who for some years had occupied the position of assistant to the captain of a mine, at £12 per month as wages, was temporarily promoted to the position of captain, a higher & more responsible position, the former holders of which had been paid as high as £20 per month, & continued to receive & was paid for some years the same wages as that paid him in the position he had vacated. On the termination of his service:—*Held*: he was estopped from setting up any claim for higher wages by reason of having accepted the lower wages, thereby recognising it as the wages to which he was entitled.—*MAYNARD v. BENNETT* (1881), 6 Nfld. L. R. 260.—*NFLD.*

**g. Agreement as to insolvent's estate.]**—The insolvent estate of S. paid dividends to the amount of fifty cents in the dollar, when an agreement was entered into whereby the creditors accepted a further dividend of four cents in the dollar in lieu of a realisation & distribution of the residue. All parties interested, including trustees of C. Bank, consented to this arrangement, & S. was granted his certificate of insolvency & final discharge. S.'s trustee retained an amount for commission to which the trustees of the C. Bank objected, & brought the present proceedings to have the said amount distributed among the creditors of S.:—*Held*:



health of the town by reason of houses discharging their sewage into it, & the paving comrs. were consequently about to arch over a portion of it, thereby preventing the access of barges to pltf.'s premises. Pltf. thereupon claimed compensation for the injury which would be done to him, but no notice was taken of his application, & he afterwards filed a bill for an injunction, charging serious damage to his trade, & that the fleet had been navigable from time immemorial:—*Held*: the fact of pltf. having in the first instance demanded compensation could not be regarded as an acquiescence, the assumption on both sides at the time being that the comrs. were entitled to do what they threatened.—*PENTNEY v. LYNN PAVING COMRS.* (1865), 12 L. T. 818; 13 W. R. 983.

1318. — Measurement of course to be run.]—*BEEVOR v. MARLER* (1898), 14 T. L. R. 289, D. C.

1319. Payment of rates—By person not appearing in rate-book as owner.]—A parish vestry had, under powers conferred by Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 4, ordered that the owners of ratable hereditaments of the annual value of £8 & under should be rated to the poor rate instead of the occupiers, & that overseers should allow the owners an abatement of 15 per cent. from the amount of the rates. Sect. 20 of the Act defines "owners" as "any person receiving the rent for his own use . . . or receiving the same of any person for whom he is acting as agent." Appls. were rent collectors & agents & collected the rents of certain houses subject to the order, & from 1916 to 1920 paid the poor rates in respect of them, but another name than theirs appeared in the rate book as owner. In two rates made in 1921, this other name still appeared as owner:—*Held*: appls. were not estopped from claiming that they were not the persons repre-

the trustees of C. Bank were not estopped from questioning the claim of the trustees of S. by reason of the above arrangement.—*Re STEER'S ESTATE* (1896), 7 Nfld. L. R. 902.—*NFLD.*

h. Infant accepting provision in father's general settlement.]—A party having accepted a provision under her father's general settlement, executed some years after the death of her mother, which was declared to be "in full of all that she can ask or claim by or through my decease":—*Held*: she was thereby excluded from claiming a share of the goods in communion between her father & mother, as at the date of the mother's decease, which had taken place twenty-five years before the claim was made.—*CULLEN v. WEMYSS* (1838), 1 Dunl. (Ct. of Sess.) 32; 14 Fac. Coll. 17.—*SCOT.*

k. In dissolution & winding up of company.]—The partner of a co. which had been dissolved, & the affairs of which had been wound up:—*Held*: barred from insisting in an action of accounting against the partners who had formed the committee of management for winding-up the concern.—*FLOWERDEW v. LAING* (1843), 3 Dunl. (Ct. of Sess.) 440; 15 Sc. Jur. 220.—*SCOT.*

l. In alteration of contract of copartnership.]—The original contract of copartnership of a joint-stock co. contemplated that the capital should be £3,000 & that the directors should have authority to borrow £500 on bond from a bank. These were declared to be fundamental articles of the contract. It was afterwards resolved to enlarge the objects & the capital of the co., & increased powers to borrow money were conferred on the directors. Large sums were borrowed

sented in the rate-book in 1921, & therefore, no distress warrants should be issued against them in default of payment of the two rates made in that year.—*PIGG v. TOW LAW OVERSEERS (WEARDALE UNION)* (1923), 22 L. G. R. 17, D. C.

By cestui que trust in breach of trust.]—*See TRUSTS.*

In validity of will.]—*See EXECUTORS.*

In voidable conveyance.]—*See FRAUDULENT & VOIDABLE CONVEYANCES.*

In family arrangements.]—*See FAMILY ARRANGEMENTS.*

As ratification of contract by infant.]—*See, generally, INFANTS.*

— Infant shareholders.]—*See COMPANIES, Vol. IX., pp. 276, 399; Nos. 1701, 1702, 2548–2555.*

As ratification of contract by married woman after discoveriture.]—*See HUSBAND & WIFE.*

As ratification of acts of agent.]—*See, generally, AGENCY, Vol. I., pp. 405 et seq.*

In ultra vires acts—By building society.]—*See BUILDING SOCIETIES, Vol. VII., p. 501, 508; Nos. 285, 327.*

— By corporations.]—*See CORPORATIONS, Vol. XIII., p. 367; No. 1003.*

— By companies.]—*See COMPANIES, Vol. IX., pp. 619 et seq.*

In submission to arbitration.]—*See ARBITRATION, Vol. II., p. 326, Nos. 102, 103.*

As release of surety.]—*See GUARANTEE.*

In use of trade mark.]—*See TRADE MARKS.*

In conversion.]—*See EQUITY, Vol. XX., pp. 335 et seq.*

Acquiescence induced by undue influence.]—*See FRAUDULENT & VOIDABLE CONVEYANCES.*

By landlord—By acceptance of rent.]—*See LANDLORD & TENANT.*

By trustee in bankruptcy—Bankrupt continuing

on the obligation of individual shareholders & it was resolved to raise funds by a call upon the shareholders, for the purpose of relieving the partners who had taken upon themselves the burden of the co.'s debts. The exors. of a shareholder who had been present at the meeting where the alteration of the contract was proposed, but who had not been present at any subsequent meeting, having refused payment of the call:—*Held*: in an action by the co. against them, as their constituent had intimated no dissent from the purposed alteration, but had paid his original share after it had been adopted, he must be held to have acquiesced in it.—*STURROCK v. THOMS' EXECUTORS* (1851), 13 Dunl. (Ct. of Sess.) 762; 23 Sc. Jur. 335.—*SCOT.*

m. Submission of claim within statute—Where claim not falling within statute.]—A. had two claims against a railway co., one of which fell within Lands Clauses Consolidation Act, 1845 (c. 18), while the other did not. For the one not falling under the statute he raised an action, but he afterwards entered into a submission of both claims, the deed declaring that the submission was to be taken as a submission within the statute. The arbiters accepted, but the time for decision having expired without a decision being pronounced, the parties endorsed on the deed a minute of renewal. The time fixed again expired without a decision. Thereafter A. insisted in a wakening of the action, for the non-statutory claim:—*Held*: the submission subsisted so as to bar any further procedure in the action.—*HILL v. DUNDEE, PERTH & ABERDEEN RY. JUNCTION CO.* (1852), 1 Stuart, 1094.—*SCOT.*

n. In objection to due negotiation

of bill of exchange.]—*Held*: a letter written by a drawer of a bill to the holder, two years after the bill had become due, & had been dishonoured, requesting delay, & stating that the drawer would not deal with the bill in any but an honest way, precluded him, after delay had been granted, from pleading that the bill had not been duly negotiated.—*ALLHUSEN & SONS v. MITCHELL & CO.* (1870), 8 Macph. (Ct. of Sess.) 600.—*SCOT.*

o. —.]—The drawer of a bill of exchange, in the knowledge of an objection to its due negotiation, asked & obtained time to meet it:—*Held*: he was barred from stating the objection in defence to an action on the bill.—*SHEPHERD v. REDDIE* (1870), 8 Macph. (Ct. of Sess.) 619.—*SCOT.*

p. In extension of scope of reference of arbitration.]—In an arbitration under a reference clause contained in an agreement, the parties to the agreement lodged claims which were outwith the scope of the reference clause. In an action of reduction of the arbiter's award:—*Held*: the parties by their actings had extended the scope of reference.—*MILLER v. OLIVER & BOYD* (1903), 41 Sc. L. R. 26.—*SCOT.*

q. Dealing with person acting as trustee without formal appointment.]—The banker of a trust co. also was the banker of an insolvent estate, of which the secretary of the co. had been appointed trustee in his private capacity. Before his appointment as trustee the secretary had passed a general power of official capacity as secretary to T. a clerk to the co. After partly administering the estate, the secretary resigned his appointment with the co., & T. succeeded. Without further power, T. assumed the administration of the estate, & the banker with full knowledge of the facts, dealt



*Sect. 3.—By representation: Sub-sect. 3, C. (c), D. & E. (a).]*

*to trade.]—See BANKRUPTCY, Vol. V., p. 734, Nos. 6358, 6359.*

*By creditors—Executors carrying on testator's business.]—See EXECUTORS.*

*By corporation—Agreement not under seal.]—See CORPORATIONS, Vol. XIII., pp. 396, 397, Nos. 1202–1208.*

*Acceptance of smaller sum in discharge of debt.]—See, generally, CONTRACT, Vol. XII., pp. 455 et seq.*

*Signature of contract at auction after reserve price disclosed—Whether sale by auction.]—See AUCTION & AUCTIONEERS, Vol. III., p. 15, No. 109.*

*Concurrence in election of corporate officer.]—See CORPORATIONS, Vol. XIII., p. 310, Nos. 418–422.*

*Payment of claim—Payment under compulsion.]—See, generally, CONTRACT, Vol. XII., pp. 555 et seq.*

#### *D. Concealment.*

*1320. Title of vendor.]—SAVAGE v. FOSTER, No. 1478, post.*

*1321. Fraudulent concealment of declaration in ejectment by tenant.]—Demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not demised; the tenant fraudulently concealed a declaration in ejectment delivered to him, & suffered judgment to go by default. The declaration in ejectment did not mention mines at all, but the sheriff, in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises*

*demised to the tenant, & also of those mines in which he had liberty to dig:—Held: although the latter could not be recovered under the declaration in ejectment, still the tenant by his own act had estopped himself from taking that objection, & in an action for the value of three years' improved rent, the landlord might recover the treble rent, in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig.—CROCKER v. FOTHERGILL (1819), 2 B. & Ald. 652; 106 E. R. 503.*

*See, generally, MISREPRESENTATION & FRAUD.*

*1322. Claim against testator's estate concealed by legatee.]—Where a party entitled to a legacy under a will, has a claim against testator, which he conceals from the exor. until after he has received the legacy, he cannot afterwards, in an action against the exor., object that the amount of the legacy was not paid in a due course of administration.—STROUD v. STROUD (1844), 7 Man. & G. 417; 8 Scott, N. R. 166; 3 L. T. O. S. 126; 135 E. R. 174.*

*1323. Insurance company concealing non-payment of premium.]—Testator of pl'ts., on Jan. 22, 1851, effected a policy of insurance against death or injury by accident with defts., which provided that he, the insured, on or before or within 21 days after Jan. 22, 1852, & on or before or within 21 days of Jan. 22, in every succeeding year, so long as the acting directors for the time being of the co. should accept the same, should pay to defts. the annual premium of £12. The policy was made subject to certain conditions indorsed on it. The first was, that, provided the premium should be paid within the 21 days, the policy should not be void, notwithstanding the happening before the expiration of them of the event upon*

*with T. as such trustee, & accepted a cheque from him in part payment of a claim proved by him against the estate. The co. was subsequently liquidated, & the banker sued the trustee of the estate for the balance of his claim:—Held: the banker having accepted & dealt with T. as the trustee's substitute, with full knowledge, was estopped from claiming as against the real trustee.—NATAL BANK v. LANGERMAN (1895), 2 O. R. 59.—S. AF.*

*r. By insolvent in underhand sale by trustees.]—Creditors in an insolvent estate empowered the trustees to sell immovable property at such time & place & on such conditions as they should fix. The terms of this authorisation came to the knowledge of the insolvent, & the fact that the trustees construed it to authorise them to sell out of hand. He asked them for permission for himself to arrange a private sale, & getting the same, unsuccessfully attempted to do so:—Held: he was estopped from thereafter contending that a private sale by the trustees was invalid.—MEARS v. PRETORIA ESTATE & MARKET CO., LTD. (1906), T. S. 291.—S. AF.*

*s. Complying with unlawful municipal demand.]—In 1898 J. in erecting a house upon a certain site, in obedience to the requirements of the local municipal authorities placed it a certain distance from his boundary. He did so under a measure of coercion, as the municipality refused consent to his plans until he complied with their requirements in this respect. In 1907 he desired to alter his premises. The municipality refused to pass the plans unless he set back the front of his building the same distance as before from his boundary. The refusal both in 1898 & in 1907 was based on a regulation prohibiting the erection of buildings projecting beyond the general*

*line of building frontage:—Held: he was not estopped from building up to his boundary by his compliance in 1898, no promise or contract having at that time been made by him to refrain in future from building up to his boundary, & the acts & rights of the municipality not being in any way affected by his conduct at that time.—JACK v. GREEN & SEA POINT MUNICIPALITY (1908), 25 S. C. 321.—S. AF.*

*t. By owner of firearm in registration by bailee as holder.]—Where the owner of a firearm entrusted it to the custody of another, whom he allowed to be registered as holder of a statutory licence in respect of it:—Held: the owner was not estopped from reclaiming the firearm from a bona fide purchaser.—LAWLESS v. LANE (1909), T. S. 589.—S. AF.*

*a. Acquiescence disentitling issue of writ of prohibition.]—A person who has set the law in motion in a ct. having no jurisdiction in the matter may himself obtain a writ of prohibition to restrain the enforcement of the order of that ct. Acquiescence disentitling the writ can only be where the defect of jurisdiction is not apparent on the face of the proceedings.—R. v. HARVEY (1879), O. B. & F. 165.—N.Z.*

*b. In erection of stationary steam-engine—Whether bar to claim for annoyance.]—Where a stationary steam-engine properly erected & worked causes no more annoyance than reasonably might have been anticipated, acquiescence in its erection will be a bar to any subsequent claim for relief in respect of such annoyance, & slight evidence will be sufficient to establish the fact of acquiescence.—WICKISON v. MORNINGTON TRAMWAYS CO., LTD. (1887), 6 N. Z. L. R. 126.—N.Z.*

*c. By company in payment of*

*interest by liquidator.]—Where a co. which has never expressly or by implication contracted to pay interest on stock accounts goes into liquidation, & the liquidators pay interest on such accounts up to the date of liquidation, the co. is not estopped by such payment from denying its liability.—Re DUNEDIN CO-OPERATIVE MEAT SUPPLY CO., Ex p. WRIGHT, STEPHENSON & Co. (1891), 10 N. Z. L. R. 33.—N.Z.*

*d. In clearing bush—Whether estopped from claiming for damage by spreading.]—Applt. & resps. were neighbours, & resps. had given applt. notice that they intended to burn felled bush on their land on the first favourable opportunity after three days. Applt. had a crop of cockfoot grass on his land waiting to be cut, & wished the burn to take place before he incurred the expense of cutting. He therefore saw resps. & asked them to burn as soon as possible & they accordingly burned earlier than they would otherwise have done. The fire spread on to applt.'s land, & burnt his cocksfoot & did other damage. This occurred owing to a change of wind, & without any negligence on resps.' part:—Held: resps. were not, on the ground either of estoppel, or of leave & licence, or of implied agreement, relieved from their obligation to keep the fire in at their peril, & they were liable to the applt. for the damage done.—PIPER v. GEARY (1898), 17 N. Z. L. R. 357.—N.Z.*

#### **PART VI. SECT. 3, SUB-SECT. 3.—D.**

*e. Concealment of mortgage by vendor.]—Where a judgment-creditor in execution of a money-decree sells property as belonging to his judgment-debtor, he is afterwards estopped from enforcing, as against the purchaser, a previous mtge. of the property which*

which the policy should become payable by its terms. The second condition provided, that if the premium should be unpaid for the 21 days after it became due, the policy should be absolutely void; & the fourth condition stipulated that in every case where a new premium should become payable, the directors should be at liberty to terminate the risk by refusing to accept the premium. The insured met with an accident on Jan. 27, 1856, & died on Feb. 1. On Feb. 4, notice was given to the co. of his death, & a correspondence took place between the secretary, & attorney of pltfs., the exors. Neither the secretary nor pltfs. knew, at the commencement of the correspondence, that the premium due on Jan. 22, had not been paid; but the secretary became aware of that fact on Feb. 8, & did not give notice of it to pltfs. till the 21 days had expired. The jury found, that defts. had intentionally withheld the information from pltfs. to prevent them from paying up the premium within the 21 days:—*Held*: defts. were not estopped by their conduct from setting up the non-payment of the premium within the 21 days, & therefore, by the second condition, the policy was void.—*SIMPSON v. ACCIDENTAL DEATH INSURANCE CO.* (1857), 2 C. B. N. S. 257; 26 L. J. C. P. 289; 30 L. T. O. S. 31; 3 Jur. N. S. 1079; 140 E. R. 413.

*Annotations*:—*Mentd.* Pritchard v. Merchant's & Tradesman's Mutual Life-Asso. Soc. (1858), 3 C. B. N. S. 622; Stuart v. Freeman, [1903] 1 K. B. 47.

**1324. Concealment by guarantor of change in position of party guaranteed.**—T., P. & D., three directors of a co., gave a joint guarantee to the bankers to secure the balance which might be due at the closing of the account, to the extent of £2,000. In Sept. 1880, the co. went into voluntary liquidation, & immediately recommenced business under the same directors, but as a new co., with the addition of the word "manufacturing" to their former title. The termination of the old co. was not disclosed to the bankers, who continued their business with the co. without intermission, merely putting the addition to the name on the cheques & in their books. P. died in Dec. 1880. In Nov. 1881, the new co. was wound up, when it was indebted to the bankers, who commenced an action upon the guarantee for the amount due to them:—*Held*: T. & D., by not having given notice to pltfs. upon the death of P. that they declined to be answerable for any other amount than that which was due at P.'s death, & by their concealment of the fact that a new co. had been formed, & by the whole tenor of their conduct in carrying on the

business as before, were estopped from denying their liability under the guarantee, & were liable to the full amount thereby secured.—*ASHBY v. DAY* (1886), 54 L. T. 408; 34 W. R. 312; 2 T. L. R. 260, C. A.

*See, generally*, GUARANTEE.

**Of title or interest while property dealt with by another.**—*See* Sub-sect. 3, H., *post*.

### *E. Laches or Delay.*

#### *(a) In General.*

*See, generally*, EQUITY, Vol. XX., pp. 524 *et seq.*

**1325. Question of fact.**—Laches is a question of fact in every case.—*WILLIAMS v. EVANS*, [1911] P. 175; 80 L. J. P. 115; 105 L. T. 79; *sub nom.* *Re WILLIAMS*, *WILLIAMS v. EVANS*, 27 T. L. R. 506.

**1326. Necessity for knowledge.**—Fraud being established against a party, it is for him, if he allege laches in the other party, to show when the latter acquired a knowledge of the truth & prove that he knowingly forbore to assert his right.—*LINDSAY PETROLEUM CO. v. HURD* (1874), L. R. 5 P. C. 221; 22 W. R. 492, P. C.

*Annotations*:—*Consd.* Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; *Re* Taylor, Atkinson v. Lord (1900), 81 L. T. 812. *Refd.* Allicard v. Skinner (1887), 36 Ch. D. 145; *Re* Sharpe, *Re* Bennett, Masonic & General Life Asso. v. Sharpe, [1892] 1 Ch. 154; Aaron's Reefs v. Twiss, [1896] A. C. 273; Rochefoucauld v. Boustead, [1897] 1 Ch. 196; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 1 Ch. 392. *Mentd.* Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520; Bagnall v. Carlton (1877), 6 Ch. D. 371; Phosphate Sewage Co. v. Hartmont (1877), 5 Ch. D. 394.

**1327. — Action brought out of statutory period.**—Deft., in 1868, published a catalogue of fruit trees, in which he copied some description of trees from works of pltf.'s. A copy of this edition was sent by deft. to pltf. in 1869, but the piracy was not discovered by the latter until 1873, after publication of a second edition of the catalogue. The bill was filed in 1873:—*Held*: pltf. had not acquiesced in the publication, & was entitled to an injunction, although the suit was not instituted within twelve months after the publication of the first edition.—*HOGG v. SCOTT* (1874), L. R. 18 Eq. 444; 43 L. J. Ch. 705; 31 L. T. 163; 22 W. R. 640.

*Annotations*:—*Refd.* Smith v. Smith (1875), L. R. 20 Eq. 500; Northumberland v. Bowman (1887), 56 L. T. 773. *Mentd.* Grace v. Newman (1875), 44 L. J. Ch. 298; Macmillan v. Cooper (1923), 93 L. J. P. C. 113.

*See, generally*, COPYRIGHT, Vol. XIII., pp. 221, 222, Nos. 598–602; LIMITATION OF ACTIONS.

**To whom available—Sureties under guarantee—Delay granted to principal.**—*See* GUARANTEE.

has been created in his own favour, but of which he has given no notice at the time of the sale, & in ignorance of which the purchaser has bid for the property & paid the full price. This principle applies, even though the mortgage-deed has been registered.—*AGARHAND GUMAN CHAND v. RAKHMA HANMANT* (1888), L. L. R. 12 Bom. 678.—*IND.*

### PART VI. SECT. 3, SUB-SECT. 3.—*E. (a).*

**f. To whom available—Where position of party setting up estoppel not changed.**—The rule of law that an excessive rate of interest will be reduced to a reasonable rate in cases of the sale of reversionary interests as applicable to cases of mtges. of such interests, though the mere fact in such latter cases that the rate of interest is excessive would not enable the person who agreed to pay it to come to the ct. & successfully ask

to have the rate reduced:—*Held*: the delay in taking proceedings did not bar pltf., inasmuch as confirmation or acquiescence will not be presumed in cases where the reversior continues in the same situation under the same circumstances which induced her to enter into the oppressive contract.—*MALONEY v. TRUSTEES, EXECUTORS & AGENCY CO., LTD.* (1898), 24 V. L. R. 297.—*AUS.*

**g. — Whether to one asserting abandonment of right by another.**—C. pre-empted certain Crown lands in British Columbia &, after doing some work on the property, died in 1900, unmarried & intestate, leaving heirs his mother & two brothers. The older brother, deft., completed the pre-emption duties & wrote his mother & brother, asking them for quit-claim deeds, in order to facilitate his obtaining a Crown grant. The mother complied with the request but the brother, pltf., refused, & on the strength of the

mother's quit-claim deed he succeeded in obtaining the Crown agent in his name in Dec. 1892. The mother died in 1900. In 1901 pltf. & deft. met, when, according to deft., he offered to transfer to pltf. his half interest in the property if he would pay his share of the expense incurred, which pltf. refused to do, & in this he was corroborated by his wife & another witness. Pltf., on the other hand, denied this & said he offered to pay his share of the expense if he would make up his account. In an action for a declaration that pltf. was entitled to a half interest in the property, it was held by the trial judge that deft. took the fee from the Crown as trustee for the heirs, but that pltf. had abandoned his interest, & he dismissed the action:—*Held*: abandonment of a clear right cannot properly be inferred except upon very convincing evidence, & the evidence in this case fell far short of that, even giving the testimony of deft., the greater credence, &



*Sect. 3.—By representation: Sub-sect. 3, E. (a)*  
*(b) i.]*

**1328. — Director inducing purchase of shares by misrepresentation.]**—In May, 1864, a prospectus was circulated proposing to form a co. described as a Finance Bank, & it stated eight objects, all more or less within the ordinary business of a banker. S. applied for fifty shares in it, & paid deposit. On June 1 the co. was registered, & fifty shares allotted to S., on which he paid a further sum. In Dec. the co. was being wound up, & simultaneously S., having discovered that the objects of the memorandum of assocn. greatly exceeded the objects of the prospectus, applied to the Ct. of Ch. to remove his name from the register. This was opposed by one of the directors whose name was to the prospectus & who signed the memorandum, on the ground that, after six months' acquiescence, S. was estopped from disputing his liability:—*Held*: the objects of the memorandum went so far beyond the objects of the prospectus that S. was entitled to have his name removed, unless estopped by his own laches; & that it was impossible for a director, by whose misrepresentations L. had been deceived into applying for shares, to set up any laches of S. as a reason why he should not be removed from the register.—*DOWNES v. SHIP* (1868), L. R. 3 H. L. 343; 37 L. J. Ch. 642; 17 W. R. 34; *sub nom.* *DOWNES v. SHIP, Re SCOTTISH & UNIVERSAL FINANCE BANK, LTD.*, 19 L. T. 74, H. L.; *affg.* S. C. *sub nom.* *Re SCOTTISH & UNIVERSAL FINANCE BANK, LTD., SHIP'S CASE* (1865), 2 De G. J. & Sm. 544, L. J.J.

*Annotations:—Refd.* *Re Russian (Vyksounski) Iron Works Co.*, Stewart's Case (1866), 1 Ch. App. 574. *Mentd.* *Re Scottish & Universal Finance & Banking Assocn.*, Buckridge's Case (1865), 13 W. R. 677; *Re Russian (Vyksounski) Ironworks Co.*, Webster's Case (1866), L. R. 2 Eq. 741; *Bwlch-y-Plwm Lead Mining Co. v. Baynes* (1867), L. R. 2 Exch. 324; *Hallows v. Fernie* (1867), L. R. 3 Eq. 520; *Re Imperial Mercantile Credit Assocn.*, Chapman & Barker's Case (1867), L. R. 3 Eq. 361; *Kennedy v. Panama, etc. Mail Co.* (1867), L. R. 2 Q. B. 580; *Oakes v. Turquand & Harding, Peek v. Same, Re Overend, Gurney* (1867), L. R. 3 H. L. 325; *Re Overend, Gurney* (1867), 15 W. R. 528; *Re Russian (Vyksounski) Iron Works Co.*, Whitehouse's Case, etc. (1867), 15 W. R. 891; *Re Oriental Commercial Bank, Alabaster's Case* (1868), L. R. 7 Eq. 273; *Ship v. Crosskill* (1870), L. R. 10 Eq. 73; *Banner v. Johnston* (1871), L. R. 5 H. L. 157; *Re Metropolitan Coal Consumers' Assocn.*, Kurberg's Case, [1892] 3 Ch. 1; *Townsend v. Moore*, [1905] P. 66; *Re Pacaya Rubber & Produce Co.*, Burns' Appln., [1914] 1 Ch. 542.

pltf. was not barred by laches, delay or acquiescence.—*COOK v. COOK* (1914), 19 B. C. R. 311.—CAN.

**h. — Mortgagor.]**—The laches of a mtgor. in taking no steps for many years to enforce his alleged rights may afford evidence against the existence of those rights, but cannot estop him from asserting them, if they do exist, at any time within the period of sixty years allowed by Act XIV. of 1859, s. 1, cl. 15.—*JUGGURNATH SAHOO v. SHAH MAHOMED HOSSEIN* (1875), 14 B. L. R. 386; L. R. 2 Ind. App. 49; 23 W. R. 99.—IND.

**k. When available—Whether as bar to defence of false representation.]**—*Held*: deft. was not debarred by laches from setting up the defence of false representation in the sale to him of certain land.—*LEE v. MCMAHON* (1883), 11 O. R. 654; 11 A. R. 555.—CAN.

**l. — — —.]**—B. having a hotel scheme under promotion, agreed to purchase an old building from R. in order to prevent it falling into the hands of persons who might use it for a brewery & thereby cause a nuisance & ruin his enterprise. R. by falsely representing that he had a serious

offer for the purchase or lease of the property for the purpose of a brewery, induced B. to close on his agreement & take a deed of the property, the payment of the price being deferred. On discovery of the falsity of these representations B. notified R. that he repudiated the contract & invited him to bring an action to test its validity if he was unwilling to give a release & take back the property. The vendor delayed some time in taking action for the recovery of the price & in the meantime, B. remained in possession & collected the rents:—*Held*: the purchaser had a right to have the contract rescinded on the ground of error, & under the circumstances, the delay in bringing the action could not be imputed as laches of deft., nor waiver of his right to have the contract set aside, & deft.'s administration of the property in the meantime could not be construed as ratification of the contract.—*BARNARD v. RIEUDEAU* (1900), 31 S. C. R. 234.—CAN.

**m. — — —.]**—Where a subscriber of a stock in an incorporated co. discovers that he was brought about to buy the shares by false representation, & that he suffers a

**1329. Application of doctrine—Dealings in shares of joint-stock company.]**—Where there is no clause in the deed of a joint-stock co., conferring on the directors a general power to forfeit shares, they have no inherent power to do so. Where directors assuming that they have power to do so, forfeit shares, & such shares are re-issued & sold, the original shareholder, although he may not have executed the deed, & the directors have no such power, is not discharged from liability after the lapse of four years from the reissue & sale.

The doctrine of acquiescence & lapse of time, does not apply to dealing with shares in a joint-stock co.—*Re NATIONAL PATENT STEAM FUEL CO.*, *BARTON'S CASE* (1859), 4 Drew. 535; 62 E. R. 205; *sub nom.* *Re NATIONAL STEAM FUEL CO.*, *Ex p. BARTON*, 28 L. J. Ch. 637; 33 L. T. O. S. 73; 5 Jur. N. S. 306; 7 W. R. 369; 45 E. R. 19; *on appeal, sub nom.* *Re NATIONAL PATENT STEAM FUEL CO.*, *BARTON'S CASE*, 4 De G. & J. 46, L. J.J.

*See, generally*, COMPANIES, Vol. IX., pp. 222, 223.

**1330. — Position of party setting up estoppel not changed.]**—Continued silence on the part of a person whose signature upon a bill of exchange has been forged is not sufficient to preclude him from alleging the forgery, unless his conduct has prejudiced the position of the holder of the bill.

A bill of exchange for £76 at two months, purporting to be accepted by A., & drawn & indorsed by B. & C., was discounted for A. by a Scottish Bank, no inquiries being made by the bank as to B. & C., whose signatures had been, in fact, forged by A. The bill fell due on Apr. 10, 1879, & notice of dishonour was afterwards sent to B. & C. On Apr. 14, before any reply to the notices of dishonour could have been received, A. brought to the agent of the bank a new bill drawn, accepted & indorsed in blank with the same names as the former one, all the signatures having been again written by A. The bill was ultimately filled in for £70 at three months, & A. paid £6 to the agent. The second bill fell due & was dishonoured on July 17. A notice that the bill was about to become due had been sent to B. three days previously, & on July 21 notice of dishonour was sent to him. After B. had received notice of dishonour of the first bill, he was told by A. that that bill had been paid. On receipt

prejudice thereby, he cannot, however, refuse to pay the price he contracted for if he has kept silence for over a year, although he received numerous demands of payment from a third party in good faith to whom the rights of the co. have been transferred with his consent. His waiver & laches estopped him from raising the question of fraud in the original contract.—*MONTREAL TRUST CO. v. ROBERT* (1917), Q. R. 52 S. C. 73; 36 D. L. R. 516.—CAN.

**n. Must amount to abandonment.]**—Laches & acquiescence, where a pltf. has an interest must amount to abandonment, before he can be deprived of his original rights.—*ATKINSON v. SLACK* (1876), 2 V. L. R. 128.—AUS.

**o. Must amount to acquiescence.]**—Mere delay in enforcing a legal right which does not amount to an acquiescence barring that right will not disentitle a pltf. to an injunction in aid of his legal right when established.—*BOOTH v. EAGLE* (1884), 2 N. Z. L. R. 294; *affg.* 2 N. Z. L. R. 165.—N.Z.

**p. No defence against Crown.]**—The plea of laches is no defence as against the Crown. In order that a patent may be set aside it is not necessary to



of notice of dishonour of the second bill he communicated with his solr., & on July 29 he for the first time informed the agent of the bank that his signatures to the bills had been forged:—*Held*: since the position of the bank had not been altered during the interval, B.'s delay in giving information to the bank did not estop him from pleading that his signatures had been forged.—*M'KENZIE v. BRITISH LINEN CO.* (1881), 6 App. Cas. 82; 44 L. T. 431; 29 W. R. 477, H. L.

*Annotations*:—*Distd.* *Ogilvie v. West Australian Mortgage & Agency Corpn.*, [1896] A. C. 257. *Refd.* *Colonial Bank v. Cady*, *London Chartered Bank of Australia v. Same* (1890), 63 L. T. 27; *Ewing v. Dominion Bank*, [1904] A. C. 806. *Mentd.* *Mackie v. Herbertson* (1884), 9 App. Cas. 303.

**1331. — Knowledge of agent.**—Where the findings of a jury were that certain entries debited by the bank to their customer were in respect of cheques forged by one of its servants, that the customer was first informed thereof by the accredited agent of the bank who requested his silence, & that the customer in complying with that request acted honestly & with a view to what he believed to be the bank's interest:—*Held*: the silence of the customer was not a legal wrong to the bank, & he was not estopped from relying on the forgery.—*OGILVIE v. WEST AUSTRALIAN MORTGAGE & AGENCY CORPN.*, [1896] A. C. 257; 65 L. J. P. C. 46; 74 L. T. 201; 12 T. L. R. 281, P. C.

**Delay amounting to waiver.**—See Sub-sect. 3, I., *post*.

**Delay amounting to election.**—See No. 1380, *post*.

(b) *Particular Instances.*

i. *Period of Delay.*

**1332. One month.**—Pltf. sold forty shares in a joint-stock co., through his brokers. After passing through various hands, the shares were bought for debt. by his own brokers. On the "name-day," Mar. 27, when debt.'s name was "passed" to pltf.'s brokers, a call was made, unknown to debt. This call was formally notified to debt. on Apr. 7. On May 11 the co. stopped payment, debt. having taken no steps to repudiate his bargain:—*Held*: debt. could not, after remaining silent from Apr. 7 to May 11, claim exemption from his contract on account of the depreciation which, unknown to him, the shares had received from the call made when the purchase was concluded.—*HAWKINS v. MALTBY* (1869), 4 Ch. App. 200; 38 L. J. Ch. 313; 20 L. T. 335; 17 W. R. 557, L. C.

*Annotations*:—*Mentd.* *Davis v. Haycock* (1869), L. R. 4 Exch. 373; *Re International Contract Co., Hughes' Claim* (1872), L. R. 13 Eq. 623.

**1333. Two months.**—Insurance on a cargo of wine, to be discharged partly at B., partly at D. & partly at L. The vessel which conveyed the cargo being wrecked near B., & three-fourths of the cargo being either lost or so impregnated with salt water as to render it imprudent to delay the sale till the ports of D. or L. could be reached, the assured, on Dec. 23, the day they heard of the loss, gave notice of abandonment; & on Dec. 27, called a meeting of underwriters, which three underwriters attended, & ordered the

assured to do the best for all parties. On Dec. 28, & not before, some of the underwriters interfered, forbidding a sale of the damaged wines about to take place at B., & rejecting the abandonment:—*Held*: the underwriters, not having stirred for more than two months after notice of the abandonment, must be taken to have acquiesced in it.—*HUDSON v. HARRISON* (1821), 3 Brod. & Bing. 97; 6 Moore, C. P. 288; 129 E. R. 1219.

*Annotations*:—*Distd.* *Shepherd v. Henderson* (1881), 7 App. Cas. 49. *Refd.* *Provincial Insce. of Canada v. Leduc* (1874), L. R. 6 P. C. 224.

**1334. Four months.**—A merchant in Cuba sold part of a cargo shipped by him to B., & C., who was A.'s correspondent in England, being informed thereof by B., made no claim until four months afterwards, when he insisted on a paramount right over B. to the cargo:—*Held*: even assuming he had originally such right, his conduct had been such that a ct. of equity would not allow him to enforce it against B.—*ZULUETA v. TYRIE* (1851), 15 Beav. 577; 51 E. R. 662.

**1335. —**—A railway co. having taken for the purposes of their railway certain lands on the north of C. street belonging to a corp., & having constructed their railway in an open cutting, afterwards covered over the top of the cutting so as to restore the surface of the lands, & entered into an agreement to let part of this surface on a building lease. It was provided by their Act that the railway co. should not take any lands belonging to the corp. without their consent in writing, & this provision was not complied with in taking the lands on the north of C. street. Subsequently an agreement was, in July, 1869, made between the corp. & the railway co., whereby it was provided that the corp. should take immediate possession of all the land on the north side of C. street not used for the railway, except a small piece of land immediately adjoining the railways in C. street, & which the co. had agreed to let, together with the whole of the land over their railway for building purposes, but that in the lease of such land the railway co. should insert a covenant that the premises should not be used for the sale of meat or poultry. At the date of this agreement the co. had let part of the excepted land to K., & afterwards they let another part of it, to which they thought the restrictive covenant did not apply, to S., who immediately began to build butchers' shops on it. This fact was known in Sept. to the corp., who however took no steps to interfere with the building till the following Jan.:—*Held*: the corp. had by laches & acquiescence lost the right of enforcing the restrictive covenant in respect of the shops build by S. upon the land.—*LONDON CORPN. v. SANDON, SAME v. METROPOLITAN RY. CO., METROPOLITAN RY. CO. v. LONDON CORPN.* (1872), 26 L. T. 86, L. J.

**1336. Seven or eight months.**—Deft. bought the lease of a house with a road leading through it under an archway. The adjoining land was laid out for building so as entirely to surround a central plot, intended to be used as mews, with houses, leaving the road under the archway the only means of access; but the building was then

show that some person is entitled to the land. It is sufficient that there existed claims or material facts, which, if present to the mind of the Crown, would have influenced it in dealing with the land.

It is not an answer to a charge of improvidence & mistake, that the Crown had in its possession documents which disclosed the claims or material

facts, if these are shown not to have been present to the mind of the official when granting the patent.—*A.-G. v. FONSECA* (1888), 5 Man. L. R. 173; *revid.* 17 S. C. R. 612.—CAN.

PART VI. SECT. 3, SUB-SECT. 3.—  
E. (b) i.

q. *Thirty-seven days.*—A person sold a horse to another, & after keeping

in ten days, sold it to another, who kept it twenty-seven days & then returned it as unsound, whereupon the first buyer proposed to return it to the original seller:—*Held*: in respect of *mora* he was not entitled to do so.—*BENNOCH v. M'KAIL* (1820), 20 Fac. Coll. 89.—SCOT.

r. *Three months.*—Three months

*Sect. 3.—By representation: Sub-sect. 3, E. (b) i.]*

so little advanced that the plot could still be approached in other ways. The lease contained covenants by the lessee to complete the house according to a specified plan, which comprised the adjoining land & buildings; but deft. declared that he had never seen the plan. No right of way was reserved in the lease or in the assignment to deft., but both contained maps in which the site of the arch was described as a gateway. Deft. did nothing for seven or eight months, & then blocked up the archway:—*Held*: he could not dispute the right of way.—*DAVIES v. SEAR* (1869), L. R. 7 Eq. 427; 38 L. J. Ch. 545; 20 L. T. 56; 17 W. R. 390.

*Annotations*:—*Mentd.* *Allen v. Seckham* (1879), 11 Ch. D. 790; *Wheeldon v. Burrows* (1879), 12 Ch. D. 31.

**1337. Nine months.**—Pltf. disputed an award of valuers for the price of growing crops, on the ground that it was made upon a wrong principle. On settlement he took the sum awarded, & signed a receipt for it, writing the words "under protest" at the top. He afterwards waited nine months, & then filed his bill:—*Held*: he was precluded by delay, & what amounted to acquiescence from disputing the valuation.—*PARROTT v. SHELLARD* (1868), 16 W. R. 928.

**1338. Some months.**—A railway co. had deviated from their line & encroached upon grounds belonging to an individual contrary to an Act of Parliament; whereupon the co., in Sept. 1847, empanelled a jury who assessed the land which had been so taken at a sum which the owner refused to accept. Pltf. in Nov. following, entered into a contract for the purchase of the same property upon which the deviation had been made, for a sum greater than what had been assessed by the jury, the co. in the meantime continuing their works & embankments. Upon pltf. applying for an injunction to restrain the co. from proceeding in their buildings, etc., it having appeared that he was the attorney to the former owner of the land, & had advised him to refuse the offer made by the co., & who therefore knew distinctly that the co. intended to proceed, but had nevertheless neglected to file his bill until some months afterwards:—*Held*: he had, by his delay, shown such acquiescence in the alleged trespass as not to be entitled to the interference of the ct.—*HOPKINS v. GREAT NORTHERN RY. CO.* (1848), 11 L. T. O. S. 306.

**1339. One year.**—Testator died in 1842, having by his will devised the residue of his real estate to trustees, upon trust for Y. The trustees, on the death of testator, through an alleged mistake on their part as to the rights of Y., allowed X. to receive the rents of a portion of the residuary estate. X. died in 1850, leaving an only child, an infant. The trustees, on the death of X., received the rents of the residuary estate previously received by him. In 1863 Y. first heard that the rents of the portion of the residuary estate so received by X. had been wrongfully received by him. In Aug. 1863, the only child of X. attained the age of 21 years. In Feb. 1864, Y. filed a bill against the trustees of testator's will & the child of X. for a declaration as to the rights of the parties, for an account, & for other relief. Upon the questions whether Real Property

Limitation Act, 1833 (c. 27), was a bar to the suit & whether pltf. could be said to have acquiesced in the title of X.:—*Held*: pltf.'s suit was not barred by either the statute or his acquiescence.—*LISTER v. PICKFORD* (1865), 34 Beav. 576; 6 New Rep. 243; 34 L. J. Ch. 582; 12 L. T. 587; 11 Jur. N. S. 649; 13 W. R. 827; 55 E. R. 757.

*Annotations*:—*Reid*. *East Stonehouse U. C. v. Willoughby*, [1902] 2 K. B. 318. *Mentd.* *Cuthbert v. Robinson* (1882), 51 L. J. Ch. 238; *Churcher v. Martin* (1889), 42 Ch. D. 312.

**1340. Fourteen months.**—A delay of fourteen months by a pltf. in taking steps to prevent the continuance of a breach of a restrictive covenant will not amount to such acquiescence as to disentitle him to an injunction.

There was no acquiescence barring the action, for D. [pltf.] had never stood by so as to have assented to what was done (*KEKEWICH, J.*).—*NORTHUMBERLAND (DUKE) v. BOWMAN* (1887), 56 L. T. 773; 3 T. L. R. 606.

**1341. One year & a half.**—In May, 1843, A. & B. agreed by parol to become jointly interested in certain lands for the purpose of a building speculation. The lease of the lands was taken in B.'s name, & A. & B. continued in joint occupation of the lands till July, 1843, when B. assumed exclusive possession & ejected A. From July, 1843, B., at his sole labour & expense, carried on operations upon the land by preparing it for building purposes & erecting houses thereon, A. never asserting any title thereto until Jan. 1845, when he claimed an equal interest with B. Upon B. repudiating A.'s title, a bill was filed by A. for specific performance of the parol agreement:—*Held*: assuming A.'s title to have been good originally, he had debarred himself from asserting that title by making no claim for eighteen months after his exclusion, during all which time he had permitted B. to carry on the undertaking at his own cost & risk.—*COWELL v. WATTS* (1850), 2 H. & Tw. 224; 47 E. R. 1665; *sub nom.* *COWELL v. WATTS, WATTS v. COWELL*, 19 L. J. Ch. 455, L. C.

**1342. Two years & a half.**—*LAIRD v. BIRKENHEAD RY. CO.*, No. 1457, *post*.

**1343. Four years.**—In Sept. 1839, a poor rate was made for the township of T., against which an appeal was entered at the Jan. sessions, 1840, & respited on the terms that a new valuation should be made, & that in the meantime the payments should be made according to the last effective rate, & the balance either for or against appts. be afterwards paid by, or allowed to them. These terms were agreed to by appts. & S., the assistant overseer, & the appeal was respited from time to time till the Michaelmas sessions, 1843, when the new valuation was completed, & the rate reduced. Pending this appeal the assistant overseer died, & a new rate was made in May, 1840, in which appts. were rated as in the rate appealed against, & on their refusal to pay were summoned before the petty sessions, who made an order that they should pay according to the agreement, that is, according to the last effective rate. They paid the amount ordered on that rate, & the like amount on four other rates, made between that time & Michaelmas, 1843. In Apr. 1844, they were summoned by

before the filing of a bill respecting a partnership, accounts had been furnished in which interest & commission were charged, & none of the partners had before suit suggested their objections to those charges:—*Held*: they were not precluded by this

delay from objecting thereto in the suit.—*JARDINE v. HOPE* (1872), 19 Gr. 76.—*CAN.*

**s. Six months.**—A buyer is bound to use diligence in availing himself of the remedies he has against

the seller as warrantor of the quality of the thing sold; more particularly when he has to show that he was not himself to blame in respect of its not suiting the purpose for which it was bought. Hence a builder of a bridge who buys cement which he finds



the overseers to pay in full, & the justices at special sessions were applied to for, & refused distress-warrants to compel such payment. On an application for a *mandamus* to the justices for this purpose:—*Held*: after so long a time the township must be taken to have acquiesced in the agreement made by S.—R. *v. ROYDS* (1844), 1 New Sess. Cas. 456; 4 L. T. O. S. 193; 9 J. P. 118.

**1344.** —.]—R. & Co. brought an action against S. & A. in respect of the use of the words "Camel-hair" in connection with belting. Pltfs. had first known of these acts of defts. in Apr. 1898, before the actions but, after inquiries into their position, had taken no steps against them:—*Held*: there had been no such acquiescence on the part of pltfs. as to debar them from suing for an injunction, but it debarred them from recovering damages for the past.—*REDDAWAY (F.) & Co., LTD. v. STEVENSON (ROBERT) & BROTHER, LTD. & STEVENSON* (1902), 20 R. P. C. 276.

**1345.** —.]—Pltf. & deft. were owners in fee of two houses, situate in one block, forming part of a property which was laid out as a building estate in 1877, & sold with restrictive covenants as to the user of the houses as shops. Deft. had purchased his house in 1879, with full notice of the existence of the restrictive covenant, from a previous purchaser whose deed of conveyance contained the covenant; but in the deed of conveyance to deft. no mention was made of the existence of any such covenants. Deft. immediately after his purchase commenced to sell & had ever since sold, beer on his house under an off licence. Pltf., who had purchased his house in 1878, also with full notice of the covenants, & which house was only four doors off deft.'s, was aware of the fact of deft.'s so trading, & he had for nine months or a year bought beer himself at deft.'s house. In Mar. 1882, pltf. brought this action, claiming an injunction to restrain deft. from using his house as a beer-shop in breach of the contract. The character of the property had completely changed since 1877, several houses situate in the block in which pltf.'s & deft.'s houses stood, having been for a considerable time, & still being, used as shops & places of business:—*Held*: pltf. had been guilty of such an amount of acquiescence as made it inequitable in him to enforce the covenant.—*SAYERS v. COLLYER* (1884), 28 Ch. D. 103; 54 L. J. Ch. 1; 51 L. T. 723; 49 J. P. 244; 33 W. R. 91; 1 T. L. R. 45, C. A.

*Annotations*:—*Distd. Northumberland v. Bowman* (1887), 56 L. T. 773. *Consd. Knight v. Simmonds*, [1896] 2 Ch. 294; *Osborne v. Bradley*, [1903] 2 Ch. 446. *Refd. Alexander v. Mansions Proprietary* (1900), 16 T. L. R. 431. *Mentd. Dreyfus v. Peruvian Guano Co.* (1889), 42 Ch. D. 66; *Goddard v. Mid. Ry.* (1891), 8 T. L. R. 126; *Meredith v. Wilson* (1893), 69 L. T. 336; *Yates v. Kyffin-Taylor & Wark*, [1899] W. N. 141; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Re R.*, [1906] 1 Ch. 730; *Elliston v. Reacher* (1908), 77 L. J. Ch. 617; *Pulleyno v. France* (No. 1) (1912), 57 Sol. Jo. 173; *Sobey v. Sainsbury*, [1913] 2 Ch. 513; *Alliance Economic Investment Co. v. Berton* (1923), 92 L. J. K. B. 750; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431; *Leeds Industrial Co-op. Soc. v. Slack* (1924), 40 T. L. R. 745.

**1346. Five years.**—A. by will gave to his wife a life interest in real estate, with remainders over;

unfit for his work & allows six months to lapse thereafter, is estopped from claiming damages from the seller, when it can no longer be ascertained whether he had mixed it properly, or whether he had not allowed it to deteriorate through exposure to molature.—*TRUDEAU v. LAFLEUR & McNALLY* (1907), Q. R. 32 S. C. 223.—CAN.

**1346 i. Five years.**—A person

aggrieved by an entry in the Register of Trade-Marks is not excluded by the lapse of five years from the date of the entry from presenting a petition for rectification of the register.—*HERBERT v. COWIE BROTHERS & Co.* (1897), 24 R. (Ct. of Sess.) 361; 34 Sc. L. R. 280; 4 S. L. T. 243.—SCOT.

**1349 i. Eight years.**—Pltf. applied to defts. for insurance at a fixed annual premium for life, but the policy sent

& also a specific bequest of personalty. After the death of testator in 1834, the residuary personal estate being deficient, the exors., with the privity of the wife, who was also an extrix., applied the proceeds of the specific bequest in discharge of a mtge. upon the real estate, & the mtge. term was assigned to a trustee to attend the inheritance. In 1839 the wife filed her bill, claiming a lien upon the real estate for the proceeds of the specific bequest so applied in discharge of the mtge.:—*Held*: the bill not alleging ignorance or misrepresentation, she was not entitled to be relieved from her voluntary act.—*TOPLIS v. VONDER HEYDE* (1840), 4 Y. & C. Ex. 173; 9 L. J. Ex. Eq. 27.

**1347.** —.]—Pltf., in 1868, at the age of 27 became an associate of a sisterhood upon the introduction of N., her spiritual director. She was afterwards a postulant, then a novice, & then a professed sister, & so continued until 1879, when she left. During her stay she made various gifts of property to a large amount to deft., the lady superior of the sisterhood for the purposes of the sisterhood, all of which gifts had been expended except two sums of railway stock, which remained in deft.'s name. The rules of the sisterhood enjoined implicit obedience, & forbade members from taking advice of externs without the superior's leave. Pltf. did not claim a return of her property until 1884, & the action was commenced in 1885:—*Held*: the conduct of pltf. in delaying to make the claim from 1879 to 1884, whether amounting in law to acquiescence or laches, or to an election not to avoid a voidable transaction, or to a ratification or confirmation of her gifts, disentitled her to recover the stock, although still standing in the name of deft. & unapplied.—*ALLCARD v. SKINNER* (1887), 36 Ch. D. 145; 56 L. J. Ch. 1052; 57 L. T. 61; 36 W. R. 251; 3 T. L. R. 751, C. A.

*Annotations*:—*Refd. Hale v. Sheldrake* (1889), 60 L. T. 292. *Mentd. Tyars v. Alsop* (1889), 61 L. T. 8; *Morley v. Loughnan*, [1893] 1 Ch. 736; *Powell v. Powell*, [1900] 1 Ch. 243; *Wilton v. Osborn*, [1901] 2 K. B. 110; *Howes v. Bishop*, [1909] 2 K. B. 390.

**1348. Six years.**—In 1889 a trustee, with the approval of his committee of inspection, sold part of a bkpt.'s estate to S. The sale was at an undervalue to the knowledge of all parties concerned. A creditor of the bkpt. became aware of the transaction in Mar. 1891, but took no steps to impugn it until Feb. 1897:—*Held*: the creditor's right to relief against S. was not barred by laches & acquiescence.—*Re GALLARD, Ex p. GALLARD*, [1897] 2 Q. B. 8; 66 L. J. Q. B. 484; 76 L. T. 327; 13 T. L. R. 316; 4 Mans. 52; *sub nom. Re GALLARD, Ex p. GALLARD v. STRETTON'S EXECUTORS*, 45 W. R. 556; 41 Sol. Jo. 407.

**1349. Eight years.**—M., a solr. acting for pltf. in a suit, entered, without consulting his client, into an agreement for compromise, whereby deft. was to pay a sum of money to pltf., which was to be handed to M. in satisfaction of his bills of costs, with compound interest; & the conduct of the suit was to be given up to another solr. M. prevailed on his client, pltf., to execute a deed carrying into effect this compromise. In the

to him contained a provision that the premium might be increased. Pltf. did not read the policy, & pursuant to notices from defts., paid them seven annual premiums at the original rate. In the eighth year defts. demanded a larger premium:—*Held*: the policy, not being in accordance with the application, was a mere counter proposal, & there was no contract; pltf. was under no obligation to read



*Sect. 3.—By representation: Sub-sect. 3, E. (b) i.]*

following year pltf. obtained independent professional advice, on the subject of the compromise, but remained on friendly terms with M., & had divers negotiations & dealings with him in relation to the deed of compromise, but did not attempt to set it aside till eight years afterwards, when she filed a bill for that purpose:—*Held*: neither the agreement for compromise nor the deed carrying it into effect, was originally binding upon pltf.; but she had precluded herself, by her conduct, & the lapse of time, from now setting the transaction aside.—*LYDDON v. MOSS* (1859), 4 De G. & J. 104; 33 L. T. O. S. 170; 5 Jur. N. S. 637; 7 W. R. 433; 45 E. R. 41, L. JJ.

*Annotations*:—*Mentd.* Ward v. Sharp (1884), 53 L. J. Ch. 313; *Re Haslam & Hier-Evans*, [1902] 1 Ch. 765.

**1350. Nine years.]**—A debtor with the knowledge of his creditor, made a voluntary settlement of a portion of his estate. The creditor became the exor. of the debtor, whom he survived nine years, & during that time he took no steps to dispute the validity of the settlement:—*Held*: the exors. of the creditor were not entitled to set aside the settlement as fraudulent.—*OLLIVER v. KING* (1856), 8 De G. M. & G. 110; 25 L. J. Ch. 427; 27 L. T. O. S. 29; 2 Jur. N. S. 312; 4 W. R. 382; 44 E. R. 331, L. JJ.

**1351. Ten years.]**—Although a gift by a daughter to her father would have been set aside if a suit had been instituted shortly afterwards, a course of dealing for more than ten years, showing a deliberate intention on the part of the daughter not to disturb the transaction & acquiesced in by the husband, was held to preclude the husband after his wife's death from impeaching the transaction.—*WRIGHT v. VANDERPLANK* (1856), 8 De G. M. & G. 133; 25 L. J. Ch. 753; 27 L. T. O. S. 91; 2 Jur. N. S. 599; 4 W. R. 410; 44 E. R. 340, L. JJ.

*Annotations*:—*Consd.* Turner v. Collins (1871), 7 Ch. App. 329. *Follid.* Allcard v. Skinner (1887), 36 Ch. D. 145. *Refd.* Kempson v. Ashbee (1874), 39 J. P. 164; Mitchell v. Homfray (1881), 8 Q. B. D. 587; *Re Maddever*, Three Towns Banking Co. v. Maddever (1883), 31 W. R. 720. *Mentd.* Tyars v. Alsop (1889), 61 L. T. 8; De Witte v. Addison (1899), 80 L. T. 207; Powell v. Powell, [1900] 1 Ch. 243; London & Westminster Loan & Discount Co. v. Bilton (1911), 27 T. L. R. 184.

the policy, which he was entitled to assume, in the absence of anything done by the co. to call his attention to the provision in question, to be in accordance with the application; he was therefore not barred by acquiescence or delay, & he was entitled to repayment of the premiums with interest.—*MOWAT v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY* (1900), 27 A. R. 675; *reversd.* 32 S. C. R. 147.—*CAN.*

**1349 ii. —.]**—Circumstances in which a party was not entitled to insist for reparation for alleged professional negligence on the part of his agent, he having been aware of the alleged neglect & its consequences for eight years, without intimating any intention of making the agent liable.—*HUNTER v. FLEMING* (1829), 8 Sh. (Ct. of Sess.) 234; 5 Fac. Coll. 206.—*SCOT.*

**1350 i. Nine years.]**—In ejectment deft. set up an equitable defence, that he had been induced to work & serve pltf. & manage his affairs for many years, by pltf.'s representations, promise, & agreement to give him the land & the immediate possession thereof, as a reward therefor; that deft. was put into possession accordingly, & worked the land & made improvements, etc.; that subsequently, in furtherance of such representations,

etc., & in consideration of such work & services, pltf. signed a written agreement to give deft. the land, thereby confirming him in possession; & deft. thereafter made improvements & was assessed & paid the taxes; that deft. had paid the full consideration & performed all conditions to entitle him to hold possession of the land & to all pltf.'s rights therein. At the trial the equitable defence was proved, the agreement mentioned having been signed in 1865; but it was urged that because deft. being out of possession, had in 1874 procured one E., pltf.'s tenant, to give him possession, informing him of his claim & had paid pltf. \$70 rent due by E., he was estopped from denying pltf.'s title; & further, that deft., having been out of possession for nine years, was estopped by his laches:—*Held*: neither the manner in which he obtained possession, nor his laches, could defeat his right to specific performance of the agreement, which had been fully executed on his part.—*WESTGATE v. WESTGATE* (1877), 28 C. P. 283.—*CAN.*

**1350 ii. —.]**—In Sept. 1876, A. obtained a concession from the Municipal Council of P. for supplying that town with water by pipes from the interior of the country. In Oct. 1877, A. entered into a contract of joint adventure with B. & C. to carry out

**1352. Eleven years.]**—In 1792 J. purchased an estate at a sale by auction, but died without having completed the contract. By his will he gave all his real & personal estate to A., his widow, who shortly afterwards married S. By deed of 1793 reciting the contract by J., his death, his will & A.'s marriage with S., who thereupon became entitled to the beneficial interest in the purchase, the estate was conveyed to S. & N. jointly, in fee, in trust as to the estate of N. for S. By deed of 1817 reciting that by certain good assurances in the law & the premises stood limited to the use of S. & N. as to the estate of N. in trust for S. the property was conveyed by S. & N. to C., a purchaser for value.

A. died in 1825. Her heiress-at-law attained 21 in 1825, & five months afterwards married. S. died in 1835. The bill was filed in 1836:—*Held*: there was no laches or acquiescence which would bar pltf.'s claim, or which would justify the ct. in raising any presumption in the deft.'s favour upon the recitals contained in the deed of 1817.—*NEESOM v. CLARKSON* (1842), 2 Hare, 163; 12 L. J. Ch. 99; 6 Jur. 1055; 67 E. R. 68.

*Annotation*:—*Mentd.* Parkinson v. Hanbury (1867), L. R. 2 H. L.

**1353. Twelve years.]**—A delay of twelve years in making the complaint does not amount to acquiescence, or to an abandonment of pltf.'s rights.—*HARTLEPOOL GAS & WATER CO. v. WEST HARTLEPOOL HARBOUR & RY. CO.* (1865), 12 L. T. 366.

**1354. Thirteen years.]**—Certain persons in Sydney, New South Wales, built a church & formed themselves into a congregation under the pastoral care of L., a Presbyterian clergyman ordained in Scotland. They drew up rules whereby they followed the doctrines & mode of worship of the Established Church of Scotland. When several similar congregations arose, the various ministers formed themselves into a synod after the manner of the church in Scotland. L. having disagreed with the other ministers, renounced all connection with them, & afterwards the synod professed to cite him before them & deposed him, & then applied to a ct. of equity to order possession to be delivered up of the church,

the work. In May, 1878, after the work had been commenced, A., partly by means of the concession, obtained for his own behoof from the T. Co., which then carried on the business of supplying P. & other ports with water by means of steam vessels, a lease of their business & plant. A. afterwards stopped the work of the joint adventure, & along with B. carried on the new business till the town of P. was destroyed by bombardment in 1879. C. was informed of these proceedings, but did not interfere. C. became bkpt. in 1885, & in 1887 his trustee assigned his interest in the joint adventure to D. In an action of accounting raised by D. in 1887 against A., the pursuer claimed profits made from the T. lease as falling to the joint adventure:—*Held*: although C. would, if he had made his claim within a reasonable time, have been entitled to share in the profits made under the T. contract in respect that it covered the same ground as the joint adventure, & had been obtained by means of the concession, his claim was extinguished by his delay in asserting it.—*STEWART v. NORTH* (1893), 20 R. (Ct. of Sess.) 260.—*SCOT.*

**1353 i. Twelve years.]**—*Semble*: an infant cannot disaffirm his deed after the lapse of twelve years.—*GERSE v. TAYLOR* (1879), 3 N. Z. L. R. C. A. 265.—*N.Z.*

& to restrain L. & his congregation from using it. The synod sued on their own behalf & on behalf of the congregation, but the congregation declined to join in the suit:—*Held*: plffs. had no title to sue, & even if they had they were barred by acquiescence for thirteen years from following out their sentence.—*LANG v. PURVES* (1862), 15 Moo. P. C. C. 389; 5 L. T. 809; 8 Jur. N. S. 523; 10 W. R. 468; 15 E. R. 541, P. C.

**1355. Fifteen years.]**—*NORTH v. ANSELL*, No. 865, *ante*.

**1356. Seventeen years.]**—*SELSEY v. RHOADES*, No. 1295, *ante*.

**1357. Nineteen years.]**—A. in India, on his own responsibility, invested money belonging to his brother B. in England in indigo which he consigned to B. & he recommended him, in consideration of his (A.) not charging commission, to settle £1,000 on each of his two sisters, which he suggested should be invested in spelter & consigned to him for sale. B. acceded to this, & A. sold the spelter & remitted the proceeds, nearly £4,000, to B. on account of his sisters. B. retained the money & gave his promissory notes to his sisters for the amount. In 1841 sisters voluntarily surrendered to their brother his promissory notes for money owing to them, but under such circumstances that the transaction could not be sustained if complained of in due time. One sister died in 1852 & the other in 1857 & the brother died in 1860. In the following year a bill was filed by the representative of the sisters to set aside the transaction:—*Held*: plff. wholly failed, this being an attempt to rip up a transaction nineteen years old, when all the actors in it were dead & which transaction they all understood at the time.—*MACKINTOSH v. STUART* (1864), 36 Beav. 21; 55 E. R. 1063.

**1358. Twenty-three years.]**—An acquiescence of twenty-three years, with a knowledge of the will, is a good bar to a claim by a residuary legatee against an exor. for an account, on the ground of neglect or misfeasance, & that independently of Real Property Limitation Act, 1833 (c. 27).—*PORTLOCK v. GARDNER* (1842), 1 Hare, 594; 11 L. J. Ch. 313; 6 Jur. 795; 66 E. R. 1168.

**1359. Thirty-seven years.]**—T., a merchant, in partnership with A., died in 1790, unmarried & intestate, possessed of leasehold property, & leaving his sisters S. & D. his sole next of kin. Soon after his death, the partnership was, on investigation by the creditors, found to be insolvent, & S. & D., with consent of their husbands, duly renounced administration of his estate. By indenture made between W. & his wife S. of the first part, A. of the second part, & his then new partner R. of the third part,—after reciting that the former partnership was insolvent; that A.

& R. had undertaken to settle with the creditors by composition, which could not be effected without administration of T.'s personal estate, & that there had been money transactions between him & W., of which neither kept any account, W. & S. renounced, at R.'s request, all their right to the administration in favour of A., who in consideration thereof covenanted, after obtaining such administration, to release W. from all claims which he as administrator of T. or otherwise might have on W.; & W., in consideration of such release, covenanted for himself, his heirs, exors. & administrators, & for his wife, that they, W. & S., would, after such administration should be granted to A., execute to him, his exors. & administrators, a release of all claims whatsoever which they might have on him as administrator of T. or otherwise. The creditors also by a composition deed agreed to accept 15s. in the pound, payable by instalments by A. & R., & to allow A. to take out administration of the estate of T. Afterwards E., the husband of D., by a deed-poll, after reciting that he had an unsettled demand against T.'s estate, & that the effects of the late partnership, together with his private estate, were insufficient to pay the partnership debts, & that the creditors entered into a composition & agreement with A. & R. as aforesaid, declared that a bond for £1,000 given to him by A. & R. pursuant to an agreement therein recited, should, when paid, be in full discharge of all sums of money due to him from T., & of all claims whatsoever of him, E., on the estate & effects of T. A. then took out letters of administration of T.'s estate, & in order to pay the creditors, raised sums of money by annuities & mtge. on the leasehold property, R. joining in the securities; but in 1793, being unable to pay the whole composition by what they had then received from the intestate's estate, they entered into further arrangements with the creditors, & soon afterwards dissolved partnership, R. remaining in exclusive possession of the leasehold premises, of which he afterwards purchased the fee simple, & dealing with them as his own for several years, without any interference by A., or the next of kin, or their husbands who survived them, all of whom died between the years 1797 & 1815; he mortgaged them in 1815 to secure debts due by him to D. & Co., subject to the leases possessed by the intestate, subject to which he also in 1818 released to them the equity of redemption, & they afterwards sold the property in fee to other parties. A bill to redeem the premises was filed against the mtgees. & purchasers in 1831, by an administrator *de bonis non* of T., claiming title also as representative of the next of kin. There was no direct proof that T.'s next

**1355 i. Fifteen years.]**—Where deft., during nonage, conveyed land in fee to the grantor of plff.; & though fifteen years had elapsed since his majority, took no steps to repudiate his deed, until he defended on this ground an action of ejectment brought against him for the land, a conveyance of which had in the interim, & after the conveyance to plff., been made to him, deft., by the person entitled:—*Held*: it might be assumed, under the power given to the ct. to draw inferences of fact, that deft. had confirmed the deed, & he could not now set up in this suit the defence of infancy.—*FEATHERSTON v. McDONELL* (1865), 15 C. P. 162.—*CAN.*

**i. Twenty years.]**—Plff., in an action of ejectment, having slept upon his rights for nearly twenty years, & the jury having found for deft.

upon secondary evidence of deeds & papers, the ct. refused to interfere.—*HEANY v. PARKER* (1868), 27 U. C. R. 509.—*CAN.*

**a. Twenty-four years.]**—A person in the employment of a railway co. was severely injured in 1846. He claimed at the time no solatium, but was employed by the co. in easy work until 1870, when he was dismissed:—*Held*: in an action by him for damages for the accident in 1846, that his claim barred by *mora*.—*COOK v. NORTH BRITISH RY. CO.* (1872), 10 Macph. (Ct. of Sess.) 513; 44 Sc. Jur. 342.—*SCOT.*

**b. Thirty years.]**—Lapse of time, short of 30 years, is not *per se* a bar to the right of the next of kin to demand proof of a will in solemn form, but may be a bar taken in conjunction with other circumstances, & the onus of showing

that there are such circumstances lies upon the executors.—*Re GOODE* (1890), 11 N. S. W. Eq. 281; 6 N. S. W. N. 121.—*AUS.*

**c. —.]**—*Held*: legatees having allowed a period of thirty years to elapse without taking steps to enforce their claims, were guilty of laches, & must be assumed to have acquiesced in the mode in which such claims were dealt with.—*Re RUNCIMAN'S ESTATE* (1905), 38 N. S. R. 89.—*CAN.*

**d. —.]**—Parties carried on business under a contract, providing that balances should be struck yearly & balance sheets subscribed within two months should be "probative." The last balance & some of those previous were not signed till more than two months after the balance was struck.

After the death of both partners, the representatives of the first deceased



**Sect. 3.—By representation: Sub-sect. 3, E. (b) i. & ii. & F. (a).]**

of kin executed releases of their interest in the residue of his estate:—*Held*: it was immaterial whether such releases were executed or not, as the various acts of ownership exercised over the leasehold property by A. & by R. & those deriving under him, all dealing with it as their absolute property for a period of 37 years, with the acquiescence of the next of kin & their representatives, established beyond all doubt an agreement by the next of kin to give up all their interest in it, in consideration of the arrangements of 1790.—*SKEFFINGTON v. BUDD* (1842), 9 Cl. & Fin. 219; 6 Jur. 809; 8 E. R. 399, H. L.; *affg.* S. C. *sub nom.* *SKEFFINGTON v. WHITEHURST* (1838), 3 Y. & C. Ex. 1.

**1360. Forty-seven years.]**—The comrs. of a canal make an agreement for letting the tolls, not warranted by the Act under which they derive their authority, & prejudicial to an interest expressly reserved by the Act to the public; this agreement is acquiesced in for 47 years, without complaint on the part of any of the shareholders, & during that period, the lessee remains in undisturbed possession of the tolls: the ct. will not, at the suit of shareholders, disturb his possession by the appointment of a receiver. *Semble*: after such acquiescence, it is not competent to shareholders in respect of their private interest to impeach the agreement.—*GRAY v. CHAPLIN* (1826), 2 Russ. 126; 38 E. R. 283, L. C. *Annotation*:—*Mentd.* *Bedford v. Ellis*, [1901] A. C. 1.

**ii. Other Cases.**

**1361. Claim by beneficiary to inventory & account.]**—The ct. will not call for an inventory & account from the widow & administratrix of a deceased at the instance of the assignee of an insolvent son on the suggestion that he has not received his share after long acquiescence; & when it is shown that a valuation & inventory was made shortly after the death & facts are proved from which it may be presumed that the

partner brought an action against the trustees of the other after thirty years had elapsed from the date of the last docketed balance, concluding for reduction of the balances & for an accounting:—*Held*: the action was not barred by *mora*.—*M'LAREN v. LIDDELL'S TRUSTEES* (1860), 22 Dunl. (Ct. of Sess.) 373; 32 Sc. Jur. 164.—*SCOT.*

**PART VI. SECT. 3, SUB-SECT. 3.—E. (b) ii.**

**e. Delay by one partner—Asserting indebtedness of other.]**—A judgment creditor of J. applied for an order for sale of the latter's interest in certain lands, the legal title to which was in K., a brother-in-law & former partner of J. An order was made for a reference to ascertain J.'s interest in the lands, & to take an account of the dealings between J. & K. In the master's office K. asserted that in the course of the partnership business he signed notes which J. indorsed & caused to be discounted, but had charged against him, K., a much larger rate of interest thereon than he had paid & he contended a large sum was due to him from J. for such overcharge:—*Held*: K.'s claim could not be entertained; there was, if not absolute evidence, at least a presumption of acquiescence from long delay; & such presumption was not rebutted by the evidence of the two partners, considering their relationship & the apparent concert between them.—*TOOTH v. KITTRIDGE*

(1893), 24 S. C. R. 287.—*CAN.*

**f. Irregularities in sale of mining areas.]**—Pltf. brought an action for a declaration of his interest in certain gold mining areas, which defts. were proceeding to sell, for a sale of the areas, & for payment of his share of the proceeds. An order for the sale of the property was drawn up by defts.' solr., & made on the written consent of pltf. There was no provision in the order as to who should have the conduct of the sale. This was undertaken by defts.' solr., who, with pltf.'s knowledge, advertised the property in accordance with the terms of the order, & proceeded to sell. Pltf. objected to the sale, & subsequently sought to set it aside on the ground that he was entitled to the conduct of it, & on other grounds:—*Held*: pltf. was entitled to the conduct of the sale, as claimed by him, but that he was estopped by his laches from taking advantage of the irregularities complained of.—*WALLACE v. GRAY* (1893), 25 N. S. R. 279.—*CAN.*

**g. Delay in moving against award—Arbitration.]**—Pltf. & deft. entered into an agreement on Aug. 28, 1889, to submit to arbn. all matters touching the division line between their lands. An award was made in writing on Nov. 9, 1889, & deft. had notice. To an action brought by pltf. on Oct. 7, 1893, for breaking & entering pltf.'s lands, being the lands referred to in the award, deft., on May 28, 1894, filed a counterclaim asking to have the award

son received considerably more than his full share.—*PITT v. WOODHAM* (1828), 1 Hag. Ecc. 247; 162 E. R. 573.

*See EQUITY*, Vol. XXI., pp. 266 *et seq.*; *EXECUTORS*.

**1362. Application for shares in company—Delay in ascertaining constitution of company.]**—A person who applies for shares in a co. not yet registered, & afterwards receives an allotment of shares in a co. professing to be the same co., is entitled to a reasonable time within which to make himself acquainted with the memorandum & articles of assocn. of the co. which has been actually registered, & if within that reasonable time he makes no attempt to repudiate his shares, he must be considered to have made himself acquainted with the memorandum & articles, & cannot be afterwards heard to say that he was ignorant of their contents (*LORD CAIRNS*, L.J.).—*Re MADRID BANK, WILKINSON'S CASE* (1867), 2 Ch. App. 536; 36 L. J. Ch. 489; 15 W. R. 499, L. J.J. *Annotation*:—*Refd.* *Oakes v. Turquand & Harding, Peek v. Same, Re Overend, Gurney* (1867), L. R. 2 H. L. 325. *See, further*, *COMPANIES*, Vol. IX., pp. 95 *et seq.*; p. 142, Nos. 787–91.

**Claim to relief in respect of contract to take shares in company.]**—*See COMPANIES*, Vol. IX., pp. 130 *et seq.*; pp. 222, 223.

**1363. Delay by creditor in compelling realisation of estate.]**—Mere laches in not compelling the exors. to realise for the purpose of paying his debt will not deprive a creditor of his right to sue the exors. for *devastavit* unless by conduct or express authority he has misled the exors. & induced them to part with assets liable to answer his claim.—*Re BIRCH, ROE v. BIRCH* (1884), 27 Ch. D. 622; 54 L. J. Ch. 119; 51 L. T. 777; 33 W. R. 72.

*Annotation*:—*Apld.* *Re Rix, Rix v. Rix* (1912), 56 Sol. Jo. 573.

*See, generally*, *EXECUTORS*.

**1364. Insufficient fund set aside to answer annuity—Reduction of interest.]**—Testator devised his real & personal estate to trustees, of whom his wife was one, upon trust for conversion

declared null & void, on the grounds that the arbitrators exceeded their jurisdiction; that deft. had no opportunity of being heard before the umpire; that the award was made *ex parte* & without hearing evidence, & on other grounds:—*Held*: deft. was precluded from having the award set aside, by his laches in moving against it.—*CLISH v. FRASER* (1895), 28 N. S. R. 163.—*CAN.*

**h. Delay in moving to set aside proceedings—No estoppel without detriment to other party.]**—Delay from Aug. 1 to Sept. 25 in moving to set aside proceedings taken in the name of appct. as one of the pltf's., without his authority:—*Held*: not a bar to relief, where no detriment had resulted to defts. thereby.—*MORRIS v. CONFEDERATION LIFE ASSOCN.* (1895), 17 P. R. 21.—*CAN.*

**k. Application for lease—By holder of licence to search.]**—Lapse of time will estop the Governor in Council from granting a lease to the holder of a licence to search for minerals, & consequently from granting a lease to commence from its actual issue.—*ENGLAND v. NEWFOUNDLAND GOVERNMENT & HENDERSON* (1898), 8 Nfld. L. R. 86; *affd.* (1899), 8 Nfld. L. R. 180.—*NFLD.*

**l. Delay of government in denial of grant of licence.]**—In an action *ex contractu* against the Govt. of Newfoundland, pltf's. claimed that they were entitled to receive a licence under Whaling Industry Act, 1902, in respect



& to invest in Government or real securities, & that his trustees should stand possessed of the trust premises to pay his wife an annuity of £100 clear of all deductions whatsoever & directed the trustees to appropriate & set apart a fund for securing such annuity & after the death of his wife, directed the trustees to pay & divide or transfer the money thereinbefore appropriated & directed to be set apart among his, testator's, children. Part of testator's property consisted of £2,500, £4 *per cent.* stock, which at his death, & for some time after, produced £100 a year; this fund was set apart by the trustees for securing payment of the widow's annuity, but, owing to successive reductions of the interest of the stock by Parliament, there was, at the widow's death, a considerable arrear to make up the deficiency between the £100 a year & the reduced income of the fund which had for many years been received by the widow:—*Held*: on the construction of the will the widow would have been entitled to have the deficiency made good out of the corpus; but she having forborne to assert her claim for so long a period during her lifetime, & having been aware of the dealings of several of her children, in respect of their shares, with persons who were acting on the belief that they were shares in a certain definite amount of stock, without giving any intimation of her intention to claim such arrears out of the corpus, the representatives of the widow could not, as against the parties who so dealt for value, with the knowledge of the widow, assert the claim, to which she would otherwise have been entitled, to have the arrears of the annuity made good out of the corpus.—*UPTON v. VANNER* (1861), 1 Drew. & Sm. 594; 5 L. T. 480; 8 Jur. N. S. 405; 10 W. R. 99; 62 E. R. 505.

**1365. Payment of annuity not enforced regularly.]**—An annuitant is not guilty of such laches as would disentitle her to recover arrears of her annuity merely on the ground that she has not actively enforced the performance of the duty of the trustees to pay her such annuity regularly.—*Re RIX, RIX v. RIX* (1912), 56 Sol. Jo. 573.

**Claim to reopen account.]**—See EQUITY, Vol. XX., p. 264 *et seq.*

**Claim to injunction.]**—See INJUNCTION.

**Claim to equitable relief generally.]**—See EQUITY, Vol. XXI., pp. 264 *et seq.*

of an area described by them in their application:—*Held*: the Govt. was not estopped by any action or delay from showing that no licence was granted or agreed to be granted to an applicant in respect of an area applied for.—*NEWFOUNDLAND STEAM WHALING CO., LTD. v. NEWFOUNDLAND GOVERNMENT* (1903), 8 Nfld. L. R. 608.—*NFLD.*

**m. Delay in moving for committal order—Non-payment by judgment debtor.]**—On Aug. 25, 1908, debt. was examined as a judgment debtor under Collection of Debts Ordinance, 1904, & was ordered to pay \$25 a month, beginning on Sept. 5, 1908. In Oct. 1910, pltf. moved to commit debt. for contempt in not paying the instalments ordered. Debt. made payments, in Sept., Oct., & Nov. 1908, since when he had paid nothing:—*Held*: if pltf. had moved promptly on default, he would have been entitled to a committal order; but he had himself suspended the order for payment & allowed it to lie dead for 2 years, & he must have done so because he conceived that debt. was unable to pay; & he had, by his own laches, put himself in a position, where he could not ask for

a committal order.—*PALM v. THOMPSON* (1910), 15 W. L. R. 433.—*CAN.*

**n. Delay due to mental condition—No bar.]**—Upon the evidence:—*Held*: pltf. did not understand the effect of the deed when she became a party to it; when executing it, she was not in a condition of mind to realise, as fully as was necessary, what she was doing; she had no independent advice, & the deed was not, in these circumstances, a bar to the action. Her mental condition also excused her laches in allowing the deed to stand so long unquestioned.—*DITCH v. DITCH* (1911), 19 W. L. R. 497; 21 Man. L. R. 507.—*CAN.*

**o. Delay in repudiating agent's authority—Sale of goods by agent.]**—*Held*: pltf. was entitled to recover from debt. certain horses which debt. had taken possession of, & damages for their detention, debt. being estopped by his conduct & laches from asserting that a sale of the horses by debt.'s wife, through which pltf. claimed, was made without his, debt.'s, authority.—*ALCOCK v. SMITH* (1913), 26 W. L. R. 322.—*CAN.*

**p. Delay in applying to annul decree—By person not a party thereto.]**—

## F. Election.

### (a) In General.

*See, generally, EQUITY, Vol. XX., pp. 403 et seq.*

**1366. General rule.]**—*SCARF v. JARDINE*, No. 577, *ante*.

**1367. Time for election—Policy of insurance.]**—Pltf.'s insurance broker, effected an insurance with defts. on the chartered freight of pltf.'s ship C. without disclosing to defts. certain information in his possession, which it was material that they should know (Oct. 10). In so doing he acted in good faith, supposing from inquiries that he had made that the information was incorrect. After initialing the slip, but before executing the policy, defts., on October 13, became possessed of the information which the broker had not disclosed; & they afterwards executed & delivered out the policy without any protest or any notice that they would treat it as void,—on Oct. 14 or 15. Upon receiving news of the loss of the vessel, they gave notice to pltf. that they did not consider the policy binding on them, on Oct. 20. On the trial of the action upon the policy, the learned judge directed the jury, in substance, that defts. were bound to make their election within a reasonable time after they became aware of the concealment, & left it to them, without expressing any opinion, whether defts. had elected to go on with the policy. The jury having found that defts. did not so elect, & a rule for a new trial on the ground of misdirection having been obtained & afterwards made absolute in the ct. below:—*Held*: this direction was right; & there being no election in fact, & no evidence that pltf. had been prejudiced by defts. not electing earlier to disaffirm the policy, defts. were not estopped from denying its validity, nor was it material to consider whether their conduct in delivering out the policy without a protest had been such as to entitle pltf. to consider it as an election.—*MORRISON v. UNIVERSAL MARINE INSURANCE CO.* (1873), L. R. 8 Exch. 197; 42 L. J. Ex. 115; 21 W. R. 774, Ex. Ch.

*Annotation*:—*Reid. Marsden v. Sambell* (1880), 43 L. T. 120.

*See, generally, INSURANCE.*

**1368. — Building agreement.]**—The exercise of a right of election to rescind a building agreement must be signified in an unqualified manner, & within a reasonable time, or, at all

A man, though no party to a decree, may preclude himself from the aid of a ct. of equity, if he knowingly allowed parties to proceed under it, & uses unreasonable delay in bringing forward his complaint; but every case of this kind depends on its own circumstances.—*ELLIS v. DEANE* (1827), Beat. 5.—*IR.*

**q. Delay in proceeding to establish title—Presumption of acts rightly done.]**—By a trust deed dated 1778, W. conveyed in trust *inter alia* to raise a sum by mtge. & sale to pay off mtges. & other debts of W. & to pay over the net income of the property to W. for life, & after his death to his heir-at-law. In 1795 the then trustees sold the premises to the husband of debt. C., who died, leaving them to his wife. W., the original grantor, died in 1824, leaving J. as his heir-at-law, who, however, took no proceedings until 1840. He sought to have the deed of sale of 1795 set aside as a fraud upon his rights:—*Held*: after so long a time it must be presumed without proof to the contrary that all the transactions above mentioned had been rightly done & pltf.'s action would be dismissed.—*COWLE v. COWIN* (1842), Bluet, 259.—*I. of M.*

*Sect. 3.—By representation: Sub-sect. 3, F. (a) &*

events, not after the other party to the agreement has gone to expense in the belief of the right of election not being exercised. A mistaken claim by one of the parties to such an agreement to rescind it does not *ipso facto* operate to rescind the agreement, unless the other party claims a rescission on the ground of the mistaken claim.—*MARSDEN v. SAMBELL* (1880), 43 L. T. 120; 28 W. R. 952.

**1369. — Debtor's position likely to be affected.]**—Where there is a choice of debtors, & a liability is sought to be created by estoppel, & the remedy over against the person who ought to pay is likely to be imperilled, by delay, the rule that an election should be made within a reasonable time ought to be strictly applied. While the indication of intention to elect must be clear and unequivocal, an act of a creditor, who has the right of election, by which he materially affects the position of his co-creditors of one of his debtors, is such clear & unequivocal act of election to proceed against that particular debtor.—*FELL v. PARKIN* (1882), 52 L. J. Q. B. 99; 47 L. T. 350.

*See, also, No. 1380, post.*

**1370. Necessity for knowledge.]**—*VYVYAN v. VYVYAN*, No. 1537, *post*.

**1371. What amounts to—User of premises by bankrupt's assignee.]**—The assignee of a bkpt., lessee of certain premises, chosen on Nov. 15, 1823, kept the bkpt. in the premises, carrying on the business for the benefit of the creditors until Apr. following, & himself occasionally superintended. But on Dec. 22, 1823, he disclaimed the lease by letter to the landlord:—*Held*: the assignee, notwithstanding such disclaimer, had elected to accept the lease by using the premises for the benefit of the creditors.—*CLARK v. HUME* (1825), Ry. & M. 207, N. P.

**1372. — — —.]**—Assignees of all a debtor's property, in trust for the creditors, are not bound to accept a lease of which they were ignorant when they executed the assignment, & which they think likely to be injurious to the creditors. They may put up such a lease for sale, to try whether it can be made beneficial, without rendering themselves chargeable as assignees of the lease. But if they treat the estate as their own, & do anything with it injurious to the owner, they are chargeable as assignees of the lease.—*CARTER v. WARNE* (1830), 4 C. & P. 191; Mood. & M. 479, N. P.

*Annotations:—Consd. How v. Kennett* (1835), 3 Ad. & El. 659; *White v. Hunt* (1870), L. R. 6 Exch. 32.

Disclaimer by trustee in bankruptcy generally, *see* BANKRUPTCY, Vol. V., pp. 938 *et seq.*

**1373. — — — Proceedings taken under mistake.]**—Where a person mistakes his remedy, & goes against the wrong estate, if he afterwards discover that he had a right to have gone against the other estate, he is not precluded as having elected.—*Re BOWERMAN, Ex p. VINING* (1836), 1 Deac. 555; 5 L. J. Bcy. 44, Ct. of R.

#### PART VI. SECT. 3, SUB-SECT. 3.— F. (a).

**1370 i. Necessity for knowledge.]**—In the absence of clear & cogent evidence that he had had presented to his mind proper materials upon which to exercise his power of election:—*Held*: pltf. was not estopped by his deed of conveyance implementing the option he had given.—*LAYCOCK v. LEE & FRASER* (1912), 19 W. L. R. 841; 1 D. L. R. 91; 17 B. C. R. 73.—**CAN.**

*r. What amounts to — Signing*

*judgment.]*—Pltf. brought an action against deft. co. & sought also to recover in debt against deft. bank under Bank Act, 1913 (c. 9), s. 88; deft. co. not having entered an appearance, judgment was signed against deft. co. & pltf. proceeded with his action against the bank; the bank contended that pltf. had elected by signing judgment against the co. & was thereby debarred from proceeding against it; pltf. thereupon obtained an order vacating the judgment against the co. & sought to recover solely from

**1374. — — — Attendance at meeting of company.]**—Where it was optional with pltf. to receive payment for an advance to defts., a co., either in shares or money, & a cheque was sent to him by the co.'s secretary in payment thereof, which after keeping two days, he returned, requesting to be paid in shares; but, in the interim, attended a meeting of the co., where his conduct led to the inference that he accepted the cheque:—*Held*: such conduct amounted to an acquiescence in the payment, & debarred him from all further claim to the shares.—*FERGUSON v. WILSON* (1866), 14 L. T. 12; *on appeal*, 2 Ch. App. 77, L. J.J.

*Annotations:—Mentd. Lewers v. Shaftesbury* (1867), 16 L. T. 135; *Hilton v. Tipper* (1868), 16 W. R. 888; *Turner v. Moy* (1875), 32 L. T. 56; *Wilson v. Bury* (1880), 5 Q. B. D. 518; *Elmore v. Pirrie* (1887), 57 L. T. 333; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307; *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851.

**1375. — — — Executor permitting earlier will to be propounded—After caveat lodged & withdrawn.]**—An exor. of a will entered a caveat to a will of a later date, but withdrew the caveat before it was warned, & allowed letters of administration with the earlier will annexed, to be granted to one of the residuary legatees named therein:—*Held*: he was not estopped by the withdrawal of the caveat under the circumstances from calling in the letters of administration, with the earlier will annexed, & propounding the alleged later will.—*GODDARD v. SMITH* (1872), L. R. 3 P. & D. 7; 42 L. J. P. & M. 14; 28 L. T. 141; 37 J. P. 199; 21 W. R. 247.

*See, gene*

**1376. — — — Delivery of policy after underwriting slip initialled—Information acquired after slip initialled.]**—*MORRISON v. UNIVERSAL MARINE INSURANCE CO.*, No. 1367, *ante*.

— **Acceptance of notice of abandonment.]**—*See* INSURANCE.

**1377. Notification of election.]**—By deed made Sept. 4, 1843, B. granted to A. licence to get all the copperas stone which might be found in a certain part of the manor of M. for 21 years, at the yearly rent of £25, payable half-yearly on June 24 & Dec. 25, with a proviso that if any part of the rent should be in arrear for 21 days, it should be lawful for B., his heirs & assigns, by notice in writing delivered to A., his exors, administrators or assigns, to determine the grant. On Jan. 31, 1856, J. H., who had become assignee of the licence, assigned the licence to defts. by way of mtge., & on Aug. 5, 1857, it was absolutely assigned to defts. by arrangement, who by oral agreement granted to J. H. the enjoyment of all the rights under it on his paying the rent thereby reserved. On Mar. 27, 1858, pltf., who had purchased the manor in Aug. 1854, distrained goods of J. H. & E. H. his son, lying on the part of the manor mentioned in the licence, for arrears of rent due at Christmas, 1857. J. H. & E. H. thereupon brought actions against pltf. for the illegal distress, in which he suffered judgment by default; & in 1858, negotiations for a settlement

the bank:—*Held*: assuming that the judgment against the co. was improperly set aside, yet the fact of so signing judgment did not operate as a conclusive election & did not therefore bar the action against the bank.—*EDBORG v. IMPERIAL TIMBER & TRADING CO.* (1914), 19 B. C. R. 514.—**CAN.**

*s. — — — Electing to take legacy in satisfaction of indebtedness.]*—It was contended that pltf. was estopped from claiming a legacy under a will as he had



of the actions & for granting a new licence to E. H. for a further term of 21 years, commencing on Jun. 24, 1864, the day on which the grant of Sept. 4, 1843, would expire, were carried on between the attorneys of J. H. & of pltf., & it was verbally arranged between pltf.'s attorney & the attorney for J. H. & E. H. that the actions should be settled on certain terms, one of which was, that such a licence should be granted to E. H. These terms pltf. refused to carry out. On Jul. 3, 1858, pltf. gave a written notice to defts. & J. H. pursuant to the proviso, to determine the licence. On Jan. 11, 1859, defts. tendered to pltf. £50 for two years' rent due at Christmas, 1858, which pltf. refused to accept. In trespass for breaking & entering pltf.'s close & taking away copperas stone, the ct. having power on a special case to draw inference of fact:—*Held*: the pltf., after the cause of forfeiture had occurred, sufficiently expressed & communicated to defts. his determination to treat the licence as existing, & was bound by that election, & therefore the subsequent notice was inoperative.—*WARD v. DAY* (1861), 5 B. & S. 359; 4 New Rep. 171; 33 L. J. Q. B. 254; 10 L. T. 578; 12 W. R. 829; 122 E. R. 865.

*Annotation*:—*Refd.* Walrond v. Hawkins (1875), 41 L. J. C. P. 116.

**1378.** —.]—*MARSDEN v. SAMBELL*, No. 1368, *ante*.

**1379.** —.]—*FELL v. PARKIN*, No. 1369, *ante*.

**1380. Loss of right to elect—Delay affecting position of wrongdoer.**—A. having ordered goods from the L. P. Co. in London, paid them £68 in cash, & gave a bill for £135, the balance of the price, directing the goods to be sent by defts.' railway to C., his agent at L. The railway co. reported to the L. P. Co. that C. was not to be found at the address given, & asked for further directions; but before any reply was received, C. claimed the goods at the station in L., & defts. thenceforward held them as warehousemen for him. In the meantime, the L. P. Co. having discovered that A. was a bkpt., directed defts. to return the goods to London; but this direction did not reach the L. station till after the *transitus* was at an end. Defts., being indemnified by the L. P. Co., afterwards refused to deliver the goods to C., whereupon he brought an action against them. At the trial, the jury found: (a) A. obtained the goods with the intention of not paying for them; (b) pltf. had advanced £250, including the £68, to A., but not *bonâ fide*; (c) he knew of A.'s fraudulent intention. A verdict was thereupon entered for defts., leave being reserved to move to enter a verdict for pltf., if the ct. should think defts. not entitled to the verdict, either upon the pleas as they then stood "or upon any possible amendment of them":—*Held*: upon the facts proved, a plea stating, "that the goods had been sold to A., & delivered by the L. P. Co. to defts., to be delivered to pltf. under a contract induced by A.'s fraud to which pltf. was privy; that the L. P. Co., supposing the *transitus* to be still subsisting, had obtained from defts. the re-delivery of the goods, but that afterwards, & after action brought, the L. P. Co. having discovered the fraud & pltf.'s knowledge

of it, elected to rescind this contract with pltf., & that they were ready to restore the £68, & the bill; that this took place before any act was done by them affirming the contract or otherwise determining their election, that no interest had vested in any innocent third person, rendering it inequitable or unjust to rescind the contract; & that pltf. was inequitably proceeding with the suit for the purpose of obtaining damages from defts. & the L. P. Co.," would have been proved, & would have furnished a complete answer to the action on equitable if not legal grounds.—*CLOUGH v. LONDON & NORTH WESTERN RY. CO.* (1871), L. R. 7 Exch. 26; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189, Ex. Ch.

*Annotations*:—*Consd.* Morrison v. Universal Marine Insce. (1873), L. R. 8 Exch. 197; R. v. Middleton (1873), L. R. 2 C. C. R. 38; Wakefield & Barnsley Banking Co. v. Normanton L. B. (1881), 44 L. T. 697. *Expld.* Scarf v. Jardine (1882), 7 App. Cas. 345. *Consd.* James v. Young (1884), 27 Ch. D. 652; *Re* Snyder Dynamite Projectile Co., Skelton's Case (1893), 68 L. T. 210; Gordon v. Street, [1899] 2 Q. B. 641. *Expld.* It. v. Paulson, [1921] 1 A. C. 271. *Extd.* Abram S.S. Co. v. Westville Shipping Co., [1923] A. C. 773. *Refd.* Erlanger v. New Sombroero Phosphate Co. (1878), 3 App. Cas. 1218; Allcard v. Skinner (1887), 36 Ch. D. 145; Dickson v. Murray (1887), 3 T. L. R. 637; Aaron's Reefs v. Twiss, [1896] A. C. 273; Law v. Law, [1905] 1 Ch. 140; Boston Fruit Co. v. British & Foreign Marine Insce., [1906] A. C. 336; United Shoe Machinery Co. of Canada v. Brunet, [1909] A. C. 330. *Mentd.* Rankin v. Potter (1873), L. R. 1 H. L. 83; *Re* Railway Time Tables Publishing Co., *Ex p.* Sandys (1889), 42 Ch. D. 98; Cornwall v. Henson, [1900] 1 Ch. 298; Armstrong v. Jackson, [1917] 1 K. B. 822.

*See, also*, No. 1369, *ante*.

**Novation of contract.**—*See* CONTRACT, Vol. XII., pp. 596 *et seq.*

**Election to waive tort & sue for money had & received.**—*See* CONTRACT, Vol. XII., p. 562, Nos. 4673–4679.

#### (b) Between Alternative Courses of Action.

**1381. Adoption of bankrupt's lease by trustees.**—*CARTER v. WARNE*, No. 1372, *ante*.

*See, generally*, BANKRUPTCY, Vol. V., pp. 938 *et seq.*

**1382. Adoption of voidable contract.**—If a voidable contract is voluntarily acted upon by a party to it, with a knowledge of all the facts, he cannot avoid it when the result has turned out to his disadvantage.

O., a builder, contracted to build a house within a given time, under certain conditions, one of which was, that if the building did not progress as the architect might consider necessary, he, the architect, might purchase such materials & employ such workmanship as he might consider necessary, & deduct the costs of the same from any moneys due to the contractor on account of the works. After a portion of the work had been done & paid for, the architect refused to certify for further payments, on the ground of delay & the want of supply of proper materials. The builder's workmen not being paid, they became clamorous, & accompanied O. to the architect's office, & O. then, after remonstrating, signed an agreement giving up the contract, in consideration of £50 then paid to him, & stipulating that the works should be paid for according to the valuation of an arbitrator

disputed the validity of the latter, & had elected to take £10,000 as a debt due to himself & not as a legacy. It appeared that pltf.'s brother had sued for a share in testator's estate as family property, & that pltf. had supported him & had also claimed a share:—there was no estoppel, & pltf.'s

right to the legacy was not affected by that claim.—*RAJAMANNAR v. VENKATAKRISHNAYYA* (1902), 1 L. R. 25 Mad. 361.—*IND.*

t. —.]—In order to infer that a party elected, he must have indicated a manifest intention of taking one estate, & rejecting the other.—

*RATHBORNE v. ALDBOROUGH* (LORD) (1831), Hayes, 207.—*IR.*

**PART VI. SECT. 3, SUB-SECT. 3.**—**F. (b).**

**1382 i. Adoption of voidable contract.**—A purchaser who elects to affirm a voidable contract for the sale of land,



**Sect. 3.—By representation: Sub-sect. 3, F. (b), (c) & (d) & G. (a).]**

named in the agreement. The arbitrator proceeded with the valuation, & was attended by O.; but after the valuation was made, awarding O. a less sum than he alleged to be proper, O. filed his bill to set aside the agreement, as having been obtained by undue pressure:—*Held*: O. had confirmed the agreement by acting upon it, & was therefore not entitled to relief.—*ORMES v. BEADEL* (1860), 2 De G. F. & J. 333; 30 L. J. Ch. 1; 3 L. T. 344; 6 Jur. N. S. 1103; 9 W. R. 25; 45 E. R. 649, L. C.

*Annotations*:—*Expld. & Apld. Re Wyld, Ex p. Wyld* (1860), 2 De G. F. & J. 642. *Mentd. Barnes v. Richards* (1902), 71 L. J. K. B. 341.

**1383. Acquisition of land by compulsion.]—**

Although the promoters of an intended railway may enter into a valid & binding agreement with the landowners along the course of the proposed line for the purchase of their lands, in the event of the Act being obtained at a certain price; yet any proceedings by the co. to acquire the land under their compulsory powers by notice to treat & entering into possession under Lands Clauses Act, 1845 (c. 18), s. 85, will preclude them from enforcing the agreement against the landowner.—*BEDFORD & CAMBRIDGE RY. CO. v. STANLEY* (1862), 2 John. & H. 746; 1 New Rep. 162; 32 L. J. Ch. 60; 7 L. T. 477; 9 Jur. N. S. 152; 11 W. R. 139; 70 E. R. 1260.

*Annotation*:—*Refd. Kemp v. S. E. Ry.* (1872), 7 Ch. App. 364.

**1384. Negotiations for extension of licence.]—**

*WARD v. DAY*, No. 1377, *ante*.

**1385. Purchaser held to contract.]—**

On a sale of lands, by one of the conditions of sale it was provided that in the event of the purchaser making any objection to the vendor's title within a certain time, the vendor might, at his election,

either rescind the contract on repayment of the deposit-money without interest or costs, or negotiate with a view to the removal of the objection; & by a further condition it was provided that any such negotiation should not prejudice the vendor's subsequent right to rescind. Where, on the purchaser making an objection to the vendor's title, the vendor declared the objection unfounded, & held the purchaser to his contract:—*Held*: this operated as an election on the part of the vendor not to rescind, & he could not afterwards rescind on repayment of the bare deposit, but was liable for interest & costs at suit of the purchaser.—*GARDOM v. LEE* (1865), 3 H. & C. 651; 6 New Rep. 161; 34 L. J. Ex. 113; 12 L. T. 430; 11 Jur. N. S. 393; 13 W. R. 719; 159 E. R. 687.

*Annotation*:—*Distd. Re Doughton & Harris's Contract*, [1898] 1 Ch. 458.

**1386. Notice to owner to sewer & pave.]—**An urban authority gave a notice under Public Health Act, 1875 (c. 55), s. 150, to an owner to sewer & pave in the form given in the Act, sched. IV., Form G., but they added to the notice words not in the form to the effect that, if the owner neglected to do the work, they would do it & declare the expenses of such work to be private improvement expenses:—*Held*: the urban authority were estopped by the terms of their notice from taking summary proceedings for the recovery of these expenses.—*GOULD v. BACUP LOCAL BOARD* (1881), 50 L. J. M. C. 44; 41 L. T. 103; 45 J. P. 325; 29 W. R. 471, D. C.

*See, generally, HIGHWAYS.*

**1387. Road treated as country road under Metropolis Management Act, 1855 (c. 120).]**

Where a local authority have done work on part of a country road under above Act, s. 98, they are not thereby estopped from subsequently treating the whole of the road as a new street under s. 105

with full knowledge of all the facts, is precluded from afterwards setting up a right for rescission thereof.—*JACKSON v. IRWIN & BILLINGS CO., LTD.* (1914), 20 B. C. R. 487.—*CAN.*

**1385 i. Purchaser held to contract.]—**If a vendor delivers a machine disconform to contract, & the purchaser intimates that he rejects it, but goes or using it for a short time, the purchaser loses his right to reject on the doctrine of personal bar, & on the doctrine of election, loses his right to retain & claim damages.—*CROOM & ARTHUR v. STEWART & CO.* (1905), 7 F. (Ct. of Sess.) 563; 42 Sc. L. R. 437; 12 S. L. T. 799.—*SCOT.*

**a. Accepting bequest in lieu of dower.]—**Where a will expressly declares that what is given to the widow is intended to be in lieu of dower, & the widow accepts it, she is as much bound by her election in a ct. of law as in equity.—*WALTON v. HILL* (1853), 8 U. C. R. 562.—*CAN.*

**b. Between attacking bye-law & award made thereunder.]—**Where pltf., being called on by the ct. to elect between attacking a bye-law & attacking an award made thereunder, had elected to attack the award, & consented to a decree setting it aside, & ordering a new arbitration, which arbitration he had prosecuted until another award was made, which he had not moved against within the time allowed therefor:—*Held*: he could not afterwards complain of having been forced to elect at the hearing.—*HARDING v. CARDIFF TOWNSHIP* (1882), 2 O. R. 329.—*CAN.*

**c. Claiming under statute—Suit abandoned.]—**W. & Co., having a contract to build an elevator for defts., purchased an engine, boiler & other

machinery from pltf. on the terms that the ownership was not to pass until payment in full of the price which was to be paid in cash on delivery, & that in case of default in payment pltf. were to be at liberty, without process of law, "to enter upon our premises & take down & remove the said machinery." Pltf. were aware that the machinery was to be placed in defts.' elevator. Pltf. first took proceedings under Mechanics' Lien Act to realise the amount of their claim, but afterwards abandoned them. In the present suit pltf. asked that defts. might be ordered to deliver up the machinery, & to permit pltf. to enter the elevator & take down & remove the machinery, & for further & other relief:—*Held*: pltf. were not estopped by having commenced proceedings under the Act, as they had not gone on to judgment.—*VULCAN IRON WORKS CO. v. RAPID CITY FARMERS ELEVATOR CO.* (1894), 9 Man. L. R. 577.—*CAN.*

**d. Refusal of offer to return money—Acceptance after learning facts.]—**Pltf. relied on deft.'s integrity, as deft. knew, & pltf., at the time the agreement for purchase of land was made, believed deft.'s representation as to value to be true. Pltf., having elected to take back his purchase-money:—*Held*: he was entitled to that relief; & was not precluded because he did not at first accept the offer to return the money. A party is not estopped because he does not repudiate fraud before he discovers it.—*STEVENSON v. SANDERS* (1912), 20 W. L. R. 787; 3 D. L. R. 790.—*CAN.*

**e. Treating void contract as valid.]—**Pltf. was engaged in England by defts. to serve them in Canada as a

bank clerk for three years, at \$700 a year. Pltf., after two years' service under the engagement, but before the expiration of the three years, desired to leave defts.' service, & gave them three months' notice, which was not accepted. He left the service, & sued for salary due & "risk-money" to his credit. Defts. contested his claim, & counterclaimed for \$400 damages for breach of the agreement:—*Held*: the contract was one having reference to the performance of service by the pltf., & therefore within Master & Servant Amendment Act, 1899, s. 3, enacting that such a contract is void; but pltf. was not at liberty to approbate & reprobate; & having elected to treat the contract as valid for two years, & having founded his action upon it, was estopped from taking advantage of the statute & saying that the contract was void.—*ASHMORE v. BANK OF BRITISH NORTH AMERICA* (1913), 24 W. L. R. 840; 4 W. W. R. 1014; 18 B. C. R. 257.—*CAN.*

**f. Reprobating settlement—Claiming legitim.]—**A husband having concurred with his wife in reprobating her father's settlements by claiming legitim:—*Held*: he was barred from claiming a bequest to himself, though it did not fall under the goods in communion.—*BUCKINGHAM (DUKE) v. BREADALBANE (MARQUIS)* (1843), 6 Dunl. (Ct. of Sess.) 250; 16 Sc. Jur. 152.—*SCOT.*

**g. Adoption of voidable deed.]—**Pltf., a brother, & two sisters by deed assigned to their father their reversionary interests under a settlement made by their father some years before, on the occasion of his second marriage. After the death of the father the brother & the two sisters

when it becomes a new street within the meaning of the Act.—*CROSSE v. WANDSWORTH BOARD OF WORKS* (1898), 79 L. T. 351; 62 J. P. 807, D. C.

*See, generally, METROPOLIS.*

**By auctioneer.]—***See AUCTION & AUCTIONEERS*, Vol. III., p. 30, Nos. 219, 220.

(c) *Between Alternative Remedies.*

**1388. Proof in bankruptcy—Abandonment of right to prove against person of debtor.]—**By the 49 Geo. 3, c. 121, s. 14, it was enacted that the proving of a debt should be deemed an election by the creditor to take the benefit of the commission. Pltf. proved a debt under a commission sued out against deft. by virtue of that Act, & after the passing of 6 Geo. 4, c. 16, which repealed previous Act, arrested deft. for the same debt. The ct. directed deft. to be discharged from custody; holding that pltf.'s election to prove under the commission operated as a final abandonment of his claim against the person of his debtor.—*ADAMS v. BRIDGER* (1832), 8 Bing. 314; 1 Moo. & S. 438; 131 E. R. 414.

**Submission to arbitration.]—***See ADMIRALTY*, Vol. I., p. 143, No. 510; *ARBITRATION*, Vol. II., pp. 350 *et seq.*

**Distress or action.]—***See ACTION*, Vol. I., pp. 59, 60.

**Acceptance of compensation under Workmen's Compensation Act, 1897 (c. 37).]**—*See, generally, MASTER & SERVANT.*

**Action proceeding to judgment.]—***See Part II.*, Sect. 3, sub-sect. 1, B. (i), & sub-sect. 2, B. (g), *ante.*

**Election to treat breach of condition as breach of warranty.]—***See, generally, SALE OF GOODS.*

(d) *Between Persons with Alternative Liability.*

**1389. Husband treated as client by solicitor.]—**A., before her marriage, employed C., a solr., in respect of an estate which, on her marriage with B., was settled to her separate use. After the marriage, C. was employed by B. in respect of actions relating to this estate, & in preparing deeds for the appointment of new trustees of the settlement. C. delivered his bill of costs to B., caused it to be taxed, & obtained a rule for a judgment against B. B. immediately after became bkpt., & C. proved the debt in the bkpcy., but received nothing. C. then filed a bill against A., B. & the trustees of the settlement, for the purpose of recovering the debt from the separate interest of the wife in the estate:—*Held*: C. had no claim against A. in respect of anything but the deeds of appointment of new trustees; & if he had any claim in respect of these deeds, he was precluded, by his proceedings against the husband, from enforcing them.—*CALLOW v. HOWLE* (1817),

brought separate actions to set aside the assignments made by them respectively, on the ground that they had been obtained by the undue influence of the father. The present pltf. assisted defts. in those actions in preparing their defence, & at the trial gave evidence on their behalf:—*Held*: his conduct amounted to an election to affirm the assignment made by him.—*LARNACH v. SIEVWRIGHT* (1900), 18 N. Z. L. R. 385.—N.Z.

**PART VI. SECT. 3, SUB-SECT. 3.—**  
F. (c).

**h. Inconsistent remedies.]—**A creditor cannot take the benefit of the consideration for a transfer of goods & at the same time attack the transfer as fraudulent. An assignee for the benefit of creditors has no higher right in this respect. A creditor suing

in the name of the assignee obtained judgment against third persons, for the payment to him as part of the debtor's estate of the proceeds of promissory notes given to the latter for part of the purchase-money of his stock-in-trade:—*Held*: it was then too late for him to attack the sale as fraudulent.—*WOOD v. REESOR* (1895), 22 A. R. 57.—CAN.

**PART VI. SECT. 3, SUB-SECT. 3.—**  
F. (d).

**k. Company instead of directors.]—**A pltf. is not estopped from suing the directors of a co. because he has previously chosen to consider the co. liable.—*DE LISSA v. ASHER* (1875), 14 N. S. W. S. C. R. 173.—AUS.

**l. Partner instead of firm.]—**In the absence of express agreement to

1 De G. & Sm. 531; 17 L. J. Ch. 71; 10 L. T. O. S. 128; 11 Jur. 984; 63 E. R. 1180.  
*Annotation*:—*Mentd. Clive v. Carew* (1859), 1 John. & H. 199.

**1390. Choice in ignorance of facts.]—**Pltf. issued a writ against the firm of R. & Co. R. only appeared to the writ, & pltf. delivered statement of claim against "R. sued as R. & Co." Issue having been joined, the case proceeded to trial, when a verdict for pltf. was taken by consent & judgment signed against "R. sued as R. & Co." Pltf. having subsequently discovered that C. had been a member of the firm of R. & Co., applied for an order to amend the judgment by making it, in accordance with the writ, a judgment against the firm of R. & Co.:—*Held*: the amendment ought not to be allowed, for pltf., although he acted in ignorance of the facts, must be taken to have elected to sue R. alone, & was concluded by the form of the proceedings subsequent to the appearance.—*MUNSTER v. COX* (1885), 10 App. Cas. 680; 55 L. J. Q. B. 108; 53 L. T. 474; 34 W. R. 461; 1 T. L. R. 542, II. L.; *affg. S.C. sub nom. MUNSTER v. RAILTON* (1883), 11 Q. B. D. 435, C. A.

*Annotation*:—*Mentd. The Duke of Buccleuch*, [1892] P. 201.

**Proof in bankruptcy.]—***See BANKRUPTCY*, Vol. IV., pp. 444 *et seq.*

**Principal & agent.]—***See AGENCY*, Vol. I., pp. 620 *et seq.*

**Principal & surety.]—***See GUARANTEE.*

**Husband & wife.]—***See HUSBAND & WIFE.*

**Joint & several contractors.]—***See CONTRACT*, Vol. XII., pp. 33 *et seq.*

**Partners.]—***See PARTNERSHIP.*

*G. Holding Out.*

(a) *In Cases of Agency.*

**1391. General rule—Admission by agent.]—**In an action of trover by the assignees of a bkpt., deft.'s attorney admitted that the party had been duly declared bkpt.:—*Held*: deft. was thereby precluded from objecting to any of the proceedings under the commission, unless he had given notice to dispute it.—*PERRING v. TUCKER* (1829), 3 Moo. & P. 557; 8 L. J. O. S. C. P. 2.

*See, generally, AGENCY*, Vol. I., pp. 605 *et seq.*

**1392. —.]—**In Sept. 1861, C. contracted with L. for the purchase of L.'s interest in the lease of the Cambrian Stores public-house, but it being found, that, owing to his official capacity, C. was unable to hold the licence in his own name, it was arranged that P., his father-in-law, should be put forward in his stead. Accordingly, on Oct. 10, following the lease was assigned by L. to P. to whom also the licence was duly transferred: & to enable P. to complete the purchase B., deft.,

that effect, a creditor taking the note of one partner for a debt of the partnership, & suing thereon, & recovering judgment but failing to realise the amount of the note, is not precluded from afterwards claiming the amount of the note against the partnership.—*CARRUTHERS v. ARDAGH* (1873), 20 Gr. 579.—CAN.

**m. —.]—***MAIL PRINTING CO. v. DEVLIN* (1889), 17 O. R. 15.—CAN.

**PART VI. SECT. 3, SUB-SECT. 3.—**  
G. (a).

**1392 i. General rule.]—***AGNEW v. DAVIS* (1911), 17 W. L. R. 570.—CAN.

**1392 ii. —.]—***GOWANS - KENT WESTERN, LTD. v. ASSINIBOIA CLUB* (1915), 33 W. L. R. 266; 11 W. W. R. 936.—CAN.



*Sect. 3.—By representation: Sub-sect. 3, G. (a).]*

advanced him £230 on a mtge., by assignment, of the lease & the furniture & effects then in & upon the premises. The mtge. deed, which was made between P., therein described as "of the Cambrian Stores" of the one part & deft. of the other part, bore date Oct. 10, 1861, & the money which was advanced by deft. to P. was by him immediately paid to L. C. was present at the negotiation between P. & deft. for the loan, at the execution of the mtge. & the payment of the money, all of which was effected on Oct. 10. P.'s name was painted up outside the door where L.'s name had been, but C. had the management of the business of the tavern behind the bar. C. became bkpt., & on trover being brought against deft. by plffs., C.'s assignees, for a wrongful conversion of the goods comprised in deft.'s mtge.:—*Held*: the property in the goods passed by the assignment from P. to B., & C. was estopped from saying that because neither he nor P. had any property in the goods at the time of its execution, therefore, the assignment was inoperative.

■ The assignment to B. was made by P. as the agent of C., & C. cannot be heard to say that the goods were not his at the time P. so acted as his agent in assigning them. It is indifferent whose property they were. He is estopped from saying that the property did not pass (BRAMWELL, B.).—EDMANDS v. BEST (1862), 1 New Rep. 30; 7 L. T. 279.

**1393.** —.]—C. proposed to H., the general manager of the M. Bank, that the bank should advance him £8,300, to enable him to conclude a contract for the purchase of an unpaid vendor's interest in a colliery. H. had authority to make the advance. An agreement between C. & the bank, providing for the loan of the money by the bank, & the mtge. of the interest in the colliery to be purchased to the bank to secure repayment of the loan & charges was prepared by a solr. on H.'s instructions, & signed by C. H. then declined to make the agreement without consulting the directors, & obtained C.'s signature to a document to the effect that the agreement was subject to the approval of the directors. On the same day, after a meeting of the directors, H. told C. that the directors approved, & that the bank would advance the money. The agreement was never signed by any one on behalf of the bank. Subsequently, H. told C. he ought to be more firmly bound to take the money from the bank, & induced him to sign a document to the effect that, in consideration of the bank's agreeing to carry out the arrangements mentioned in the agreement, he agreed to pay the bank charges named therein, whether the bank carried through the transaction

**1396 i.** *What constitutes holding out—Question for jury.*—Whether authority has been conferred on an agent is a question of fact, which may be proved by showing that it was expressly given; or the acts of recognition by the principal may be such that the authority may be inferred.—SAYWARD v. DUNSMUIR (1905), 11 B. C. R. 375; 2 W. L. R. 319.—CAN.

**1396 ii.** —.]—*Held*: If resps. had acted upon the assumption that there was not any proper construction, & that the principals had failed to notify them within a reasonable time that they disapproved the contract, it was open to the jury to infer from the silence of the principals that they had assented to it.—INTERNATIONAL PAPER CO. v. SPICER (1906), 4 C. L. R. 739.—AUS.

**n.** — *Former hotel proprietor's name over door.*—Deft. was a licensee of an hotel & kept his name up over the door, but was not really interested in the business, which was carried on by others who were supplied with liquor in bulk by plffs.:—*Held*: in the absence of any evidence of an intimation to plffs., that the business was not being carried on by deft., deft. was estopped from denying that the persons carrying on the business were his agents for the purchase of —TOOTH v. LAWS (1888), 1 R. 154; 4 N. S. W. W. N.

*way—Known to third party.*—Where plff. seeks to enforce a contract on the ground that it was made with a person whom deft. held out to the

or not. In fact, the directors did not approve of the agreement, & H. acted under the erroneous impression that they did. The bank refused to find the money, & C. was, in consequence, unable to complete his contract:—*Held*: Stat. Frauds not being pleaded, the circumstances constituted an agreement between C. & the bank, & the bank were estopped from denying such an agreement.—MANCHESTER & OLDHAM BANK, LTD. v. COOK (W. A.) & Co. (1883), 49 L. T. 674.

**1394.** —.]—FARQUHARSON BROTHERS & Co. v. KING & Co., No. 1021, ante

**1395.** —.]—Applts.' cashier presented at resps.' bank cheques drawn on resps. in favour of applts. & crossed generally; in exchange he was handed cheques for the same amounts drawn by resps. upon other banks & crossed generally. Applts. had by their conduct held out their cashier as having authority to deal with the cheques in this way. The cashier fraudulently paid the cheques handed him by resps. to his own banking account & misappropriated the proceeds:—*Held*: the cheques drawn on resps. were paid by the cheques given in exchange within Bills of Exchange Act, 1882 (c. 61), s. 79 (2), but applts. were estopped from denying the authority of their cashier to receive payment in that manner & were not entitled to recover damages.—MEYER & Co., LTD. v. SZE HAI TONG BANKING & INSURANCE CO., LTD., [1913] A. C. 817; 83 L. J. P. C. 103; 109 L. T. 691; 57 Sol. Jo. 700, P. C.

*See, generally, AGENCY, Vol. I., p. 384.*

— **Where agent's authority limited—Limitation unknown to third party.**—*See AGENCY, Vol. I., p. 384.*

**Knowledge of agent.**—*See, generally, AGENCY, Vol. I., pp. 610 et seq.*

**Insurance agent.**—*See INSURANCE.*

**Authority of solicitor to compromise suit.**—*See SOLICITORS.*

**1396.** *What constitutes holding out—Question for jury.*—BATCHELOR v. HUNT (1851), 18 L. T. O. S. 75.

**1397.** — **Employment of insurance broker to effect policy.**—Plff., a shipbuilder in London, employed one W., an insurance broker, to effect a policy upon a ship at Lloyd's &, after the happening of a loss, gave W. the ship's papers for the purpose of enabling him to adjust the loss with the underwriters. The policy was effected in W.'s name, & he retained possession of it. An adjustment having taken place, the loss was settled, in accordance with the usage prevailing at Lloyd's, which was found to be generally known to merchants & shipowners, but which the jury found was not known to plff., who had merely left the policy in W.'s hands for safe custody, by the underwriter setting off the

world as his agent, by permitting him to deal in a certain way, plff. must prove that he was aware of & contracted on the strength of that course of dealing from which he seeks to show an implied agency.—ROBINSON v. TYSON (1888), 9 N. S. W. L. R. 297.—AUS.

**p.** — *Whether investing employee with title "Land Commissioner."*—Plffs., as assignees, claimed specific performance of an alleged agreement for the sale of lands based upon the following letter: The C. Co. hereby agree to sell to you a piece of land at or near H., to contain at least one hundred acres of land, at the price of \$5.00 per acre. The land to be as near as possible as shown on the annexed sketch. (Signed) K., Land Comr." The lands claimed were not



amount payable by him upon the policy against the balance due to him from the broker for premiums on other policies effected by him:—*Held*: assuming that pltf. was estopped from denying that the broker had authority to receive the amount due from the underwriter on the policy in money, he was not bound by the usage, & consequently, he was entitled to recover the amount against the underwriter, notwithstanding such settlement.—*SWEETING v. PEARCE* (1861), 9 C. B. N. S. 534; 30 L. J. C. P. 109; 5 L. T. 79; 7 Jur. N. S. 800; 9 W. R. 343; 1 Mar. L. C. 134; 142 E. R. 210, Ex. Ch.

*Annotations*:—*Mentd.* Catterall v. Hindle (1867), L. R. 2 C. P. 368; Emanuel v. Roberts (1868), 9 B. & S. 121; Grissell v. Bristowe (1868), L. R. 3 C. P. 112; Bridges v. Garrett (1869), L. R. 4 C. P. 580; Pearson v. Scott (1878), 9 Ch. D. 198; Blackburn v. Mason (1893), 37 Sol. Jo. 283; Pape v. Westacott, [1894] 1 Q. B. 272; Legge v. Byas, Mosley (1901), 18 T. L. R. 137; Matveleff v. Crossfield (1903), 51 W. R. 365; Bradford v. Price (1923), 92 L. J. K. B. 871.

**1398. — Payment of debt incurred by wife without authority.]**—When a husband has not authorised his wife to pledge his credit he is not, by the fact of giving a cheque in payment of a debt incurred by her, estopped from disputing his liability for goods afterwards supplied to her.—*DURRANT v. HOLDSWORTH* (1886), 2 T. L. R. 763.

*See, further*, AGENCY, Vol. I., p. 384; CARRIERS, Vol. VIII., pp. 122, 123.

**1399. Whether conclusive—Of partnership—Bills & receipts signed as for partnership.]**—A father who holds out to the world that his son is his partner, & who sends bills & signs receipts in their joint names, in an action brought in his own name is not precluded from showing that his son is not a partner.—*GLOSSOP v. COLMAN* (1815), 1 Stark. 25, N. P.

*Annotation*:—*Mentd.* Barker v. Stubbs (1840), 1 Man. & G. 41.

**1400. Operation of rule—Agent fraudulently abusing authority.]**—The reason why a party is bound by the acceptance of his partner without his authority is, because he has consented to the existence of his partner's authority to accept, & is therefore responsible to a person who takes the bill *bonâ fide*. The reason is founded on the law of estoppel *in pais*, & it is because he is bound by the exercise of authority, even though fraudulently used, to a person who takes the bill *bonâ fide*; if not so taken it cannot be binding on him, but if it be taken so, he is estopped from denying the acceptance (*WILLES, J.*).—*HOGG v. SKEEN* (1865), 18 C. B. N. S. 426; 5 New Rep. 279; 34 L. J. C. P. 153; 11 L. T. 709; 11 Jur. N. S. 244; 13 W. R. 383; 144 E. R. 510.

**1401. — Client trusting solicitor.]**—W. built

those shown on the sketch plan but other lands alleged to have been substituted therefor by verbal agreement with another employee of deft. co., at the time of survey:—*Held*: specific performance could not be decreed in the absence of any proof of authority of the agent to sell the lands of deft. co., & the mere fact of investing their employee with the title of "Land Commissioner" did not estop deft. from denying his power to sell lands.—*ELK LUMBER CO. v. CROW'S NEST PASS COAL CO.* (1907), 39 S. C. R. 169.—*CAN.*

**q. — Previous acceptance of goods bought by agent.]**—R., representing himself as agent of deft. purchased goods from pltf. for deft., pltf. taking in payment a draft drawn by R. on deft., payable to pltf. Pltf. shipped the goods to deft., & placed a draft in the bank for collection. Deft. accepted the goods & paid the

draft. Two other sales were made & settled in a similar manner. The drafts were on special forms of deft., furnished by deft. to R. Upon pltf. making a further similar sale & shipment, deft. refused the draft & returned the goods, asserting that R. had no instructions to purchase them:—*Held*: R. was the authorised agent of deft.; & in any case, deft. was, by his conduct, estopped from denying the agency.—*RAMELSON & LEVINSON v. NORTH-WEST HIDE & FUR CO.* (1914), 27 W. L. R. 160; 15 D. L. R. 905.—*CAN.*

**r. Whether conclusive—Of partnership—Necessity for knowledge of third party.]**—When a person, not in fact a partner, authorises his name to be used in the firm name of a partnership there is a holding out of himself as a partner to any one who knows or has reason to believe that this represents the name of the person so authorising its use, but a partnership

some houses on land which D., a solr., had conveyed to him, & then mortgaged the houses & land to D. to secure an advance. D. transferred the mtge. to E., who did not give W. notice of the transfer. W. afterwards agreed to sell three of the houses to F., who was to have a free conveyance prepared by D., & to accept W.'s title from D. D. & W. were parties to the purchase deed, which falsely recited that D. being seised of the property for an unincumbered estate of inheritance in fee simple in possession, had some time before agreed to sell the same to W., but that no conveyance had been executed. D. received the purchase-money, & retained part. W. received the balance of the purchase-money. D. paid E. the interest on the mtge. debt for some years after the sale of F., & then absconded. F. in fact had no notice of E.'s security, & W. denied knowledge of it:—*Held*: considering the mode in which W. placed himself entirely in the hands of D. in the transactions, the knowledge that D. had must be imputed to W., & he could not be heard to say that E. was paid off by the payment to D.—*DIXON v. WINCH*, [1900] 1 Ch. 736; 69 L. J. Ch. 465; 82 L. T. 437; 48 W. R. 612; 16 T. L. R. 276; 44 Sol. Jo. 327, C. A.

*Annotations*:—*Refd.* Turner v. Smith, [1901] 1 Ch. 213; Berwick v. Price, [1905] 1 Ch. 632; Powell v. Brown (1907), 97 L. T. 854.

*See, generally*, SOLICITORS.

**1402. — Where agent acts in own interest.]**—Where an agent, in contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted *bonâ fide*, repudiate liability on the contract on the ground that the agent, in making it, acted in his own interests, & not in those of his principal.—*HAMBRO v. BURNAND*, [1904] 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803; 52 W. R. 583; 20 T. L. R. 398; 48 Sol. Jo. 369; 9 Com. Cas. 251, C. A.

*Annotations*:—*Apprvd.* Lloyd v. Grace, Smith, [1912] A. C. 716. *Consd.* Underwood v. Bank of Liverpool, Underwood v. Barclays Bank, [1924] 1 K. B. 775. *Refd.* British Marine Mutual Insee. Assocn. v. Draffen, Read & Morgan (1903), 47 Sol. Jo. 672; Ruben v. Great Fingall Consolidated, [1904] 2 K. B. 712; Cuthbert v. Roberts, Lubbock, [1909] 2 Ch. 226; Willis, Faber v. Joyce (1911), 104 L. T. 576. *Mentd.* Malcolm, Brunner v. Waterhouse (1908), 24 T. L. R. 854.

**1403. — Where agent's act illegal.]**—The bailiff, who was carrying out a distress for rent in arrear, illegally broke into the house & seized certain goods. He went out without having sold the goods. Subsequently the landlord put in a fresh distress for the same rent:—*Held*: the first alleged distress was illegal & void *ab initio*, & was

by estoppel or by holding out will not be created if the real position of affairs is known to the creditor.—*MCLEAN v. CLARK* (1893), 20 A. R. 660.—*CAN.*

**s. Authority to complete documents signed in blank—Bonds.]**—Where a person chooses to entrust to his own man of business a blank paper duly stamped as a bond & signed & sealed by himself, in order that the instrument may be duly drawn up & money raised upon it for his benefit, if the instrument is afterwards duly drawn up & money obtained upon it from persons who have no reason to doubt the *bona fides* of the transaction, it must, in the absence of any evidence to the contrary, be taken that the bond was drawn in accordance with the obligor's wishes & instructions.—*WAHIDUNNESSA v. SURGADASS* (1879), 1 L. R. 5 Calc. 39.—*IND.*

**t. Agent's authority limited—Known**

*Sect. 3.—By representation: Sub-sect. 3, G. (a), (b)*

a trespass & not a distress, &, therefore, the landlord was not thereby prevented from putting in the subsequent distress to recover the rent due.—*GRUNNELL v. WELCH*, [1906] 2 K. B. 555; 75 L. J. K. B. 657; 95 L. T. 238; 54 W. R. 581; 22 T. L. R. 688; 50 Sol. Jo. 632, C. A.

**Authority of master of ship as to bills of lading.]**  
—See SHIPPING.

**Authority of auctioneer.]**—See AUCTION & AUCTIONEERS, Vol. III., pp. 14 *et seq.*

**Authority to complete documents signed in blank—Bills of Exchange.]**—See BILLS OF EXCHANGE, Vol. VI., pp. 72 *et seq.*

—**Transfers of shares.]**—See COMPANIES, Vol. IX., pp. 365 *et seq.*

*(b) As to Right, Title, Possession, or Capacity of Party Holding Out.*

**1404. Name of party.]**—An objection was raised to the validity of a commission, that bkpt. was described in it by the names of Robert Martin Jackson, his name being only Robert Jackson. It appeared, however, that he had himself adopted & used the name of Martin.

The law will not permit a man to say he is not known by the name which he himself has adopted & used (LORD ELDON, C.).—*Re JACKSON, Ex p. SMITH* (1814), 2 Rose, 25, L. C.

**1405. —.]**—Where A., having two Christian names, has omitted one of them in his dealings with B., he cannot, in an action brought against him by B., make the same omission a ground for setting aside the proceedings.—*WALKER v. WILLOUGHBY* (1816), 6 Taunt. 530; 2 Marsh. 230; 128 E. R. 1140.

**1406. Contract entered into on basis that funds available.]**—Certain of the trustees under an Act of Parliament for making a road, the fund provided by the Act being neither sufficient nor available for the object until the completion of the road, raised money on their personal credit to carry on the work, & afterwards brought an action against the other trustees who had attended any of the meetings for payment of an equal proportion each of the whole expense of the road, or at least for a proportion of the expense authorised at the meeting or meetings which they attended. The Ct. of Session held that the mere fact of presence at

meetings did constitute a *prima facie* ground of personal liability, & that the *onus* lay on defenders to show, if they could, facts & circumstances exempting them from that personal liability. On an appeal to, & a remit by, the House of Lords:—*Held*: the mere fact of presence at meetings did not constitute a *prima facie* ground of personal liability, & the *onus* lay upon the pursuers to show acts beyond mere attendance done by the defenders to render them personally liable; &, therefore, the defences of those trustees, against whom nothing was alleged & proved except the mere fact of presence at meetings were sustained; but as to those trustees who signed contracts, they were personally liable for a proportion of the expense of such contracts as they signed.

When trustees confine themselves to the Act of Parliament & the application of the Parliamentary funds, they are not personally liable; but this also rests on strong principle, that as the trustees must know whether there are funds to carry on the work, when they contract with those who do not know, they shall be considered as representing that there are funds, & shall be bound to provide funds to pay the contractors (LORD ELDON, C.).—*HIGGINS v. LIVINGSTONE* (1816), 4 Dow, 341; 3 E. R. 1186, H. L.

*Annotations:—Expld.* *Wilson v. Goodman* (1841), 4 Hare, 51. *Refd.* *Sproft v. Powell* (1826), 3 Bing. 478; *Parrott v. Eyre* (1833), 3 L. J. C. P. 3.

**1407. Man & woman living together though not legally married.]**—Rents devised to a female *durante viduitate*, do not pass over to the remainderman upon her cohabiting with one who, under an illegal marriage, holds himself out as her husband, & the party, who thus holds himself out, is not, by so doing, estopped to show the invalidity of the marriage.—*ALLEN v. WOOD* (1834), 1 Bing. N. C. 8; 4 Moo. & S. 510; 3 L. J. C. P. 219; 131 E. R. 1020.

**1408. That party's interest determined.]**—*DOWNS v. COOPER*, No. 1031, *ante*.

**1409. Power to assign shares.]**—In an action for not transferring to plffs. certain shares of deft. in a railway co., & which deft. had sold, & promised to transfer to plffs. within a reasonable time, & plffs. had promised to accept within a reasonable time, the declaration averred that plffs. had always, from the time of the making of the said promise, been ready & willing to accept the transfer of the said shares, whereof deft. had

to third party—No estoppel.]—B. effected a policy of fire insurance with appls. through their local agent. The policy made the proposal the basis of the insurance, & its correctness or untruth in any respect material or not, was to exonerate the co. from all liability & fraud or falsehood in the notice of claim for loss under the policy was to work a forfeiture of all benefits thereunder. On signing the proposal B. received from the agent a cover note signed by him & containing the words "accepted by the co. subject to be approved of the manager, etc." Across the document were written the words "Fourteen days cover only." In the proposal which was filled up by the agent, & in the notice after the fire B.'s interest in the premises was falsely described to a material extent:—*Held*: the authority of the local agent was limited to transmitting the proposal to the co., & issuing to the proponent an interim receipt giving temporary cover; of this limitation B. had express notice, & the co. was therefore not estopped from setting up the excess of authority of the agent.—*PHOENIX ASSURANCE CO., LTD. v. BRECHIN* (1906), 3 C. L. R. 946.—AUS.

**a. Manager of company—Estopped from denying his agency.]**—*Held*: deft., an agent, who had acquired title to certain property, held as trustee for plff., he being manager for plff. co., &, under the circumstances, was estopped from setting up his deed.—*EMPIRE COAL & TRAMWAY CO., LTD. v. PATRICK* (1908), 6 E. L. R. 266.—CAN.

**PART VI. SECT. 3, SUB-SECT. 3.—G. (b).**

**b. Bailor of cattle representing himself as owner—Fraud on execution creditor—Estopped from suing for pasturage.]**—Deft. went to England, leaving A., an agent, on his farm, who purchased corn from plff. to feed deft.'s cattle. Executions were issued against deft., & A., to protect the cattle, assigned them to plff. as if to pay the sum due to him for corn, but gave at the same time an undertaking that he would pay pasturage for them at the usual rates; & when the bailiff came to seize, plff. claimed the cattle as his own:—*Held*: he could not afterwards sue deft. for the pasturage for having concurred in the fraud by holding out the cattle as his own, he was estopped.

—*BELL v. PEEL* (1858), 15 U. C. R. 594.—CAN.

**c. True owner allowing title to be claimed.]**—If the true owner of goods so conduct himself as to enable another, who has the possession, but not the property, of such goods, to hold himself out to the world as the real owner, the true owner is estopped from denying the title of an innocent purchaser for value. The possession of property attached to the reality, which thereby becomes reality, is a sufficient indication of ownership to estop the real owner as against an innocent purchaser for value.—*McDONALD v. WEEKS* (1860), 1 Gr. 297.—CAN.

**d. Action in name of company—Allowed to proceed—Company estopped from denying authorisation.]**—In an action for false arrest & malicious prosecution, it appeared that C., acting as cashier for deft. co., believing that he had overpaid plff., an employee of deft. co., \$100, caused him to be arrested by deft. co. in an action in the county ct. Deft. co. charged C. with the \$100, & made no demand upon plff. for the amount, and while it did not authorise C. to issue the *capias*



notice :—*Held* : in the absence of its being shown to be illegal debt. was estopped from saying the shares were not assignable.—*TEMPEST v. KILNER* (1845), 2 C. B. 300 ; 3 Dow. & L. 407 ; 3 Ry. & Can. Cas. 790 ; 15 L. J. C. P. 10 ; 6 L. T. O. S. 152 ; 9 Jur. 1038 ; 135 E. R. 960 ; *subsequent proceedings* (1846), 3 C. B. 249.

*See, generally, COMPANIES, Vol. IV., pp. 347 et seq.*

**1410. Party admitted to defend as mortgagee & landlord.]**—In an action of trespass for mesne profits accruing between the date of demise in the declaration in the original action of ejectment, & the date of the judgment in that action :—*Held* : the consent rule entered into by debt. whereby he was admitted to defend “as mtgee. & landlord,” was conclusive evidence against debt. of his being landlord of the premises, & debt. was not entitled to set up as a defence that he was a mtgee. out of possession, & had received no profits.—*DOE v. CHALLIS* (1851), 17 Q. B. 166 ; 20 L. J. Q. B. 478 ; 17 L. T. O. S. 142 ; 15 Jur. 900 ; 117 E. R. 1244.

**1411. Landlord holding himself out as bailee.]**—Pltf. deposited household furniture at a depository to be warehoused at the rate of 30s. a year. At the time he thought he was depositing them with a co. with whom he had had dealings before ; & he received a receipt in the name of the co., which name was also over the door of the depository. The fact was that the co. had sold their business to B., & let the premises to him, but they had authorised the use of their name. B. being in arrears for rent, debts. seized & sold pltf.'s goods under a warrant of distress from two of the directors of the co., on which pltf. brought an action against debts. :—*Held* : the co. were estopped from distraining as landlords by having allowed themselves to be held out as the persons with whom the goods were deposited.—*MILES v. FURBER* (1873), L. R. 8 Q. B. 77 ; 42 L. J. Q. B. 41 ; 27 L. T. 756 ; 37 J. P. 516 ; 21 W. R. 262.  
*Annotation* :—*Mentd.* *Clarke v. Millwall Dock Co.* (1885), 53 L. T. 316.

**1412. Agreement to pay water rate.]**—*EAST LONDON WATERWORKS CO. v. FOULKES* (1892), 37 Sol. Jo. 29 ; *subsequent proceedings*, [1894] 1 Q. B. 819.

**Holding out as partner.]**—*See PARTNERSHIP.*

**Holding out as owner of goods by sale.]**—*See SALE OF GOODS ; TROVER & CONVERSION.*

**Power to assign trade mark.]**—*See TRADE MARKS.*

**Existence of assets of testator's estate.]**—*See EXECUTORS.*

**1413. Lease taken by landlord through agent.]**—In an action for an illegal distress for rent, debt.'s agent had let the premises to an agent of one under whom as landlord pltf. claimed ; such taking was a stratagem to obtain possession of the premises ; the agent had given up the premises to his principal immediately after he had obtained possession of them ; & the principal had put pltf. into possession ; no portion of the rent beyond the deposit on the letting had been paid ; & the

title of pltf.'s landlord was better than that of debt. :—*Held* : pltf. was estopped from denying that he was tenant to debt.—*FARNHAM v. THORN* (1849), 15 L. T. O. S. 343.

**Qualification as solicitor.]**—*See SOLICITORS.*

(c) *As to Right, Title, Possession, or Capacity of Third Party.*

**1414. Third party allowed by assignees to retain goods of bankrupt.]**—Trespass for taking pltf.'s goods. Defts., by a special plea, stated that one A. became a bkpt., & the issuing of a commission, & the assignment of effects to the assignees, was then set forth in the usual form. That said goods were the property of the assignees, but that pltf. claiming title under colour of a certain gift, pretended to have been made thereof by bkpt., seized & took the goods, & therefore, debts., as the servants of the assignees, justified the trespass. Replication, that the said goods were not the goods of the assignees, but were pltf.'s goods :—*Held* : the proceedings under the commission of bkpcy. were admitted by the replication, & the only point in issue, was the property in the goods.

Pltf. might have shown, although that is carrying his right to the fullest extent, that these were originally the goods of bkpt., but that the assignees had so long allowed him to remain in the possession of them, exercising full apparent control over them in the course of his trading, that they were estopped from saying that the assignment to pltf. could be objected to (*TINDAL, C.J.*).—*JONES v. BROWN* (1835), 1 Bing. N. C. 484 ; 1 Hodg. 33 ; 1 Scott, 453 ; 4 L. J. C. P. 124 ; 131 E. R. 1204.

*Annotation* :—*Mentd.* *Byers v. Southwell* (1839), 9 C. & P. 320.

**1415. Pretended sale of goods — Possession given.]**—Pltf., being in difficulties & fearing that some of his creditors would issue execution against his goods, agreed with debt., who was also a creditor, that there should be a pretended sale of them to him. For this purpose an invoice was made out & a receipt given to debt. for a sum therein stated to be the purchase-money, & possession of the goods was delivered to debt. Afterwards debt. sold the goods as his own, whereupon pltf. brought trover :—*Held* : no property in the goods passed to debt., & pltf. was not precluded from showing that no payment was in fact made, & that the transaction was not a real, but a pretended sale.—*BOWES v. FOSTER* (1858), 2 H. & N. 779 ; 27 L. J. Ex. 262 ; 30 L. T. O. S. 306 ; 4 Jur. N. S. 95 ; 6 W. R. 257 ; 157 E. R. 322.

*Annotations* :—*Expld.* *Ashpitel v. Bryan* (1863), 3 B. & S. 474 ; *Lee v. L. & Y. Ry.* (1871), 6 Ch. App. 527. *Apld.* *Taylor v. Bowers* (1876), 1 Q. B. D. 291.

**1416. Recital in draft deed sent for approval.]**—Testator, who died in 1760, made a general devise of freeholds & copyholds to his daughter in tail. His grandson was in 1783 admitted to the copyholds as tenant in tail, & was proved to have been in 1833 in possession of the copyholds & of certain freeholds then held therewith. He made a will

it permitted the action to proceed & paid the costs on judgment being given for pltf. :—*Held* : debt. co., by permitting its name to be used in the action, was estopped from setting up that it did not authorise the action & arrest.—*LANDRY v. BATHURST LUMBER CO.* (1916), 44 N. B. R. 374 ; 35 D. L. R. 701.—*CAN.*

e. *Authorisation of wife—To hold herself out as proprietor.]*—Pltfs. & debts., either party holding a separate decree against the same estate, had by leave purchased in execution.

Both parties claimed the proprietary right & possession, debts. holding the latter. The first of the decrees in date was pltf.'s for money against the representatives of the deceased owner of the property, which before then had been mortgaged to debts. by his widow. Pltfs. obtained only the equity of redemption, their purchase having been of the right, title, & interest. The mtgees., having got a decree upon their mtge. against the widow, purchased at the sale in execution & defended the possession which they obtained :—*Held* : the owner, having in his life-

time authorised his wife to hold herself out as proprietor in her own right, could not have succeeded in a suit to disentitle the mtgees. without proving that they either had taken the mtge. with such notice or that they had been put upon inquiry ; the same principle applied to these pltfs., who had purchased his right, title, & interest & that they were bound equally with him.—*MAHOMED MOZUFFER HOSSEIN v. KISHORI MOHUN ROY* (1895), 1 L. R. 22 Cal. 969 ; 1 L. R. 22 Ind. App. 129.—*IND.*



*Sect. 3.—By representation: Sub-sect. 3, G. (c) & (d).]*

purporting to devise these freeholds & the copyholds, & died in 1840. His brother & heir in 1841 executed a deed purporting to be for the purpose of barring any estates tail in the freeholds, whereby he conveyed the freeholds to the devisee under the will, & covenanted to surrender the copyholds. This deed was not inrolled, but the devisee was admitted to the copyholds. The devisee died intestate, & his brother succeeded him as his heir, & made a will purporting to devise the freeholds & the copyholds in fifths, pltf. taking one-fifth & deft. another fifth. Deft. afterwards agreed to buy pltf.'s one-fifth, & a conveyance was made by her conveying to deft. her one-fifth & all her estates & shares in the land, neither of them being aware of the earlier title. Four years afterwards the deed purporting to bar the estate tail was found, & thereupon deft. requested pltf., who was heir in tail of the original testator, to confirm the sale, & sent to her the draft of a deed reciting that the original testator was seised in fee of the freeholds & devised them, & that she was tenant in tail. She then filed a bill to have her conveyance set aside & to be declared tenant in tail of the freeholds:—*Held*: under the circumstances, the sending by deft. of the draft deed stating that the original testator was seised in fee was not an admission by deft. of the fact.—*BULLEY v. BULLEY* (1874), 9 Ch. App. 739; 44 L. J. Ch. 79; 30 L. T. 848; 22 W. R. 779, L. J.

**1417. Business purchased in name of third party.]**—*EDMUNDS v. WALLINGFORD*, No. 384, *ante*.

**Third party entrusted with goods.]**—*See, generally*, PAWNS & PLEDGES; SALE OF GOODS.

**1418. Third party entrusted with documents of title—General rule.]**—The arguments at your Lordships' Bar on behalf of resp. appeared to me to go almost to this, that whenever you have an equitable owner who is the absolute owner, that is to say, entitled to the whole equitable interest, such a person ought not to have a trustee at all holding the indicia of legal ownership; or, if he chooses, for his own purpose, to have such a trustee, he must be in danger of suffering for every act of improper conduct by that trustee; & that therefore, if the person entitled absolutely to the equitable interest in a share in a railway co., chooses for his own purpose to have that share standing in the name of a trustee for him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into. . . . I find no authority for such a proposition, & I feel satisfied that your Lordships will not be disposed to introduce, for the first time, that as a rule of law (*LORD CAIRNS, C.*)—*SHROPSHIRE UNION RAILWAYS & CANAL CO. v. R.* (1875), L. R. 7 H. L. 496; 45 L. J. Q. B. 31; 32 L. T.

**PART VI. SECT. 3, SUB-SECT. 3.—**  
**G. (c).**

**1418 i. Third party entrusted with documents of title—General rule.]**—When one person arms another with a symbol of property he should be the sufferer & not the person who gives credit to the operation & is misled by it.—*BEDARD v. SPENCER GRAIN CO., LTD.*, [1919] 2 W. W. R. 723.—**CAN.**

**Share certificates.]**—Certificates for shares in B. Co., registered in the name of pltf.s., were indorsed in blank by S. & J., pltf.s.' managers, acting within the scope of their authority, & left in J.'s custody. Thereafter J., without the knowledge of

S., pledged the shares with defts. as security for money lent by them to him personally. Defts. received the certificates *bona fide* & in the ordinary course of business. In an action for delivery up of the certificates to pltf.s.:—*Held*: pltf.s. had, by their conduct, enabled J. to act as he did, & in consequence were estopped from reclaiming the shares from defts.—*AFRICAN MINING & FINANCIAL ASSOCN. v. DE CATELIN* (1897), 1 O. R. 314.—**S. AF.**

**f. — Bills of lading.]**—The owner of goods by endorsing bills of lading in blank & delivering them to another, thereby enabling that other to hold himself out as the true owner,

283; 23 W. R. 709, H. L.; *reversg.* S. C. *sub nom.* *R. v. SHROPSHIRE UNION CO.* (1873), L. R. 8 Q. B. 420, Ex. Ch.

**Annotations:—Consd.** *Carritt v. Real & Personal Advance Co.* (1889), 42 Ch. D. 263; *Rimmer v. Webster*, [1902] 2 Ch. 163; *Burgis v. Constantine*, [1908] 2 K. B. 484. **Refd.** *Bradley v. Riches* (1878), 9 Ch. D. 189; *Re Richards*, *Humber v. Richards* (1890), 45 Ch. D. 589; *Lloyd's Bank v. Bullock*, [1896] 2 Ch. 192. **Mentd.** *Ortigosa v. Brown* (1878), 47 L. J. Ch. 168; *R. v. Charnwood Forest Ry.* (1884), Cab. & El. 419; *Soc. Générale de Paris v. Walker* (1885), 11 App. Cas. 20; *Re Vernon*, *Ewens* (1886), 33 Ch. D. 402; *R. v. Lambourn Valley Ry.* (1888), 22 Q. B. D. 463; *Roots v. Williamson* (1888), 38 Ch. D. 485; *Union Bank of London v. Kent* (1888), 39 Ch. D. 238; *Taylor v. Russell*, [1891] 1 Ch. 8; *Powell v. London & Provincial Bank* (1893), 62 L. J. Ch. 795; *Ward v. Duncombe*, [1893] A. C. 369; *Re Wasdale*, *Brittin v. Partridge*, [1899] 1 Ch. 163; *Lloyd's Bank v. Pearson*, [1901] 1 Ch. 865; *Taylor v. London & County Banking Co.*, *London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231; *Longman v. Bath Electric Tramways*, [1905] 1 Ch. 616; *Rainford v. Keith & Blackman Co.*, [1905] 1 Ch. 296; *Walker v. Linom*, [1907] 2 Ch. 104; *Coleman v. London County & Westminster Bank*, [1916] 2 Ch. 353; *Hill v. Peters*, [1918] 2 Ch. 273.

**1419. — — — — —.]**—The mere fact that a person has transferred the legal ownership of stock or shares or other property, real or personal, to a trustee, & gives him the title deeds, or the securities, or other indicia of title, does not justify any one in assuming that the persons to whom such transfer is made is the beneficial owner (*FARWELL, L.J.*).—*BURGIS v. CONSTANTINE*, [1908] 2 K. B. 484; 77 L. J. K. B. 1045; 99 L. T. 490; 24 T. L. R. 682; 11 Asp. M. L. C. 130; 13 Com. Cas. 299, C. A.

**— To goods.]**—*See* AGENCY, Vol. I., pp. 376, 377, Nos. 823, 824; PAWNS & PLEDGES; SALE OF GOODS.

**— To land.]**—*See* MORTGAGE; SALE OF LAND.

**1420. — Share certificates.]**—Pltf. gave B. certain share certificates upon terms that B. should sell them for pltf. or return them within seven days, & pltf. gave B. a written undertaking to execute a transfer of the shares to any person to whom B. might dispose of them. B. did not sell or return the certificates, but took them to deft., a pawnbroker, showed him the undertaking, & represented that B. was the owner, & so induced deft. to make an advance upon them. In an action by pltf. against deft. for return of the shares:—*Held*: pltf. was not estopped from denying B.'s authority to pledge, as the document shown to deft. was not such as to induce him to think that B. could deal with the shares otherwise than by sale.—*WALTHO v. BROOKS & AARON* (1885), 1 T. L. R. 565, D. C.

*See, further*, BILLS OF EXCHANGE, Vol. VI., pp. 451 *et seq.*; COMPANIES, Vol. IV., pp. 365, 366, Nos. 2330–2336.

**— — — Transfer by way of security & sub-mortgage.]**—*See* COMPANIES, Vol. IX., p. 414, Nos. 2671, 2672.

**1421. — Notice of bankruptcy to lessors & surrender of lease.]**—*HEANE v. ROGERS*, No. 1096, *ante*.

& by permitting him to draw demand drafts in his own name & upon his own account to which drafts the bills of lading are attached as security for advances of money, thereby misleading third parties into the reasonable *bona fide* belief that such other person is the rightful owner of the goods represented by the bills of lading, & into dealing in accordance with such belief, may be estopped, as against such third parties, from denying such ownership so believed as aforesaid.—*BEDARD v. SPENCER GRAIN CO., LTD.*, [1919] 2 W. W. R. 723.—**CAN.**

**g. — — — — —.]**—An owner of grain entrusted another person with

**1422. Recognition by bankrupt of validity of commission—Attending sale of goods.]—**HEANE v. ROGERS, No. 1096, *ante*.

**1423. Third party held out as attorney.]—**If a prisoner who executes a warrant of attorney, introduces a person as his attorney, he cannot afterwards set aside the warrant on the ground that such attorney was uncertificated.—COX v. CANNON (1838), 4 Bing. N. C. 453; 6 Dowl. 625; 6 Scott, 347; 7 L. J. C. P. 288; 132 E. R. 862.

*Annotation*:—**Expld.** Holgate v. Slight (1851), 2 L. M. & P. 229.

**1424. Petition for vesting of bankrupt's property.]—**Where petitioner for annulling the bkpcy. had filed the petition for vesting bkpt.'s estate in the assignee of the Insolvent Ct.:—*Held*: he was estopped from urging as an ingredient in support of the equitable invalidity of the petition that bkpt. had no property for division among his creditors.—*Re* MERRYWEATHER (1851), 18 L. T. O. S. 52.

**1425. Goods transferred to third party—Through third party's fraud.]—**(1) The owner of goods lying at a warehouse was induced by the fraud of F. to instruct the warehouseman to transfer the goods to F.'s order. F. then sold the goods to an innocent purchaser, who before paying the price obtained a statement from the warehouseman that he held the goods to the purchaser's order. On the discovery of F.'s fraud the warehouseman refused to deliver to H. In an action of trover by the purchaser against the warehouseman:—*Held*: the warehouseman having attorned to the purchaser, was estopped from impeaching his title.

(2) *Semble*: the true owner, having enabled F. to hold himself out as the owner, could not set up his title against that of an innocent purchaser from F.—HENDERSON & CO. v. WILLIAMS, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308; 72 L. T. 98; 43 W. R. 274; 11 T. L. R. 148; 14 R. 375, C. A.

*Annotations*:—*As to* (1) **Consd.** Farquharson v. King, [1902] A. C. 325. *As to* (2) **Expld.** Farquharson v. King, [1902] A. C. 325. **Refd.** Herdman v. Wheeler, [1902] 1 K. B. 361. *Generally*, **Mentd.** Compania Naviera Vasconzada v. Churchill & Sim, Same v. Burton, [1906] 1 K. B. 237.

**1426. Enemy property collusively held out as property of ally.]—**Pltfs., a Frenchman & a Swiss, carrying on trade at Lisbon under the name of deft., a Portuguese, shipped a cargo from thence for a port of France, which cargo being captured by a British cruiser, & libelled for condemnation in the Ct. of Admlty. as French & enemy's property, was ordered to be restored to deft. on his putting in & establishing, with pltf.'s privity & consent, a claim to it as his own property:—*Held*: pltfs. were, by thus colluding with defts. to withdraw from the Admlty. the decision of the true question by establishing a false fact, estopped from maintaining an action for money had & received against deft. for the proceeds, by showing

the bills of lading covering it in such form as enabled the other person to deal with them:—*Held*: he had apparently clothed him with full authority to deal with them as he saw fit, & was estopped from asserting his title as against parties who had received them from such other person in good faith & for value, on the principle that when one of two innocent persons must suffer by the fraud of a third he who enabled the third person to commit the fraud should be the sufferer.—ST. CYR v. SPENCER GRAIN CO., LTD. (1920), 1 W. W. R. 600; 13 Alta. L. R. 146.—CAN.

*h. Third person held out as owner of chose in action.]—*If the owner of a chose in action clothes a third party

the true fact, that the property was their own, & that deft. was their agent.—DE METTON v. DE MELLO (1810), 12 East, 234; 2 Camp. 420; 104 E. R. 91.

*Annotation*:—**Distd.** Bowes v. Foster (1858), 2 H. & N. 779.

**Security invalidly created held out as valid.]—**See BONDS, Vol. VII., p. 226, Nos. 683, 684; COMPANIES, Vol. X., pp. 737 *et seq.*

**Share issued as fully or partly paid up.]—**See COMPANIES, Vol. IX., pp. 290, 299.

**Title to shares in company.]—**See COMPANIES, Vol. IX., pp. 288 *et seq.*

**Solicitor entrusted with executed deed containing receipt.]—**See Nos. 853, 854, *ante*.

#### (d) Other Cases.

**1427. That adventure terminated—Receipt of return premium.]—**Where the assured claims & receives the return premium due upon the arrival of the vessel, & the policy is adjusted upon that footing, he cannot, without an express stipulation, resort again to the underwriter in any contingency of the adventure.—MAY v. CHRISTIE (1815), Holt, N. P. 67.

**1428. Legality of scheme.]—**A person had obtained letters patent for the distillation of potatoes. They contained a proviso making them void in case they should be assigned to, or the benefit divided among more than five persons. He & others entered into a scheme by which one of them, who was supposed to have influence, should exert himself among his friends & connections, to induce persons to form a co. of many persons for carrying on the business of the patent, & to pay their money for shares in the concern. He who was to do this, took a bond from his companions in fraud, for the payment of £10,000 as soon as he should have induced his different friends connections to pay calls on their shares to the amount of £45,000. The pleadings did not aver as a fact that pltf. knew that there was such a proviso in the letters patent:—*Held*: he must be presumed to have known it, & he was estopped from setting up his pretended ignorance of that which it was his duty to know before he began to obtain money from the different persons who were to be defrauded.—DUVERGIER v. FELLOWS (1830), 10 B. & C. 826; L. & Welsb. 344; 8 L. J. O. S. K. B. 270; 109 E. R. 655; *affd. on appeal* (1832), 6 Bli. N. S. 87, H. L.

*Annotations*:—**Consd.** Garrard v. Hardey (1843), 5 Man. & G. 471. **Mentd.** Solarte v. Palmer (1834), 2 Cl. & Fin. 93; Blundell v. Winsor (1837), 8 Sim. 601; London Grand Junction Ry. v. Freeman (1841), 2 Man. & G. 606; Harrison v. Heathorn (1843), 6 Man. & G. 81; Sheppard v. Oxenford (1855), 1 K. & J. 491; *Re* Mexican & South American Co., *Re* Aston (1859), 27 Beav. 474.

**1429. Delivery out of policy—Knowledge of misrepresentation acquired after contract to insure.]—**MORRISON v. UNIVERSAL MARINE INSURANCE CO., No. 1367, *ante*.

with the apparent ownership & right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, & who has received it in good faith & for value.—MACDONALD v. BANK OF VANCOUVER (1915), 32 W. L. R. 339; 11 W. W. R. 8; 25 D. L. R. 567; 22 B. C. R. 310.—CAN.

#### PART VI. SECT. 3, SUB-SECT. 3.—G. (d).

**k. Bailee setting up title of third person—As against bailor.]—**Pltf. had sold certain goods to M., which were at the time lying at defts.' railway station, & defts. were fully aware of the sale, but, notwithstanding, they contracted with pltf. to carry & deliver

them as required, & gave him a shipping bill accordingly. In an action by pltf. against defts. for the non-delivery:—*Held*: defts. could not set up M.'s title to the goods as against pltf., for a bailee setting up the right of a third person against his bailor, must be *bonâ fide* defending on the right & title of such third person.—BRILL v. GRAND TRUNK RY. CO. (1870), 20 C. P. 440.—CAN.

**l. Partnership—Retiring partner—Notice of retirement.]—**Pltfs. received from their traveller an order for goods from the firm of C. Bros., hotel keepers. Before they delivered the goods they became aware by means of a mercantile agency that a partnership had existed under the name of C. Bros.,



*Sect. 3.—By representation: Sub-sect. 3, G. (d)*

**1430. Bonds held out as negotiable.]—**S., in order to enable E. to obtain advances from M. & a money dealer in the city, placed at E.'s disposal stock of the Grand Trunk of Canada Ry., & executed blank transfers of the stock, which he handed over to E. He also handed him bonds of two American cos., which on their face purported to be payable to bearer, & were generally treated & dealt with on the Stock Exchange as negotiable instruments. M. made the required advances to E., who transferred the securities of S. over to him or his nominees. M. had borrowed the sums from various banks with whom he had large business transactions, & in accordance with the usual course of business between the money dealers & the banks, had deposited with the banks a bundle of securities, including, besides those belonging to him personally, the securities deposited with him by E., in order to cover not merely the amount due as between him & E., but also the sum for the time being due from him to the banks. E., at the time of obtaining the advance, was aware of the course of business. The bonds were handed over, & the stocks transferred to the banks, the blanks being filled in by the names of nominees of the banks, & notice of the execution of the transfers was sent to S. The banks, at the time of receiving from M. the securities, had no notice other than that derived from the character of the business of M., & the above-stated course of business that M. was depositing securities of S. beyond the limits of his authority:—*Held*: S., having handed over to E., & enabled him to deal with, bonds which were negotiable on their face & treated as negotiable, was estopped as between himself & the banks from denying the negotiability of the instruments.—*EASTON v. LONDON JOINT STOCK BANK* (1886), 34 Ch. D. 95; 56 L. J. Ch. 569; 55 L. T. 678; 35 W. R. 220; 3 T. L. R. 68, C. A.; *reversd.* on another point, *sub nom.* *SHEFFIELD v. LONDON JOINT STOCK BANK* (1888), 13 App. Cas. 333, H. L.

*Annotations:—***Refd.** Colonial Bank v. Hepworth (1887), 36 Ch. D. 36; Williams v. Colonial Bank, Williams v. London Chartered Bank of Australia (1888), 38 Ch. D. 388. **Mentd.** Kaemena v. Central Bank of London (1888), 4 T. L. R. 657; Levy v. Richardson (1889), 5 T. L. R. 236; London Joint Stock Bank v. Simmons, [1892] A. C. 201; Venables v. Baring, [1892] 3 Ch. 527; Bentinck v. London Joint Stock Bank, [1893] 2 Ch. 120; Redfern v. Rosenthal (1901), 85 L. T. 313; Cuthbert v. Roberts, Lubbock (1909), 78 L. J. Ch. 529; Jameson v. Union Bank of Scotland (1913), 109 L. T. 850; Fuller v. Glyn, Mills, Currie, [1914] 2 K. B. 168.

& that S. was one of the members of it, & they were at the same time informed that the partnership still existed. They shipped & charged the goods, & also goods subsequently ordered, to C. Bros. The partnership did not exist at the time the first order was given, S. having retired from the business, & pl'tfs. had had no dealings with the firm while it was in existence. No public notice was given of the dissolution; S. continued to live at the hotel except when he was absent on his own business; the lamp with the name of C. Bros. continued at the door; the liquor licence in the name of C. Bros. continued to hang in the bar-room; & letter-paper with the heading "C. Bros., proprietors," continued to be handed to customers:—*Held*: where a known member of a firm retires from it, & credit is afterwards given to the firm by a person who has had no previous dealings with it, but has become aware as one of the public that it existed, & has not become aware of his retirement, the retiring member of the firm is liable unless he

shows that he has given reasonable public notice of his retirement; & as such notice was not given here, S. was liable, not only for the goods first, but for those subsequently ordered, no notice of the retirement having ever been given.—*REID v. COLEMAN* (1889), 19 O. R. 93.—**CAN.**

**m. — Holding out & ratification distinguished.]—***GRADY v. TIERNEY* (1899), 20 C. L. T. 193; 4 Terr. L. R. 133.—**CAN.**

**n. As to proprietorship of vehicle.]—**Pl'tf. travelled by a coach, the property of H. Ltd., while the ticket was issued in the names of the two other defts. H. & C. personally. Deft. H. owned all the shares in the co. except one & held a debenture covering all its assets. By a working arrangement the takings of the two lines of coaches were pooled, & then divided between H. & C., & then paid over to the cos. by each to the co. he controlled. The jury found for pl'tf. against the two defts. personally. On a motion for a new trial:—*Held*: defts. H.

**1431. Intention to hold goods to order of another.]—**Deft. gave to B. & Co. warrants signed by him for hides *ex* Anne Charlotte, "held to order of B. & Co.," the warrants further stating that they must be produced before the goods could be delivered. B. & Co. deposited the warrants with pl'tfs. to secure an advance. Prior to this deposit B. & Co. had obtained advances from S. & Co. upon the same hides, & deft. having, on B. & Co.'s instructions, given to S. & Co. an acknowledgment that he held the hides to their order, had delivered the hides to S. & Co.'s order. In an action against deft. for wrongful delivery of the hides:—*Held*: deft., by giving the warrants to B. & Co., had represented to pl'tfs. through them, that he would continue to hold the goods to the order of B. & Co., & he was liable to pl'tfs. accordingly.—*LONDON & COUNTY BANKING Co., LTD. v. FULFORD* (1886), 2 T. L. R. 703.

**1432. Description of goods sold.]—**Pl'tfs., who were the registered proprietors of the trade mark "Burgoyne" for wine, sold by auction wine in casks bearing the inscription "Burgoyne London." The wine had been consigned to pl'tfs. on approval & rejected by them, & was sold on account of the growers. Defts. purchased the wine at the auction, & re-sold it as "Burgoyne's Superior Australian Burgundy." On the trial of an action, to restrain defts. from infringing pl'tfs.' trade mark, & from passing off the wine in question as being pl'tfs.' wine it was held, that the wine was not pl'tfs.' wine, & that pl'tfs. were not estopped by their conduct from restraining the sale of the wine as their wine. An injunction & an account of profits were granted. Defts. appealed:—*Held*: defts. were justified in coming to the conclusion that the wine was Burgoyne's wine & they were so justified by reason of the conduct of pl'tfs. in the matter, & pl'tfs. were not entitled to any relief.—*BURGOYNE & Co., LTD. v. GODFREE & Co.* (1904), 22 R. P. C. 168, C. A.

#### *H. Silence or Standing by.*

##### *(a) In General.*

**1433. General rule.]—***CAIRNCROSS v. LORIMER*, No. 1227, *ante*.

**1434. —.]—***Qu.*: whether a person who stands by & sees an act done, knowing what the necessary consequences will be, is estopped from afterwards complaining of those consequences.—*A.-G. v. HALIFAX CORPN.* (1869), 39 L. J. Ch. 129; 21 L. T. 52; 17 W. R. 1088.

*Annotation:—***Mentd.** North Staffordshire Ry. v. Tunstall L. B. of Health (1870), 39 L. J. Ch. 131.

& C. held themselves out as proprietors of the coach, & entered into a contract to carry pl'tf. & were now estopped from denying that they were coach proprietors.—*KING v. HALL*, [1921] N. Z. L. R. 94.—**N.Z.**

#### **PART VI. SECT. 3, SUB-SECT. 3.—** **H. (a).**

**o. Whether amounting to acquiescence—Question for jury.]—**A., the owner of land through which a river flows, is entitled to recover damages in an action on the case from B., the owner of the land adjoining, situate lower down the stream, for erecting a mill-dam upon his own land, which caused the water to flow back upon A.'s land. The circumstance of A.'s being present while the work was going on, & himself assisting as a labourer in the employ of B., is not conclusive evidence of a licence so as to estop A. from maintaining such action; but is for the consideration of the jury, in connection with the other circumstances of the case, particularly such



**1435.** ——.]—Defts. agreed under the terms of a deed of licence granted to them by pltf. in 1868, to pay to him a certain royalty on all guns & breech actions manufactured, produced, or sold under the powers thereby granted.

The jury found that it was the intention of defts. that the covenant in the deed should apply only to the manufacturing & conversion of rifles exclusive of those manufactured & converted for the govt.; that pltf. did at the time of the execution of the deed know that such was defts.' intention & purposely abstained from mentioning the subject in order that they might be bound contrary to their intention; that defts. at the time of the execution of the deed believed that rifles the subject of pltf.'s patent could be manufactured & converted for the govt. without a licence—such being at that time the common belief as to the law on the subject:—*Held*: (1) the words “under the powers thereby granted” contained a latent ambiguity which required extrinsic evidence to show what was the intention of the parties; & that, upon the finding of the jury, neither in law nor in equity could pltf. maintain his claim.

(2) There is another good answer to this claim, & that is the doctrine well known & recognised in cts. of law; that if you stand by & allow another to do an act in a particular way, which you could have prevented at the time, you must be held by the act so done with your acquiescence (COCKBURN, C.J.).—RODEN v. LONDON SMALL ARMS CO., LTD. (1876), 46 L. J. Q. B. 213; 35 L. T. 505; 25 W. R. 269.

**1436.** ——. Application to companies.]—LAIRD v. BIRKENHEAD RY. CO., No. 1457, *post*.

*See, generally*, CORPORATIONS, Vol. XIII., pp. 396, 397.

**1437. A form of acquiescence.**]—NORTHUMBERLAND (DUKE) v. BOWMAN, No. 1340, *ante*.

**1438.** ——.]—If a party, having a right, stands

as tend to show that A. could not have been aware of the effect of the dam.—SMITH v. SCOTT & CRANDALL (1840), 1 Kerr, 1.—CAN.

*p. Failure to assert possessory title*—[Whether intention to abandon right.]—In 1836, pltf. became the owner of & went to reside on lot 22, but by mistake occupied the four acres in question, being part of lot 23, as part of lot 22, & as such in 1838 cleared & fenced it. In 1868 pltf.'s son, who had always resided on lot 22 with his father, & for many years had worked it, purchased with pltf.'s knowledge & assent lot 23, which he worked jointly with lot 22, the whole crop going to the father to do as he liked with. In 1875 the son sold lot 23 to deft., the land in question still & for a long time thereafter continuing within pltf.'s fence. There was some evidence given to show that pltf. had warned his son that he would never own the piece in question, but it did not clearly appear whether this was at the time of or after the purchase:—*Held*: there was nothing in the evidence to show that pltf. by his acts or conduct had ever led to the belief that he did not intend to assert his possessory title to the land in question, or that he had abandoned it, so as to estop him in equity from afterwards claiming it.—JUNKIN v. STRONG (1878), 28 C. P. 498.—CAN.

*q. Failure to deny that insurance effected—Acceptance of premiums.*]—Pltfs., through an agent of defts. orally applied on Nov. 7, 1901, for an insurance for one year, & defts. accepted the risk for one year at a premium of \$33.60, & gave an interim receipt, which, however, provided in terms

that the insurance should be for thirty days only. On Nov. 30, 1901, pltfs. paid a full year's premium to the agent & believed themselves insured the whole year. According to his usual course of dealing with defts. the agent did not pay over the premium to the latter till Jan. 20, 1902, & defts. accepted it knowing for what it was paid. They did not, however, issue a policy, & after the fire occurred repudiated liability on the ground that they had only insured pltfs. for thirty days:—*Held*: defts. liable, for if they intended to treat the insurance as terminated at the end of thirty days it was their duty to have so informed pltfs. & returned them a proper portion of the premium paid, & not having done so they were legally, as well as morally liable.—COULTER v. EQUITY FIRE INSURANCE CO. (1907), 24 C. L. T. 88; 7 O. L. R. 180; 3 O. W. R. 194; *affd.*, 25 C. L. T. 30; 4 O. W. R. 383; 9 O. L. R. 35.—CAN.

*r. Acquiescence in suit against wrong person.*]—S. died indebted to the second deft., M. On his death his widow, T., became his heir, as he left neither son nor brother surviving. In 1878, M. brought a suit to enforce payment of the debt due by S., & he made B., the mother of S., deft. in the suit, omitting T. altogether. On Aug. 30, 1878, M. obtained an *ex parte* decree, & on July 26, 1880, the house of S., then in the possession of B., was sold in execution, & the first deft., R., purchased it. On Sept. 6, 1880, the sale was confirmed, & on Nov. 26, 1880, R. was put into possession. On Dec. 10, 1880, S. B. presented a petition on behalf, as he alleged, of pltf. T., the widow of S.,

by & sees another dealing with the property in a manner inconsistent with that right, & makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence (LORD COTTENHAM, C.).—LEEDS (DUKE) v. AMHERST (EARL) (1846), 2 Ph. 117; 16 L. J. Ch. 5; 10 Jur. 956; 41 E. R. 886, L. C.

*Annotations*:—*Consd.* Northumberland v. Bowman (1887), 56 L. T. 773. *Refd.* Somersetshire Coal Canal Co. v. Harcourt (1858), 2 De G. & J. 596; Gent v. Harrison (1859), John. 517; Hogg v. Scott (1874), L. R. 18 Eq. 444; De Bussche v. Alt (1878), 8 Ch. D. 286. *Mentd.* Morris v. Morris (1847), 8 L. T. O. S. 510; Morris v. Morris (1859), 28 L. J. Ch. 329; Bright v. Legerton (1861), 2 De G. F. & J. 606; Bagot v. Bagot, Legge v. Legge (1863), 32 Beav. 509; Dashwood v. Magniac, [1891] 3 Ch. 306; Phillips v. Homfray, [1892] 1 Ch. 465.

**1439. Necessity for knowledge.**]—A grantor of a bill of sale over jewellery left in possession of his stock in trade, has no power to pledge the same. The acquiescence which will deprive a man of his legal rights must amount to fraud.

Defts. further pleaded that pltf. permitted M. [the grantor] to have the goods in his possession & to deal with same in such a manner that defts. were induced by pltf.'s conduct to believe, & did in fact believe, that M. had authority to pledge the same. This was what they called the standing-by doctrine, & they urged that as pltf. had paid off previous pledges in 1876, he must have been aware of this subsequent course of conduct by M. This standing-by doctrine must be subject to the proof that pltf. had knowledge of what M. was about to do (HUDDLESTON, B.).—JOSEPH v. WEBB, JOSEPH v. LYONS, JOSEPH v. PIDCOCK, JOSEPH v. JONES (1881), 1 Cab. & El. 262, N. P.; *on appeal*, *nom.* JOSEPH v. LYONS, 15 Q. B. D. 280, C. A.

*Annotation*:—*Mentd.* Hallas v. Robinson (1885), 15 Q. B. D.

**1440. Letter not replied to—Construction of contract.**]—A firm of contractors tendered for the execution of certain work for the Comrs. of Works. The tender having been accepted, a contract in writing, to be signed & sealed on behalf of both

to set aside the sale. He did not produce any authority from her, & his application was rejected on June 14, 1881. On Oct. 31, 1878, T. adopted pltf. B., under an authority, as she alleged, of her deceased husband, S. In 1881 T. filed the present suit on behalf of her adopted son B. to set aside the sale & to recover the house:—*Held*: pltf. was entitled to have the sale set aside, & to recover possession of the house. The estate was vested in T. as legal representative of her deceased husband. Had T. wilfully put forward B. as the representative of S. so as to deceive & mislead M., then, no doubt, she might be held bound by the decree obtained by the latter against B. Her mere quiescence while M. wilfully sued the wrong person could not affect her legal rights or deprive B. of his rights.—BASWANTAPA SHIDAPA v. RANU & MAIKHANA (1884), 1 L. R. 9 Bom. 86.—IND.

*s. Party allowing decree against himself.*]—In 1877 pltf. executed a deed of hypothecation to one of two partners to secure a loan obtained from them jointly. In 1881 pltf. sold, *inter alia*, the hypothecated property to defts. Nos. 2 to 4, & it was arranged that the secured debt should be paid off by the vendees. They failed to do this, but in 1882 they executed a nitge. for the amount due in favour of the other of the two partners, & he thereupon gave a written discharge to pltf., who was found to have been acting in collusion with him to the disadvantage of his partner, the holder of the hypothecation-bond. The latter brought a suit in 1885 upon the hypothecation-bond & obtained a personal decree against the present pltf., which was

*Sect. 3.—By representation: Sub-sect. 3, H. (a) &*

parties, was prepared. Before the execution of this document by the Comrs. of Works the contractors wrote to say that they were sending the contract executed by them "on the assumption that in the event of the Bill dealing with workmen's insurance now before Parliament becoming law, the payments thereunder which will fall upon this co. as employers will be recouped to the co. under clause 15 of the contract." No reply was received to this letter, & the contract was executed by the Comrs. of Works. In an arbitration the arbitrator stated a case for the opinion of the ct. to ascertain whether the terms of the letter were binding on the comrs.:—*Held*: the comrs. were not bound by the terms of the letter, nor estopped from relying upon the true construction of the sealed contract.—*LESLIE & Co. v. WORKS COMRS.* (1914), 78 J. P. 462.

—*Whether an admission by conduct.*—*See generally, EVIDENCE.*

*As bar to claim for injunction.*—*See INJUNCTION.*

(b) *While Money expended.*

**1441. General rule.**—Where a party has stood by & allowed another party to lay out money on an estate he will not be allowed to have a decree unless he makes compensation for amount so expended.—*LLEVELLYN v. MACKWORTH* (1740), Barn. Ch. 445; 27 E. R. 714, L. C.

*Annotation*:—*Refd.* *Codrington v. Lindsay* (1873), 8 Ch. App. 578.

**1442. By principal on agent's estate.**—Where an agent permitted his principal to expend money on an estate which the agent afterwards claimed as his own, & to which his real representative established a legal title by ejectment:—*Held*: an injunction should be granted to restrain an action brought by the agent's representative for mesne profits.—*CAWDOR (LORD) v. LEWIS* (1835), 1 Y. & C. Ex. 427; 4 L. J. Ex. Eq. 59; 160 E. R. 174.

*Annotations*:—*Consd.* *Barnard v. Wallis* (1840), 2 Ry. & Can. Cas. 162. *Mentd.* *Rawson v. Samuel* (1841), Cr. & Ph. 161.

*ex parte*, the amount of the decree being declared to be charged on the land in the possession of defts. Nos. 2 to 4. Meanwhile, deft. No. 1 who was the assignee of the mtge. of 1882, had obtained a decree upon it against deft. No. 4. This decree not having been executed, he subsequently sued upon the mtge. again & obtained a decree against defts. Nos. 2 to 4. Pltf. now sued to have the last-mentioned decree set aside & recover the balance of the purchase-money from defts. Nos. 2 to 4:—*Held*: pltf., having allowed a decree to be passed against him *ex parte* in the suit of the holder of the hypothecation-bond, & having obtained a collusive discharge from the other partner, was not entitled to recover against defts.—*KANAGAPPA v. SOKKALINGA* (1892), 1 L. R. 15 Mad. 362.—*IND.*

t. *Where no legal obligation to speak—No estoppel.*—Unless there was a legal obligation to speak, a party who remains silent cannot thereafter be estopped from asserting the truth on the ground of silent acquiescence.—*DOYLE v. LEYDS* (1896), 3 O. R. 22.—*S. AF.*

**PART VI. SECT. 3, SUB-SECT. 3.—H. (b).**

a. *General rule—Necessity for knowledge.*—A. brought a suit against B. & others for ejectment, making the landlord a deft. to the suit, on the allegation that he, A., having obtained

a lease of the land from the landlord, took possession, but subsequently was forcibly dispossessed by defts., second party, in collusion with the landlord:—*Held*: as it was not shown that pltf. knew that defts. were spending money upon the improvement of the land & were doing so in the belief that they had a good title, while he stood by & allowed them to proceed with these expenditures, pltf. was entitled to get a decree for ejectment without indemnifying defts. for their outlay.—*NUNDO KUMAR NASKER v. BANOMALI GAYAN* (1902), 1 L. R. 29 Cal. 87.—*IND.*

b. ———.]—The equitable doctrine of acquiescence, under which it is held that a person who knowingly allows another to build or expend money on his land in the erroneous supposition that it is his own cannot afterwards assert his title, does not apply to cases where the true owner had merely the means of knowledge of the fact, but it does not appear that he actually knew it. In the case of adjoining owners having equal means of knowing their common boundary, it is doubtful whether either could be allowed to set up the equity arising from acquiescence by averring his own ignorance & the knowledge of the other.—*JOHNS v. RIVERS* (1872), 2 C. A. 344.—*N.Z.*

c. *By purchaser of equitable interest.*—Pltf. to the knowledge & with the approval of deft.'s wife, made an agreement with deft. for the pur-

**1443. By purchaser pending treaty as to terms.**—An offer of a wayleave, purporting to emanate from several landowners, & signed by O., was made by him in Mar. 1843, to an iron co., upon the terms of the payment of triple damages. O.'s mtgees. approved of the offer; & there were negotiations between the agent of the co. & the agent of O. & the mtgees., which resulted in no definite arrangement. The iron co. transferred their interest in the offer to the S. & D. Ry. Co., who set about making a railway over the land in 1844, which was finished in 1845. The mtgees., under a power of sale, sold the land, in 1846, to a person through whom deft. claimed as purchaser. An action of ejectment was brought in 1847, which was restrained by injunction, & there were no further proceedings, in consequence of the insolvency of the then owner. Upon a bill filed by the S. & D. Ry. Co. for specific performance of the offer of 1843, as an agreement:—*Held*: (1) the staking out of the land by the railway co. & the making of the railway did not, under the circumstances, imply such acquiescence on the part of the owner as to turn the offer into an agreement.

(2) If there be a treaty about land, & disagreement as to terms, & the intended purchaser nevertheless expends money upon it, the vendor shall not be taken to have acquiesced.—*MEYNELL v. SURTEES* (1855), 3 Sm. & G. 101; 25 L. J. Ch. 257; 25 L. T. O. S. 227; 1 Jur. N. S. 737; 3 W. R. 535; 65 E. R. 581, L. C.

*Annotation*:—*Mentd.* *Benecke v. Chadwicke* (1856), 4 W. R. 687.

**1444. Person expending money with knowledge of title.**—The equitable rule, as to the effect of a person's lying by & allowing another to expend money on his property, does not apply where the money is expended with knowledge of the real state of the title.—*RENNIE v. YOUNG* (1858), 2 De G. & J. 136; 27 L. J. Ch. 753; 44 E. R. 939, L. JJ.

**1445. Erection of buildings—On land of party standing by.**—An owner of land who stands by while a person in possession in ignorance of the owner's title erects buildings on it may be bound

chase of an interest in certain lands, which stood in deft.'s name, of which he represented himself to be the equitable owner, & to which no claim was at any time made by his wife. Upon the strength of this agreement, pltf. expended money in the development of the lands, which money, it was afterwards agreed, should be repaid to him for a surrender of his interest in the lands. For this money pltf. obtained a judgment against deft. & issued execution; & upon pltf. moving for an order for sale of deft.'s equitable interest in the lands to satisfy pltf.'s execution, deft.'s wife claimed the interest as her own, asserting that her husband held as a trustee for her, the lands having been purchased with her money:—*Held*: she was estopped from asserting her title as against pltf.'s execution; she stood by & not only allowed but encouraged pltf. to expend upon the property the money which he was now trying to get back. An expenditure which he made in the belief that the property belonged to deft., as deft. expressly, & his wife tacitly, represented to be the case.—*HARVEY v. PARTON* (1913), 24 W. L. R. 379; 5 Alta. L. R. 73.—*CAN.*

**1445 i. Erection of buildings—On land of party standing by.**—C. died in 1907, leaving to his three sons a business & immovable property, including an abata & some kucha buildings in L. which he purchased for Rs. 125. In



by his acquiescence, so that he will be restrained from enforcing a judgment for recovery of the land except on terms of repaying the outlay on the buildings.—**OXFORD'S (EARL) CASE** (1615), 1 Rep. Ch. 1; 21 E. R. 485, L. C.

*Annotation*:—**Reid**. *Russell v. Watts* (1885), 55 L. J. Ch. 158.

**1446.** ———. ———.]—Where a man suffered another to build on his ground, without setting up a right till afterwards:—*Held*: the owner must permit the person building to enjoy it quietly.—**EAST INDIA CO. v. VINCENT** (1740), 2 Atk. 83; 26 E. R. 451, L. C.

*Annotations*:—**Consd.** *Barnard v. Wallis* (1810), 2 Ry. & Can. Cas. 162. **Distd.** *Harryman v. Collins* (1854), 18 Beav. 11; *Hervey v. Smith* (1855), 1 K. & J. 389. **Consd.** *Meynell v. Surtees* (1855), 25 L. J. Ch. 257. **Reid**. *Scott v. Scott* (1854), 23 L. T. O. S. 27; *Crampton v. Varna Ry.* (1872), 7 Ch. App. 562; *McManus v. Cooke* (1887), 35 Ch. D. 681. **Mentd.** *Blakemore v. Glamorganshire Canal Navigation* (1832), 1 My. & K. 151; *Lond v. Murray* (1851), 17 L. T. O. S. 248.

**1447.** ———. ———. **Lessor**.]—On a demise of a piece of ground on which a tenant has built, if it corresponds with the abutments, though not with the measured distance as stated in the lease, & the lessor sees the building going on without objecting to it, he shall not afterwards be allowed to claim the overplus above the measured distance, on the footing of an encroachment.—**NEALE d. LEROUX v. PARKIN** (1794), 1 Esp. 229, N. P.

**1448.** ———. ———. **Subsequent agreement as to rent to be paid.**]—If a man stands by & allows another to erect a building on his ground, & he afterwards agrees as to the rent to be paid for it, neither the owner of the land nor any person claiming under him can dispute the right of the builder to use the land.—**MOLD v. WHEATCROFT** (1859), 27 Beav. 510; 29 L. J. Ch. 11; 1 L. T. 226; 6 Jur. N. S. 2; 54 E. R. 202; *subsequent proceedings* (1860), 30 L. J. Ch. 598.

**1449.** ———. ———.]—If a stranger begins to build on land supposing it to be his own, & the real owner, perceiving his mistake, abstains from setting

him right, & leaves him to persevere in his error, a ct. of equity will not afterwards allow the real owner to assert his title to the land.

But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it.

So, if a tenant builds on his landlord's land he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land & buildings when the tenancy has determined.—**RAMSDEN v. DYSON** (1866), L. R. 1 H. L. 129; 12 Jur. N. S. 506; 14 W. R. 926, H. L.; *revsq.* S. C. *sub nom.* **THORNTON v. RAMSDEN** (1864), 4 Giff. 519.

*Annotations*:—**Consd.** *Plimmer v. Wellington Corpn.* (1884), 9 App. Cas. 699. **Distd.** *Weller v. Stone* (1885), 54 L. J. Ch. 497. **Consd.** *Proctor v. Bennis* (1887), 36 Ch. D. 740. **Apld.** *A.-G. to Prince of Wales v. Collom*, [1916] 2 K. B. 193; *Michaud v. Montreal City* (1923), 92 L. J. P. C. 161. **Reid**. *Bankart v. Tennant* (1870), L. R. 10 Eq. 141; *Bastin v. Bidwell* (1881), 44 L. T. 742; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Re Clarke, Ex p. Newton v. Kearly* (1889), 60 L. T. 335; *Wimbledon & Putney Commons Conservators v. Nicol* (1894), 10 T. L. R. 247; *Re Williams & Parry's Contract* (1895), 72 L. T. 869; *Civil Service Musical Instrument Assocn. v. Whiteman* (1899), 68 L. J. Ch. 484; *Lala Beni Ram v. Kundan Lal* (1899), 15 T. L. R. 258; *Ahnad Yar v. Secretary of State for India in Council* (1901), 17 T. L. R. 500; *Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117. **Mentd.** *Marriott v. Reid* (1900), 82 L. T. 369; *Cloutte v. Storey* (1910), 80 L. J. Ch. 193; *Wheeler v. Stratton* (1911), 105 L. T. 786; *Ramsden v. I. R. Comrs.* (1912), 82 L. J. K. B. 1290; *Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co. & Donkin* (1921), 90 L. J. Ch. 420.

**1450.** ———. ———. **Whether tenancy by estoppel created.**]—Where the owner of land sees another person erecting buildings upon it, & knowing that such other person is under the mistaken belief that the land is his own, purposely abstains from interfering with the view of claiming the building when erected, equity might possibly prevent him from ejecting that other person; but to raise the equitable estoppel as between landlord & tenant it is incumbent to show that the conduct of the

July, 1908, S. his second son, sold this abata & kucha buildings to G. for Rs. 2,600. G. immediately began to build & spent some Rs. 3,000 on erecting a two-storeyed house on the site. In 1913, he sold the same to the Punjab National Bank & they spent Rs. 207 on alterations. In July, 1916, the youngest brother & the sons of the eldest brother, then deceased, sued for possession of the property on the ground that S. had no right to sell without their consent:—*Held*: pltf.'s long silence, coupled with the fact that they knew of the building operations & abstained from asserting their rights, showed that they had acquiesced in the sale, & they were consequently estopped from asserting those rights.—**DHANPAT RAI v. GURANDITTA MAL** (1921), 1 L. R. 2 Lah. 258.—**IND.**

**1448 i.** ———. ———. **Subsequent agreement as to rent to be paid.**]—Deft. entered into occupation of certain land with the permission of pltf., who was the owner, & erected buildings & otherwise expended money upon it. Pltf. & deft. were relations & lived near each other. Pltf. constantly visited the land & knew what deft. was doing, but made no objection. Subsequently pltf., being anxious to obtain from deft. an acknowledgment of his, pltf.'s, title, induced, but without misrepresentation or fraud, deft. to sign a rent-note. The ct. found that, although this rent-note was, in terms, a lease for one year, yet the intention of the parties was not that deft. should at the expiration of the year or on any subsequent demand, hand over to pltf., the land with the buildings which had been erected by deft. with pltf.'s

implied consent, without being recouped for the expenditure thus incurred; that subsequently to the execution of the rent-note deft. had erected other buildings, & that pltf. knew of this, & made no objection:—*Held*: pltf. could not recover possession of the land, or require the removal of the buildings without recouping deft. the money he had expended. Pltf. was estopped from denying the claim of deft. He had stood by in silence while his tenant had spent money on his land.—**DATTATRAYA RAYAJI PAI v. SHRIDHAR NARAYAN PAI** (1892), 1 L. R. 17 Bom. 736.—**IND.**

**1450 i.** ———. ———. **Whether tenancy by estoppel created.**]—C. built on deft.'s land believing it to be his own. Deft., with knowledge of the mistake, abstained from setting him right, & left him to persevere in his error. C. assigned his estate, right, title & interest in the land to pltf., a purchaser with notice. In a suit by pltf. for a declaration that the land was chargeable with payment to pltf. of the amount of the expenditure:—*Held*: C. had an estate by estoppel, which was assignable whether C. were at the date of the assignment in possession of the land or not.—**HAMILTON v. GERAGHTY** (1901), 1 S. R. N. S. W. 81; 18 N. S. W. W. N. 152.—**AUS.**

**d. Construction of road**—*By public authority.*]—If an owner of property allows municipal authorities to take possession of the same & spend money in making a road on the same, believing that the property was a valid gift from the owner:—*Held*: the owner cannot afterwards assert his title on the

ground that the gift was non-effective because of conditions which had not been fulfilled.—**MICHAUD v. MONTREAL CITY**, [1923] 3 D. L. R. 487; Q. R. 35 K. B. 295; Q. R. 30 K. B. 46.—**CAN.**

**e. Works becoming a nuisance.**]—In 1861, while deft. was building a tannery on land adjoining pltf.'s, pltf. encouraged deft. to proceed. The business was commenced the same year; in 1863 additions were made to the buildings with pltf.'s knowledge & acquiescence; & pltf. made no complaint until 1868, though all this time the business had been carried on, & pltf. had resided on the premises adjoining:—*Held*: he had debarred himself from relief in equity, on the ground of the tannery being a nuisance.—**HEENAN v. DEWAR** (1870), 17 Gr. 638; 18 Gr. 438.—**CAN.**

**f. Whether mere submission sufficient.**]—Mere submission to an injury, such as the erection of a building on one's land, for any time short of the period limited by statute for the enforcement of a right, cannot operate to deprive one of that right. In order to amount to acquiescence which would create an equitable estoppel there must have been some equivocal conduct on the part of the owner of the land whereby the person erecting the building was induced or encouraged to make expenditures.—**WHITE v. SANDON WATERWORKS & LIGHT CO.** (1904), 10 B. C. R. 361.—**CAN.**

**g. Additions by tenant to property of landlord without permission**—*Acquiescence of landlord.*]—Where the lessee of a dwelling-house, being fully aware



**Sect. 3.—By representation: Sub-sect. 3, H. (b).]**

landlord was sufficient to justify the legal inference that he had contracted that the right of tenancy should be changed into a perpetual right of occupation.—*LALA BENI RAM v. KUNDAN LAL* (1899), 15 T. L. R. 258, P. C.

**On land claimed by party standing**

Deft. was the owner by purchase of garden land adjoining two cottages at W. in the manor of C., & was also in possession of a house & garden at Z., the site of which she had purchased in 1902. This house was subsequently enlarged from one of six rooms into one of eleven rooms, with an additional wing. These alterations & some improvements to the garden cost £500, & were known to the mineral agent of the Duchy, who remained passive. The Duchy claimed that under Assessionable Manors Act, 1844 (c. 105), ss. 55, 69, the two cottages & land at W. & the house & land at Z. had been originally erected, entered upon, & used in connection with the mines at W. & Z. respectively, & were now vested in the Duchy. From 1846 onwards licences & leases had been granted by the Duchy for the working of the two mines, but neither had been in fact worked for many years.

Upon an information by the A.-G. to His Royal Highness the Prince of Wales claiming declarations of title to the lands & buildings, & an injunction to restrain the deft. from asserting any title to the same:—*Held*: in regard to the Duchy's claim to the house at Z. deft. had established a good equitable defence based on estoppel, the expenditure on the house having been made to the knowledge of the agent to the Duchy & on property which deft. reasonably believed to be her own; & that such equitable defence was good against the Crown.—*A.-G. TO PRINCE OF WALES v. COLLOM*, [1916] 2 K. B. 193; 85 L. J. K. B. 1484; 114 L. T. 1121; 32 T. L. R. 448.

**1452. — On adjacent land—New buildings higher than old—No complaint as to infringement of rights of light.]**—If an adjoining owner knowingly permits a messuage & premises to be rebuilt of an increased size & height, with the alteration of ancient lights, & the opening new lights upon an additional floor, he cannot object to them after they are complete, or assert a right to raise a party-wall, & build upon his own property so high as to render the new buildings less accessible to light & air than they were at the completion of the work.—*COTCHING v. BASSETT* (1862), 32 Beav. 101; 32 L. J. Ch. 286; 9 Jur. N. S. 590; 11 W. R. 197; 55 E. R. 40.

*Annotations*:—*Refd.* *Russell v. Watts* (1885), 10 App. Cas. 590; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Hoare v. Lewisham Corpn.* (1901), 85 L. T. 281.

**1453. — — —.]**—*WILLIAMS v. JERSEY (EARL)*, No. 1461, *post*.

**1454. — — — Adjoining owner not in possession or occupation.]**—(1) Where on the site of old buildings the erection of new buildings of much greater height, materially obstructing the access of light & air to adjoining property, has been completed before complaints made or bill filed, the ct. although it has jurisdiction to grant a mandatory injunction, will not do so in a case where the owner of such property has himself

treated the case as one for compensation by damages. But having that jurisdiction, it will direct an inquiry to assess damages, & will not leave pltf. to his remedy by action.

(2) Although a month should elapse between the completion of the building & any objection thereto, the ct. will not consider that there was laches or acquiescence on the part of the owner of the adjoining property when he was not himself in possession or occupation of it.—*GORT (VISCOUNT) v. CLARK* (1868), 18 L. T. 343; 16 W. R. 569, L. J.

*Annotations*:—*As to* (1) *Refd.* *Roskell v. Whitworth* (1871), 19 W. R. 804; *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287.

**1455. Watercourse diverted.]**—A. diverted a watercourse which put B. to great expense, & the diversion being a nuisance to B. he brought an action which was barred, it being proved that B. did see the work when it was carrying on & connived at without showing the least disagreement, but rather the contrary.—*ANON.* (1709), 2 Eq. Cas. Abr. 522; 22 E. R. 441.

*Annotations*:—*Consd.* *Williams v. Jersey* (1841), Cr. & Ph. 91. *Refd.* *McManus v. Cooke* (1887), 35 Ch. D. 681.

**1456. Construction of railway—To pass over land of party standing by.]**—The owner of land, upon which a railway co. empowered by Parliament are about to enter, is not entitled to an interlocutory injunction to restrain them from so entering, if, by his silence & conduct, he has permitted the co. to carry on their works upon the supposition that they were entitled to enter on & take the land in question.—*GREENHALGH v. MANCHESTER & BIRMINGHAM RY. CO.* (1838), 3 My. & Cr. 784; 9 Sim. 416; 1 Ry. & Can. Cas. 68; 8 L. J. Ch. 75; 3 Jur. 693; 40 E. R. 1128, L. C.

*Annotations*:—*Consd.* *Lindsey v. G. N. Ry.* (1853), 10 Haro. 664. *Refd.* *Galbreath v. Armour* (1845), 4 Bell, Sc. App. 374.

**1457. Construction of railway junction—Under company's superintendence.]**—A railway co., after allowing a person to construct, at his own expense, & under their sanction & superintendence, a junction for the conveyance of goods between his premises & their railway, & after allowing such junction to be used for two & a half years, will be held, in the absence of any formal written contract, bound by acquiescence, & not entitled, at their own option, to determine the user, which has been so long enjoyed.—*LAIRD v. BIRKENHEAD RY. CO.* (1859), John. 500; 29 L. J. Ch. 218; 1 L. T. 159; 6 Jur. N. S. 140; 8 W. R. 58; 70 E. R. 519.

*Annotations*:—*Apld.* *Michaud v. Montreal City* (1923), 92 L. J. P. C. 161. *Refd.* *Civil Service Musical Instrument Assocn. v. Whiteman* (1899), 68 L. J. Ch. 484; *Marriott v. Reid* (1900), 82 L. T. 369; *Hoare v. Lewisham Corpn.* (1901), 85 L. T. 281. *Mentd.* *Bourke v. Alexandra Hotel Co.* (1877), 25 W. R. 393.

**1458. Works interfering with private road.]**—A railway co. made excavations upon their own land, the purpose of which was the partial diversion of the stream of water of a navigable river, & the works so prosecuted necessarily occasioned the obstruction of a private road.

Pltfs., who were the owners of a fulling-mill, which was supplied with water from the river, alleged that the proposed diversion of the stream was illegal under the powers of the act. Pltfs.,

of his position as such lessee, made additions to the leased premises without the permission of his lessor, but apparently with his knowledge & without any interference on his part, & subsequently, when the lessor sued to eject him for non-payment of rent, claimed compensation for such addi-

tions:—*Held*: the lessor was entitled to recover possession from the lessee without paying him compensation.—*NAUNIHAL BHAGAT v. RAMESHAR BHAGAT* (1894), 1 L. R. 16 All. 328.—*IND.*

*h. Works by municipal authority—Ratepayers taking benefit.]*—*Semble*:

where ratepayers of a municipality have lain by & taken the benefit of works constructed by the Town Council, instead of interdicting such construction as they might have done, they are stopped from objecting to paying for such works.—*THORNTON v. HUGO* (1886), 5 E. D. C. 280.—*S. AF.*

who had a right of way over the private road, also alleged that the co. were interfering with the road without the performance of the conditions imposed by the railway Act, as preliminary to interfering with the road:—*Held*: although the co. were working on their own land, pltfs. must be held to have had notice of the intended works of the co., & had by an acquiescence for eighteen months, during which the co. had expended a large sum of money on the works precluded themselves for asking for the interposition of the ct. by injunction.—*ILLINGWORTH v. MANCHESTER & LEEDS RY. CO.* (1840), 2 Ry. & Can. Cas. 187, L. C.

**1459. Expenditure of charitable subscriptions—Adverse title set up by subscribers.]**—The necessary funds having been subscribed by certain parties, a piece of land was purchased & conveyed by deed to trustees for a charitable purpose. Under this deed the trustees entered into & continued in possession for several years; &, with the acquiescence of all the subscribers, including some not parties to the deed, a considerable expenditure was made, & heavy liabilities were incurred:—*Held*: even assuming the subscribers not parties to the deed had an equitable interest in the land in respect of the moneys subscribed by them, yet they would not be heard to assert a title to the land adverse to that of the trustees.—*A.-G. v. MUNRO* (1845), 1 Holt, Eq. 103; 5 L. T. O. S. 124; 9 J. P. 309; 9 Jur. 461; 71 E. R. 686; *subsequent proceedings* (1848), 2 De G. & Sm. 122, L. C.

*Annotation*:—*Consd.* *A.-G. v. Hardy* (1851), 1 Sim. N. S. 338.

**1460. Mine opened.]**—Where pltfs.' agent granted a licence to carry on for two years mining works on ground not opened, & watched the working until the adventure proved successful, & then pltfs. objected that, according to the custom of that district, the agent had no right to grant a licence for more than one year:—*Held*: pltfs. were precluded from then objecting by reason of their having stood by without interfering with defts.' works.—*HARRISON v. AMES* (1850), 15 L. T. O. S. 321, L. C.

**1461. Works likely to become a nuisance.]**—A. filed a bill against B., praying a declaration that A. was entitled to use & practise the smelting of copper ores, at A.'s copper works & that A. might be quieted therein, & that B. might be restricted from proceeding in an action brought by him to recover damages against A., in respect of the injury done to the grass, herbage & lands belonging to him, & adjoining the copper works, by means of the deleterious matters arising from the smelting of copper ore. The bill alleged that B. had known of the existence of the copper works during several years past, & was acquainted with them whilst they were being erected, & encouraged A. in the erection thereof, & in the expenditure of large sums of money thereon. On demurrer, for want of equity:—*Held*: the demurrer was bad.

*Semble*: A., having an equity, loses that equity as against B., by permitting B. to proceed & deal with property in ignorance of the equity of A., so standing by & permitting another interest to arise inconsistent with that equity.—*WILLIAMS v. JERSEY (EARL)* (1841), Cr. & Ph. 91; 10 L. J. Ch. 149; 5 Jur. 426; 41 E. R. 424, L. C.

*Annotations*:—*Refd.* *Osborne v. Bradley*, [1903] 2 Ch. 446. *Mentd.* *Smith v. Kay* (1859), 7 H. L. Cas. 750; *Smith v. Hayes* (1867), 15 W. R. 871.

**1462. — No action taken till nuisance arises.]**—If works likely to become a nuisance are erected, & subsequently carried on without any objection,

the owners of adjoining estates, who acquiesced so long as no perceptible injury was sustained, are not precluded, when injury arises, from objecting to an extension of the works, or from pursuing their legal remedy to recover damages for injury sustained by such works; & when an action has been brought, & damages recovered, the ct. will not restrain the execution to obtain payment of the amount, or prevent pltf. in the action from taking other proceedings at law.—*BANKART v. HOUGHTON* (1860), 27 Beav. 425; 28 L. J. Ch. 473; 32 L. T. O. S. 382; 23 J. P. 260; 5 Jur. N. S. 282; 7 W. R. 197; 54 E. R. 167; *subsequent proceedings, sub nom.* *HOUGHTON v. BANKART* (1861), 3 De G. F. & J. 16, L. J.

*Annotation*:—*Refd.* *Davies v. Marshall* (1861), 31 L. J. C. P. 61.

**1463. Trade likely to become nuisance.]**—Where a party had lain by & allowed expenditure to be incurred, & a trade, which might be a nuisance in point of law, to be established & carried in for a considerable period without asking for the interference of the ct. or bringing an action:—*Held*: he was precluded by acquiescence from obtaining relief in equity, though the trade had been gradually increasing.—*SWAINE v. GREAT NORTHERN RY. CO.* (1863), 3 New Rep. 109; 9 L. T. 571; 28 J. P. 20; 9 Jur. N. S. 1196; *on appeal* (1864), 4 De G. J. & Sm. 211, L. J.

*Annotations*:—*Mentd.* *Langmead v. Maple* (1865), 18 C. B. N. S. 255; *Crump v. Lambert* (1867), 17 L. T. 133; *Dowling v. Pontypool, Caerleon, & Newport Ry.* (1874), L. R. 18 Eq. 714; *Serrao v. Noel* (1885), 15 Q. B. D. 549; *Gosnell v. Aerated Bread Co.* (1894), 10 T. L. R. 661; *A.-G. v. Preston Corpn.* (1896), 13 T. L. R. 14.

*See, generally*, NUISANCE.

**1464. On faith of extension of option to purchase.]**—An option to purchase certain patents, exercisable within six months from the date of the contract, was granted by deft. to pltf.:—*Held*: as deft. had treated the time for such exercise as being extended to some later date & there had been an expenditure of time, work, & money by pltf. consequent thereon, deft. had by his conduct raised an equity against himself which prevented him from contending that the option had expired at the end of the six lunar months.—*BRUNER v. MOORE*, [1904] 1 Ch. 305; 73 L. J. Ch. 377; 89 L. T. 738; 52 W. R. 295; 20 T. L. R. 125; 48 Sol. Jo. 131.

*Annotations*:—*Refd.* *Hartley v. Hymans*, [1920] 3 K. B. 475. *Mentd.* *Morrell v. Studd & Millington*, [1913] 2 Ch. 648; *Erith Engineering Co. v. Sanford Riley Stokes Co. & Babcock & Wilcox* (1920), 37 R. P. C. 217; *Phipps (Northampton & Towcester Breweries) v. Rogers* (1924), 93 L. J. K. B. 1009; *Schiller v. Petersen*, [1924] 1 Ch. 394.

**1465. Works executed by local authority.]**—A local authority served a notice under Public Health Act, 1875 (c. 55), s. 150, on frontagers requiring them to execute certain works "within one calendar month from the date of the service hereof" without having exercised any discretion whatever in considering what was a reasonable time to allow for the execution of the works. The frontagers did not commence the works nor object to the validity of the notice, & after three months the local authority, without the consent of the frontagers, began the works & completed them within four months, & served on the frontagers the usual demand for payment. The frontagers thereupon presented a memorial to the Local Government Board under sect. 268 of the Act appealing against the apportionment on the ground that the notice requiring them to execute the works within one month was unreasonable & bad, having regard to the fact that the local authority were unable to do the work themselves under four months. The Board held



*Sect. 3.—By representation: Sub-sect. 3, H. (b), (c) &*

an inquiry & eventually intimated that they were prepared to make an order confirming the apportionment. Thereupon the frontagers withdrew their memorial with the approval of the Board. In an action by the local authority to recover payment from the frontagers of the expenses incurred in doing the works:—*Held*: (1) the frontagers, in standing by & doing nothing, had not waived their rights under sect. 150 of the Act, nor estopped themselves from objecting that the notice was bad; (2) the frontagers were not estopped by their proceedings before the Local Government Board under sect. 268 of the Act from raising the point as to the validity of the notice, inasmuch as, although the Board had intimated that they proposed to decide it against them, no order had in fact been made & the appeal had been withdrawn with the sanction of the Board.—*BRISTOL CORPN. v. SINNOTT*, [1918] 1 Ch. 62; 117 L. T. 644; 82 J. P. 9; 62 Sol. Jo. 53; 15 L. G. R. 871, C. A.

*Annotation*:—*As to (1) & (2) Reid v. Macclesfield Corpn. v. Macclesfield Grammar School*, [1921] 2 Ch. 189.

*(c) While Property or Goods of Party Standing by Dealt with.*

**1466. General rule.**—(1) A., the owner of certain chattels, pledged them to B., who was a broker, to secure advances made on his behalf by B.; & B. afterwards, in his own name, & unknown to A., re-pledged the same chattels to C., to secure advances made by C. to B., but of which, unknown to C., A. was to have the benefit. C. having subsequently applied in vain to B. for payment of his advances, threatened to realise his security by a sale, which, however, he was from time to time induced to postpone, by the solicitations of B., & his assurances of speedy payment; & this was communicated by B. to A., his principal. In a suit by A. against B. & C., praying to redeem the property in pledge on payment of any balance found due on the account between himself & B.:—*Held*: A. had no equity to restrain C. from proceeding to an immediate sale.

(2) A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be in equity permitted to assert his own title against a title created by that other, although he derives no benefit from the transaction.—*NICHOLSON v. HOOPER* (1838), 4 My. & Cr. 179; 41 E. R. 70, L. C.

**1467. Father's property settled by son.**—Father, supposing his son tenant in fee, stands by & lets his son make a settlement, which he had not power of doing according to his real title; yet shall make good the settlement.

**PART VI. SECT. 3, SUB-SECT. 3.—H. (c).**

**k. Exercise of rights of ownership by possessor.**—When a person to whom possession of goods is given is permitted by the person to whom they truly belong to assume the appearance & exercise the acts of an uncontrolled & absolute owner, a *bonâ fide* purchaser from such possessor is entitled to retain them against the claim of the true owner.

**l. Tax sale of land—Presence of**—*CLAYTON v. SHIBLEY* (1885),

**m. Mere presence at sale—Whether acquiescence.**—Where the owner of lands was present, but took no part in a deed subsequently executed by the representative of his vendor

granting the same lands to a third person, the mere fact of his having been present raises no presumption of acquiescence or ratification thereof.—*POWELL v. WATERS* (1897), 28 S. C. R. 133.—**CAN.**

**n. Goods taken.**—Pltf. agreed to sell 40 feet of curbing stone to P., who had contract to place stones in the town of W. Prior to this agreement, the town, with pltf.'s knowledge, but without any authority or permission on his part, except such as can be implied from the fact that he saw the town's servants taking the stone & made no protest or objection, had taken away & made use of 174 feet of pltf.'s curbing stone. Pltf. sent a bill of all the stone to P., & at his request the town held back all P.'s payment so as to force a settlement of the bill, but P. refused to pay pltf.

Had it been known it [the fee] was in the father, it would have been insisted on that he should have joined (*LORD KING, C.*).—*TEASDALE v. TEASDALE* (1726), *Cas. temp. King*, 59; 25 E. R. 222.

*Annotation*:—*Consd. Olliver v. King* (1856), 8 De G. M. & G. 110.

**1468. Exercise of acts of ownership by tenant.**—When the landlord suffers his tenant to exercise acts of ownership, & makes no objection to it, it is evidence to be left to the jury, whether he did not mean to be bound by those acts of his tenant.—*DOE d. WINCKLEY v. PYE* (1795), 1 Esp. 363.

*Annotation*:—*Mentd. Carne v. Nicoll* (1835), 1 Scott, 466.

**1469. Goods seized in execution.**—*PICKARD v. SEARS*, No. 1032, *ante*.

**1470. — Goods subject to hire-purchase agreement.**—Under a hire-purchase agreement pltf. let to the tenant of premises certain furniture, the value of which was about half of that of all the goods upon the premises. Deft., who was the lessor of the premises, having recovered judgment against the tenant for arrears of rent, obtained a *fi. fa.* thereon, under which the sheriff seized all the goods on the premises & some days later, on Apr. 27, 1921, sold them by public auction. The sale realised £105 8s. 8d., & after deduction of the sheriff's charges & other sums, about one-half of that amount, or £52 10s. 6d., was received by deft. in respect of the judgment debt. Pltf. were informed of the seizure of the goods some days before the sale, but they gave no notice to any one that the goods hired belonged to them, & they made no inquiries until May, 1922, when they for the first time learned of the execution & sale. In an action by pltf. against deft. to recover the sum last above mentioned as money had & received by deft. to the use of pltf.:—*Held*: in the circumstances pltf. were not estopped from maintaining the action by reason of their not having informed the sheriff as agent of the deft. or at all, that the goods hired belonged to them & should not be sold.—*JONES BROTHERS (HOLLOWAY), LTD. v. WOODHOUSE*, [1923] 2 K. B. 117; 92 L. J. K. B. 638; 129 L. T. 317; 67 Sol. Jo. 518, D. C.

Hire purchase agreements, *see, generally*, *BAILMENT*, Vol. III., pp. 92 *et seq.*

**1471. Goods pledged.**—*NICHOLSON v. HOOPER*, No. 1466, *ante*.

**1472. Goods sold.**—Where pltf., who was owner of the goodwill & fixtures of a public-house, allowed A. to represent himself as such to the landlords, & the latter thereupon let the public-house to A., & A. sold the lease & fixtures to deft., who was informed by the landlords that A. was their tenant:—*Held*: pltf. had estopped himself from recovering the fixtures from deft., who had purchased *bonâ fide*.—*GREGG v. WELLS* (1839), 10

for more than 40 feet. The town being threatened with suit by P., paid him, & pltf. then sued the town in trover for conversion of 174 feet of stone:—*Held*: pltf.'s conduct did not estop him from recovering against the town.—*FISHER v. WOODSTOCK* (1909), 39 N. B. R. 192; 7 E. L. R. 170.—**CAN.**

**o. Invalid sale for arrears of taxes.**—Default in payment of taxes illegally imposed, & inaction & silence with knowledge that the lands on which such taxes have been imposed have been sold for alleged arrears of taxes, does not disentitle the owner from availing himself of the statutory procedure provided for the contestation of sales for arrears of taxes.—*ANDERSON v. SOUTH VANCOUVER MUNICIPALITY* (1911), 16 B. C. R. 401; 45 S. C. R. 425.—**CAN.**

**p. Land sold by mistake.**—*M., a*



Ad. & El. 90; 2 Per. & Dav. 296; 8 L. J. Q. B. 193; 3 Jur. 555; 113 E. R. 35.

**Annotations:**—**Consd.** Cooper v. Willomat (1845), 1 C. B. 672; Jordan v. Money (1854), 5 H. L. Cas. 185. **Refd.** Freeman v. Cooke (1848), 6 Dow. & L. 187; Machu v. L. & S. W. Ry. (1848), 2 Exch. 415; Doe v. Challis (1851), 15 Jur. 900; Dunston v. Paterson (1857), 1 C. B. N. S. 495; Simpson v. Accidental Death Insce. (1857), 2 C. B. N. S. 257; Cornish v. Abington (1859), 28 L. J. Ex. 262; Harding v. Hall (1866), 14 L. T. 410; Polak v. Everett (1876), 45 L. J. Q. B. 369.

**1473. Water abstracted for illegal purpose.]—**(1) In 1794 an Act of Parliament was passed empowering a co. to make & maintain a canal, & the Act provided, that it should be lawful for the owners of lands within the distance of twenty yards from the canal to take water from the canal for the sole purpose of condensing the steam used in working any engine, but for no other purpose. Defts. were the owners of two mills, one of which was begun in 1829, & during the erection of it an application was made by the then owner to the co. to be allowed to lay down pipes from the canal to his engine-house, to convey water for steam & injection. No condition was made by the co. that the use of the water should be confined to condensing purposes; & the owner, with the knowledge of the company, & under the superintendence of their engineer, laid down pipes for both the above purposes. After the lapse of several years, an action was brought by the co. against the owners of the mill for getting water for other than condensing purposes; & they obtained a verdict, with damages, & then filed a bill for a perpetual injunction:—**Held:** the co. were precluded by acquiescence from disputing the right of the owners of the mill to obtain water for both the above purposes; but an injunction was granted to restrain defts. from using the water to make saw or size, & for cleaning the boilers.

(2) The other mill was built in 1841, & the notice then given to the co. was for liberty to lay a pipe for injecting water only, & was made after the millowner had received notice that the co. would insist on adhering to their Act of Parliament:—**Held:** there was no acquiescence on the part of the co. as to this mill; & an injunction, restraining defts. from using the canal water for any other purpose than that of condensing steam, was granted.—**ROCHDALE CANAL CO. v. KING** (1853), 16 Beav. 630; 22 L. J. Ch. 604; 22 L. T. O. S. 73; 17 Jur. 1001; 1 W. R. 278; 51 E. R. 924.

**Annotations:**—**As to** (1) **Refd.** Beaufort v. Patrick (1853), 17 Beav. 60. **Generally, Mentd.** McManus v. Cooke (1887), 35 Ch. D. 681.

**1474. Father's property mortgaged by son.]—**A mtge. effected by the son upon the property, the father, though in possession, allowing the son to act as if absolute owner, upheld.—**HUGHES v. SEANOR** (1870), 18 W. R. 1122, L. C.

judgment creditor, having attached certain land of his judgment debtor, entered, by mistake, one parcel thereof in the proclamation of sale as two parcels having different numbers in the list of property to be sold. This parcel was put up for sale & purchased by the decree-holder himself, & was subsequently put up for sale & purchased by T. In a suit brought by T. against M. to restrain M. from entering on the land:—**Held:** M. was estopped by his conduct from setting up his title as purchaser against T.—**TINNAPPA CHETTI v. MURUGAPPA CHETTI** (1883), 1 L. R. 7 Mad. 107.—**IND.**

**q. Trade mark—Permission by owner to another to adopt.]—**Where plffs. by their conduct led deft. to believe that they claimed no right to a certain trade mark, & that it was open to deft. to adopt it as his own, & deft.

did adopt it, & by his industry secured a wide popularity for it in the Indian market:—**Held:** plffs. were estopped from denying deft.'s right to use the trade mark in the Indian market.—**LAVERGNE v. HOOPER** (1881), 1 L. R. 8 Mad. 149.—**IND.**

**r. Acquiescence by landlord in wrongful use of mill.]—**A landlord having let a mill described as a paper mill; & it having been made use of, with his knowledge, for six years as an oil mill; & thereafter the tenant having assigned the lease to another party, who employed it as a flour mill:—**Held:** the landlord was barred from insisting that it should not be used as a flour mill, but should be reconverted into a paper mill.—**YOUNG, ROSS, RICHARDSON & CO. v. RAMSAY** (1825), 1 Wils. & S. 560; 2 S. R. (Ct. of Sess.) 793.—**SCOT.**

**1475. Bill of sale given over goods.]—**A., who was living in the same house with B., was the owner of certain goods therein, which goods she, A., for a fraudulent purpose, permitted B. to raise & receive money upon by way of bill of sale in his own name to C., who believed the goods to be the goods of B. The said goods being afterwards seized upon a *fi. fa.* against A.:—**Held:** the sale to C. of the goods was valid, B. being in effect the agent of A. in the transaction.—**Low v. MACGILL** (1864), 4 New Rep. 145; 10 L. T. 495; 12 W. R. 826.

**1476. —.]—****WESTEN v. FAIRBRIDGE**, No. 1199, *ante*.

**1477. Land used for street widening.]—**Where the owner of a strip of land offered to present it to a city council for the purpose of widening a street in the city, & himself presided as mayor at a meeting of the council at which a resolution was passed accepting the gift, & the city, while he was still mayor, took possession of the land, & spent money in paving it & fitting it for public use, without any objection on his part:—**Held:** he was estopped from alleging that the gift was made subject to a condition which had not been fulfilled, or that it was ineffective because it was not carried out by a notarial act.—**MICHAUD v. MONTREAL CITY** (1923), 92 L. J. P. C. 161; 129 L. T. 417, P. C.

*Compare* Sub-sect. 3, G. (c), *ante*.

(d) *While Property in which Party Standing by Interested Dealt with.*

**1478. General rule.]—**Where a person knowing his own title, & not giving notice of it to a purchaser, shall never set it up against the purchaser.—**SAVAGE v. FOSTER** (1723), 9 Mod. Rep. 35; 88 E. R. 299.

**Annotations:**—**Refd.** McAlister v. Rochester (Bp.) & Ecclesiastical Comrs. for England (1879), 12 L. T. 22; Bell v. Marsh, [1903] 1 Ch. 528. **Mentd.** Cory v. Gertken (1816), 2 Madd. 40; Wilkinson v. Charlesworth (1836), 5 L. J. Ch. 172; Stikeman v. Dawson (1847), 1 De G. & Sm. 90; Vaughan v. Vanderstegen (1854), 2 Drew. 363; Barrow v. Barrow (1858), 4 K. & J. 409; Willoughby v. Middleton (1862), 2 John. & H. 344; Nicholl v. Jones (1866), L. R. 3 Eq. 696; Sharpe v. Foy (1868), 4 Ch. App. 35; *Re* Lush's Trusts (1869), 4 Ch. App. 591; Cornwall v. Hawkins (1872), 26 L. T. 607.

**1479. —.]—**Where a man, having an interest in property, stands by & sees another man dealing with that as owner, with another person who is ignorant of the want of title in the person with whom he is dealing, equity will bind the man who stands by (**LORD ST. LEONARDS, C.**).—**MANGLES v. DIXON** (1852), 3 H. L. Cas. 702; 19 L. T. O. S. 260; 10 E. R. 278, H. L.

**Annotations:**—**Refd.** Rolt v. White (1862), 3 De G. J. & Sm. 360. **Mentd.** Watson v. Mid Wales Ry. (1867), L. R. 2 C. P. 593; Higgs v. Assam Tea Co. (1869), L. R. 4 Exch. 387; Rodger v. Comptoir d'Escompte de Paris (1869),

#### PART VI. SECT. 3, SUB-SECT. 3.— H. (d).

**s. General rule—Whether applicable to infants.]—**Deft. advanced to pltf. who, to his knowledge, was an infant under the age of 21 years, a sum of money to be employed in the purchase of a horse, taking as security for the loan a bill of sale, which was properly executed & filed in the office of the Registrar of Deeds. Deft., hearing that pltf. was about to sell the horse, took possession under the bill of sale & sold to a third party:—**Held:** the fact that pltf. stood by & allowed the horse to be sold, without objection, did not assist deft., as an infant could no more estop himself by conduct of this sort than he could contract.—**MEYERS v. BLACKBURN** (1905), 38 N. S. R. 50.—**CAN.**

**t. Property subject to mortgage sold.]**

*Sect. 3.—By representation: Sub-sect. 3, H. (d) &*

*L. R. 2 P. C. 393; Leask v. Scott (1877), 2 Q. B. D. 376; Watts v. Driscoll, [1901] 1 Ch. 294; Stoddart v. Union Trust (1911), 81 L. J. K. B. 140.*

**1480. Property subject to lien sold.]—**A party who, having a lien or claim on property, suppresses it, & permits another person to purchase the property, upon the supposition that no such lien or claim exists, cannot afterwards be allowed to set up such lien or claim against such purchaser.—*BROWN v. THORPE* (1841), 11 L. J. Ch. 73.

**1481. Interest dealt with—Party standing by not party to deed.]—**Where a person who is not a party to a deed stands by while his interest under the deed is being dealt with, he will not be allowed afterwards to set up his interest against a person claiming under the deed.—*BENNETT v. GOUDE* (1853), 21 L. T. O. S. 237.

**1482. Property subject to charge further charged—Loss of priority.]—**Where a party having a charge upon an estate, encourages or even permits another to advance money upon the security of the estate without giving notice of the charge, the party who has thus been encouraged or permitted to make the advance is entitled to priority over the party who has thus encouraged or permitted the advance to be made. The fact of the party having the charge standing by & permitting the further advance to be made, without giving notice of the charge, is alone sufficient to support this equity on the part of the subsequent incumbrancer. The equity is still more strong where the party having the charge has participated in the transaction of the subsequent loan, or has made representations leading the other party to believe in the non-existence of the prior charge (*TURNER, J.*).—*STRONGE v. HAWKES* (1853), 4 De G. M. & G. 186; 43 E. R. 478, L. JJ.

*Annotation:—Refd. Williams v. Pinckney (1897), 67 L. J. Ch. 34.*

Priorities generally, *see* EQUITY, Vol. XX., pp. 296 *et seq.*; MORTGAGE.

**1483. Sale of premises by landlord—Agreement to give possession before termination of tenancy.]—**

—Pltf. sued to realise his security under a mtge. executed to him by deft. No. 1, by sale of the mortgaged premises which were in the possession of defts. Nos. 2 & 3. It appeared that pltf. had previously attached & brought to sale the mortgaged premises in execution of a decree against deft. No. 1, & that the other defts. had purchased at the ct. sale without notice of pltf.'s mtge., which was not referred to in the attachment lists or sale certificates.—*Held: pltf. was estopped from setting up his present claim.*—*JAGANATHA v. GANGI REDDI* (1892), 1 L. R. 15 Mad. 303.—*IND.*

**a. —.]—**Where mortgaged property is sold in execution of a decree in a suit brought upon the mtge., the interest of the mtgee., at whose instance the sale is made, is held to pass to the purchaser, & the mtgee. is estopped from disputing that such is the effect of the sale.—*KHEVRAJ JUSRUP v. LINGAYA* (1873), 1 L. R. 5 Bom. 2.—*IND.*

**b. —.]—**Pltf. claimed under a mtge., dated Nov. 27, 1871, for Rs. 50, which was neither registered nor accompanied with possession. Deft. claimed under a mtge., dated Mar. 17, 1873, for Rs. 150, which was both registered & accompanied with possession. Deft. had no notice, express or constructive, of pltf.'s previous mtge. In 1873 pltf. sued the mtgor. for a money

claim unconnected with the mtge., & on Feb. 20, 1874, obtained a decree for Rs. 100. In execution of this money decree, the mortgaged property was attached & sold by the ct. at pltf.'s instance, deft. becoming the purchaser for Rs. 86 on Sept. 17, 1874. An unregistered certificate of the ct.'s sale, bearing date Oct. 29, 1874, was issued to deft. In 1874 pltf. brought a suit on his mtge., to which suit deft. was not a party, & obtained a decree the date of which did not appear in evidence, for possession of the mortgaged property against the mtgor. In endeavouring to enforce that decree, pltf. was obstructed by deft. on Jan. 15, 1875.—*Held: as deft. had no notice of pltf.'s mtge. when pltf. caused the ct.'s sale to be made under his money decree, or that the sale was made subject to pltf.'s mtge., it was incumbent on pltf. as such money judgment creditor, to inform deft., when bidding for the right, title, & interest of the judgment debtor in the mortgaged property, that the judgment creditor, pltf., held a mtge. on the same property, & intended to enforce it, especially as the mtge. was neither registered nor accompanied with possession; & pltf., having omitted so to inform deft., was estopped from enforcing his own mtge. against deft.*—*TUKARAM BIN ATMARAM v. RAMCHANDRA BUDHARAM* (1876), 1 L. R. 1 Bom. 314.—*IND.*

**c. Party with claim against land**

**Under a three years' agreement in writing deft. B. became tenant of certain premises belonging to pltf. F., & after the expiration of his tenancy in Mar. 1898, B. remained on in possession as tenant from year to year. In Dec. 1898, B. asked F. to release him from his tenancy, & it was verbally agreed that B. should go out on June 24 following. F. placed a notice board on the premises that the same were "to be let," & subsequently sold the premises to a third party, who bought with possession at Midsummer, 1899. On June 24, 1899, deft. refused to give up possession. In an action of ejectment brought by F. against B.:—*Held: deft., by his conduct in standing by & permitting pltf. to contract an obligation with the purchaser, was estopped from denying that his tenancy was other than that upon the footing of which he allowed his landlord to sell the property to the purchaser.*—*FENNER v. BLAKE*, [1900] 1 Q. B. 426; 69 L. J. Q. B. 257; 82 L. T. 149; 48 W. R. 392, D. C.**

**1484. Property subject to mortgage settled.]—**Where a mtgee. was present whilst a mtgor. was in treaty for his son's marriage, & fraudulently concealed his mtge.:—*Held: the son, the wife, & the issue, should hold the lands against the mtgee. & his heirs.*—*BERRISFORD v. MILWARD* (1740), 2 Atk. 49; 26 E. R. 427.

*Annotations:—Mentd. Beckett v. Cordley (1784), 1 Bro. C. C. 353; Jameson v. Stein (1855), 25 L. J. Ch. 41.*

*(c) Other Cases.*

**1485. Sufficiency of tender not objected to.]—**In an action for the non-delivery of railway shares purchased for pltf.'s account by a broker from deft.'s broker:—*Held: deft., having notice of the tender to his broker, & not objecting to its sufficiency, was estopped from afterwards disputing it.*

*Semble: deft.'s admission that he had not the shares to deliver, would not dispense with a tender of the price & offer on the part of pltf. to receive the shares.*—*JACKSON v. JACOB* (1837), 3 Bing N. C. 869; 3 Hodg. 219; 5 Scott, 79; 6 L. J. C. P. 315; 1 Jur. 262; 132 E. R. 645.

**1486. Non-reply to claim for interest.]—**A railway co. gave the usual notice to a tenant for life

**sold—Failure to enforce demand.]—**Mere silence, during the dealing with an estate against which a claim exists, does not bar the claimant. A person claiming to be exonerated by an estate, was referred to by a purchaser but did not mention his claim, omitted to make it in a suit in which he might have done so, ineffectually attempted to enforce it in another suit, & had acted as if liable to the demand from which he sought exoneration:—*Held: barred.*—*BOYD v. BELTON* (1844), 8 L. Eq. R. 113.—*IR.*

**PART VI. SECT. 3, SUB-SECT. 3.—**  
**H. (e).**

**d. Acquiescence of tenant—Whether binding on landlord.]—**Two mill stones were seized & sold for taxes, the tenant of the mill, who was assessed as occupant, being present at the sale & making no objection. In replevin by the owner of the mill against the purchaser:—*Held: the tenant's acquiescence was immaterial; for his possession, when proved to be merely as occupant, was no proof of property, & pltf. therefore was not prevented from disputing the sale, which was clearly illegal, the stones being part of the mill.*—*GRIMSHAW v. BURNHAM* (1865), 25 U. C. R. 147.—*CAN.*

**e. Guarantee—Forgery.]—**In an action on a guarantee to secure payment for goods furnished by pltf. to



of settled estates that they required a portion of the estates for their line, & afterwards made an offer for the fee simple. The solr. of the tenant for life accepted the offer, stipulating that interest at £5 per cent. should be paid from the time of the co. taking possession, & proposing that, as the title was well known, the co. should be satisfied without the production of the deeds. To this the co. objected, & proposed to pay the money into a banker's in the names of the respective solrs. pending the investigation of the title. The tenant for life's solr. thereupon suggested that, as the money must be paid into ct., it had better be so at once. The co. thereupon paid the money into ct. to the account of the Railway Act only, & communicated to the tenant for life's solr. that they had paid the money into ct. under Lands Clauses Consolidation Act, 1845 (c. 18), s. 69. The solr. for the tenant for life thereupon reminded them that interest at £5 per cent. would continue to be payable till the purchase was completed. To this the co.'s solr. returned no answer, &, although several other communications passed between the solrs. respecting the purchase, the co.'s solr. did not, till a year afterwards, express any objection to the payment of interest. The money remained uninvested during the whole of that period:—*Held*: the co. had acquiesced in the vendor's view of the case, & were bound to pay interest up to the investment.—*Re ROYSTON & HITCHIN RAILWAY COMPANY'S ACT, 1846, Ex p. HARDWICKE (EARL)* (1852), 1 De G. M. & G. 297; 7 Ry. & Can. Cas. 919; 18 L. T. O. S. 281; 42 E. R. 567, L. J.J.

*Annotations*:—*Mentd.* *Lewis v. South Wales Ry.* (1853), 10 Hare, 113; *Re L. B. & S. C. Ry., A.-G. v. Haberdashers Co.* (1854), 18 Beav. 608; *Re Marylebone Improvement Act, 1868, Ex p. Topple* (1871), 19 W. R. 1058.

#### 1487. Execution of process not countermanded.]

Where it was the practice of an inferior ct. for the officer of the ct. on a verdict for either party, to issue execution in case of non-payment & levy the amount:—*Held*: the fact of pltf.'s bringing his plaint, & not countermanding the execution was evidence of his having impliedly authorised the execution.—*COOMER v. LATHAM* (1847), 16 M. & W. 713; 16 L. J. Ex. 175.

W., alleged to have been made by deft. & G., but afterwards proved to be a forgery, it appeared that pltf. had had no communication whatever with deft. during the currency of the account sued for; but that W. afterwards becoming insolvent, F. was sent to where W. lived, to represent certain creditors, amongst whom were pltf., & at a meeting at which deft. was present, F. asked W. what claims were guaranteed, & by whom, to which W. answered that pltf.'s note, with certain others, was indorsed by deft. & G., & although deft. heard this, he said nothing. F., however, did not then appear to have been aware of the guarantee. After this W. absconded, & some time afterwards deft. & G. went to pltf.'s office & tried to make a settlement, for a less amount, of W.'s liability. This pltf. refused to do, alleging that they were fully secured, & produced the guarantee. G. at once said that he did not believe it to be his signature; but deft. said nothing:—*Held*: deft. was not estopped by his conduct from denying his liability.—*TURNER v. WILSON* (1873), 23 C. P. 87.—CAN.

*1. Assets of partnership—Disposal of by one partner.*—In 1867 deft. S. entered into an agreement with pltf. for an advance of money to enable him to perform a stipulation in a lease made to him a short time before for the period of seven years by the R.

Hotel Co., that he would expend \$10,000 in providing furniture, etc., for the hotel. Pltf. agreed to advance the money necessary to open the hotel, not exceeding \$10,000, & S. to pay interest on one-half the amount till repaid to pltf., & each party to share equally in all profits, articles of furniture, supplies, etc., put in the house, & pltf. to have a chattel mtge. on everything belonging to both parties, until the half of all the money advanced should be repaid to pltf. After the expiration of the term there were negotiations between pltf. & S. for a settlement, in the course of which the latter rendered statements to pltf. in which he assigned a value to the furniture & treated it as an asset belonging to them jointly. After these negotiations S. continued to carry on the business of the hotel without any dissent by pltf., under a new lease which had been granted to him by the hotel co. before the expiration of the original term. In 1875, S. becoming embarrassed, a new arrangement was concluded between him & the co., by which he surrendered the old lease & obtained a new one for the term of ten years; & in consideration of an advance of money & arrears of rent, he executed a bill of sale to the co. of the furniture. The lease contained a stipulation that on certain conditions being performed the furniture should at the end of the term belong to S. Subsequently S. assigned the lease

**1488. Recognition by trustees of title of cestui que trust.]**—When trustees have for a series of years recognised the title of their *cestuis que trust*, they cannot turn round upon them & say they will do so no longer.—*NEWSOME v. FLOWERS* (1861), 30 Beav. 461; 31 L. J. Ch. 29; 5 L. T. 570; 26 J. P. 100; 7 Jur. N. S. 1268; 10 W. R. 26; 54 E. R. 968.

**1489. Examination of debtor to bankrupt—Right of set-off not disclosed.]**—A person examined adversely on a summons in bkpcy. by creditors & assignees is under no obligation except that of fully & sufficiently answering questions put to him. Where, therefore, a person on such an examination did not mention a right of set-off which he had against a sum claimed to be due from him to the estate, & subsequently the unrealised credits were sold:—*Held*: he was not precluded by the omission from insisting on the right of set-off as against the purchaser.—*ROLT v. WHITE* (1862), 3 De G. J. & Sm. 360; 1 New Rep. 171; 7 L. T. 586; 9 Jur. N. S. 343; 46 E. R. 674, L. C.

**1490. While success of project doubtful.]**—The rule that a ct. of equity will not assist persons who stand aloof from a joint undertaking in a time of adversity, & then claim a share in it, when it has been rendered prosperous by the exertions of others, does not apply when the others have set apart a sum to answer the share of the person so standing aloof. *Semble*: it would ordinarily apply to a case in which the members of a co. appropriated shares whose owners stood aloof.—*Re SHADWELL WATERWORKS Co., Ex p. DIBBENS* (1869), 18 W. R. 160.

**1491. Business sold & premises let to purchaser—Business carried on in vendors' name.]**—*MILES v. FURBER*, No. 1411, ante.

**1492. Machine not objected to as infringement of patent.]**—In an action by P., patentee of a stoking machine, for infringement against persons who had purchased stoking machines made by B., it was proved that before the purchase P. knowing that they were going to set up stoking machines went to them & asked them to try his machine, saying that they would find it a

to L., who had actual notice of pltf.'s interest in the furniture. Evidence was given to prove that the co. had notice of the relation existing between S. & pltf. in reference to this furniture. There was no evidence to show that pltf. knew of this transaction until after it was consummated, when he promptly repudiated it:—*Held*: there being a partnership between pltf. & S., & they being joint owners of the furniture, S. had no power to sell & convey pltf.'s interest therein; & pltf. was not estopped by simply remaining passive from asserting his right to the furniture, & he was entitled to a lien for any balance that might be due to him on the accounts being taken.—*CROSSMAN v. SHEARS* (1879), 3 A. R. 583.—CAN.

*g. Partner present when mortgage given.]*—A mtgee. having commenced proceedings under a mtge., S. professed to have a claim to some of the property as an alleged partner of the mtgor. It appeared, however, that S. was present when the mtge. was given, & knew all about the transaction; that the money which the mtge. was given to secure was partly for the purposes of a printing office in which he claimed to be interested as such partner; & that he had, at the time of the transaction, made no objection & asserted no claim:—*Held*: he was estopped from setting up any right or title as against the mtgees.,



*Sect. 3.—By representation: Sub-sect. 3, H. (c) & I. (a) i. & ii.]*

better machine than B.'s, without giving any intimation that he considered B.'s machine to be an infringement of his patent, though he admitted that he did at that time consider it to be so, & intended to take legal proceedings when he was in funds:—*Held*: as the purchasers did not depose that when they bought B.'s machines they were ignorant of P.'s patent, nor was there any reason to believe that they were ignorant of it, or that P. supposed them to be so, P. had not, on the ground of acquiescence or estoppel lost his right to sue them for an infringement in using B.'s machines, it not being the duty of a patentee to warn persons that what they are doing is an infringement, & P.'s conduct not amounting to a representation that it was not an infringement.

In order to make out acquiescence it is necessary to establish that pltf. stood by & knowingly allowed defts. to proceed & to expend money in ignorance of the fact that he had rights & meant to assert such rights (BOWEN, J.).—PROCTOR v. BENNIS (1887), 36 Ch. D. 740; 57 L. J. Ch. 11; 57 L. T. 662; 36 W. R. 456; 3 T. L. R. 820; 4 R. P. C. 333, C. A.

*Annotations*:—*Mentd.* Gosnell v. Bishop (1888), 4 T. L. R. 397; Proctor v. Bayley (1889), 61 L. T. 752; Ticket Punch & Register Co. v. Colley's Patents (1895), 11 T. L. R. 262; Incandescent Gas Light Co. v. De Mare Incandescent Gas Light System (1896), 13 R. P. C. 559; Perry v. Soc. des Lunetiers (1896), 13 R. P. C. 664; Akt. Separator v. Dairy Outfit Co. (1898), 15 R. P. C. 327; Consolidated Car Heating Co. v. Came, [1903] A. C. 509; British United Shoe Machinery Co. v. Thompson (1905), 22 R. P. C. 177; Roth v. Cracknell (1921), 38 R. P. C. 120.

**1493. Nuisance not objected to—By local authority.]**—ST. MARY, ISLINGTON VESTRY v. HORNSEY URBAN COUNCIL, No. 1061, *ante*.

**1494. Former authority acted on without objection.]**—It was admitted that in the early part of the transactions pltf. had the authority of deft., & although deft. was aware from the accounts rendered of what was being done he took no steps to revoke the authority (LAURANCE, J.).—CAMPBELL & Co. v. BRASS (1891), 7 T. L. R. 612.

**Bankrupt continuing to trade—With knowledge of creditors.]**—See BANKRUPTCY, Vol. V., pp. 733 *et seq.*

**Execution of deed with knowledge that parcels incorrect.]**—See No. 833, *ante*.

**Concealment of material facts.]**—See Sub-sect. 3, D., *ante*.

whose title was the same as if he had joined in the mtge.—ROBINSON v. COOK (1884), 6 O. R. 590.—CAN.

**h. Municipal works illegally executed—Action by ratepayer assisting in such works.]**—A ratepayer of a municipality cannot maintain an action, on behalf of himself & the other ratepayers, against the municipality for the improper construction of a drain authorised by by-law, when such ratepayer has himself been a contractor for a portion of the work, & has received his share of the money voted for the work in excess of the amount expended.—DILLON v. RALFEIGH TOWNSHIP (1886), 14 S. C. R. 739; 13 A. R. 53.—CAN.

**k. Company director—Present when illegal resolution passed.]**—Director of railway co., being a creditor & present at a meeting where authority was given to pledge the bonds of the co., is estopped from setting up the invalidity of such bonds in an action by the pledgee.—ROYAL TRUST Co. v.

**l. Forgery of bill—Failure to notify—Whether adoption of forgery.]**—A

party who is not clearly proved to have known of the existence of his forged signature to a promissory note, is not estopped on the ground of neglectful standing by, from setting up the forgery against the holder.—ETHER v. LABELLE (1907), Q. R. 33 S. C. 39.—CAN.

**m. — — — — —.]**—When a person comes to know that his signature has been forged to a bill, mere delay on his part of giving notice of the forgery to the bill-holder will not necessarily imply adoption nor bar him from repudiating liability unless the bill-holder or others have been prejudiced by his silence.—M'KENZIE v. BRITISH LINEN CO. (1881), 8 R. (Ct. of Sess.) 8 H. L.—SCOT.

**n. Failure to reply to letters.]**—A vendor of grain to a person who is in fact an agent for a member of the W. grain exchange, but is not known so to be by the vendor, by refraining from replying to letters written to him by such member is not estopped from denying that sales of the grain effected by such member were authorised by him.—WINEARLS v. HOEY, [1917] 3 W. W. R. 287.—CAN.

*I. Waiver.*

*(a) In Legal Proceedings.*

*i. In General.*

**Generally.]**—See COURTS, Vol. XVI., pp. 117–124.

**In Admiralty.]**—See ADMIRALTY, Vol. I., pp. 166, 167.

**Arbitration proceedings.]**—See ARBITRATION, Vol. II., pp. 416, 417, 456, 553, 554, Nos. 683–691, 1850–1854.

**Bastardy proceedings.]**—See BASTARDY, Vol. III., p. 400, Nos. 338–340.

**Proceedings on Crown side of King's Bench Division.]**—See CROWN PRACTICE, Vol. XVI., pp. 364, 365, 431, 432, Nos. 1957–1970, 2919–2926.

**Proceedings to acquire land compulsorily.]**—See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 177, 203, 204, 208, Nos. 555, 556, 825, 826, 890, 891.

**In county courts.]**—See COUNTY COURTS, Vol. XIII., pp. 475, 529, 530, 550, 551, Nos. 246, 247, 802 *et seq.*, 1060 *et seq.*

**Proceedings to recover expenses in respect of streets.]**—See HIGHWAYS.

**Proceedings under Workmen's Compensation Acts.]**—See MASTER & SERVANT.

**In foreign courts.]**—See CONFLICT OF LAWS, Vol. XI., pp. 448–450.

**Waiver of contempt.]**—See CONTEMPT OF COURT, Vol. XVI., p. 92.

*ii. By Positive Acts.*

**1495. General rule.]**—The general rule is that a party does not lose the right of appeal by acting upon an order.—MASTERMAN v. PRICE (1847), 1 Coop. temp. Cott. 358; 47 E. R. 894, L. C.

**1496. — — — — —.]**—Mere respectful acquiescence or submission to the ruling of a ct. does not amount to acquiescence or waiver of a right to complain of an illegal decision. To prove acquiescence, or waiver, it ought to be shown that something was said or done to give the ct. a jurisdiction which it did not possess.—BEAUDRY v. MONTREAL CORPN. (1858), 11 Moo. P. C. C. 399; 31 L. T. O. S. 18; 22 J. P. 240; 6 W. R. 346; 14 E. R. 746, P. C.

**1497. Bringing action—On defective bond—Waiver of irregularity.]**—The judge of a county ct. upon the removal of a plaint in replevin into a superior ct., took the bond provided for by 9 & 10 Vict. c. 95, s. 127, to himself instead of to

**o. Mortgage—Failure to notify equitable claim.]**—On treaty for a mtge., one entitled to be recouped out of the estate, if a certain incumbrance was levied out of his own estate, communicated with the mtgee. with reference to the mtge.; but did not inform him of his equitable claim:—*Held*: he could not afterwards set it up against him.—BOYD v. BELTON (1844), 8 L. Eq. R. 113; 1 Con. & Law. 730.—IR.

**PART VI. SECT. 3, SUB-SECT. 3.—I. (a) ii.**

**p. Bringing action—Waiver of objection to authority of arbitrators.]**—Suing on an award will estop a party from denying the authority of the arbitrators.—BLACK v. ALLAN (1867), 17 C. P. 240.—CAN.

**q. — — — — —.]**—Lands were sold under a *fi. fa.* lands after the expiry of the year, & a deed executed to the grantor of pltf. by the sheriff which recited that the writ had been duly renewed, but neither the sheriff's nor the district clerk's books showed any such renewal. Subsequently, an ordinary writ of

the other party to the action, as desired by the Act. The bond having been forfeited the obligee brought an action upon it:—*Held*: the bond was made to the judge as trustee & might be sued on by him, & also by declaring in the superior ct. deft. in the present suit had waived the irregularity.—*STANSFELD v. HELLAWELL* (1852), 7 Exch. 373; Saund. & M. 8; 21 L. J. Ex. 148; L. T. O. S. 112; 16 J. P. 345; 16 Jur. ... 155 E. R. 992.

**1498. — Without objecting to appearance of defendant to caveat—Waiver of objection to defendants' title.**—Deft. entered a caveat in the goods of S. & afterwards upon this caveat being warned by pltf. entered an appearance claiming as universal legatees of the universal legatee of S. Pltf. then filed a declaration that S. died intestate, leaving pltf. his lawful widow. Defts. in their plea propounded a will of S. appointing B. sole extrix., & universal legatee. Upon motion by pltf. for an order that defts. should amend their plea by setting forth in it such matter as would entitle them to administration with the will of S. annexed:—*Held*: by filing the declaration without objecting to the appearance, pltf. had admitted defts.' title to set up the will.—*INKSON v. JEEVES* (1863), 3 Sw. & Tr. 39; 32 L. J. P. M. & A. 69; 8 L. T. 173; 27 J. P. 261; 11 W. R. 350; 164 E. R. 1186.

**1499. Appearance—To oppose rule—Rule obtained by defective affidavit—No waiver of objection to affidavit.**—Appearing to oppose a rule does not waive an objection to the affidavit on which the rule was obtained.—*BARHAM v. LEE* (1834), 2 Dowl. 779; 4 Moo. & S. 327.

**1500. — Waiver of objection that proceedings voidable.**—In an action of debt, the declaration stated the construction of the railway & deterioration of pltf.'s house by it; that he gave notice to the co. to purchase it, but that they did not treat with him for the purchase, nor for compensation for damages, etc., nor agree as to the value of the house or amount of compensation, that thereupon he requested them to issue their warrant for a jury, but that they did not comply with his request; whereupon he requested the sheriff of M. to summon a jury, to assess the sum to be paid for the purchase of his property & for compensation. That an inquisition was taken in pursuance of the request before F. & G., then

sheriffs of M.; that a jury were impanelled & sworn; & that pltf. & the co. appeared by their counsel. That the jury found that the house was deteriorated by the railway, & gave a verdict for £250, to be paid to pltf. by the co. for the purchase of his interest, & also by way of compensation for damage, etc.; & that the sheriff gave judgment for the sum of £250 accordingly. That the verdict & judgment signed by the sheriff were deposited & still remained amongst the records of the quarter sessions. Allegation, that pltf. was willing to convey, etc., but that the co., though requested, had not paid the £250, or any part thereof:—*Held*: the objection that one of the persons constituting the office of sheriff was interested, if applicable to the case of a warrant issued by the co., did not affect proceedings instituted by the claimant under their private Act, & even if the proceedings were voidable, the co. had waived the objection by appearing & taking part in the inquisition.—*CORRIEAL v. LONDON & BLACKWALL RY. CO.* (1843), 5 Man. & G. 219; 2 Dowl. N. S. 851; 3 Ry. & Can. Cas. 411; 6 Scott, N. R. 241; 12 L. J. C. P. 209; 134 E. R. 545.

*Annotations*:—*Mentd.* R. v. London & Blackwall Ry. (1845), 4 Ry. & Can. Cas. 119; *Re Bradshaw & East & West India Docks & Birmingham Junction Ry.* (1848), 12 Q. B. 562; *East & West India Docks & Birmingham Junction Ry. v. Gattke* (1851), 3 Mac. & G. 155; *South Staffordshire Ry. v. Hall* (1851), 17 L. T. O. S. 2; *R. v. L. & N. W. Ry.* (1851), 3 E. & B. 443; *Mortimer v. South Wales Ry.* (1859), 1 E. & E. 375; *Cobb v. Mid Wales Ry.* (1866), 35 L. J. Q. B. 117; *Long Eaton Recreation Grounds Co. v. Mid. Ry.*, [1902] 2 K. B. 574.

**1501. — Waiver of objection to jurisdiction.**—Resp. who appears absolutely thereby admits the jurisdiction of the Divorce Ct., & cannot afterwards amend his appearance in order to plead to the jurisdiction.—*GARSTIN v. GARSTIN* (1865), 4 Sw. & Tr. 73; 34 L. J. P. M. & A. 15; 13 W. R. 508; 164 E. R. 1443.

*Annotations*:—*Mentd.* *Cavendish v. Cavendish & Rochefoucauld* (1866), 15 W. R. 182; *Gordon v. Gordon*, [1904] P. 163.

Matrimonial causes generally, see HUSBAND & WIFE.

**1502. Answering bill—Plaintiff under disability—Waiver of right to set up disability.**—Bill by A. against R. praying that certain judgments entered up by R. against A. might be ordered to stand as a security for the amount properly due from A.

*fi. fa.* lands was issued on the judgment, a sale was made & a deed to pltf. executed by the sheriff. In 1886, one of defts. commenced an action against the present pltf. & others, to set aside the sheriff's first deed, which was dismissed for want of prosecution:—*Held*: the said deft. was not thereby estopped from setting up the invalidity of the sheriff's sale.—*DABY v. GEHL* (1889), 18 O. R. 132.—*CAN.*

**r. — For ejectment as tenant—No estoppel from asserting defendant a trespasser.**—The mere fact of a pltf. in a suit for ejectment in a civil ct. having on a previous occasion applied to the revenue ct. for the ejectment of deft. will not estop him from asserting that deft. was unlawfully in possession, i.e. as a trespasser.—*ZUBEDA BIBI v. SHEO CHARAN* (1899), 1 L. R. 22 All. 83.—*IND.*

**s. — Subsequent discovery of mistaken rights.**—When parties deliberately come before a certain tribunal & together ask for a decision in a certain way, it is not open to one of them afterwards to seek to upset the decision on the ground that he mistook his rights at the time.—*IHAKA TE ROU v. LOVE* (1891), 10 N. Z. L. R. 529.—*N.Z.*

**1501 i. Appearance—Waiver of objection to jurisdiction.**—The service of the summons in this action on the station master of defts. at B. was void, but defts. having appeared at the trial & after their objection to the jurisdiction had been overruled having proceeded with the defence & cross-examined witnesses, etc.:—*Held*: they had thereby precluded themselves from objecting to the jurisdiction.—*Re GUY v. GRAND TRUNK RY. CO.* (1881), 10 P. R. 372.—*CAN.*

**1501 ii. —**—In an action on a judgment of a foreign state, granting a husband a divorce & a wife a sum of money as alimony, it was contended by the husband that, as he had never acquired the necessary domicile to give the foreign ct. jurisdiction to grant the divorce, the judgment was invalid:—*Held*: as he had invoked & submitted to the jurisdiction of the foreign ct., he had precluded himself from setting up any want of jurisdiction.—*SWAIZIE v. SWAIZIE* (1899), 20 C. L. T. 33; 31 O. R. 324.—*CAN.*

**1501 iii. —**—A collision having taken place between a British ship & a foreign ship, by which both ships were injured, an action of damages was raised by the owners of the

British ship against the master of the foreign ship, "as master, & also as owner or part owner of said ship, or in those capacities, or one or other of them, or otherwise representing the said ship." The foreign ship was arrested to found jurisdiction. On the following day the master raised a counteraction against the owners of the British ship, in name of the owner of the foreign ship, & of the master "as master, & representing the owners of said vessel." To the first action the master pleaded no jurisdiction. It was admitted on record that the master was neither owner nor part owner of the foreign ship:—*Held*: the master having in the second action appealed to the jurisdiction of the ct. against the same parties, & in reference to the same matter, he was barred from objecting to the jurisdiction in the first action.—*MORISON & MILNE v. MASSA* (1866), 5 Macph. (Ct. of Sess.) 130; 39 Sc. Jur. 57.—*SCOT.*

**t. — Waiver of non-filing of plaintiff's papers.**—After judgment in a case which had been defended, a motion was made to set aside the judgment, *fi. fa.* levy, & all other proceedings, on the grounds that there were no papers or documents on pltf.'s



*Sect. 3.—By representation: Sub-sect. 3, I. (a) ii.]*

to R. in respect of the actual advances made by R. to A.; the bill suggesting that a less sum than the sum claimed by R. had been advanced & was due upon the judgments. By the answer to the original bill, deft. stated two outlawries against pltf. at the suit of third parties, & craved the same benefit as if he had pleaded them in bar to pltf.'s bill. By the answer to the amended bill, deft. set up a third outlawry at the suit of deft. himself, but for a debt not in question in the suit. On the cause coming on for hearing, deft. objected that pltf., being outlawed, had no right to sue:—*Held*: deft., by answering, had waived his right to set up the outlawry.—*ANSTRUTHER v. ROBERTS* (1856), 4 W. R. 349.

**1503. Consenting to trial of issue—Waiver of objection to materiality of issue.]**—A contract in writing for the sale of a quantity of a certain kind of goods, "fair usual quality," provided that any dispute on the contract should be settled by arbn. in the usual way. A dispute arose on the contract as to whether the goods were in accordance with the contract, & was referred to arbn. The sellers alleged that by a custom of the trade, even if the goods were not in accordance with the contract, provided the inferiority of quality was not excessive, the buyers were bound to accept them at an allowance, & the arbitrators heard evidence as to the existence of the custom. The arbitrators by their award found that the goods were not in accordance with contract, but that they must nevertheless be accepted by the buyers at an allowance. On a motion to set aside the award, the Div. Ct. held that the award was not necessarily bad upon its face, but that, the arbitrators having taken the alleged custom into consideration, if the custom did not in fact exist they had exceeded their jurisdiction & the award would not be binding, & with the consent of the parties directed an issue to inquire whether there was any such custom. On the trial of the issue the judge found that the custom had not been proved, the result being that the judgment of the Div. Ct. had the effect of setting the award aside:—*Held*: the award had rightly been set aside, inasmuch as the arbitrators had no jurisdiction to find that the custom existed & applied to the contract; & the parties having consented to the issue being tried could not deny its

side of the cause on the files of the ct. except the judgment roll, which omission had only very lately come to deft.'s knowledge:—*Held*: deft. was estopped by his proceedings in the action from taking advantage of the non-filing of pltf.'s papers.—*LYNOTT v. SEELY* (1848), 1 All. 35.—**CAN.**

**a. — Bonâ fide belief in jurisdiction.]**—Defts. had gone before A., who was *bonâ fide* supposed to be a comr. for the county of L. & acknowledged a recognisance of bail:—*Held*: they were not estopped from disputing the authority of A. as comr.—*MAGNAN v. LESTER* (1856), 6

**b. — —.]**—In a case for malicious prosecution before a magistrate:—*Held*: deft., by having caused the application to the magistrate as such, was not precluded from objecting that he had no jurisdiction, there being nothing to show that deft. did not really believe him to have authority.

**c. — Waiver of objection to defective service.]**—Defts. appeared to the writ of summons, & set up in their statement of defence that the high

ct. of justice had no jurisdiction; that the cause of action arose in W., & defts.' head office was at M., & the service of process was on their agent for local purposes at L.:—*Held*: the appearance had precluded all question as to the sufficiency of the service.—*DART v. CITIZENS' INSURANCE CO.* (1886), 11 P. R. 513.—**CAN.**

**d. — Waiver of objection to illegality of adjournment.]**—Where an adjournment of the proceedings before the magistrate for more than a week had been made at the request of deft., who afterwards attended on the resumed proceedings, taking his chances of securing a dismissal of the prosecution, & urging that on the evidence it ought to be dismissed:—*Held*: he had estopped himself from objecting afterwards that such subsequent proceedings on the prosecution were on this ground illegal.—*R. v. HEFFERNAN* (1887), 13 O. R. 616.—**CAN.**

**e. Proceeding to arbitration—Objection made to trustees' want of power to refer.]**—In an action brought by trustees to enforce implement of an award pronounced in a submission to which they were parties:—*Held*: defender was not barred from objecting to the trustees' want of power by her

materiality, for the correctness of the finding thereon that the custom had not been proved.—*Re NORTH WESTERN RUBBER CO., LTD. & BACH & CO.*, [1908] 2 K. B. 907; 78 L. J. K. B. 51; 99 L. T. 680, C. A.

*Annotations*:—**Mentd.** *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1916] 1 A. C. 314; *Miller, Gibb v. Smith & Tyrer*, [1917] 2 K. B. 141.

**1504. Putting deed in evidence—Waiver of objection to interlineation in material part.]**—A deed, given in evidence by pltf. under a judge's order, had an interlineation in a material part, which was not noticed in the attestation:—*Held*: deft. was precluded from objecting, that the interlineation should be shown to have been made before the execution of the deed.

The deed being put in under a judge's order, in the common form given in the rules of ct., the objection insisted on must be taken to be waived. The object of the admission is to dispense with the burden of bringing the attesting witness to the trial. When a summons is taken out, calling upon a party to admit a deed, he has a right to inspect before the order is made, for the purpose of seeing whether there is any ground for resisting the order. If he sees an interlineation in a material part of it—& the part of this deed in which the interlineation appears unquestionably is so, he should not accede to the making of the order. If, after notice of the interlineation, he dishonestly declines to oppose the making of the order, because he must know that the opposite party would rely on the admission, & not bring any witness to prove that the interlineation was there at the time of the execution of the deed, he cannot afterwards object to the deed on account of the interlineation. We must presume that deft. acted upon the right which he had to inspect the deed (*COLERIDGE, J.*).—*FREEMAN v. STEGGALL* (1849), 14 Q. B. 202; 19 L. J. Q. B. 18; 14 L. T. O. S. 129; 13 Jur. 1030; 117 E. R. 82.

**1505. Treating evidence as admissible—Waiver of objection that evidence inadmissible.]**—Upon a proceeding which, though in form interlocutory, finally decides the rights of the parties, evidence upon information & belief is in general inadmissible, & the party against whom it is given is not bound to contradict it; but if in the first instance he treats it as admissible, he may be precluded from objecting to it in the Ct. of Appeal.—

having taken part in the proceedings under the reference, the objection having been stated before the award was issued.—*MURRAY & M'MASTER (THOMPSON'S TRUSTEES) v. MUIR* (1867), 40 Sc. Jur. 83.—**SCOT.**

**f. Cross-examining on promissory note—Waiver of objection to irregularities.]**—Where a declaration contained a count upon a promissory note & common counts, & pltf., under an order for particulars, gave an account for goods sold & delivered only, but at the trial deft. cross-examined upon the note & afterwards at the close of pltf.'s case, obtained a nonsuit because the note was not mentioned in the particulars:—*Held*: the objections were too late after cross-examining on the note.—*BIGLOW v. SPRAGUE* (1836), 5 O. S. 65.—**CAN.**

**g. Consenting to guardianship ad litem—No waiver of right to goods sued for.]**—In trover, where pltf. sued by his mother as his next friend:—*Held*: the latter by allowing herself to be made guardian for bringing the suit, did not waive any right that she might have had to the goods sued for, & the consent of the mother to become *prochein ami* was no legal estoppel on



GILBERT v. ENDEAN (1878), 9 Ch. D. 259; 39 L. T. 404; 27 W. R. 252, C. A.

**Annotations:**—**Expld.** Stephenson v. Garnett, [1898] 1 Q. B. 677. **Refd.** Ainsworth v. Wilding, [1896] 1 Ch. 673. **Mentd.** Re Diamond Fuel Co. (1879), 13 Ch. D. 400; Re Gaudet Frères S.S. Co. (1879), 12 Ch. D. 882; Arkwright v. Newbold (1881), 17 Ch. D. 301; Charles v. Butson (1895), 39 Sol. Jo. 346; Turner v. Green (1895), 43 W. R. 537; Halford v. Hardy (1899), 81 L. T. 721; Carter v. Roberts, [1903] 2 Ch. 312; Townend v. Townend (1905), 93 L. T. 680; Re Launder, Launder v. Richards (1908), 98 L. T. 551.

**1506. Giving cognovit—Waiver of objection to irregularity of judgment.]**—Though judgment has been irregularly signed without filing common bail for debt, according to the statute till after the succeeding term after the writ was returnable & after the judgment itself has been entered up, yet debt, having given a *cognovit* is estopped from objecting to the irregularity, if before the time of making such objection pltf. has filed common bail *nunc pro tunc*.—DAVIS v. HUGHES (1797), 7 Term Rep. 206; 101 E. R. 934.

**1507. Statement of case on appeal—Whether estoppee from objecting that no appeal would lie.]**—The statement of the case does not preclude resp. from objecting that no appeal will lie.—KINGSFORD v. MERRY (1856), 1 H. & N. 503; 26 L. J. Ex. 83; 28 L. T. O. S. 236; 3 Jur. N. S. 68; 5 W. R. 151; 156 E. R. 1299, Ex. Ch.

**Annotations:**—**Mentd.** Higgons v. Burton (1857), 26 L. J. Ex. 342; Kemp v. Covington (1857), 28 L. T. O. S. 289; Cornish v. Abington (1859), 4 H. & N. 549; Gobind Chunder Sein v. Ryan (1861), 9 Moo. Ind. App. 140; Hardman v. Booth (1863), 32 L. J. Ex. 105; Pease v. Gloahoc, The Marie Joseph (1866), L. R. 1 P. C. 219; Re Overend, Gurney, Ex p. Oakes & Peck (1867), L. R. 3 Eq. 576; Fuentes v. Montis (1868), L. R. 3 C. P. 268; Cole v. North Western Bank (1875), L. R. 10 C. P. 354; Lindsay v. Cundy (1876), 45 L. J. Q. B. 381; Johnson v. Credit Lyonnais Co. (1877), 3 C. P. D. 32; Stone v. City & County Bank, Collins v. Same (1877), 3 C. P. D. 282; Attenborough v. St. Katherine's Dock Co. (1878), 3 C. P. D. 450; Joseph v. Webb, Joseph v. Lyons, Joseph v. Pidcock, Joseph v. Jones (1884), Cab. & El. 262; London & County Banking Co. v. London & River Plate Bank (1887), 4 T. L. R. 179; Henderson v. Williams, [1895] 1 Q. B. 521; Farquharson v. King, [1901] 2 K. B. 697; Oppenheimer v. Frazer & Wyatt, [1907] 2 K. B. 50; Folkes v. King, [1923] 1 K. B. 282.

**1508. Taxation of costs—Consent to—Waiver of objection to jurisdiction.]**—Justices at quarter sessions may direct their officer to tax the costs of an appeal, & may adopt his taxation as their own act & insert the amount in their order, provided all this be done before the end of the sessions. But if the party against whom costs are given consent that the taxation shall take place after the sessions are over, & the justices

give judgment for costs *nunc pro tunc*, the party so consenting is precluded from afterwards objecting to their want of jurisdiction.

Applt., in an appeal against a highway rate, entered into recognisances to pay costs, as required by Highway Act, 1835 (c. 50), s. 105. The appeal was heard at the Oct. sessions, 1858, when the justices confirmed the rate. Nothing was said at those sessions as to costs, but by a Standing Order of Sessions, made in 1843, it was ordered that the costs of every appeal tried should be taxed by the clerk of the peace during the sessions & be paid by the unsuccessful party, unless the justices who tried the appeal should order to the contrary. The clerk of the peace certified under Summary Jurisdiction Act, 1847 (c. 43), s. 27, that, at the trial, in Oct. 1858, the justices had made no order to the contrary, & that the solrs. of the respective parties had agreed that the costs should be taxed out of ct.; that in Apr. 1859, he attended resp.'s solr. & taxed his costs at £33 7s., applt.'s solr. having objected to attend the taxation, & that the costs had not been paid to him the clerk of the peace. A distress warrant having issued on application by resp. against the applt. for these costs:—**Held:** the distress warrant had properly issued; applt., by consenting at the trial that the costs should be taxed after the sessions, was precluded from objecting that the taxation was not made at the sessions; the justices might well assume, it being so stated in the certificate of the clerk of the peace, that applt. had consented.—FREEMAN v. READ (1860), 9 C. B. N. S. 301; 30 L. J. M. C. 123; 142 E. R. 118; *sub nom.* READ v. FREEMAN, 3 L. T. 369; 25 J. P. 87; 7 Jur. N. S. 546; *sub nom.* REED v. FREEMAN, 9 W. R. 141.

**Annotation:**—**Refd.** Southampton Gaslight & Coke Co. v. Southampton Grdns. (1877), 36 L. T. 548.

**1509. — Obtaining order for—Waiver of right to deny retainer.]**—A solr. having delivered ten bills of costs to a client, the client obtained an order to tax the ten bills, the order containing no reservation of a right to dispute the solr.'s retainer:—**Held:** it was not open to the client to dispute the retainer of the solr. as to one of the bills *in toto*, though he could dispute the retainer as to particular items in any of the bills.

—**Re** FRAPE, *Ex p.* PERRETT (No. 2), [1894] 2 Ch. 290; 63 L. J. Ch. 678; 71 L. T. 80; 42 W. R. 475; 38 Sol. Jo. 421, 439; 8 R. 274.

**1510. — Attendance at—Waiver of appeal on**

her.—BARKER v. TABOR (1837), 5 O. S. 570.—**CAN.**

**h. Pleading to action—Waiver of irregularity.]**—M'PHELM v. LARSON (1858), 4 All. 71.—**CAN.**

**k. Magistrate convicting & imposing fine—Waiver of objection to jurisdiction.]**—In an action against a magistrate for not returning a conviction:—**Held:** debt., having actually convicted & imposed a fine, could not object that the declaration did not show that he had jurisdiction to convict.—BAGLEY v. CURTIS (1865), 15 C. P. 366.—**CAN.**

**l. Consenting to appearance of person to defend—Waiver of irregularity.]**—In ejectment against A. & B., by consent of pltf.'s attorney, an appearance was entered for S. as landlord, A. & B. not appearing. The notice of trial was intitled as against A. & B., & notice was served on pltf.'s attorney warning him that this would be objected to. The *nisi prius* record contained no appearance, but annexed to it was an appearance by S. as landlord. Pltf. was allowed to enter this on the record, & took a verdict, debt. not

appearing. On application to set aside the verdict, pltf. objected that the affidavits filed by debt., intitled as against S. alone, were wrongly intitled, & that no judge's order was shown allowing S. to defend:—**Held:** pltf. was precluded from the last objection, for he had consented to S. appearing, & obtained leave to enter his appearance on the record.—JONES v. SEATON (1866), 26 U. C. R. 166.—**CAN.**

**m. Waiver of right to raise particular defence.]**—On appeal debts, urged a ground not taken in the rule *nisi* or raised by the pleadings, viz., that the evidence disclosed good cause for dismissal. When offered the opportunity at the trial to amend & raise such defence, counsel for debts, declined to do so:—**Held:** the defence could not be raised on appeal.—LASH v. MERIDEN BRITANNIA Co. (1883), 8 A. R. 680.—**CAN.**

**n. Execution creditors filing claims before liquidator—Not estopped from claiming money in court.]**—Under various executions against debt. co. certain goods were seized. Upon adverse claims being made the sheriff

sold the goods & paid the money into ct. under the terms of an interpleader order to abide the result of an issue. Before the determination of the issue the co. was ordered to be wound up. The execution creditors, having succeeded in the issue, moved for payment to them of the money in ct., & were opposed by the liquidator:—**Held:** they were not estopped from setting up such claim because they had filed claims before the liquidator.—GALT v. SASKATCHEWAN COAL Co. (1887), 4 Man. L. R. 304.—**CAN.**

**o. Obtaining enlargement of time for complying with order—Waiver of right to appeal from order.]**—By an order of a judge in chambers a motion by debt. to set aside a judgment for irregularity was refused, but the debt. was let in to defend upon paying into ct. or securing \$700 within a month. Debt. moved for & obtained an order extending the time for paying the money in, & then appealed from the part of the order refusing to set aside the judgment for irregularity:—**Held:** debt. had waived his right of appeal from the order by obtaining an enlargement of the time for

*Sect. 3.—By representation: Sub-sect. 3, I. (a) ii. iii.*

**question of costs.]**—There is no absolute rule in the Ecclesiastical Cts. that there shall not be an appeal on a question of costs but if a party attends a taxation & thereby does an act in furtherance of the sentence it bars his right to appeal.—*LLOYD v. POOLE* (1831), 3 Hag. Ecc. 477; 162 E. R. 1232.

**1511. ——— Waiver of objection to jurisdiction.]**—Where the parties attend & proceed with the taxation of costs by the clerk of the peace under an order of sessions without making objection to his jurisdiction, they are estopped from moving to quash the order drawn up by the clerk of the peace after such taxation for payment of the amount allowed.—*R. v. SHREWSBURY & HEREFORD RY. CO.* (1855), 25 L. T. O. S. 65; 3 W. R. 373.

*Annotations:—Apld.* *Freeman v. Read* (1860), 9 C. B. N. S. 301; *Ex p. Watkins* (1862), 5 L. T. 605. *Refd.* *Southampton Gas Light & Coke Co. v. Southampton Grdns.* (1877), 25 W. R. 671.

**1512. ———.]**—Where a party objects to an order of quarter sessions, on the ground that the amount of costs inserted in the order was ascertained by taxation after the sessions had expired, he should protest against the taxation before the taxing officer; otherwise, if he attends & proceeds with the taxation without protesting, he waives the objection.—*Ex p. WATKINS* (1862), 5 L. T. 605; 26 J. P. 71; 10 W. R. 249.

*Annotation:—Mentd.* *R. v. Hampshire JJ.* (1861), 3 New Rep. 487.

**1513. ——— Waiver of lien.]—Re CHATTERTON** (1881), 26 Sol. Jo. 59, C. A.

*Annotation:—Mentd.* *Re Frape* (1893), 62 L. J. Ch. 473.

**1514. ——— & acceptance—Waiver of right of appeal.]**—A sentence of the Prerogative Ct. of York, in a testamentary cause, was pronounced in Aug. 1856. This sentence decreed probate of the will in question, costs being given out of testator's estate to both parties. These costs were taxed & paid in Nov. of that year, the proctor of the opposing party attending. In June, 1857, application was made by the party originally opposing the will for leave to appeal. Such application was refused, on the ground that the taxation & receipt of the costs was an acquiescence in the sentence & perempted the appeal.

complying with it.—*PIERCE v. PALMER* (1887), 12 P. R. 308.—**CAN.**

**p. Moving for new trial & paying money into court—No waiver of objection to jurisdiction.]**—Deft. in an action in the div. ct. in the county of Y., brought upon a promissory note dated at T., but actually made at W., filed a notice disputing the jurisdiction. Judgment, however, was given in the action against him in his absence, & he moved for & obtained a new trial, paying the money into ct. as a condition, & afterwards applied for an order of transference, which was refused. Before the new trial he applied for a prohibition:—*Held:* by moving for a new trial & paying the money into ct., deft. had not waived his right, & prohibition should be granted.—*Re D.*

**q. Compliance with part of order—Waiver of objection to other part.]**—An order appealed from permitted deft. to amend a paragraph of his defence within six days, in default of which it was to be struck out, & deft. availed himself of the privilege of amending that paragraph:—*Held:* by compliance with such part of the order,

he had not precluded himself from appealing against another part of the order.—*GOWENLOCK v. FERRY* (1896), 11 Man. L. R. 257.—**CAN.**

**r. Voluntarily entering into a recognisance—No estoppel from denying its validity.]**—A person voluntarily entering into a recognisance is not estopped from denying its validity.—*Re NORTH DUFFERIN ELECTION* (1887), 4 Man. L. R. 280.—**CAN.**

**s. Consenting to trial without jury—Waiver of statutory rights.]**—The parties in an action for divorce consented to an order that the trial should take place before a judge without a jury. A decree for divorce having been pronounced, the judge proceeded to assess the damages, when the correspondent invoked Divorce & Matrimonial Causes Act (c. 85), s. 33, which provides that the damages to be recovered in any such petition for divorce shall in all cases be ascertained by the verdict of the jury:—*Held:* having consented to a trial without a jury, he was estopped from availing himself of this provision.—*WILLIAMS v. WILLIAMS & HUTTON* (1909), 14 B. C. R. 313.—**CAN.**

**t. Waiver of objection to illegality of**

—*BROWN v. DAVENPORT* (1857), 11 Moo. P. C. C. 297; 14 E. R. 708.

**Acceptance of costs.]—Sec Nos. 1232, 1234, 1236, ante.**

**1515. Proceeding to arbitration—Waiver of objection to misdescription of plaintiff's interest.]**—In an arbn. pltf. claimed as mtgee. in possession whereas in fact he had sub-let the premises. In an action on the award:—*Held:* defts. by proceeding to arbn. had waived any objection they might have taken to the claim, & the misdescription of pltf.'s interest was not fatal to the right to recover.—*LOVERING v. CITY OF LONDON & SOUTHWARK SUBWAY CO.* (1891), 7 T. L. R. 600, C. A.

**— & taking up award—Waiver of irregularity in reference.]**—A. accepted a bill of exchange, but became bkpt. before it fell due. On its coming due, B. paid it for the honour of A., but there was no protest of the bill for non-payment, nor did B. make any formal statement that he paid it for the honour of A. B. then claimed to prove for the amount of the bill. The question whether he was entitled to prove was by him & the assignees referred to arbn., without any such authority as is required by Bkpey. Act, 1849 (c. 106), s. 153. B. never repudiated the reference, but argued the case on its merits before the referee, & took up the award, by which the referee decided that there was no right of proof:—*Held:* (1) whether an award under such a reference could have bound the estate of the bkpt. or not, B. having taken the chance of having a decision in his favour, could not object to the validity of the award on the ground of the non-compliance with the requisitions of the Act.

(2) (TURNER, L.J.) The reference being unauthorised, this award could not have bound the estate nor the comr.—*Re WYLD, Ex p. WYLD* (1860), 2 De G. F. & J. 642; 30 L. J. Bey. 10; 3 L. T. 794; 7 Jur. N. S. 291; 9 W. R. 421; 45 E. R. 770, L. C. & L. JJ.

**1517. Ruling sheriff to return writ—Waiver of objection to irregularity of writ.]**—Trespass for breaking & entering pltf.'s house & seizing his goods. Plea, that deft. brought an action against pltf., which was referred to arbn. by an agreement afterwards made a rule of ct.; that the arbitrator awarded a certain sum to be due to deft., & ordered pltf. to pay it on a certain day which he

remand.]—An order of remand, contrary to Code of Civil Procedure, s. 564, is not merely irregular, but illegal; but it is not on that account absolutely void so as to render any consent of the parties of no avail. It can be objected to by a party, if he has not given his consent to such a course, & even a party, who has not consented, may be equitably estopped by subsequent conduct from treating such an order as null & void.—*KALAHASTI ESTATE (MANAGER OF COURTS OF WARDS) v. RAMASAMI REDDI* (1905), 1 L. R. 28 Mad. 437.—**IND.**

**a. Tendering cross-interrogatory to witness—Waiver of incompetency of witness.]**—Where a party tenders a cross-interrogatory to a witness who is a deft. he precludes himself from objecting to such witness as incompetent, when the answer to that interrogatory is sought to be used by the other side.—*ELLIS v. DEANE* (1827), 3 Mol. 48.—**IR.**

**b. Consenting to examination of unsworn witness—Waiver of objection that evidence inadmissible.]**—Although in a civil, as well as a criminal, case, the usual oath should be administered to a peer examined as a witness, the



refusing to do, deft. issued a writ of *fi. fa.* & levied on pltf.'s goods. Replication, that by a rule of ct. it was ordered that the writ should be set aside for irregularity. Rejoinder by way of estoppel that, after the making of that rule of ct., pltf. ruled the sheriff to return the writ of *fi. fa.* :—*Held*: pltf., by ruling the sheriff to return the writ, was not estopped from showing that it was not a good writ, for although it might be bad as against the party suing it out it might still be good as respected the sheriff.—*JONES v. WILLIAMS* (1841), 8 M. & W. 349; 9 Dowl. 702; 10 L. J. Ex. 253; 5 Jur. 895; 151 E. R. 1073.

*Annotations*:—*Mentd.* *Nash v. Swinburne* (1842), 3 Man. & G. 853; *Doe d. Harrison v. Hampson* (1847), 4 C. B. 745; *Doe d. Pennington v. Barrell* (1847), 11 Jur. 904; *Re Lilley & Harvey* (1849), 14 Q. B. 403; *Widgery v. Tepper, Hall v. Tepper* (1877), 6 Ch. D. 364; *Taylor v. Roe*, [1894] 1 Ch. 413.

### iii. By Omissions.

**1518. General rule.]**—A party who complains of an irregularity ought to use due diligence in making his complaint, & this though he be out of the country. A party against whom a *distringas* to compel appearance had issued was at the time of the issuing of the writ of summons, & down to the time of this rule, living at Boulogne to avoid her creditors, having, however, a dwelling-house in England, in which a part of her family was residing. The *distringas* having issued in Michaelmas Term, & a return being made by the sheriff of *non est inventus & nulla bona*, deft. late in Hilary Term following applied to set it aside, on the ground that she had been during the whole of the proceedings out of the country:—*Held*: she had by her laches lost her right to set aside the proceedings.—*DICK v. DOVER* (1850), 14 L. T. O. S. 424.

**1519. —.]**—To deprive a pltf. of a legal right at the hearing of the cause a case of acquiescence must be shown much stronger than such as would be a sufficient defence to an interlocutory application by him & must amount not only to positive licence, but to an implication of an actual grant.—*PATCHING v. DUBBINS* (1853), Kay, 1; 22 L. T. O. S. 116; 17 Jur. 1113; 2 W. R. 2; 69 E. R. 1; *affd.*, 2 Eq. Rep. 71, L. J. *Annotations*:—*Mentd.* *Schlumberger v. Lister* (1860), 6 Jur. N. S. 1336; *McLean v. McKay* (1873), L. R. 5 P. C. 321.

### 1520. No objection taken—To jurisdiction

parties, by acquiescing in the examination of such a witness without the previous sanction of an oath, are precluded by such acquiescence from making any objection to the reception of such evidence after verdict, or asking for a new trial, on such grounds.—*BIRCH v. SOMERVILLE* (1852), 18 L. T. O. S. 336.—*IR.*

**c. Consenting to appear & answer appeal—Waiver of objection to validity of appeal.]**—The revising barrister had decided against several persons, & consolidated their appeals. The declaration of agreement to prosecute the appeal was signed by E. alone, who was not one of the parties decided against, but was named by the revising barrister as applt. Resp. had signed the declaration undertaking to appear & answer the appeal:—*Held*: he was estopped from questioning the validity of the appeal on the ground that it should have been signed by, or on behalf of, one of the persons decided against.—*EDWARDS v. LANG* (1868), L. R. 3 C. L. 135; 1 L. R. 11, & L. 22.—*IR.*

### PART VI. SECT. 3, SUB-SECT. 3.— 1. (a) iii.

#### d. No objection taken—To juris-

**Interest of bench.]**—If a party to the appeal knowing of the interest, expressly or impliedly assent to the interested magistrate acting, such party cannot afterwards make the objection.—*R. v. CHELTENHAM COMRS.* (1841), 1 Q. B. 467; 1 Gal. & Dav. 167; 10 L. J. M. C. 99; 5 Jur. 867; 113 E. R. 1211.

*Annotations*:—*Mentd.* *R. v. Hertfordshire JJ.* (1845), 6 Q. B. 753; *Ex p. Acland* (1847), 1 L. T. O. S. 146; *Fuller v. Brown* (1849), 13 L. T. O. S. 301; *R. v. Aberdare Canal Co.* (1850), 14 Q. B. 854; *R. v. Middlesex JJ.* (1854), 18 J. P. Jo. 390; *R. v. Surrey JJ.* (1855), 19 J. P. Jo. 755; *Graham v. Berry* (1865), 3 Moo. P. C. C. N. S. 207; *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417.

**1521. — Defendant abroad.]**—*DICK v. DOVER*, No. 1518, *ante*.

**1522. — To irregularity—Permitting other party to take further steps.]**—If a party lies by after an irregularity in the proceedings, & knowingly permits the other party to take a further step in the cause, before he moves to take advantage of the irregularity, it is as much a waiver of the irregularity as taking a step himself.—*GAIRE v. GOODMAN* (1805), 2 Smith, K. B. 391.

*Annotation*:—*Refd.* *Downes v. Witherington* (1810), 2 Taunt. 243.

**1523. — Writ—Irregularly issued.]**—Where prisoner committed to custody for a criminal offence sued out a writ of *habeas corpus* from the plea side of the ct., & obtained his discharge on the ground that the warrant of commitment was defective:—*Held*: the solr. for the Crown, who had opposed his discharge without then objecting that the writ had irregularly issued, had thereby waived the objection, & he could not afterwards set aside the writ for irregularity.—*EASTON'S CASE* (1840), 12 Ad. & El. 645; 113 E. R. 959; *sub nom. Re EASTON*, 4 Per. & Dav. 558; 10 L. J. Q. B. 16; 5 Jur. 117; *sub nom. Re EATON*, 9 Dowl. 207; Woll. 49.

**1524. — Prematurely issued.]**—Pltfs. sued deft. to recover the amount of three promissory notes signed by him, amounting in all to £960. By mistake, the writ was issued before the second & third notes were due. A summons for judgment under Ord. 14 was taken out, on the hearing of which deft. was represented by a solr. who did not raise the defect in the writ as a defence. The master gave judgment for pltfs. for £600 & gave leave to defend as to the balance. At the trial of the action:—*Held*: as

the supreme ct.:—*Held*: it was too late to take the objection that the master had no authority to direct the issue of the order.—*SABEANS v. EDWARDS* (1917), 50 N. S. R. 424.—*CAN.*

—*Defts.* appeared in a French ct. defended a suit, made no objection to the jurisdiction. In a suit upon the decree of the said ct., defts. pleaded want of jurisdiction:—*Held*: defts. were estopped from pleading want of jurisdiction.—*KANDOTH MAMMI v. NEELANCHERAYIL ABDU KALANDAN* (1872), 8 Mad. 14.—*IND.*

foreign ct. where deft. took no objection to the jurisdiction, but appeared by an agent & defended the suit on the merits:—*Held*: he must be held to have waived the jurisdiction; & in a suit brought on the judgment of the foreign ct., he was estopped from taking any exception to the jurisdiction.—*FAZAL SHAU KHAN v. GAFAR KHAN* (1891), L. R. 15 Mad. 82.—*IND.*

**1. — To irregularity—Arbitration proceedings.]**—Pltf. having bought two horses from deft. & given a chattel mortgage upon them, a dispute arose

.....—An applicant for a prohibition against a judge of a division ct. for excess of jurisdiction, who has appeared at the trial, cross-examined witnesses, argued the case before the judge, & taken no exception at the time to the jurisdiction, is precluded from objecting to the jurisdiction after judgment entered & execution issued in the ct. below.—*Re BURROWES* (1868), 18 C. P. 493.—*CAN.*

**e. —.]**—Where deft. submits to examination before a magistrate it is too late afterwards to object to its propriety.—*R. v. RAMSAY* (1886), 11 O. R. 210.—*CAN.*

**f. —.]**—Prisoner having appeared & consented to be tried by the county ct. judge, his objection to the jurisdiction came too late.—*R. v. BROWN* (1898), 31 N. S. R. 401.—*CAN.*

.....—In an action for the partition of land pltf.'s solicitor consented to the taking out of the order for sale, & after the sale, pltfs. received their proportion of the proceeds & retained the same & appropriated it to their own use. The order or decree for the sale of the property was made by the judge of the county ct., acting as a master of

foreign ct. where deft. took no objection to the jurisdiction, but appeared by an agent & defended the suit on the merits:—*Held*: he must be held to have waived the jurisdiction; & in a suit brought on the judgment of the foreign ct., he was estopped from taking any exception to the jurisdiction.—*FAZAL SHAU KHAN v. GAFAR KHAN* (1891), L. R. 15 Mad. 82.—*IND.*

**1. — To irregularity—Arbitration proceedings.]**—Pltf. having bought two horses from deft. & given a chattel mortgage upon them, a dispute arose



*Sect. 3.—By representation: Sub-sect. 3, I. (a) iii.]*

deft. had not set up the premature issue of the writ as a defence on the hearing of the summons under Ord. 14, the judgment then obtained cured the defect in the writ.—*STIRLING & Co. v. NORTH* (1913), 29 T. L. R. 216.

**1525. ——— Irregular service.]**—It is no objection to the service of a writ of summons, that it was not made until after the expiration of four months from the date provided deft. agrees to accept it as good service.

Deft. cannot avail himself of an irregularity, in the service of the writ, to which he has himself assented (*TINDAL, C.J.*).—*COATES v. SANDY* (1841), 2 Man. & G. 313; 9 Dowl. 381; Drinkwater, 120; 2 Scott, N. R. 535; Woll, 134; 133 E. R. 765.

**1526. ———.]**—Service of a copy of a writ was made by leave, under a mistaken belief as to the state of facts, upon F., a foreigner, residing out of British jurisdiction. F. took no steps to have the service set aside or to enter an appearance, & judgment was signed against him four months after the service of the writ:—*Held*: a notice of the writ, & not any service of the writ, was compulsory upon a non-British subject not in British dominions, under ord. 11, r. 6; & such a wrongful service was not an irregularity which could be dealt with under ord. 70, r. 1, nor was deft. estopped, under ord. 70, r. 2, from taking steps to set aside the proceedings.—*HEWITSON v. FABRE* (1888), 21 Q. B. D. 6; 57 L. J. Q. B. 449; 58 L. T. 856; 36 W. R. 717; *sub nom.* *HEWETSON v. FABRE*, 4 T. L. R. 519, D. C.

**1527. ——— Party sued in wrong name.]**—Where a party is sued by a wrong name, & suffers

as to whether the horses had been paid for or not. The parties agreed to refer their disputes to arbitration, pltf. having been induced by threats to do so. The proceedings of the arbitrators were admittedly irregular, but an award was made giving the horses to deft. who was to pay the feed bill due against them, & \$15 for previous expenses. Deft. then paid the feed bill & the \$15 & took away the horses. Pltf. afterwards replevied the horses in the county ct.:—*Held*: pltf. was not estopped from objecting to the agreement & award by the fact that he had allowed deft. to take the horses & pay the money according to the award, or by allowing deft. to keep the horses for so long.—*LAFERRIERE v. CADIEUX* (1896), 11 Man. L. R. 175.—**CAN.**

**m. ———.]**—Where the parties prayed the ct. to appoint two arbitrators & an umpire & to refer the case to them for decision, & undertook to abide by such decision as might be passed by them unanimously or by a majority of them:—*Held*: pltf., having appeared before the umpire & taken no objection to the procedure of the umpire from Mar. to Aug., was estopped from raising the objection that an award of the umpire alone was invalid.—*KUPU RAU v. VENKATARAMAYAR* (1882), 1 L. R. 4 Mad. 311.—**IND.**

**n. ———.]**—Where objection to the validity of the award on the ground that it was made beyond the time allowed was not taken by deft. in the first ct.:—*Held*: he was not thereby estopped from raising the objection for the first time in appeal, inasmuch as it was not shown that in the first ct. he was aware of the defect, or had done anything to imply consent to extension of the

time.—*CHUHAMA L. HARI RAM* (1886), 1 L. R. 8 All. 548.—**IND.**

**o. ———.]**—One of the parties to a submission to arbitration brought a reduction to the decree-arbitral, on the ground that the submission had fallen at a date prior to that of the decree in consequence of the arbiter having neglected to prorogate it:—*Held*: pursuer was barred from pleading the want of prorogation, because the parties had continued to plead before the arbiter long after the date of the alleged lapse of the submission.—*PAUL v. HENDERSON* (1867), 5 Macph. (Ct. of Sess.) 613; 39 Sc. Jur. 307.—**SCOT.**

**p. ——— Application out of time.]**—On appeal from an order varying a referee's report objection was taken that the appln. for the order was made out of time:—*Held*: the objection should have been taken before the judge who made the order, who could have extended the time, & not being so taken was waived.—*FULTZ v. MCNEIL* (1906), 38 N. S. R. 506.—**CAN.**

**q. ——— Action against partnership.—On foreign judgment against corporation.]**—A judgment was recovered by pltf. in Q. against defts. sued & described as "La Cie. de P. Le T." a corpn. having its head office in O. There was no incorporated co. in O. of that name, but a partnership in that name was registered in O., the partners being F. M. & his wife. This action was begun by writ of summons specially indorsed with a claim for the amount of the Q. judgment. Le T. P. Co. appeared by the name mentioned in the writ as if sued as a corpn., & pltf. obtained a summary judgment against defts. Upon a motion by pltf. for leave to issue

judgment to go against him, without attempting to rectify the mistake, he cannot afterwards, in an action against the sheriff for false imprisonment, complain of an execution issued against him by that name.—*FISHER v. MAGNAY* (1843), 5 Man. & G. 778; 1 Dow. & L. 40; 6 Scott, N. R. 588; 12 L. J. C. P. 276; 1 L. T. O. S. 109; 134 E. R. 774.

*Annotation*:—*Distd. Walley v. M'Connell* (1849), 13 Q. B. 903.

**1528. ——— Issue of distringas against party abroad.]**—If a *distringas* to compel an appearance issues against a person who was abroad at the time when service of the writ of summons was attempted, it is irregular, but unless deft. applies promptly after he is aware of the proceedings against him, he will be taken to have waived the irregularity.—*BROUGH v. EISENBERG* (1849), 14 Q. B. 446; 19 L. J. Q. B. 22; 14 L. T. O. S. 270; 14 Jur. 64; 117 E. R. 174.

*Annotations*:—*Apld.* *Dick v. Dover* (1850), 14 L. T. O. S. 380, 424. *Mentd.* *Whitaker v. Crocker* (1851), 2 L. M. & J. 76.

**1529. ——— Cause tried without jury before commissioner without judge's order.]**—A cause was tried without a jury before a comr. of *Nisi Prius*, not a judge of the superior cts. The parties had consented; & the judge in open ct. sanctioned this course; but there was neither a judge's order, nor a consent in writing. The unsuccessful party having moved for a new trial:—*Held*: the comr. having general jurisdiction to try, the parties were precluded by their conduct from questioning the verdict on account of the absence of these preliminaries.—*ANDREWS v. ELLIOTT* (1855), 5 E. & B. 502; 25 L. J. Q. B. 1; 26 L. T. O. S. 57; 1 Jur. N. S. 1046; 119 E. R. 567; *affd.* (1856), 6 E. & B. 338, Ex. Ch.

*Annotations*:—*Apld.* *Haines v. East India Co.* (1856), 11 Moo. P. C. C. 39; *Tyerman v. Smith* (1856), 6 E. & B.

execution against F. M. & his wife, as members of the partnership, an issue was directed to determine whether they were members & liable to execution:—*Held*: if the Q. judgment was to be regarded as one against a corpn., & therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that objection should have been taken, but was not, on the motion for summary judgment.—*GIBSON v. LE TEMPS PUBLISHING CO.* (1906), 24 C. L. T. 21; 6 O. L. R. 690; 2 O. W. R. 1122.—**CAN.**

**r. ——— Amount payable under affiliation order.—Not put before jury in appeal.]**—After the judge of a county ct., on the finding of the jury, had confirmed an affiliation order made by a magistrate, deft. applied for a new trial on the ground that the amount which the magistrate ordered deft. to pay had not been put before or passed upon by the jury:—*Held*: it was incumbent upon deft. to have raised the point now relied on when the case was being given to the jury, & having failed to do so at that time, he was estopped from doing so afterwards.—*SHEET HARBOUR OVERSEERS v. KENNEDY* (1915), 48 N. S. R. 258.—**CAN.**

**s. ——— Agreement as to cution of decree.—Execution of agreement as decree.]**—The parties to a decree altered by agreement such decree as regards the mode of payment & the interest payable. For many years such agreement was executed as a decree, without objection being taken by the judgment-debtor:—*Held*: the judgment-debtor was not, by reason that he had submitted to the execution of such agreement as a decree, estopped from objecting to its continued execution as a decree.

719. **Refd.** Ringland v. Lowndes (1864), 17 C. B. N. S. 514; Irwin v. Grey (1865), 19 C. B. N. S. 585; Foster v. Usherwood (1877), 47 L. J. Q. B. 30. **Mentd.** Waterton v. Baker (1868), L. R. 3 Q. B. 173; Hamlyn v. Betteley (1880), 6 Q. B. D. 63.

**1530. ——— Notice of objection out of time.]**—Applts., more than 25 days after the deposit of a list by the overseers, gave to the assessment committee notice of objection thereto. The assessment committee heard & decided on the objection; & on an appeal against such decision took the preliminary objection that the notice had been given out of time:—**Held**: the objection must be overruled.—**HOARE, WILSON & Co. v. ST. OLAVE'S UNION ASSESSMENT COMMITTEE** (1890), Ryde, Rat. App. (1886-90), 209.

**1531. ——— To action—Want of jurisdiction.]**—Pltf. having a cause of action for £38 10s. upon the balance of an account, sued in the county ct. for £17 part thereof; & as deft. confessed the debt, & it did not appear to the ct. that the claim was part of a debt exceeding £20 obtained judgment for that sum. Afterwards he sued for the residue in the superior ct. where it was held, that by suing in the county ct. for part of the debt he had abandoned the residue. Upon a rule to set aside the verdict, & to enter it for pltf.:—**Held**: as he had done nothing to abandon the excess, & deft. had not excepted to the jurisdiction of the county ct. pltf. might maintain such action in the superior ct.—**VINES v. ARNOLD** (1849), 8 C. B. 632; 7 Dow. & L. 277; Cox, M. & H. 320; Rob. L. & W. 180; 19 L. J. C. P. 98; 14 L. T. O. S. 222; 13 J. P. 795; 14 Jur. 350; 137 E. R. 655.

**Annotation:—Refd.** Isaac v. Wyld (1851), 7 Exch. 163.

**1532. ——— Failure to plead deed of arrangement.]**—In an action against defts. for not arresting a judgment-debtor who had produced

to them a due certificate of the filing & registration of a deed of arrangement, but which deed, having been executed before the commencement of the action, was, to the knowledge of defts., pleadable in bar of the action against the judgment-debtor, but had, in fact, not been so pleaded:—**Held**: defendants were bound to arrest the judgment-debtor, & he was estopped from using the deed to defeat execution.—**GODWIN v. STONE** (1869), L. R. 4 Exch. 331; 38 L. J. Ex. 153; 20 L. T. 711; 17 W. R. 923.

**Annotations:—Consd.** Allen v. Carter (1870), L. R. 5 C. P. 414. **Refd.** Ames v. Waterlow (1869), L. R. 5 C. P. 53.

**1533. ——— ———.]**—Where a debtor, having had an opportunity to plead a deed under Bankruptcy Act, 1861 (c. 134), s. 192, has neglected to do so, both he & the sheriff, provided the latter has notice of the facts, are estopped from relying on it, under sect. 198, as a bar to an execution.

B. was on Aug. 3 served with a writ under Bills of Exchange Act, at the suit of A., & on Aug. 5 B. executed a composition-deed, which was registered on Aug. 13. On Aug. 15 judgment was signed for non-appearance to the writ, & a *ca. sa.* issued on Sept. 25, under which B. was arrested. The sheriff, having notice of these facts, released B. from custody on being shown the certificate of registration of the deed:—**Held**: the sheriff was liable to an action for an escape.—**ALLEN v. CARTER** (1870), L. R. 5 C. P. 414; 39 L. J. C. P. 212; 22 L. T. 586.

**1534. Failure to give counter notice—Of intention to dispute validity of will—Court of Probate Act, 1857 (c. 77), s. 64.]**—By above sect. the probate of a will of real estate is to be "sufficient" evidence of such will, its validity & contents, if the party intending to establish the will gives notice to the other party ten days before the trial

**DEBI RAI v. GOKAL PRASAD** (1881), I. L. R. 3 All. 585.—**IND.**

**t. ——— ———.]**—**RAM-LAKHAN RAI v. BAKHTAUR RAI** (1884), I. L. R. 6 All. 623.—**IND.**

**a. ——— ——— Sale in execution of decree.]**—The fact that a judgment-debtor, who petitions to have the sale in execution of the decree against him set aside on the ground of fraud & irregularity, has, in a petition made previous to the sale asking for its adjournment, made no mention of the irregularities relied on does not create an estoppel.—**RAMAN v. KUNHAYAN** (1893), I. L. R. 17 Mad. 304.—**IND.**

**b. ——— ——— Right to sue in forma pauperis.]**—Pltf. in a suit brought in *forma pauperis* died, but in ignorance of her death the ct. passed a decree in her favour. Deft. appealed, making respondent to his appeal a lady whom he alleged to be the legal representative of deceased pltf. On this appeal an order was passed, by consent of parties, sending back the suit to be re-tried on the merits as between deft. & the person nominated by him as pltf., & a decree was again passed in favour of pltf.:—**Held**: it was not thereafter open to deft. to object that there had been no inquiry into the right of the representative of the original pltf. to sue as a pauper.—**AKBAR HUSAIN v. ALIA BIBI** (1902), I. L. R. 25 All. 137.—**IND.**

**c. ——— ——— Bankruptcy proceedings.]**—Where a creditor tenders a proof for a debt under Debtors & Creditors Act, 1876, s. 96, even if he do so informally & the proof is rejected, it is an election to take the benefit of the bkpy., & will operate as a waiver of all previous irregularities in the bkpy. proceedings, & the creditor who has so claimed cannot afterwards appear & ask to have the bkpy. annulled.—**Re MCCALLUM** (1883), 1

N. Z. L. R. 396.—**N.Z.**

**d. ——— To admissibility of evidence.]**—By 3 Vic., No. 7, s. 4, a copy of a duplicate certificate to be filed in the Supreme ct. was made the only evidence of a marriage under the Act:—**Held**: although the marriage was proved by the original register, & it was no part of a minister's duty to keep the same, the prisoner was estopped from relying on the objection, the exclusion of the evidence not having been claimed at the trial.—**R. v. TAAFE** (1852), 1 Legge, 713.—**AUS.**

**e. ——— ———.]**—Where deft., at the trial assents to the reception of parol evidence to prove the understanding on which a note was given, & a verdict is given against him, he cannot be allowed afterwards to argue *in banc*, the technical objection he had waived at the trial.—**DAVIS v. MCSHERRY** (1850), 7 U. C. R. 490.—**CAN.**

**f. ——— ———.]**—**Held**: applt. was estopped from appealing from the master's ruling that depositions taken on a former application would be read as evidence, by reason of applt. not having objected at a particular stage of the proceedings.—**MACLENNAN v. GRAY** (1888), 12 P. R. 431.—**CAN.**

**g. ——— To attaching order in garnishee proceedings.]**—O. being agent of pltf. co., & having a quantity of stone consigned to him, sold it to deft. ostensibly as his own. Subsequently, the price of the stone remaining unpaid, was garnished by a creditor of O., who, although he had notice of the garnishee proceedings, took no steps to have the money released from the attaching order, or to show that the money was due to the co. & not to him, & judgment was given against deft. as garnishee:—**Held**: pltf. were estopped from saying that O. sold

the stone as their agent.—**WALLACE HUESTIS GREYSTONE CO. v. FOXWELL** (1880), 20 N. B. R. 68.—**CAN.**

**h. ——— To question put to jury.]**—It was objected that a false representation alleged by deft. had not been found to be false to the knowledge of pltf. co.:—**Held**: that a question with regard to such representation, put to the jury, having been assented to by counsel on both sides as one the finding on which would be decisive, it was too late to take this objection.—**STAR KIDNEY PAD CO. v. GREENWOOD** (1884), 5 O. R. 28.—**CAN.**

**validity of bye-law.]**—A deft. convicted on summary conviction of an infraction of a city bye-law is estopped from contending on appeal that the bye-law is *ultra vires* unless the objection was taken before the magistrate.—**R. v. BOWMAN** (1898), 6 B. C. R. 271.—**CAN.**

**i. ——— To construction of words on bill of exchange.]**—An objection, raised in appeal for the first time, that the insertion of the words "and exchange" on drafts prevented them from being for a sum certain, was not allowed on the ground that had it been raised at the trial evidence might have been adduced to show that these words imported a definite & precise liability.—**UNION BANK OF CANADA v. ANTONIOU**, [1921] 1 W. W. R. 649; 56 D. L. R. 338; 61 S. C. R. 253.—**CAN.**

**m. ——— To genuineness of deeds.]**—Where pottahs about half a century old were put forward in suits to which the representatives of the present litigants were parties & no objection was raised then or since, their conduct was held to amount to an admission of, or acquiescence in, the *bona fides* of the pottahs.—**KAILAS CHANDRA ROY v. HIRA LAL SEAL, FAKIR CHAND GHOSE v. HIRA LAL SEAL** (1868),



*Sect. 3.—By representation: Sub-sect. 3, I. (a) iii. & (b) i. & ii.]*

of his intention to give the probate in evidence, unless within four days of the receipt of such notice the party receiving it gives a counter-notice of the intention to dispute the validity of the will:—*Held*: that “sufficient” means “*prima facie*” only, & not “conclusive,” & the opposite party is not estopped by the sect. from disputing the validity of the will, although he has given no counter notice.—*BARRACLOUGH v. GREENHOUGH* (1867), L. R. 2 Q. B. 612; 8 B. & S. 623; 36 L. J. Q. B. 251; 15 W. R. 934, Ex. Ch.; *reversg.* S. C. *sub nom.* *BARACLOUGH v. GREENOUGH*, 15 L. T. 157.

*Annotations*:—*Mentd.* *Simpson v. Smith* (1871), L. R. 6 C. P. 87; *Ystalyfera Iron Co. v. Neath & Brecon Ry.* (1873), L. R. 17 Eq. 142.

**1535. Failure to appeal—From interlocutory order.]**—There is no appeal from an interlocutory order, which is a mere grievance; but the cause being appealed on the merits, the party may bring the grievance to the notice of the superior ct.; failing to do so, the party is held to adopt the interlocutory order; and upon the cause being remitted, is estopped from moving the ct. to rescind such order.—*THE WILLIAM HUTT* (1860), 1 Lush. 25; 1 L. T. 448; 167 E. R. 13.

*Annotations*:—*Mentd.* *The Demetrius* (1872), L. R. 3 A. & E. 523; *The Jacob Landstrom* (1878), 4 P. D. 191; *The Strathgarry*, [1895] P. 264; *The Creteforest*, [1920] P. 111.

*See, now*, R. S. C., Ord. 58, r. 14.

**1536. Failure to apply for issue.]—*Semble*:** if, at the hearing, a married heiress-at-law does not ask for an issue, she is bound by the decree.—*TURNER v. TURNER* (1852), 2 De G. M. & G. 28; 21 L. J. Ch. 422; 19 L. T. O. S. 15; 42 E. R. 781. *Annotation*:—*Refd.* *Watson v. Marston* (1853), 4 De G. M. & G. 230.

**Point not raised in county court—Whether available on appeal.]—*See* COUNTY COURTS, Vol. XIII., pp. 529, 530.**

(b) *Apart from Legal Proceedings.*  
i. *In General.*

**1537. General rule.]—**Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognisant of his rights, &, being so, neglects to enforce them.—*VYVYAN v. VYVYAN* (1861), 30 Beav. 65; 7 Jur. N. S. 891; 9 W. R. 879; 54 E. R. 813; *affd.*, 4 De G. F. & J. 183, L. C.

**1538. Acquiescence in trivial breach of covenant—No waiver of breach of more important character.]—**The owners of a freehold property,

on a sale of a plot of land to pltf., covenanted with him not to allow any house built on the adjoining land to be used for the sale of liquor. They afterwards sold another plot to a person who granted a lease to deft., such lease purporting to allow deft. to carry on the trade of a vendor of wines & spirits & bottled ale. Deft. at the date of his lease knew of the existence of the former covenant. Deft. having commenced to carry on the sale of wines, etc.:—*Held*: acquiescence in a trivial breach did not preclude pltf. from relief in respect of a breach of an important character.—*RICHARDS v. REVITT* (1877), 7 Ch. D. 224; 47 L. J. Ch. 472; 37 L. T. 632; 26 W. R. 166.

*Annotations*:—*Apld.* *Meredith v. Wilson* (1893), 69 L. T. 336. *Refd.* *Osborne v. Bradley*, [1903] 2 Ch. 416. *Mentd.* *Formby v. Barker* (1903), 89 L. T. 249; *Elliston v. Reacher*, [1908] 2 Ch. 374; *Sharp v. Harrison*, [1922] 1 Ch. 502.

**1539. ———.]—**Certain lots forming part of a building estate, were subject to a restrictive covenant that no building on any lot should be erected or used as a shop, workshop, warehouse, or factory, nor should any trade or manufacture be carried on on any lot. Since 1886 W. carried on the business of a laundryman on one of the lots. In July, 1893, he commenced to build on a lot of which he was the owner, a building adapted solely for the purposes of his business. An owner of other of the lots, thereupon commenced an action to restrain the erection of the building. The evidence showed that all the buildings erected on the lots were private residences, but that in several of them trades, *e.g.*, dressmaking, boot repairing, & washing, had for some time openly been carried on. It also appeared that pltf. had kept cows on some of his lots, & had sold their milk at a shed erected on the lots for their use, that he had discontinued this business in 1886, & that subsequently he had temporarily let a part of these lots to a mason, & permitted him to erect & use a shed thereon for the purposes of his business:—*Held*: (1) deft. had committed a breach of the covenant; (2) the breach was greater & more serious than any previously committed; (3) having regard to that fact, pltf. was entitled to relief, & accordingly an injunction ought to be granted.—*MEREDITH v. WILSON* (1893), 69 L. T. 336.

**1540. ———.]—**Restrictive covenants intended to preserve the character of land to be laid out & used in a particular way will not be enforced in equity if such land has already been so laid out or used that its preservation, as intended, is no longer possible & the object of

2 B. L. R. A. C. 95; 10 W. R. 403.—**IND.**

**n. ——— *To application for execution of decree.*]**—Where a judgment-debtor, being entitled & having an opportunity to plead a bar to execution of the decree against him, neglects to do so, & the application is entertained by the ct. & orders passed thereupon the judgment-debtor cannot at a subsequent stage of the same execution proceedings object that such previous application for execution ought to have been held to be barred.—*SHER*

**o. ——— *To accounts of administrator pendente lite.*]**—Where an administrator *pendente lite* had retained as his remuneration more than he was entitled to claim, & his accounts showing such amounts had been passed by the ct. with the knowledge of pltf. & without any objection being taken by them, & a suit was subsequently brought by pltf. to recover from him

such excess:—*Held*: such suit was not barred by estoppel.—*OSMOND BEEBY v. KHITISH CHANDRA ACHARJYA CHOWDHURY* (1914), 1 L. L. R. 41 Calc. 771.—**IND.**

**p. ——— *To competency of plaintiff to sue.*]**—A party who had allowed the agent of his opponent to obtain decree for expenses in his own name, found barred by the exception of competent & omitted, from suspending a charge, on the allegation that the agent had no attorney licence, for the period when the expenses were incurred.—*EWING v. WALLACE* (1831), 6 Wils. & S. 222; *affg.*, 9 Sh. (Ct. of Sess.) 385; 6 Fac. Coll. 281.—**SCOT.**

**q. Failure to plead discharge under Insolvent Act—Before judgment.]**—Pltf. recovered judgment against deft. after plea *quis darrein continuance* of composition & discharge under Insolvent Act, 1869, the suit having been commenced before the assignment of deft. under the Act.

The discharge was confirmed after plea & before trial, but did not appear to have been brought to the notice of the ct. in any way at the trial. On motion to set aside execution on the judgment:—*Held*: deft. having neglected to plead his discharge before judgment was estopped from setting it up afterwards to defeat the execution.—*WALLACE v. BOSSOM* (1878), 2 S. C. R. 488.—**CAN.**

**r. Failure to defend suit—Objection to execution of decree.]**—Where a person on his own application was added as a party resp. to an appeal, & on the case on appeal being remanded for re-trial on the merits, took no steps whatever to defend the suit:—*Held*: he could not afterwards plead by way of objection to execution of the decree, matters which ought to have formed part of his defence to the suit, had he chosen to defend it.—*KISHAN SAHAI v. ALADAD KHAN* (1891), 1 L. R. 14 All. 64.—**IND.**



the covenants cannot be attained; but the fact that such covenants have not been enforced in the case of some trivial breaches does not prevent them from being enforced in the case of other subsequent breaches.—*KNIGHT v. SIMMONDS*, [1896] 2 Ch. 294; 65 L. J. Ch. 583; 74 L. T. 563; 44 W. R. 580; 12 T. L. R. 401; 40 Sol. Jo. 531, C. A.

*Annotations*:—*Consd. Sobey v. Sainsbury*, [1913] 2 Ch. 513. *Reid. Rowell v. Satchell*, [1903] 2 Ch. 212; *Ramuz v. Leigh-on-Sea Conservative & Unionist Club* (1915), 31 T. L. R. 174.

**Waiver of breaches of covenants generally.**—*See* LANDLORD & TENANT; SALE OF LAND.

**In respect of contracts generally—Waiver of time for performance.**—*See* CONTRACT, Vol. XII., pp. 316, 317, 356–358.

**Waiver before breach.**—*See* CONTRACT, Vol. XII., pp. 332–334.

**Waiver of right to elect to treat contract as at an end.**—*See* CONTRACT, Vol. XII., pp. 348, 349.

**Waiver of condition precedent.**—*See* CONTRACT, Vol. XII., pp. 433, 434.

**Money tortiously received or retained—Waiver of tort.**—*See* CONTRACT, Vol. XII., pp. 562, 563.

**In respect of building contracts—Waiver of certificate.**—*See* BUILDING CONTRACTS, Vol. VII., pp. 363, 364, Nos. 127, 128.

**Waiver of right to forfeit.**—*See* BUILDING CONTRACTS, Vol. VII., pp. 407, 408, Nos. 298, 299.

**In respect of negotiable instruments—Waiver of presentment for payment.**—*See* BILLS OF EXCHANGE, Vol. VI., pp. 246, 247, Nos. 1578–1583.

**Waiver of notice of dishonour.**—*See* BILLS OF EXCHANGE, Vol. VI., pp. 281–286.

**In respect of land—Acquisition under compulsory powers—Consent to entry on land.**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 218, Nos. 1018–1023.

**Sale of land—Waiver of objections to title.**—*See* SALE OF LAND.

**Waiver of right of rescission.**—*See* SALE OF LAND.

**Landlord & tenant—Waiver of forfeiture by lessor.**—*See* LANDLORD & TENANT.

**Waiver of notice to repair.**—*See* LANDLORD & TENANT.

**Waiver of notice to quit.**—*See* LANDLORD & TENANT.

**Waiver of breaches of covenants.**—*See* LANDLORD & TENANT.

#### PART VI. SECT. 3, SUB-SECT. 3.— I. (b) ii.

**1544 i. Instructions to sheriff to proceed with execution—No waiver of right to attach sheriff—For not duly returning writ.**—A *fi. fa.* at the suit of G. against R. was placed in the sheriff's hands, with instructions not to enforce it until further orders, unless other executions should come in. No further instructions were received, & pltf. subsequently put in an execution with directions to proceed at once. The sheriff levied on both writs, & paid over the money to G., who had indemnified him. Pltf. then obtained a return to his writ of *nulla bona*, which the sheriff said was the only return he would make, & sued out a *ca. sa.*, on which R. was arrested:—*Held*: pltf., by taking such return, had not precluded himself from proceedings against the sheriff, & he could maintain an action for a false return.—*AITKIN v. MOODY* (1856), 13 U. G. R. 469.—CAN.

**a. Election to office—Person impeaching election voting thereat.**—Upon an application under Local Govt. Act, J.—VOL. XXI.

1890, to oust from office, it is the ct.'s duty to consider whether appct. has by his conduct precluded himself from the right to take the objections upon which he relies, & if the ct. is of opinion that he has so precluded himself, it should refuse the application. Where appct. has nominated a candidate for election & had voted thereat:—*Held*: he was precluded from objecting to the validity of the election.—*Re HENDY, Ex p. CLAYTON* (1902), 28 V. L. R. 105.—AUS.

—The ct. will not set aside an election on the relation of a party who concurred in the election, & voted for the person whose election he afterwards attempts to set aside.—*R. v. PARKER* (1852), 2 C. P. 15.—CAN.

**a. —**—A party whose proxy had been present at the election of directors of a railway co. & had seconded the motion for their election:—*Held*: to be barred *personali exceptione* from objecting to their proceedings, on the ground that they were not directors of the co.—*HUTCHESON v. HALKETT* (1847), 10 Dunl. (Ct. of Sess.) 150; 20 Sc. Jur.

#### ii. By Positive Acts.

**1541. Voluntary resignation—Waiver of objection to authority of mayor to disfranchise burgess.**—*R. v. TIDDERLEY* (1660), 1 Sid. 14; 82 E. R. 941.

*Annotations*:—*Mentd. R. v. Simpson* (1717), 1 Stra. 44; *R. v. Griffiths* (1822), 5 B. & Ald. 731; *R. v. Pattison* (1832), 4 B. & Ad. 9; *Godmanchester Bailiffs v. Phillips* (1836), 4 Ad. & El. 550.

**1542. Acceptance of money—Waiver of objection as to amount.**—If the conditions of sale are that a certain sum per cent. shall be paid as a deposit, & the auctioneer accepts a less sum, he cannot afterwards object that too little was paid.—*HANSON v. ROBERDEAU* (1792), Peake, 163, N. P.

*Annotations*:—*Mentd. Franklyn v. Lamond* (1847), 4 C. B. 658; *Wood v. Baxter* (1883), 49 L. T. 45.

**1543. — From sheriff—No waiver of right to bring action against sheriff—For false return.**—Where the sheriff on a *fi. fa.* returns that he has levied part of the debt, & that the debtor has no goods whereof the residue can be levied; & the creditor accepts the amount levied on account, & towards payment of his debt; he is not thereby precluded from bringing an action against the sheriff for a false return.—*HOLMES v. CLIFTON* (1839), 10 Ad. & El. 673; 2 Per. & Dav. 556; 4 Per. & Dav. 112; 8 L. J. Q. B. 247; 3 Jur. 629; 113 E. R. 255.

**1544. Instructions to sheriff to proceed with execution—No waiver of right to attach sheriff—For not duly returning writ.**—Pltf. does not waive his right to an attachment against the sheriff for not duly returning a writ of *fi. fa.*, by directing him, after the expiration of the rule to return the writ, to proceed with the execution, which had been suspended by an adverse claim.—*HOWITT v. RICKABY* (1841), 9 M. & W. 52; 1 Dowl. N. S. 389; 11 L. J. Ex. 73; 152 E. R. 23.

**1545. Assessment of compensation—In respect of loss of office—Waiver of right to deny holding of office.**—*Mandamus* to a borough corpn., recited that the prosecutor had held certain offices of profit within the borough that under 5 & 6 Will. 4, c. 76, he was removed therefrom; that he preferred his claim for compensation to the town council, who disallowed the same; that he then obtained a *mandamus* requiring the corpn. to assess compensation, & to secure the amount by bond; & that they assessed £60 *per annum* whereupon he appealed to the Lords of the Treasury who awarded £112 *per annum*. The writ concluded by requiring the corpn. to give

#### 43.—SCOT.

**b. Defective harvester—Knowledge of purchasers of defect.**—Applts. delivered to resps. a harvester, under a hire purchase agreement containing *inter alia* the following terms: "All our machines are warranted to be well made & of good material, & to do good work with proper management when set up & correctly operated. If upon starting any one of our machines it should not work well, immediate written notice must be given to G., & the local agent from whom it was purchased, & reasonable time allowed to get it & remedy the defects, if any, the hirer rendering necessary & friendly assistance; when, if it cannot be made to do good work, it shall be returned free of charge to the place where received, & the payment of money & notes will be returned. Failure to immediately give notice as above, or continued possession of the machine, whether it is kept in use or not, shall be conclusive evidence that the machine fulfils every warranty." The machine when tested after delivery was not in good working order,

**Sect. 3.—By representation: Sub-sect. 3, I. (b) ii.]**

their bond for such last mentioned amount. Return: that claimant did not hold certain of the offices, that he had made a former appeal to the Lords of the Treasury, against the original disallowance by the town council & that the Lords of the Treasury had then assessed only £60 *per annum*. To the first part of the return the claimant pleaded estoppel stating the assessment in compliance with the former writ & stating also that the corpn. had returned to that writ that they had made such assessment. To the second part of the return demurrer. Demurrer to the plea of estoppel for duplicity:—*Held*: (1) the Lords of the Treasury had no jurisdiction to entertain the first appeal, the claim having been altogether disallowed by the town council & the matter of appeal being therefore not a question of amount but of right; & consequently that the Lords might entertain in the second appeal & their award upon it was conclusive; (2) the plea was bad for duplicity; (3) the assessment by the corpn. under the former *mandamus* admitted by the present return estopped the corpn. from denying that the claimant held the offices in question.—*SANDWICH CORPN. v. R.* (1847), 10 Q. B. 671; 16 L. J. Q. B. 432; 11 Jur. 1100;

but no notice of any kind was given to appls. for over six weeks, & although resps. & appls. agent knew the machine was not working properly, resps. signed a starting certificate. Later, negotiations took place between appls. & resps. with a view to sending an expert to examine the machine, & an offer was made to exchange the machine for another:—*Held*: no notice having been given to appls. as required by the contract, resps. were precluded from raising any question as to a breach of warranty, & in the circumstances there was no waiver of notice.—*HARRIS SCARFE & CO., LTD. v. BROWNIE BROTHERS* (1915), 18 W. A. L. R. 55.—*AUS.*

**c. Drawer of bill agent of company—Whether acceptance waives right of objection—As to description of company.]**—Where a bill is drawn by a person signing as agent of a co., the acceptance admits the signature & authority of the agent, & precludes any technical objections as to the composition or description of the co., or their ability to draw the bill.—*BANK OF MONTREAL v. DE LATRE* (1849), 5 U. C. R. 362.—*CAN.*

**d. Contract under seal—Incapacity of corporation.]**—A municipal corpn. with certain defined powers is not, by entering into a contract under seal, estopped from showing its incapacity to make such a contract.—*JAMEISON v. FREDERICTON CITY* (1851), 2 All. 128.—*CAN.*

**e. Part payment of estimate—Estimate not presented as required by law.]**—Where an estimate of the sum required for school purposes for a certain year was sent to the town council by the trustees, & the council recognised such estimate by paying a portion, & submitted to the ct. their reasons for refusing to pay the balance:—*Held*: they were precluded from objecting that the estimate was not laid before them as by law required.—*BROCKVILLE SCHOOL TRUSTEES v. BROCKVILLE TOWN* (1852), 9 U. C. R. 302.—*CAN.*

**f. Insurance policy—Delay in giving notice—Fire.]**—Where notice of the loss & the particulars of it are required by a policy, they may be waived by the conduct of insurers. In this case the declaration alleged that notice of the loss was given to defts. forthwith, & an account of the particulars of the loss as soon as possible,

such being the conditions of the policy; & issues were taken on these allegations. There were two separate policies on a shop & on the goods contained in it. Both building & goods were destroyed. The fire took place on June 13, & the notices, both as to the shop & the goods, were given on July 13. Defts. then entered into correspondence with pltf. as to furnishing better particulars, which were afterwards furnished; & they then refused to pay for the goods on account of some suspicious circumstances attending the fire, but they paid the amount insured on the house:—*Held*: defts. were precluded from objecting to the sufficiency of the notices, or to the time at which they were given.—*LAMBKIN v. ONTARIO MARINE & FIRE INSURANCE CO.* (1854), 12 U. C. R. 578.—*CAN.*

**g. — — —.]**—Conditions of a policy required proofs, etc., within 14 days after loss, & provided that no claim should be payable for a specified time after the loss should have been ascertained & proved in accordance with this condition. There were two subsequent clauses providing respectively that until such proofs were produced no money should be payable by insurer, & for forfeiture of all rights of insured if the claim should not, for the space of three months after the occurrence of the fire, be in all respects verified in the manner aforesaid:—*Held*: neither the local agent for soliciting risks nor an adjuster sent for the purpose of investigating the loss under a policy of fire insurance, has authority to waive compliance with conditions precedent to the insurer's liability or to extend the time thereby limited for their fulfilment, & as the policy in question specially required it, there could be no waiver unless by indorsement in writing upon the policy signed as therein specified.—*COMMERCIAL UNION ASSURANCE CO. v. MARGESON* (1899), 29 S. C. R. 601.—*CAN.*

**h. — — —.]**—A policy of accident insurance with an insurance co. provided that it should be a condition precedent to recovery that notice should be given within 14 days of the accident, & in case of death the representatives should agree to a *post mortem* examination if required by insurers. Insured met with an accident & died about a month

116 E. R. 218, Ex. Ch.; *reversg.* S. C. sub nom. *R. v. SANDWICH CORPN.* (1846), 10 Q. B. 563.

*Annotation*:—*Generally*, *Mentd. R. v. Brighton Council* (1857), 7 E. & B. 249.

**1546. Recognition of true owner—Waiver of right to set up Real Property Limitation Act, 1833 (c. 27.)]**—*DOE d. GROVES v. GROVES*, No. 1142, *ante*.

**1547. Confirmation of agreement—Waiver of objection that agreement under mistake.]**—Pltf. & deft., being mtgor. & mtgee., entered into an agreement, being a compromise of a foreclosure suit, by which the mortgaged estate was to remain the absolute property of deft., subject only to this condition, that if pltf. paid a certain sum upon a day named, deft. should reconvey the estate, & deliver up the title deeds to pltf. A person was willing to purchase a portion of the estate from pltf. for more than the sum to be paid to deft.; but deft. refused to produce the title deeds to the proposed purchaser. Pltf., believing this difficulty could not be overcome, twelve days before the day named for the repurchase, entered into a fresh agreement with deft., securing to the latter far more favourable terms. The purchaser was, in fact, willing to waive the difficulty about the title deeds, & ready immediately to pay the money for the repurchase to deft., & he informed

afterwards. Notice of the accident was not sent to the co. until 3 days before death. After the death the co. wrote to the widow: "In accordance with the conditions of our policy, we desire a *post mortem* examination of deceased." The co. did not inform the widow that they intended to reserve the objection for want of timeous notice. The widow gave her consent to the *post mortem*, which took place. In an action on the policy brought by the widow as extrix:—*Held*: the co. by demanding a *post mortem* examination had waived the defence of timeous notice.—*DONNISON v. EMPLOYERS' ACCIDENT & LIVE STOCK INSURANCE CO.* (1897), 24 R. (Ct. of Sess.) 681; 34 Sc. L. R. 510.—*SCOT.*

**k. — — — Delay in taking proceedings.]**—*COUSINEAU v. CITY OF LONDON FIRE INSURANCE CO.* (1888), 15 O. R. 329.—*CAN.*

**l. — — — Waiver of condition.]**—A policy of insurance against loss by fire contained the following condition: in case of subsequent assurance on any interest in property assured by this co., whether the interest assured by the same as that assured by this co. or not, notice thereof must be given in writing at once, & such subsequent assurance, indorsed on the policy granted by this co., or otherwise acknowledged in writing; in default whereof such policy shall thenceforth cease & be of no effect. Assured effected subsequent assurance & verbally notified the agent, but there was no indorsement made on the policy, nor any acknowledgment in writing by the co. A loss having occurred, the damage was adjusted by the inspector of the co., & neither he, nor the agent, made any objection to the loss on the ground of non-compliance with the above condition. In a suit to recover the amount of the policy the co. pleaded breach of the condition, in reply to which pltf. set up a waiver of the condition, & contended that by the act of the agent & inspector the co. were estopped from setting it up:—*Held*: assured not having complied with the condition, the policy ceased & became of no effect on the subsequent assurance being effected, & neither the agent nor the inspector had power to waive a compliance with its terms.—*WESTERN ASSURANCE CO. v. DOULL*



pltf.'s solr. & deft. of this after the agreement, but before the day named for the repurchase. The agreement was, two months afterwards, embodied in a deed, which was executed by pltf. The purchaser filed a bill against pltf. for specific performance, in which all the facts appeared, & to which pltf. put in an answer stating, without question, her agreement with deft. She also raised a sum of money, which she was enabled to do by the agreement. Upon a bill, seeking to set aside the agreement & deed:—*Held*: whether there had or had not been sufficient grounds for impeaching the agreement, pltf., by confirmation & acquiescence, after a full knowledge of the circumstances, had lost all title to this relief.—*SMITH v. PAWSON* (1855), 25 L. T. O. S. 40, L. JJ.

**1548. Payment—Of one rate—No waiver of objection to another rate.]—**A meeting of all the ratepayers of the parish of H. was held on Nov. 11, 1853, to consider whether the parish should adopt the provisions of the Lighting & Watching Act, 1833 (c. 90), when two-thirds of those present, as required by sect. 8, did not adopt the Act. On Dec. 1 another meeting was called of those ratepayers who lived within a radius of half-a-mile from the market, being the town portion of the parish. At this meeting the Act was adopted by a majority of two-thirds of the persons present,

(1886), 6 R. & G. 478; 5 C. L. T. 539; 12 S. C. R. 446.—*CAN.*

**m. — Condition in policy as to uninhabited house—Notice to company—Refusal of company to entertain claim.]—**Under the circumstances of this case, the co. were bound by the notice given to their agent by insured that, being about to leave the country, his dwelling-house would be left uninhabited, but in charge of a neighbour, notwithstanding a condition in the policy that the same should be void if the co.'s consent to any dwelling being so left were not obtained from the head office & indorsed on the policy. The refusal of the co. to recognise or entertain pltf.'s claim, amounted to a waiver of their right to demand from him the details of his loss, prior to his bringing suit.—*AGRICULTURAL INSURANCE CO. OF WATERTOWN v. ANSLEY* (1888), 14 Q. L. R. 183; 15 Q. L. R. 256; 17 R. L. O. S. 108.—*CAN.*

**n. — Misdescription of risk.]—**Where an insurance has been treated as existing by the reference of a claim for loss to arbn. under a clause in the policy, insurer is estopped from setting up the defence of no contract on the ground of mistake made on the part of insured in describing the risk.—*CITY OF LONDON INSURANCE CO. v. SMITH* (1888), 15 S. C. R. 69.—*CAN.*

**o. — Refusal of mortgagees to accept policy—Reinsurance by mortgagees.]—**Pltf. who was insured against fire with defts. for \$1,000, effected a change of mtges. on the insured property. The new mtgees. refused to accept defts.' policy, & insured the property for the same amount with another co., notifying pltf. of the fact by letter. Pltf. showed the letter to defts.' secretary-treasurer asking him to bring the matter before the board, & was then informed by him that it would be all right & that there was nothing further to do. Subsequently pltf. paid an assessment on defts.' policy, which accrued after the notification of the double insurance, which was received by defts. & entered in their books. It did not appear that this payment was on account of losses incurred by defts. previous to the double insurance. Pltf.'s property was destroyed by fire the day Ontario Insurance Act, 1887, came into force:—*Held*: the policy being voidable at

& thereupon a rate was duly assessed upon S., who lived within the town district. This rate was paid, but on a second rate being made he refused to pay:—*Semble*: the payment by S. of one rate did not estop him from objecting to another one.—*R. v. DUNN* (1857), 7 E. & B. 220; 26 L. J. M. C. 74; 21 J. P. 565; 3 Jur. N. S. 341; 119 E. R. 1229; *sub nom.* *R. v. SUSSEX JJ.*, 28 L. T. O. S. 252.

*Annotation*:—*Mentd.* *R. v. Dickenson* (1857), 21 J. P. 389.

**1549. — Of deposit—& receipt of abstract of title—Waiver of right to recover deposit on ground of non-disclosure of name of vendor.]—**Pltf. signed a contract for the purchase of a leasehold shop from "the vendor," subject to particulars & conditions; & the auctioneer signed "as agent for the vendor." Pltf. paid a deposit, & the vendor's solr. forwarded to pltf.'s solrs. an abstract of title, & in reply they wrote: "Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next to examine abstract of title, with deeds, etc." After examining the abstract they forwarded requisitions, writing at the foot of them, "The above requisitions are made without prejudice to any question which may arise as to the contract for the purchase of the premises." Pltf. subsequently repudiated the contract, on

defts.' option, the receipt & entry in their books of the assessment after the secretary-treasurer was aware of the double insurance, operated as an estoppel upon them.—*MCINTYRE v. EAST WILLIAMS MUTUAL FIRE INSURANCE CO.* (1889), 18 O. R. 79.—*CAN.*

**p. — Premium payable by note.]—**B. applied to a mutual co. for insurance on his property for four years, giving an undertaking to pay the amounts required from time to time & a four months' note for the first premium. He received a receipt beginning as follows: "Received from B. an undertaking for the sum of \$46.50, being the premium for an insurance to the extent of \$1,500 on the property described in his application of this date" & then providing that the co. could cancel the contract at any time within 50 days by notice mailed to appct., & that non-receipt of a policy within the 50 days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B., & no policy was issued within the said time, which expired on Mar. 4, 1891. On Apr. 17, B. received a letter from the manager asking him to remit funds to pay his note maturing on May 1. He did so, & his letter of remittance crossed another from the manager, mailed at Owen Sound, Apr. 20, stating the rejection of his application & returning the undertaking & note. On Apr. 24 the insured property was destroyed by fire, B. notified the manager by telegraph, & on Apr. 29 the latter wrote returning the money remitted by B., who afterwards sent it again to the manager, & it was again returned:—*Held*: there was some evidence for the jury that the co., by demanding & receiving payment of the note, had waived the right to cancel the contract, & were estopped from denying that B. was insured.—*DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCN. v. BRADT* (1895), 25 S. C. R. 154.—*CAN.*

**q. — Part premium unpaid at time of loss by fire.]—***GREEN v. MANITOBA ASSURANCE CO.* (1901), 13 Man. L. R. 395.—*CAN.*

**r. — Payment of premium after due date—Thirty days' grace.]—***PEOPLE'S LIFE INSURANCE CO. v. TATTERSALL* (1906), 37 S. C. R. 690.—*CAN.*

**s. — Action by insurer — After**

*notice of non-observance of condition in policy.]—*An insurer of indemnity against accidents to employees, who takes charge of the defence of an action brought by an employee against insured for injuries by accident, & who continues in charge of such defence after learning of the non-observance by insured of a condition of the policy, may be estopped from denying that he has waived such condition.—*PARROTT v. WESTERN CANADA ACCIDENT & GUARANTEE INSURANCE CO.* (1920), 3 W. W. R. 113; 53 D. L. R. 533.—*CAN.*

**t. — Effected by ship broker — Non-disclosure of principal.]—**A ship broker effected an insurance on a vessel without disclosing the name of his principal. A loss ensued & the underwriters objected to the validity of the policy on the ground of misrepresentation. They afterwards wrote off a loss. Their broker communicated this to insured & offered to settle on condition of insured getting authority from the trustee of their broker, who had become bkpt., to receive the insurance, but under deduction of certain premiums due by him personally on transactions with which insured had no concern. This condition was refused by insured. It was not proved that the underwriters had impressed funds into the hands of their brokers to settle the loss, nor that they had authorised their brokers to waive the objection of misrepresentations:—*Held*: the underwriters were not barred by this adjustment from showing that this policy was *ab initio* void.—*LOSH, WILSON & BELL v. MARTIN* (1856), 19 Dunl. (Ct. of Sess.) 101; 29 Sc. Jur. 49.—*SCOT.*

**u. — Knowledge of agent of company — Of disability of assured — Whether company estopped.]—**In a proposal for a policy of insurance against accident a person wrote opposite the question, "Are there any circumstances which render you peculiarly liable to accident?" "Slight lameness from birth." He also signed the usual declaration as to the truth of his statements. As a matter of fact he had been very lame all his life. He was killed by an accident. In an action by his widow against the insurance co. it was proved that the co.'s agent, through whom deceased insured, was aware of

*Sect. 3.—By representation: Sub-sect. 3, I. (b) ii.]*

the ground (*inter alia*), that the contract did not disclose the name of the vendor, & brought an action to recover the deposit:—*Held*: pltf. could not recover, having chosen, knowing that the vendor's name did not appear in the memorandum, to pay the deposit & receive the abstract of title; & the expression in the correspondence, "without prejudice to any question which may arise as to the contract of purchase," could not have been meant or understood as referring to the validity of the contract.—*THOMAS v. BROWN* (1876), 1 Q. B. D. 714; 45 L. J. Q. B. 811; 35 L. T. 237; 24 W. R. 821.

*Annotations*:—*Consd.* *Chillingworth v. Esche* (1923), 129 L. T. 808. *Mentd.* *Rossiter v. Miller* (1877), 46 L. J. Ch. 228; *Monnickendam v. Leanse* (1923), 39 T. L. R. 445.

**1550. Recognition of void sale—Subsequent claim in trover.**—The trustee of a bkpt.'s estate applied, under Bkpcy. Act, 1869 (c. 71), s. 72, to the Ct. of Bkpcy. to declare a bill of sale, made by the bkpt. previously to his bkpcy., fraudulent & void as against himself as trustee, & to order the assignee under the bill of sale who had previously to the bkpcy. sold the goods comprised therein, to pay over the proceeds of the sale to himself as such trustee. The Ct. of Bkpcy. having

lameness:—*Held*: the agent's knowledge was also the co.'s knowledge, which barred the co. from taking advantage of the misdescription of the lameness.—*CRUIKSHANK v. NORTHERN ACCIDENT INSURANCE CO., LTD.* (1895), 23 R. (Ct. of Sess.) 147; 33 Sc. L. R. 134; 3 S. L. T. 167.—*SCOT.*

**b. Chattel mortgage—Mortgagor assigning goods when mortgage became due—Sheriff put in possession by mortgagee.**—R. being indebted to L. gave him a chattel mtge. & confession of judgment, & after the mtgo. became due made an assignment for the benefit of creditors to W. & S., who took possession of the goods. L. then put a writ of *fi. fa.* in the sheriff's hands, directing him to levy & make the amount of his debt out of the goods of R.:—*Held*: the fact of L. having put an execution in the sheriff's hands at his suit, directing to levy of the goods mtged. to him as the goods of R., did not estop him from setting up his title under the chattel mtge.—*WAKEFIELD v. LYNN* (1855), 5 C. P. 410.—*CAN.*

**c. Seizure of realty fixtures as chattels by sheriff—Purchasers estopped from asserting that execution did not attach.**—A steam saw mill having been burnt down, the engines & boilers were left, the boilers set in the brick wall of the furnace, & the engine supported by a frame which was bolted to timbers sunk in the ground. The sheriff seized both under a *fi. fa.* treating them as chattels, made two ineffectual attempts to sell, & returned goods on hand. On the return day of the writ they were removed by pltf., who had purchased by verbal agreement from the execution debtor; but the sheriff followed, retaken them as seized under the *fi. fa.*, & afterwards sold under a *ven. ex.* Pltfs. forbade the sale & brought trespass against the sheriff:—*Held*: while the engine & boiler remained fixed in the mill, after the fire, they partook of the realty, & could not be seized under the *fi. fa.* as chattels, & pltfs., having purchased them as chattels by oral sale, were estopped from ascertaining that the execution did not attach, because they were part of the realty.—*WALTON v. JARVIS* (1857), 14 U. C. R. 640.—*CAN.*

**d. Property belonging to plaintiff seized in execution—Purchase of property by plaintiff at sheriff's sale.**—Where property claimed by pltf. is seized by an execution against A.,

& pltf. forbids the sale, he is not, by purchasing at the sheriff's sale, estopped from denying it was A.'s property.—*PELTON v. TEMPLE* (1868), 1 Han. 274.—*CAN.*

**e. Sale of organ—Payment by note—Note discounted by vendors.**—Pltfs. sold to R. an organ on credit, & received from him a conditional hire receipt, which acknowledged the receipt of an organ on hire. It contained a stipulation that the signer might purchase the organ for \$130, payable in two equal annual instalments on Feb. 1, 1875, & Feb. 1, 1876, with interest; & it provided that it should remain pltfs.' property on hire until fully paid for, & that they might resume possession on default, although a part of the purchase-money might have been paid, or a note or notes given on account thereof. This receipt, & a note dated Feb. 17, 1874, payable four months after date, were signed by R. Some days afterwards it was discovered the receipt bore no date, whereupon pltfs.' bookkeeper filled in Feb. 25, 1874, the day on which the receipt & note were received by pltfs. Pltfs. discounted the note with their bankers, & at maturity obtained a renewal & returned it to R. The first instalment was paid, & renewals in whole or in part were given until Sept. 1875. In May, 1876, R. transferred the organ to G. & B. as security for a debt. He represented that he had paid the purchase-money, & produced as evidence the note of Feb. 17, 1874, which had been returned to him on its renewal, & they acted upon this misstatement. The note bore marks of having been discounted, but there was nothing to connect it with the organ. While the organ was in the possession of B., it was seized by pltfs.' agent & removed to the express office, from which it was taken by G., the other debt., under B.'s direction, & carried back to the house in which they both lived. Subsequently B. sold the instrument to G.:—*Held*: pltfs. were not estopped, for there was no representation by pltfs., & no neglect of any duty owing to defts.; & the discounting of the note was not a waiver of pltfs.' right of property.—*MASON v. BICKLE* (1878), 2 A. R. 291.—*CAN.*

**f. Assent to composition—Payable by instalments.**—Pltfs. being creditors of debt., an insolvent, assented to a composition & received their

made the order prayed for, & the assignee having accordingly paid over the proceeds of the sale:—*Held*: the trustee could not afterwards bring an action of trover against the assignee under the bill of sale to recover the difference between the value of the goods & the amount realised by the sale, inasmuch as by the proceedings in bkpcy. to recover the proceeds of the sale he had affirmed such sale & waived the tort.—*SMITH v. BAKER* (1873), L. R. 8 C. P. 350; 42 L. J. C. P. 155; 28 L. T. 637; 37 J. P. 567.

*Annotations*:—*Consd.* *Roe v. Mutual Loan Fund* (1887), 19 Q. B. D. 347. *Apld.* *Comitti v. Maher* (1905), 94 L. T. 158. *Consd.* *Re A Bkpcy. Notice*, [1924] 2 Ch. 76. *Refd.* *Rice v. Reed*, [1900] 1 Q. B. 54; *Re Wilson*, [1916] 1 K. B. 382; *Edwards v. Motor Union Insce.*, [1922] 2 K. B. 249. *Mentd.* *Mercer v. Vans Collina* (1897), 4 Mans. 363; *Davis v. Petrie* (1905), 93 L. T. 511.

**1551. Acceptance of notice of assignment—Of bond issued by insurance company—Waiver of right to set up against assignee equities between obligor & obligee.**—An insurance co. having power to issue bonds & other securities, issued to S. a bond conditioned to be void on payment to him, his exors., administrators, & assigns, of £250 on a future day. The bond was assigned, for value, to B., & notice of the assignment given at the office of the co. & accepted, but the assign-

composition, payable in several instalments on a claim filed in Sept. 1876, showing a balance of \$2,036 after giving credit for a "note endorsed by T. C." After the time for payment of the composition elapsed, pltfs. filed a second claim containing substantially the same debts, but omitting the credit of the note endorsed by T. C. The total amount of the debts in the second claim was \$2,831 from which pltfs. deducted the amount of the first claim leaving a balance of \$795:—*Held*: in filing the first claim, on which the T. C. note was credited, & receiving a composition on the claim as thus filed, pltfs. had waived the right to demand a composition on the sum that would have been due if they had not given credit for the T. C. note.—*ANDERSON v. SUTHERLAND* (1882), 3 R. & G. 356.—*CAN.*

**g. Sale of crude oil—Property in oil not to pass until payment—Sale by purchaser to third party.**—Pltf. consigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made certain payments. Before making such payments, however, A. sold the oil to debt., without the knowledge of pltf.:—*Held*: although defts. were purchasers for value from A., in belief that he was the owner & entitled to sell the oil in question, pltf., under his agreement with A., having retained the property in the oil, & not having done anything to estop him from maintaining his right of ownership, was entitled to recover from the purchasers the price of the oil.—*FORRISTAL v. McDONALD* (1883), 9 S. C. R. 12.—*CAN.*

**h. Assignment of patent—No recital of its validity.**—C. assigned an undivided interest in a patent to B. with whom he entered into partnership. During the partnership B. retained the interest so assigned, & upon a dissolution re-assigned simply what he had received without giving any covenant & without asserting by recital or otherwise the validity of the patent:—*Held*: B. was not estopped from disputing the validity of the patent.—*GRIP PRINTING & PUBLISHING CO. OF TORONTO v. BUTTERFIELD* (1884), 11 A. R. 145; *reversd.* 11 S. C. R. 291.—*CAN.*

**i. Whether defendant estopped—From objecting to validity of patent.**—Action to recover royalties alleged to be payable on threshing



ment was never registered. No inquiry was made as to the validity of the instrument before B. took the assignment. Before the bond fell due the co. went into liquidation. On an application by B.'s exors. to prove against the co.:—*Held*: the co. had, by accepting notice of the assignment, precluded themselves from setting up against the assignee equities between them & the original obligor attaching to the instrument itself.—*Re HERCULES INSURANCE CO., BRUNTON'S CLAIM*, (1874), L. R. 19 Eq. 302; 44 L. J. Ch. 450; 31 L. T. 747; 23 W. R. 286.

**1552. Putting *distringas* on shares—No waiver of right to disclaim shares.]**—By putting a *distringas* on shares a legatee does not accept the shares so that he cannot afterwards disclaim.—*HOBBS v. WAYET* (1887), 36 Ch. D. 256; 56 L. J. Ch. 819; 57 L. T. 225; 36 W. R. 72.

*Annotations*:—*Mentd.* Wolmershausen v. Gullick, [1893] 2 Ch. 514; *St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271.

**1553. Taking security—Waiver of lien for costs.]**—If a solr. takes from his client such a security as this solr. took, the *prima facie* inference is that he waives his lien (LORD ESHER, M.R.).—*BISSILL v. BRADFORD & DISTRICT TRAMWAY CO., LTD.* (1893), 9 T. L. R. 337; 37 Sol. Jo. 343, C. A.

*Annotation*:—*Refd.* *Re Morris*, [1908] 1 K. B. 473.

machines manufactured by deft., under an indenture made between pltf. B. & deft., whereby pltf. B. sold & transferred to deft. the right to manufacture & use a certain invention known as "Beam's Thresher"; & in consideration thereof deft. agreed to pay a named royalty on all machines manufactured "upon or after" the principle of the invention. Pltf. B. subsequently assigned to his co-pltf. F. one-half share or interest in the invention, & also one-half of the moneys then, & to grow, due under the indenture. Pltfs.' patent was for a combination, part only of which was used by deft. The machines in question were manufactured after the assignment to F. Deft. objected that the patent was invalid on the ground of want of novelty in the invention, & that it was not the subject of a patent; & also that the machine was not manufactured on the principle of pltfs.' patent. Parol evidence was admitted, subject to objection, that pltf. B. agreed to prevent any infringement of the patent, & if he failed to do so, he should not be entitled to any royalties. The agreement contained no such stipulation:—*Held*: deft., having used pltfs.' invention, could not raise the objection to the validity of the patent.—*BEAM v. MERNER* (1887), 14 O. R. 412.—CAN.

**l. Whether Crown estopped by receipt of dividend—Insolvency of bank.]**—The bank of P. E. Island became insolvent, & a winding-up order was made. The bank was indebted to the Crown in \$93,494.20 public moneys of Canada on deposit to the credit of the Receiver-General. The first claim filed at the request of resp., liquidator of the bank, did not specially notify the liquidator that the Crown would insist upon the privilege of being paid in full. Two dividends of 15 per cent. each were afterwards paid, & on Feb. 28, 1884, there was a balance due of \$65,426.95, & resp. was notified that the Crown intended to insist upon the prerogative right to be paid in full. At this time there was on hand a sum sufficient to pay the claim in full:—*Held*: the Crown had not waived its right to be preferred in this case by the form in which the claim was made, & by the acceptance of two dividends.—*R. v. BANK OF NOVA SCOTIA* (1885), 11 S. C. R. 1.—CAN.

**m. Payment of taxes under protest—Whether estopped from proceeding—To have assessment quashed.]**—The chamberlain may summarily issue execution for taxes not paid within a certain time after notice, & to avoid execution a bank paid the taxes under protest:—*Held*: such payment did not preclude them from afterwards taking proceedings to have the assessment quashed.—*Ex p. LEWIN* (1885), 11 S. C. R. 484.—CAN.

**n. Alienation of land devised—Partition of proceeds.]**—By will dated Feb. 11, 1833, testator devised, to M. his daughter by an Indian woman & to E. & M., his daughters by another woman, a defined portion of two seigniories & the balance of property to his sons W. & E. A short time after making this will testator, who was heavily in debt, received an unexpected offer of £15,000 for the seigniories, & sold at once, paid his most pressing debts, amounting to £5,400, & invested the balance in loans on real estate. At his death, his estate appearing to be vacant as regards the £9,600, a curator was appointed. On Sept. 27, 1839, the parties entitled under the will proceeded to divide & apportion their legacies, basing their calculations upon the approximate area of the seigniories devised, & received the collected part of the sums allotted to each by the partition. In an action brought by W., residuary legatee, against the curator, the ct. ordered the curator to account, which he did, deposited \$50,000, & other securities. On a report of distribution F. filed an opposition claiming his share under the will. Applt. contested, on the grounds that the legacies were revoked & that in his capacity of universal legatee of his mother, the legitimate child, he alleged, of testator & the Indian woman who was *commune en biens* with testator, he was entitled to one-half of the proceeds of the £9,600; & that in the event of his claim to legitimacy & revocation of the legacy being rejected, as by the will the daughters were exempt from the payment of the debts, he should, as representing one of the daughters, be entitled to her proportion of £15,000, the net proceeds of the sale:—*Held*: as applt. did not at the death of his mother, repudiate the partage to

**1554. Negotiations for settlement of claim—“Without prejudice”**—No waiver of right to rely on Public Authorities' Protection Act, 1893 (c. 61), s. 1 (a).]—Pltf. was injured by the negligence of defts.' servants when driving a motor fire-engine in the course of their duty. A correspondence, written "without prejudice," passed between the solrs. for the parties which contained suggestions for a settlement, the sum which pltf. would be willing to accept, & requests for particulars, & more than six months after the act complained of pltf. brought an action to recover damages for the injuries sustained. Defts. pleaded that the action not having been brought within six months, as required by above sub-sect., would not lie. Pltf. alleged that defts. had waived their rights under the Act or were estopped from relying on the Act. The Act was not mentioned in the correspondence. The jury at the trial found that defts. so conducted themselves as to lead pltf. to believe that they were prepared to entertain the payment of reasonable compensation on the particulars being furnished & in that way led pltf. or her solr. to postpone the issue of the writ:—*Held*: defts. were not estopped from setting up the Act.—*HEWLETT v. LONDON COUNTY COUNCIL* (1908), 72 J. P. 136; 24 T. L. R. 331.

**1555. Contract treated as subsisting—After time for performance expired.]**—By a contract coming

which she was a party, but ratified it & acted under it, he was estopped from claiming more than what was allotted to his mother.—*JONES v. FRASER* (1886), 13 S. C. R. 312.—CAN.

**o. Sale of goods—Acceptance of part.]**—Pltfs. agreed to deliver to defts. a quantity of Staffordshire Crown Bar iron of the T. K. brand. A part of the iron was delivered to defts., of which a considerable quantity was unbranded; defts., however, did not treat the absence of the brand as creating a difficulty in the way of their accepting the iron, but proceeded to test it, & finding it unsatisfactory, declined to receive any more, or to pay for the whole or part. This action was then brought for the contract price of the whole. The jury found that the iron was merchantable, but not equal in quality to the standard T. K. Crown brand:—*Held*: defts., having used in the manufacture of their machines, after the doubtful quality of the iron had been brought to their notice, & without the consent of pltfs., a considerable quantity of what had been delivered to them as part of an entire contract, had precluded themselves from objecting to the remainder of that which came into their possession.—*BERTRAM v. MASSEY MANUFACTURING CO.* (1888), 15 O. R. 516.—CAN.

**p. Warrant to confess judgment—Obtained by false representations—Election to treat judgment as binding.]**—*SMITH v. NICHOL* (1891), 23 N. S. R. 382.—CAN.

**q. Action to quash bye-law—Notice of abandonment.]**—Appets. for an order quashing the bye-law had, before moving, appeared on a notice given by them to name an arbitrator, before a judge, who raised the objection to the bye-law upon which they afterwards moved, whereupon they gave notice of abandonment:—*Held*: they were not estopped, but that they should have no costs.—*Re DAVIS & TORONTO CITY* (1891), 21 O. R. 243.—CAN.

**r. Licence to sell lands—Judgment creditors receiving payment—Out of proceeds of sale—Election to treat licence valid.]**—An extrix. obtained from the Probate Ct. a licence to sell real estate of a deceased testator for the payment of his debts. Judgment

**Sect. 3.—By representation: Sub-sect. 3, I. (b) ii. & iii.]**

within Sale of Goods Act, 1893 (c. 71), s. 4, & duly made in writing, pltf. agreed to sell to deft. 11,000 lbs. of cotton yarn, delivery to begin in Sept. 1918, & to be at the rate of 1,100 lbs. per week, failure to deliver within the stipulated time to render the contract liable to cancellation by deft., & incomplete deliveries not to be taken into account. Delivery should have been completed by Nov. 15, 1918. Pltf. delivered no yarn till Oct. 26, 1918, when he delivered 550 lbs., & thereafter on various dates from the end of Nov. 1918, to the end of Feb. 1919, he delivered seven further quantities averaging upward of 500 lbs. each. During all this period & the early part of Mar. 1919, deft. by his letters complained of the delay & asked for better deliveries, but thereby led pltf. to entertain the belief that the contract still subsisted, & to act upon that belief at expense to himself. On Mar. 13, 1919, deft., having given no previous notice requiring delivery in any reasonable time, wrote to pltf. cancelling the order, & he thereupon refused to take any further quantity of the yarn. Pltf. brought an action against deft. for damages for refusing to take the remainder of the yarn:—**Held**: although time

was of the essence of the contract with respect to delivery which should, *prima facie*, have been completed by Nov. 15, 1918, yet deft. by his letters, though written after that date, had waived his right to insist that the period for delivery terminated on that date, & was also thereby estopped from alleging that that period terminated on that date.—**HARTLEY v. HYMAN**, [1920] 3 K. B. 475; 90 L. J. K. B. 14; 124 L. T. 31; 30 T. L. R. 805; 25 Com. Cas. 365.

**Annotation**:—**Reid**. *Levey v. Goldberg*, [1922] 1 K. B. 688.

**1556. Interest accepted at lower rate—Waiver of right to claim higher rate.**—By a bond & disposition in security dated Nov. 9, 1910, a loan was effected on the security of a Scottish estate, the loan to be repaid on the following Whitsunday with interest during non-payment at the rate of 5 per cent. *per annum*, payable on Feb. 1, May 1, Aug. 1, & Nov. 1 in each year; & by a minute of agreement of even date with the bond it was agreed that on the punctual payment of interest as thereafter modified the loan should not be called in for fourteen years, & that the 5 per cent. interest stipulated for in the bond should be modified to 4 per cent. so long as the interest at lower rate was punctually paid. By a letter of Apr. 29, 1918, the lenders demanded payment

creditors of the devisees moved to set aside the licence, but failed on their motion, & again in appeal. The lands were sold under the licence & the extrix. paid part of the price to the judgment creditors, & they received the same knowing the moneys to have been proceeds of the sale of the lands. Afterwards the judgment creditors, still claiming the licence to be null, issued execution against the lands, & the purchaser brought an action to have it declared that the judgment was not a charge thereon:—**Held**: the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the licence as having been regularly issued, & were estopped from attacking its validity in answer to the action.—**CLARK v. PHINNEY** (1896), 25 S. C. R. 633.—**CAN.**

**s. Validity of lien—Acceptance of bond by respondent.**—Appl. under a contract in writing made by him with resp., for an agreed price per thousand, cut upon the land of resp. a quantity of logs, & hauled them to a portable mill upon the land, where they were manufactured into deals, planks, etc. The work was performed in part by applt. himself with his team, though there was no stipulation to that effect between the parties, but chiefly by labourers & teams, by the terms of the contract hired & paid by applt. A portion of the amount due to applt. under the agreement being unpaid, he caused an attachment to be placed upon the above mentioned deals, planks, etc., claiming a lien thereupon by virtue of Woodmen's Lien Act, 1894:—**Held**: resp. by giving a bond in order to secure the payment of the amount claimed if the lien should prove effectual, & thus obtaining a release of the deals, etc., attached, did not estop himself from disputing the validity of the lien.—**BAXTER v. KENNEDY** (1900), 35 N. B. R. 179.—**CAN.**

**t. Defects in building—Occupation of building.**—Action to recover balance of contract price for erection of a dwelling-house for deft. Objection was made to pltf.'s right to recover on account of defect in want of quarter round in the kitchen & bath room, & want of collar ties to the rafters. Deft. had been in occupation of the house for nearly two years without specifically mentioning these defects to supply which would have cost only

about \$7, &, when examined for discovery before the trial, had not mentioned them. They were raised for the first time at the trial. He had, however, often complained about the work as a whole:—**Held**: deft. waived the requirements as to the quarter round & collar ties.—**DAVIS v. O'BRIEN** (1908), 8 W. L. R. 562; 18 Man. L. R. 79.—**CAN.**

**a. Charge on land created by homesteader—Effect of charge.**—**AMERICAN ABELL CO. v. McMILLAN** (1909), 19 Man. L. R. 97.—**CAN.**

**b. Statutory permission to erect poles & wires—Electric light scheme—Acquiescence by municipality.**—By the statute incorporating a power co. which became amalgamated with defts., the co. had power to lay all necessary works for the transmission & supply of electricity, including poles & wires, which might, with the consent of the council of any municipality affected, be erected in any of the streets or highways of the province, & an appeal was given to the Lieutenant-Governor in Council in the event of a failure to agree "as to the terms upon which the co. should be allowed to exercise any of its franchises or rights hereby conferred": The co. never did apply to pltf. for permission to erect poles & wires for the purpose of distributing the current developed at their hydro-electric plant; & pltf. had never in terms consented to the erection of poles & wires for that purpose:—**Held**: there was no evidence upon which an estoppel could be based; & defts. had no right to erect poles or wires upon the city streets for the purpose of transmitting electric current developed outside the city for electric light or commercial power.—**WINNIPEG CITY v. WINNIPEG ELECTRIC RY. CO.** (1910), 13 W. L. R. 21; 16 W. L. R. 62.—**CAN.**

**c. Dealing with shares after allotment—Contributories.**—**Re EMPIRE ACCIDENT & SURETY CO., FAILL'S CASE** (1913), 24 O. W. R. 807; 4 O. W. N. 1411; 11 D. L. R. 847.—**CAN.**

**d. Damages for breach of contract—Delay in waterwork's scheme.**—**MACDOUGALL & CO. v. PENTICTON MUNICIPALITY** (1914), 27 W. L. R. 713.—**CAN.**

**e. Party to formation of company—Whether estopped from denying right—To negotiate sale.**—Deft. being a party to the formation of the holding co.

would be estopped from questioning the regularity of its creation or organisation, or its right to negotiate & make a proposed sale of the property.—**INTERNATIONAL MINING SYNDICATE v. STEWART** (1914), 48 N. S. R. 172.—**CAN.**

**f. Lien on land—Form of waiver signed—No consideration.**—**PALFREY v. BROWN** (1915), 31 W. L. R. 535.—**CAN.**

**g. Committee-man bound by bye-law which he enforced.**—Pltf., who was a committee-man of a co-operative society, had in such capacity given effect to a bye-law of the society dealing with the withdrawal of members & payment for their shares:—**Held**: he was estopped from setting up, in an action to set aside such bye-law, that it was irregular.—**MERRITT, ETC., SOCIETY, LTD. v. YOUNG** (1916), 34 W. L. R. 826; 10 W. W. R. 944.—**CAN.**

**h. Payment of taxes by wife—Property assessed in husband's name.**—A wife not legally separated from her husband who knows that property owned by her is assessed in his name & who pays the taxes on that property is estopped from denying the property was properly assessed.—**BYRNE v. CHATHAM TOWN** (1917), 44 N. B. R. 271; 33 D. L. R. 111.—**CAN.**

**k. Waiver of constitution of society—By subordinate branch.**—**NATIONAL TRUST CO. v. CANADIAN ORDER OF FORESTERS** (No. 2), [1923] 4 D. L. R. 978; 3 W. W. R. 1344.—**CAN.**

**l. Payment of tax under protest—Prior payment without protest.**—The levy of a tax in each year gives a new & distinct cause of action, & the payment of the tax without protest for one year does not bar a suit to recover a sum paid in a subsequent year under protest on account of a tax which was not legally chargeable for that year.—**PITAMBER-DAS v. JAMBUSAR TOWN MUNICIPALITY** (1892), 1 L. R. 17 Bom. 510.—**IND.**

**m. Action to set aside sale—Compromise not to contest validity of sale.**—In a proceeding to set aside a sale on the ground of irregularity & fraud, the judgment debtor put in a compromise petition to which the decree-holder consented, & it was agreed that the judgment debtor should have time up to a certain date to pay up the full decretal amount, & that then the sale should be set aside, but that, if he failed, the sale should stand good.



of the instalments of interest due on Feb. 1 & May 1, 1918, respectively, & stated that unless the interest were in future regularly & punctually paid interest at the rate stipulated for in the bond would be exacted. On May 13, payment of interest for the two quarters at the lower rate was made & was accepted without demur. On Aug. 7, the borrower sent a cheque for the interest due on Aug. 1, but it was returned as being neither timeous nor sufficient:—*Held*: the lenders were not estopped by their conduct from insisting on their strict rights under the bond.—*MACLAINE v. GARRY*, [1921] 1 A. C. 376; 90 L. J. P. C. 73; 124 L. T. 385; 37 T. L. R. 139; 26 Com. Cas. 148, H. L.

**1557. Taking possession of premises under clause in policy—Waiver of previous non-compliance with terms.**—Resp. insured goods in his business premises against fire under a policy issued by applt. co. The policy contained a condition that the assured was to give notice of any loss or damage under the policy forthwith, & within a specified time was to deliver detailed particulars; failure to observe this condition was to preclude the assured from recovering. There was a further condition, under the head "salvage," by which the co., so long as a claim was not adjusted, without incurring any further liability, might take possession of the premises & of any goods thereon at the date of the fire, with power to sell the goods. A fire having occurred resp. gave notice of it forthwith. Before the expiration of the time specified for the delivery of the particulars, applt. co. took possession under the condition above referred to; they remained in possession for four months, but did not sell any of the goods. Particulars were delivered by resp. but after the specified period. In an action upon the policy:—*Held*: applt. co. was precluded from relying upon the failure to deliver the particulars within the time specified.—*YORKSHIRE INSURANCE CO. v. CRAINE*, [1922] 2 A. C. 541; 91 L. J. P. C. 226; 128 L. T. 77; 38 T. L. R. 845; 66 Sol. Jo. 708, P. C.

### iii. By Omissions.

**1558. General rule.**—A party who knows that an irregularity has been committed must act with due diligence in applying to set aside the irregular

On the day fixed for payment the judgment debtor paid a portion of the money, & obtained further time from the ct. to pay the balance. On the judgment debtor's tendering the balance on the day fixed by the ct. for payment, the decree-holder refused to accept the money. The ct. tried the case on the merits, & set aside the sale:—*Held*: the judgment debtor was bound by the agreement & that he was estopped from contesting the legality of the sale.—*UTTAM CHANDRA KRITHY v. KHETRA NATH CHATTOPADHYA* (1901), 1 L. R. 29 Cal. 577.—IND.

**n. Right to transfer shares restricted—By Act of Parliament—Whether right can be waived.**—The restriction in Bank of New Zealand Share Guarantee Act, 1894, s. 4, providing "that every transfer of shares, after being approved by the directors, shall not be valid until authorised in writing by the President," cannot be waived, nor can a party be estopped from denying that the provision has been complied with, it being for the protection of the public in respect of the State guarantee conferred by the statute. Shortly after the passing of the above statute certain Bank of New Zealand shares were transferred to resps. who immediately transferred them to other persons. Both transfers were pre-

sented together to the bank for registration on July 13, 1894. The bank officials purported to accept & register the transfer to resps., but to reject the transfer from them. Neither transfer was approved by the directors or authorised in writing by the President, the then directors & President being in London. On Sept. 6, 1894, resps. received new scrip in their names & gave a receipt therefor. In Nov. 1894, the bank made a call, which it now sued for. Resps., as one defence, denied that they were shareholders when the call was made:—*Held*: even if the requirements of the statute could be waived, there was no waiver, & no facts existed which would estop resps. from setting up the provisions of sect. 4.—*BANK OF NEW ZEALAND v. LOGAN* (1900), 18 N. Z. L. R. 641.—N.Z.

**o. Lodging of proof of debt informally—In bankruptcy proceedings—Withdrawal of proof.**—Land was held by resp.'s wife in her own name, but she was a trustee of the land for resp. Resp. procured materials for the purpose of building on this land from applts., who claimed a lien on the land under Contractors' & Workmen's Lien Act, 1892. Resp. was subsequently adjudicated a bkpt., & at the first meeting of his creditors one of the applts. attended, & put in

proceeding or else he must be taken to have waived it (*COLTMAN, J.*).—*BATE v. LAURENCE* (1844), 2 Dow. & L. 83; 7 Man. & G. 405; 8 Scott, N. R. 122; 13 L. J. C. P. 147; 3 L. T. O. S. 103; 8 Jur. 759; 135 E. R. 169.

*Annotation*:—*Mentd.* *Alcock v. Sutcliffe* (1847), 16 L. J. Q. B. 129.

**1559.** —.]—Where a wrongful act has been completed without the knowledge or assent of the party injured, his right of action is not ordinarily barred by mere submission to the injury, or even by a voluntary promise not to seek redress; some conduct amounting to release or accord & satisfaction must be shown; although, on account of laches, relief may be refused under special circumstances.

Pltf., in the year 1868, consigned a ship to G. & Co. in China for sale, fixing a minimum price of \$90,000, & requiring cash payment. G. & Co. employed deft. in Japan to sell the ship, with the same instructions. This was done with the knowledge & consent of pltf. Deft., having vainly attempted to sell the ship on the terms mentioned, took her himself for \$90,000, & about the same time resold her to a Japanese prince for \$160,000, payable as to \$75,000 in cash, & the rest on credit. Pltf. was not informed that deft. had purchased the vessel himself, or that he had resold it, till June, 1869, after the transaction was completed. Deft. paid \$90,000 to G. & Co., who remitted it to pltf., & eventually obtained the whole amount of \$160,000 from the Japanese prince. In 1873 pltf. filed a bill in Chancery to compel deft. to account for the profit made by him in the resale of the ship:—*Held*: there had been no such acquiescence or laches on the part of pltf. as to disentitle him to relief.—*DE BUSSCHE v. ALT* (1878), 8 Ch. D. 286; 47 L. J. Ch. 381; 38 L. T. 370; 3 Asp. M. L. C. 584, L. JJ.

*Annotations*:—*Reid.* *Re Pepperell*, *Pepperell v. Chamberlain* (1879), 27 W. R. 410; *Blake v. Gale* (1885), 31 Ch. D. 196; *Allcard v. Skinner* (1887), 36 Ch. D. 145; *Northumberland v. Bowman* (1887), 56 L. T. 773; *Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117. *Mentd.* *The Fanny*, *The Mathilda* (1883), 48 L. T. 771; *Meyerstein v. Eastern Agency Co.* (1885), 1 T. L. R. 595; *Powell & Thomas v. Jones*, [1905] 1 K. B. 11; *Harris v. Fiat Motors* (1906), 22 T. L. R. 556; *Re Joicey*, *Joicey v. Elliot*, [1915] 2 Ch. 115; *Keen v. Mear*, [1920] 2 Ch. 574; *Prager v. Blatspiel*, *Stamp & Heacock*, [1924] 1 K. B. 566.

an informal proof of the debt due by resp. to applts. The proof of debt was afterwards withdrawn by applts., & they decided to rely on their lien. In proceedings by them to enforce the lien:—*Held*: the lodging of the proof of debt did not estop applts. from enforcing the lien.—*BONTHORNE v. MAUDE* (1906), 26 N. Z. L. R. 317.—N.Z.

**p. Discharge of debt—Lex loci contractus—Execution—Rights of foreign trustee.**—M., being resident in T. pledged shares to C. in security of a debt incurred there, & afterwards his estate was sequestrated as insolvent by the High ct. of the T. C. neither proved his debt nor realised his security. M., without first obtaining his rehabilitation, came to reside in Cape Colony:—*Held*: the retention of the shares by C. did not amount to a waiver of his right to sue for the amount of the debt.—*CAPE OF GOOD HOPE BANK v. MELLE* (1892), 10 S. C. 280.—S. AF.

### PART VI. SECT. 3, SUB-SECT. 3.—I. (b) iii.

**q. No objection taken—To irregular valuation.**—T. the owner of an original Crown grant in the municipality of G. had erected a shop on one corner of the land, but did not erect any division fence between the

*Sect. 3.—By representation: Sub-sect. 3, I. (b)*

**1560. No objection taken—To secret marriage of infant—Infant entitled to portion on marriage with parent's consent.]—FARMER v. COMPTON (1625), 1 Rep. Ch. 1; 21 E. R. 490.**

*Annotations:—*Refd. Daley v. Desbouverie (1738), 2 Atk. 261; Hervey v. Aston (1738), West temp. Hard. 350; Dashwood v. Bulkeley (1804), 10 Ves. 230; Re Brown, Ingall v. Brown (1904), 1 Ch. 120.

**1561. — To form of account.]—A. & B. & Co., country bankers, had a cash account with C. & Co., London bankers, who were in the habit of transmitting to the former monthly statements of mutual debits & credits. A. died, leaving a large balance due from himself & partners to C. & Co., who, for two months afterwards, made no alteration in their own books as to the mode of keeping the account, but continued it as before. In the interval, money was transmitted to C. & Co., from the country bank, sufficient to pay off the balance due from the firm at the time of A.'s death. During the two months no accounts were transmitted to the country bank, but at the end of that time, two separate accounts were sent, one called the old account, made up to the death of A., without giving credit for the money received since his death, in liquidation of the balance at that time due from the firm; & the other called the new, comprising the two months, giving credit for the sums received during that period. In an action by C. & Co., on a joint & several indemnity-bond, given by A. & B. against the heirs of A. for the balance due at his death:—*Held*: C. & Co., by continuing their own private account against A. & B. for two months after the death of A. as theretofore, were not estopped from suing his heirs.—SIMSON v. INGHAM (1823), 2 B. & C. 65; 3 Dow.**

workshop & the rest of the land. The G. council rated T. in respect of a portion of the grant as being unimproved land. T. made an objection to the assessment by letter to the Council but did not appeal in accordance with Municipal Corpn. Act:—*Held*: although the valuation was irregular yet as deft. had not availed himself of the right of appeal given by the statute under which the rate was imposed, it was not open to him to raise such defence on an action for the recovery of the rate.—GUILDFORD MUNICIPAL COUNCIL v. TRAYLEN (1908), 10 W. A. L. R. 87.—AUS.

*r. — breach of condition.]* Conditions in a policy for avoiding the same have, in case of a breach, the effect of avoiding the policy, not *ipso facto*, but if the insurance co. so elect. Where breaches of such conditions had occurred before loss, & the co., after being notified of such breaches, took no notice thereof, but called for the proofs of loss which were required on the footing of the policy being a subsisting instrument, & these were furnished:—*Held*: the co. had precluded themselves from afterwards setting up the forfeiture.—CANADA LANDED CREDIT CO. v. CANADA FARMERS' MUTUAL STOCK INSURANCE CO. (1870), 17 Gr. 418.—CAN.

his goods co., & in other cos. notice to defendants. He afterwards assigned the goods to M. The deed of assignment provided that D. should transfer all policies to M. The policy provided that all other insurances should be notified in writing, otherwise the insured should take no benefit by the policy. The insurance agent, with knowledge of the assignment & the other insurances, received a premium from M., & agreed to hold him insured. M., after the fire,

assigned all his interests to trustees for his creditors:—*Held*: M. was insured, & the co. was estopped from insisting on the absence of a notice in writing of other insurances.—MURCHIE v. VICTORIA INSURANCE CO. (1885), 4 N. Z. L. R. 114.—N.Z.

*t. — To proofs of loss.]—Held*: the fact of the co., after receiving the insured's proofs of loss, remaining silent for some months & until action brought, was no waiver of right to receive proper proofs.—MASON v. ANDES INSURANCE CO. (1873), 23 C. P. 37.—CAN.

*a. — —.]—The proofs of loss did not comply with the conditions of the policy sued on, but they were in accordance with printed forms furnished to pltf. by defts.' agent. The co. received them on Aug. 6, & on Nov. 11 informed pltf. that they had placed the matter in the hands of the Insurance Co. for adjustment "saving their rights at law"; but they took no objection to the sufficiency of the proofs until the trial:—*Held*: in the circumstances they were estopped from taking advantage of the defect.—SHANNON v. HASTINGS MUTUAL INSURANCE CO. (1876), 26 C. P. 380; 2 A. R. 81.—CAN.*

*b. — —.]—Where insurers repudiate liability on a policy they cannot object that proofs of loss have not been furnished.—MORROW v. LANCASHIRE INSURANCE CO. (1899), 26 A. R. 173; affd. 2 S. C. R. 294.—CAN.*

*c. — To arbitration on claim—After execution of composition deed.]—After the assignment & execution of the deed of composition & discharge, deft., the insolvent, permitted an arbitration on pltf.'s claim to be proceeded with, personally attending the arbitration, & not setting up the deed as a bar:—*Held*: this would preclude deft. from afterwards setting up such*

& Ry. K. B. 249; 1 L. J. O. S. K. B. 234; 107 E. R. 307.

*Annotations:—*Refd. Hume v. Bolland (1826), Ry. & M. 371; Field v. Carr (1828), 5 Bing. 13; Friend v. Young, [1897] 2 Ch. 421; London & Westminster Bank v. Button (1907), 51 Sol. Jo. 466. *Mentd.* Simson v. Cooke (1824), 1 Bing. 452; Pemberton v. Oakes (1827), 4 Russ. 154; Smith v. Wigley (1833), 3 Moo. & S. 174; Chitty v. Naish (1834), 2 Dowl. 511; Mills v. Fowkes (1839), 1 Arn. 62; Bank of Scotland v. Christie (1841), 1 Cl. & Fin. 214; Nash v. Hodgson (1855), 6 De G. M. & G. 474; Bell v. Buckley (1856), 11 Exch. 631; Siebel v. Springfield (1863), 3 New Rep. 36; Aberystwith & Welsh Coast Ry. v. Piercy (1864), 2 Hem. & M. 713; City Discount Co. v. McLean (1874), L. R. 9 C. P. 692; Hooper v. Keay (1875), 1 Q. B. D. 178; Prince v. Oriental Bank Corpn. (1878), 3 App. Cas. 325; Brown, Janson v. Cama & Salberg (1890), 6 T. L. R. 250; Smith v. Betty, [1903] 2 K. B. 317; Seymour v. Pickett, [1905] 1 K. B. 715; Deeley v. Lloyds Bank, [1912] A. C. 756.

**1562. — To mode of loading cargo.]—Where the cause of complaint, in an action on a charter-party by the freighters against the owner of a vessel, was, that a full cargo was not taken in, in consequence of arrangements in the stowage varying from those contemplated by the charter-party:—*Held*: pltf. were not entitled to recover, as it appeared that one of them & the broker, who managed the business, were present from time to time during the loading & cognisant of the arrangements, but did not make any objection.—HOVILL v. STEPHENSON (1830), 4 C. & P. 469, C. P.**

**1563. — To jurisdiction of board.]—The ct. of directors of the East India Co. sent to the board of control for their approval a draft of a dispatch headed "Political Department" which that board altered & returned to them to be transmitted to India pursuant to 33 Geo. 2, c. 52, s. 12. The directors objected to the alterations but not to the jurisdiction of the comrs. to make them; & the alterations being insisted on by the board, the directors afterwards rescinded the resolution on**

deed as a ground for setting aside a *fi. fa.* against his issued on the award.—PIGEON v. MARTIN (1875), 25 C. P. 233.—CAN.

*d. — To improper stamp.]—The note upon which this action was brought had not been properly stamped, & it was urged that it could not be a payment or satisfaction of one of which it was intended to be a renewal:—*Held*: pltf. being aware of the objection to the unstamped note, & receiving it in lieu of the paper which he held, could not urge this as an objection, he having declared upon it as a promissory note.—BAILLIE v. DICKSON (1882), 7 A. R. 759.—CAN.*

*e. — To sale under provision in chattel mortgage.]—The tenant having given a chattel mtge. of a building, the building was about to be sold at public auction, during the term, under a provision in the mtge. The landlord, hearing of it, went to the place advertised, where he was informed that the wife of the tenant was going to buy in the building at the auction. Satisfied with this he went away before the sale, making no objection to it & taking no steps to warn bidders of any claim that the building had become part of the freehold, & had passed to him as such; but, on the contrary, giving the bailiff conducting the sale a distress warrant, under which the landlord was to be paid a portion of the proceeds of the sale:—*Held*: as against a purchaser ignorant of the landlord's rights, the landlord was estopped from claiming the building as a part of the freehold, & from asserting any right to restrain the removal during the term.—GRAY v. MACLENNAN (1886), 3 Man. L. R. 337.—CAN.*

*f. — To wrongful assessment.]—A ratepayer, being a Roman Catholic,*



which the dispatch was founded & left it to the comrs. to originate the dispatch pursuant to sect. 15 of the statute. On motion for a *mandamus* to the directors to transmit the altered dispatch:—*Held*: the directors having admitted the jurisdiction of the board with respect to the dispatch & only contested the alterations were estopped from afterwards contending that the dispatch was not one over which the board had authority.—*R. v. EAST INDIA CO. (DIRECTORS) (1833)*, 4 B. & Ad. 530; 1 Nev. & M. K. B. 335; 2 L. J. K. B. 78; 110 E. R. 554.

*Annotation*:—*Mentd. Ex p. Napier (1852)*, 18 Q. B. 692.

1564. — To tender—Of shares.]—*JACKSON v. JACOB*, No. 1485, *ante*.

— — — — —.]—*See, further, STOCK EXCHANGE.*

— — — — — Of bank-note.]—*See BANKERS*, Vol. III., p. 198, Nos. 430, 431.

1565. — That party rated not occupier or owner—Objection taken to validity of rate—No waiver of objection to validity of distress warrant.]—A. was rated to the sewers rate in respect of certain lands, of some of which he was neither the owner nor the occupier; he traversed the presentment of the jury, under the Sewers Acts, "that such lands were benefited by the works of the Comrs. of Sewers"; but did not object that he was not

& appearing in the assessment roll as such & as a supporter of separate schools, who has not given the notice required by R. S. O. 1887, c. 227, s. 40, is not, nor are other ratepayers, estopped from claiming, in the following or future year, that he should not be placed as a supporter of separate schools with reference to the assessment of such year, although he has not given notice of withdrawal mentioned in R. S. O. 1887, c. 227, s. 47.—*Re ROMAN CATHOLIC SEPARATE SCHOOLS (1889)*, 18 O. R. 606.—*CAN.*

g. — — — — —.]—Where an assessment roll covering over half a million dollars has been duly confirmed without objection on the part of a ratepayer that his property has been too highly assessed by a comparatively trivial amount, he cannot be permitted afterwards to urge that objection before the cts. upon an application to have the assessment roll set aside.—*MONTREAL CORPN. v. BÉLANGER (1889)*, 30 S. C. R. 574.—*CAN.*

h. — — — — — To execution sale.]—A creditor who was a party to an action against the lessor in which the property was sold in execution subject to the lease & who did not oppose such sale cannot, afterwards, contest payments of the amount of the policy on the ground of fraud.—*LANGELIER v. CHARLEBOIS (1903)*, 34 S. C. R. 1.—*CAN.*

k. — — — — —.]—*Held*: judgment debtor who might have raised objections to a sale in execution of a decree against him, but who had refrained from doing so, & who might have appealed against the order for sale, had no right, after the sale had been carried out, to prefer an objection that the property sold was not legally saleable.—*UMED v. JAS RAM (1907)*, 1 L. R. 29 All. 612.—*IND.*

l. — — — — — To defect in goods—Sold under warranty.]—The purchaser of goods subject to a latent defect, sold with a warranty, is not estopped from claiming for breach of the warranty, when sued for the price, by having received the goods without objection made at the time.—*SMITH v. ARCHIBALD (1907)*, 2 E. L. R. 397; 41 N. S. R. 211.—*CAN.*

m. — — — — — To improper seizure of goods.]—Deft. M., the bailiff of other defts., was instructed to seize the goods in a certain hotel which were

liable to seizure under a chattel mtgo. made by J. to the other defts., default having been made. M. seized not only the goods of J. mortgaged by him, but also other goods in the hotel not included in the mtgo. & belonging to pltf., who had become the partner of J., & afterwards bought out J.'s interest in the hotel business. M. made out an inventory of the goods seized & posted it up in the hotel, & advertised a sale of the goods to take place on Jan. 21. On Jan. 20, defts. abandoned the seizure & restored all the goods to pltf. Pltf. brought this action for improper seizure, & injury to his credit & business:—*Held*: when the seizure was made pltf. was present, he was shown the mtgo. made by J., & the instructions to M., & he did not make known to M. that he was seizing goods not covered by the mtgo., nor did he make any claim to the goods not included in the mtgo., & the goods were of such a character that, unless they were separated by pltf., it was difficult, if not impossible, for M. to distinguish them; & pltf. was estopped by his conduct from impeaching the validity of the sale; & defts. should have leave to amend their defence by pleading the estoppel.—*BARON v. DREWRY (1911)*, 16 W. L. R. 709; 4 Sask. L. R. 717.—*CAN.*

n. — — — — — To discharge of water on land—Whether waiver per se.]—At the trial of an action for wrongfully discharging water on to pltf.'s land from adjoining lands belonging to defts., it was admitted by pltf. that his predecessor in title knew of the construction in 1875 of certain drainage works tending to bring water on to his land shortly after such works were executed, & did not object; & that neither the predecessor nor pltf., who became entitled in 1891, objected to the works until 1893. Defts. contended that these admissions established the defence of acquiescence:—*Held*: they were not enough for that purpose, as there might have been circumstances that would have prevented such non-objection from amounting to acquiescence.—*SMITH v. OTAGO PRESBYTERIAN CHURCH BOARD OF TRUSTEES (1896)*, 15 N. Z. L. R. 680.—*N.Z.*

o. — — — — — To purchase of annuity bond.]—A. executed a trust deed for behoof of his creditors, under which a clear annual sum of £600 was provided to him, & acceding creditors bound

the occupier or the owner of part of the lands in respect of which he was rated. When summoned, also, before the comrs. for payment of the whole sum £132, at which he was rated, he only objected to the validity of the rate, & thereupon the comrs. issued their warrant of distress to levy the £132 upon the goods of A.:—*Held*: A. was not estopped under the above circumstances from objecting that the warrant was void.—*TUCKER v. MAITLAND (1854)*, 3 C. L. R. 345; 24 L. T. O. S. 111; 18 J. P. Jo. 757.

1566. — To notice requiring execution of works by frontagers.]—*BRISTOL CORPN. v. SINNOTT*, No. 1465, *ante*.

1567. Delay.]—B., by his will, devised his freehold estates to his wife M. for life, & subject thereto, he devised the same to M., & her heirs in trust to be divided to & among all his children who should be living at the death of M., in such shares, etc., as M. should by will appoint. In Dec. 1824, M. purchased of the children their reversionary interests in the estates at an undervalue. In June, 1827, M. died, having devised all her real estates to T. in fee, subject to a charge of £2,000 & other incumbrances. In 1838 H., who had married one of the daughters of testator & had joined in the conveyance to M., became insolvent; & in Jan. 1842, the creditors' assignee under the

themselves not to raise action or diligence against A., or his estate; he afterwards along with two co-obligants, granted bond for an annuity of £221, in consideration of a sum of £2,000 paid to one of these co-obligants, during whose life the annuity was payable; B. an acceding creditor of A. subsequently became trustee under the above trust deed, & after some years, during which the annuity was fully paid up, he bought, on his own account, the bond of annuity, paying for it the full original price of £2,000; A. was aware of this transaction, & made no objection to it at the time; after B.'s death, his trustees & exors. raised action & diligence against A. for arrears of the annuity:—*Held*: a plea by A. to the effect that B. as trustee aforesaid, could only acquire the bond of annuity for behoof of A. & the trust, & was barred by the deed of accession from proceeding against A.'s person or estate, should be repelled as inapplicable to the case.—*HAMILTON v. WRIGHT (1839)*, 1 Dunl. (Ct. of Sess.) 668.—*SCOT.*

p. — — — — — To accountant's report.]—*Held*: an objection to an accountant's report, which was competent to have been stated before the pronouncing of a decree by the ct., approving of the report generally, but was omitted, cannot afterwards be brought forward.—*ROBERTS v. CUTHBERT (1840)*, 15 Fac. Coll. 1488.—*SCOT.*

q. — — — — — To validity of warranty.]—*BUSHBY v. GUARDIAN ASSURANCE CO., LTD. (1916)*, App. D. 488.—*S. AF.*

1567 i. Delay.]—In an action against the indorser of a note, it appeared that his name had been written by the maker, his nephew, & there was no evidence of express authority; but it was proved that deft. had before & afterwards indorsed for his nephew on purchases by him from these pltf.s, & that when payment of this note was demanded from him he had asked for time, & had not denied his indorsement until some months afterwards, when the maker had absconded. His excuse was that he kept no memorandum of his indorsements, & supposed it was right:—*Held*: deft. had precluded himself by his conduct from disputing his liability.—*PRATT v. DRAKE (1859)*, 7 U. C. R. 27.—*CAN.*

1567 ii. — — —.]—Action for damages

*Sect. 3.—By representation: Sub-sect. 3, I. (b) iii. & J.]*

insolvency filed his bill against T., to set aside the transaction of Dec. 1824, on the ground of its being a purchase by a trustee from her *cestui que trust*, while the influence was subsisting, of her reversionary interests at a gross undervalue:—*Held*: though the vendor would have had a right to rescind the transaction, if recent, yet the unexplained acquiescence of more than fifteen years, from the death of M. to the filing of the bill, amounted to a waiver of that right: & in the absence of fraud, etc., the poverty of the vendor during the whole of that period was no sufficient excuse for the delay.—*ROBERTS v. TUNSTALL* (1845), 4 Hare, 257; 14 L. J. Ch. 184; 4 L. T. O. S. 412; 9 Jur. 292; 67 E. R. 645.

*Annotations*:—*Consd.* *Harcourt v. White* (1860), 28 Beav. 303; *Re Agriculturists Insee., Brotherhood's Case* (1862), 31 Beav. 365. *Reid.* *Smith v. Bakes* (1855), 20 Beav. 568; *Clanricarde v. Henning* (1861), 30 Beav. 175; *Agriculturist Cattle Insee., Spackman's Case* (1865), 34 L. J. Ch. 323; *Browne v. McClintock* (1873), L. R. 6 H. L. 456; *Carey v. Cuthbert* (1873), 22 W. R. 249.

1568. —.]—In 1826 pltf., as next friend of his daughter, then an infant, instituted a suit, to which he was not a party, in which she claimed to be equitably entitled in fee to two-fourth parts of certain freeholds vested in trustees, he having been previously informed that there was a question whether he was not entitled to it as tenant by the curtesy. A decree for partition, whereby two-fourths of the estate was allotted to his daughter in severalty, was obtained in 1830; & it was also thereby declared that the daughter, on the death of her mother, became entitled to two-fourths of the estates in fee, & to the rents & profits thereof.

In 1833, the father still acting as next friend for his daughter in the suit, obtained an order of the ct. approving of a deed of partition containing a conveyance by the trustees of two-fourths of the estate in question to the daughter in fee, & declaring that the father, his exors., etc., should have the use of the same for ten years if the daughter should so long live & remain an infant & unmarried, & from & after the happening of either of those events to the daughter in fee; & providing that the rents received by the father should be applied at the discretion of the father towards the maintenance of the daughter. This deed was acted upon until the daughter attained the age of 21 in 1843; after which period, until her marriage without her father's consent, in 1847; he accounted to her for the rents. The daughter & her husband subsequently brought an ejectment against the father, who thereupon, in 1852, filed a bill, alleging that he was entitled to the estate as tenant by the curtesy; & his title was not concluded by the suit commenced in 1826, to which he was not a party, inasmuch as it had been filed

by him as next friend in ignorance of his own right to curtesy:—*Held*: he was not entitled as tenant by the curtesy, inasmuch as the proceedings he had taken, & his conduct from the filing of the bill in 1826, were equivalent to a waiver, as against his daughter & her husband, of his right to curtesy; & his representatives to his daughter were of such a character as that the marriage must be considered to have been contracted by her upon the faith of their correctness.—*STONE v. GODFREY* (1854), 5 De G. M. & G. 76; 2 Eq. Rep. 866; 23 L. J. Ch. 769; 23 L. T. O. S. 289; 18 Jur. 524; 43 E. R. 798, L. JJ.

*Annotations*:—*Reid.* *Bill v. Richards* (1857), 2 H. & N. 311; *Re Saxon Life Assce. Soc., Anchor Assce. Case, Era Assce. Soc.'s Case, Re Era Assce. Soc., William's Case, Anchor Assce. Case* (1863), 32 L. J. Ch. 206. *Mentd.* *Rogers v. Ingham* (1876), 3 Ch. D. 351; *Re Bowman, Re Lay, Whytehead v. Boulton* (1889), 60 L. T. 888; *Gas Light & Coke Co. v. Met. Ry.* (1892), 9 T. L. R. 98; *Allcard v. Walker*, [1896] 2 Ch. 369; *Carnell v. Harrison*, [1916] 1 Ch. 328; *Re Musgrave, Machell v. Parry*, [1916] 2 Ch. 417; *Burroughs v.*

1569. —.]—In 1838 a railway co. purchased land & covenanted with the vendor that it should be for ever thereafter used & employed as & for a first-class station or place for the purpose of taking up & setting down passengers travelling along the railway:—*Held*: (1) the term "first-class" related to the taking up & setting down passengers, & defts. must in this respect put the station on the same footing as the most favoured station on the line; (2) it did not relate to building & other accommodation of that nature, & even assuming it to do so, the vendor must be taken, after the lapse of time, to have been satisfied with the buildings provided.—*HOOD v. NORTH EASTERN RY. CO.* (1870), 5 Ch. App. 525; 23 L. T. 206; 18 W. R. 473, L. C. & L. J.

*Annotation*:—*Generally, Mentd.* *Kennard v. Cory*, [1922] 2 Ch. 1.

1570. —.]—Where a suit is instituted for specific performance of a contract, & the defence set up is, that the contract was made in consideration of certain promises which pltf. had not fulfilled, a delay to defeat that defence must be such as amounts to an acquiescence in the non-fulfilment of the alleged promises. Where the subject of the contract was an agreement to take the lease of a house, & the proposed tenant went into possession at once, & occupied for two years, but, while continuing in occupation, from time to time called on the landlord to fulfil promises which the tenant alleged to have been the inducement for the contract & paid rent, but always paid it under protest:—*Held*: these circumstances did not amount to such acquiescence as to prevent the tenant from ultimately refusing to perform the contract, but that the payments were to be treated as merely made in respect of the actual use & occupation, & in no other character.—*LAMARE v. DIXON* (1873), L. R. 6 H. L. 414; 43

for negligence

for negligence. *Pltfs.* for some time had been shipping similar produce over defts.' line & C. N. R. to S. The shipping bill in this instance did not indicate any particular way. Defts. without advising *pltfs.* sent this perishable produce to S. over their own line, causing considerable delay:—*Held*: defts. were estopped from raising defence of want of notice of damage.—*VERNON FRUIT CO. v. CANADIAN PACIFIC RY. CO.* (1909), 12 W. L. R. 445.—*CAN.*

1567 *iii.* —.]—Where a mtgee. after an order nisi for foreclosure, but before order absolute, sold the land in 1906 to the knowledge of the mtgor., who took no action till 1911, when he brought an action to redeem:—*Held*:

the mtgor. had abandoned his rights & was not entitled to redeem.—*WILLIAMS v. SUN LIFE ASSURANCE CO. & SPENCER (DAVID), LTD.* (1911), 16 B. C. R. 370.—*CAN.*

*r. Failure to set up possessory title*—*In notice before trial.*—A line run without legal authority between lots 5 & 6 acquiesced in for years, was subsequently found to be erroneous, & a new line was run according to law, which took away land from the supposed lot 5, & added to 6. Pltf. sought to recover the land so taken, which was clearly a part of lot 6, claiming right by possession, though his grantor never pretended to have any right thereto, & he did not claim by possession in his notice:—*Held*: pltf. not having set up a possessory

title in his notice, was debarred from doing so at the trial.—*SMITH v. CLUXTON* (1861), 10 C. P. 538.—*CAN.*

*s. Money paid in mistake*—*No investigation demanded*—*No bar to recovery.*—*Pltfs.* were sureties for the payment of certain moneys due by the bank of L. to deft. bank, for which deft. bank held collateral security. Acceptances held by defts. as collateral security for one of the amounts were realised upon & appropriated to a different indebtedness without *pltfs.* consent. *Pltfs.* in ignorance of this fact, paid a balance demanded from them by defts., & afterwards brought action to recover the same as paid under mistake of fact:—*Held*: *pltfs.* were not estopped from recovering by reason of their not having demanded



L. J. Ch. 203 ; 22 W. R. 49, H. L. ; *reusg.* S. C. *sub nom.* DIXON v. LAMARE (1871), 19 W. R. 942, L. C.

*Annotations* :—*Reid*. Jones v. Joseph (1918), 87 L. J. K. B. 510 ; Abram S.S. Co. v. Westville Shipping Co., [1923] A. C. 773. *Mentd.* Hembrow v. Talbot (1892), 36 Sol. Jo. 712.

**1571.** —.]—In 1880 certain property was demised by S. to M. for the term of 21 years from 1876, & S. thereby covenanted with M. that if M., his exors., administrators, or assigns, should at any time during the term be desirous of purchasing the freehold of the property at a certain price, & should give six months' notice in writing of his or their intention so to purchase the premises to S., his heirs or assigns, he or they would convey the freehold to M., his heirs & assigns upon payment of such sum. The freehold of the property was shortly afterwards conveyed to deft., subject to the lease. The lease was assigned among other properties by M. to a co. in 1889. The co. went into liquidation in 1895. In that year its liquidator agreed to sell all its undertakings & assets to a new co., & later, by a trust deed, the old co. demised, & the new co. demised & confirmed to the trustees of a deed of trust the lease for the unexpired residue of the term except the last day thereof. On Dec. 14, 1896, the secretary of the new co. wrote to deft.'s son on her behalf in reference to the purchase of the freehold, & the new co. relied upon this letter as sufficient service of notice under the option to establish a contract as against deft. Deft., who was not aware, till the trial, of the circumstances under which the alleged notice had been given, contended that no valid notice had been given under the lease :—*Held* : that on the facts of the case deft. was estopped from raising the objection that the notice was not properly given.—*FRIARY, HOLROYD & HEALEY'S BREWERIES, LTD. v. SINGLETON*, [1899] 2 Ch. 261 ; 68 L. J. Ch. 622 ; 81 L. T. 101 ; 47 W. R. 662 ; 15 T. L. R. 448 ; 43 Sol. Jo. 622, C. A. *Annotations* :—*Mentd.* Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608 ; Woodall v. Clifton, [1905] 2 Ch. 257.

#### *J. Other Acts and Omissions.*

**1572. Renunciation of administration with will annexed.**—A legatee, having renounced administration *cum testamento annexo*, is not barred thereby from contesting the validity of a will.—*GASCOYNE v. CHANDLER* (1755), 2 Lee, 241 ; 161 E. R. 327.

**1573. Admission of receipt of money—Insurance premium.**—Although generally an underwriter having subscribed a policy, & thereby confessed the receipt of the premium, is estopped from afterwards claiming the premium against the assured, yet where, by the fraud of the assured the underwriter is induced to give credit for the premiums to the broker, & the broker to give credit to the assured, the underwriter is entitled to receive the premiums from the assured.—*FOY v. BELL* (1811), 3 Taunt. 493 ; 128 E. R. 195.

**1574. Admission of interest or title of third party—Promise to pay parties claiming lien.**—

an investigation of the state of accounts before making the payment in question or by the fact that when called upon for payment they asked & received further time.—*BLACK v. BANK OF NOVA SCOTIA* (1889), 21 N. S. R. 448.—CAN.

*t. Failure to repudiate liability.*—A. sold to B. a new engine & agreed to take from B. certain old engines at a fixed price. The old engines were not delivered in time, i.e. within a reasonable time. A. then demanded rent from B. for the old engines still in his possession, & B. failed to re-

pudiate the imputed liability :—*Held* : B. was not estopped from disputing his liability.—*VANCOUVER MACHINERY DEPOT v. VANCOUVER TIMBER & TRADING CO.* (1914), 29 W. L. R. 93 ; 6 W. W. R. 1523 ; 18 D. L. R. 491.—CAN.

#### **PART VI. SECT. 3, SUB-SECT. 3.—J.**

*a. Action of ejectment by possessor—Whether admission of possession by defendant—As bar to action for trespass.*—In an action of trespass to land :—*Held* : pltf., having sufficient possession to maintain trespass, was not estopped

A. being possessed of an old vessel, sent her to B.'s yard to be repaired. B. agreed to find timber for the repairs, & materials were accordingly supplied by B. & other persons to the amount of £200. The vessel was repaired in B.'s yard with the above materials, but no work was done upon her by either B. or the other creditors. On the vessel being advertised for sale, B. & the other persons insisted that she should not be removed until they were paid. A.'s agent assented, & said they should be paid out of the purchase money, & signed an authority to the auctioneer to that effect. The sale then proceeded, & the vessel was knocked down to C. for £300.\* Immediately after the sale, B. & the other creditors applied to C. for payment, & he promised that he would, on the following Thursday, bring the purchase money for the auctioneer to pay the creditors with. C. did not do so :—*Held* : the agreement for payment of the repairs out of the purchase money, of which C. was cognisant, & had assented to, precluded him from maintaining trover until such payment was made.—*NORRIS v. WILLIAMS* (1833), 1 Cr. & M. 842 ; 2 L. J. Ex. 257 ; 149 E. R. 639.

**1575.** — *Dog delivered up to enable third party to comply with judgment in trover.*—Deft. had brought two separate actions of trover for a dog at the same assizes against A. & B. ; in the action against A. he recovered a verdict for £50, to be reduced to 1s. by consent, on A. giving up the dog ; in the action against B., B. obtained a verdict. At the trial of these actions the dog was in the possession of B. A few days after the trials, B. gave the dog in question to A. for the purpose of delivering up to deft. with 1s. damages. A. accordingly gave up the dog, & at the same time B.'s attorney gave deft. notice that the dog belonged to B. & demanded possession ; deft. refused. On trover afterwards brought by B. for the dog :—*Held* : B. had not estopped himself from recovering by enabling A. to give possession of the dog to deft.—*SANDYS v. HODGSON* (1839), 10 Ad. & El. 472 ; 2 Per. & Dav. 435 ; 9 L. J. Q. B. 31 ; 113 E. R. 179.

**1576.** — *Request by compounding debtor's solicitor to creditor to prove debt.*—A receiving order was rescinded upon a scheme of arrangement being agreed upon with the approval of the creditors. Under the scheme the trustee was alone authorised to admit proofs of debts probable in bkpcy. A creditor tendered a proof for the balance of the judgment, signed against the debtor by default, for bets won by the creditor from the debtor. It was alleged that a previous arrangement, by which the creditor abstained from posting the debtor as a defaulter in respect of the unpaid balance, constituted a valuable consideration for the judgment. Further, that even if this were not so, the trustee was estopped by a letter from the debtor's solrs. to the creditor requesting him to prove his debt & vote for the scheme :—*Held* : the letter from the debtor's solr. to the creditor did not operate as an estoppel

by having brought ejectment, as being an admission of deft.'s possession.—*HECK v. KNAPP* (1861), 20 U. C. R. 360.—CAN.

*b. Sale of mortgaged property—Failure to declare mortgage.*—A mtgee. under a registered mtge. deed obtained a money-decree against the mtgors. & sold the mortgaged property in execution of the decree. The mtge. lien was not announced in the proclamation of sale as required by Civil Procedure Code, Act. XIV. of 1882, s. 287, & the purchaser had no

**Sect. 3.—By representation: Sub-sect. 3, J.]**

between the creditor & the trustee, or justify the latter in paying a composition upon an unprovable debt.—*Re DEERHURST, Ex p. SEATON* (1891), 60 L. J. Q. B. 411; 64 L. T. 118; 8 Morr. 97; *affd.*, 7 T. L. R. 373, C. A.

*Annotations*:—*Mentd. Ward v. Fry* (1901), 85 L. T. 394; *Re Browne, Ex p. Martin* (1901), 1 B. 133.

**1577. Admission of contract of service—Resolution to employ attorney.]**—Churchwardens having been present at a parish meeting where it was voted unanimously to employ the attorney:—*Held*: they could not deny that he acted by their.—*R. v. SOLLY* (1840), Woll. 6; 4 J. P.

*R. v. Westmoreland JJ.* (1843), 1 L. Sevenoaks (1845) 9 T. D. 405

... a party applies to an officer to exercise a certain power for his benefit, he will not be allowed to deny the existence of such power, if it can be presumed by legal possibility, that the officer possesses the power for the exercise of which the application was made.—*THOMPSON v. FARDEN* (1840), 1 Man. & G. 535; 8 Dowl. 813; 1 Scott, N. R. 275; 9 L. J. C. P. 284; 4 Jur. 608; 133 E. R. 443.

**1579. Acquisition of property subject to ment with notice.]**—A. granted a lease of land to B. in 1779. In 1794 an Act was passed...

... the canal authorised persons, to complete the respective portions of the canal within two years, the defaulter was to pay £500 per annum until completion.

C's portion of the canal was not completed within the time specified, but was subsequently made under an arrangement between C. & B., the lessee. No compensation was made to A. in respect of his reversion, but all the acts of C. were done with the consent of the proprietors of the lands, of whom A. was one. In 1783 A. mortgaged his reversion, which was sold in 1794 to D. under a decree of the ct. The particulars of sale contained a statement that the canal was to pass through the land. In 1844 the lease to B. expired, & the devisees of D. brought an action of ejectment against C. to recover the land covered by the canal, & obtained a verdict.

In a suit by C. against the devisees of D. for an injunction to restrain further proceedings in the action, & for a conveyance to C.:—*Held*: (1) A. had acquiesced, & was not entitled to the land; (2) the devisees of D. were not bound by the acts of A.; but D. having purchased with the knowledge that the canal was to remain for the benefit of the public, his devisees could not interfere with this easement.—*BEAUFORT (DUKE) v. PATRICK* (1853), 17 Beav. 60; 7 Ry. & Can. Cas. 906; 1 Eq. Rep. 41; 22 L. J. Ch. 489; 21 L. T. O. S. 296; 17 Jur. 682; 1 W. R. 280; 51 E. R. 954.

*Annotations*:—As to (1) *Refd. Somersetshire Coal Canal Co.* (1858), 2 De G. & J. 596; *Mold v. Wheatcroft* Beav. 510; *Eardley v. Granville* (1876) 24

of the  
the mtgors. & the  
the mtge. debt of sale of the  
gaged property:—*Held*: the o  
to declare the mtge. at the t  
the sale could not be treated as  
an estoppel.—*DHONDO BALKRISHNA  
KANITKAR v. RAOJI* (1895), 1 L. R.  
20 Bom. 290.—*IND.*

c. *Contractor carrying out extra work—Failure to obtain consent of official—Though work completed & accepted.]*—*FOLEY v. VERIGIN RURAL TELEPHONE CO.*, [1923] 4 D. L. R. 533.—*CAN*

d. — *Without new contract.]*—W. entered into a contract with a borough council to construct a tunnel. After

W. R. 528; *Plimmer v. Wellington Corpn.* (1884), 9 App. Cas. 699. *Generally, Mentd. Martin v. L. C. & D. Ry.* (1866), 1 Ch. App. 501.

*See, generally, EASEMENTS, Vol. XIX., pp. 1 et seq.*

**1580. Authorising expenditure.]**—*HARRUP v. BAYLEY*, No. 1301, *ante*.

**1581. Refusal by legatee for life to enter upon onerous property.]**—By codicil testator gave leaseholds to A., B. & C., three sisters, in succession, in terms which were held to give the enjoyment to them successively for life for their separate use, with a condition that they should suffer their mother to reside during her life to the better doing which testator directed his exors. to set apart a sum of £8,000 & to apply the interest in paying for the rent & repairs, paint, etc., of the leaseholds, which were very heavy. A., B. & C. were all married women. The exors. assented to the bequest, but A. died without taking possession. Then B. claimed the whole absolutely; but failing in establishing her right to more than a life interest, she declined to enter into possession or fulfil the covenants. The exors., having paid for ground rent & repairs a very large sum *ultra* the interest of the £8,000, obtained a direction to sell the premises, which they did for £4,500. B. then claimed to have the interest of that sum for her life & also of the £8,000:—*Held*: B. was not

*LONSDALE (EARL) v. BERC*  
3 K. & J. 185; 3

John.  
1 Ch.

**1582. Non-compliance with statutory duty.]**—By a local Act subject to the restrictions & provisions in that Act contained, the corpn. were empowered to construct a reservoir & intercept the waters of the river Etherow for the purposes of the Act. By sect. 45, they were not to divert the water of the Etherow until a reservoir should be completed & filled with water. By sect. 46, they were required to discharge out of the reservoir sixty cubic feet per second for twelve hours of every working day. By a later Act, in lieu of sixty cubic feet, seventy-five cubic feet per second were to be discharged. By sect. 15, in case of any failure, neglect or default by or in consequence of which the quantity of water required by that Act to flow or be discharged over the gauge should not so flow, the corpn. were to forfeit £50 by way of penalty, to the occupiers of certain mills. By sect. 17, it was enacted that it should not be lawful for the corpn. to use or appropriate any water flowing to the river Etherow until they should have secured & commenced to discharge the stipulated quantity of 75 feet per second.

The corporation made a reservoir which from engineering difficulties was never completed, as required by the first Act, or with the additions imposed by the later Act, so as to be filled with water or capable of being filled with water; & water had not been discharged therefrom in the quantity & manner required by the Acts, or in any larger quantity; but in 1857, they diverted

performing the work he abandoned it. The sureties for the due performance of the contract contracted with S. that he should complete the work under the superintendence of the engineer of the borough. During the work S. was ordered by the engineer to increase the thickness of the brick-work, & to do this he had to remove the wooden lining already erected



the water of the Etherow for the supply of the inhabitants within the limits of the Acts, & since that time had discharged certain quantities of water from the reservoir during twelve hours of every day.

In 1860, pltf., a millowner on the Etherow, brought an action against the corpn. The declaration contained counts for wrongfully diverting the waters of the Etherow, & also counts for not discharging a quantity of water equal to 75 cubic feet per second for twelve hours of every working day. Defts. paid money into ct. as to the former counts, & to the latter pleaded that they had not completed the reservoir & works mentioned in the Act, so as to make it their duty to discharge water at the rate specified:—*Held*: the plea was good, defts. were not estopped from setting up the non-completion of the reservoir, & pltf. were only entitled to damages for the loss of the natural flow of the waters of the Etherow, & not for the non-discharge from the reservoir of the 75 cubic feet per second.—*WALLER v. MANCHESTER CORPN.* (1861), 6 H. & N. 667; 30 L. J. Ex. 293; 7 Jur. N. S. 635; 158 E. R. 275.

**1583. Abandonment of proceedings—Whether binding on executors.**—The grantor of an annuity commenced proceedings to set aside the grant, but abandoned those proceedings & then died:—*Held*: his exors. were not estopped from questioning the validity of the transaction.—*BURGESS v. RICHARDSON* (1861), 29 Beav. 487; 4 L. T. 316; 7 Jur. N. S. 1178; 9 W. R. 512; 54 E. R. 716.

**1584. Publication of book with particular title—Knowledge of published intention of another author [to use title].**—H. in 1863 registered a magazine called B., & as the Copyright Act required an entry of the date of first publication, inserted the day of registration, but did nothing further. In 1866, & before any publication by H., M. registered a magazine, also called B., & extensively advertised it as about to appear. H. was aware of this, & was himself the means of advertising M.'s book; he did not remonstrate, but without advertising or in any manner calling attention to what he was about to do, hastily prepared his own magazine & published it under the title B., before the appearance of that of M.—*Held*: the conduct of H. would preclude him from asserting against M. any exclusive right to the use of the name B.—*MAXWELL v. HOGG, HOGG v. MAXWELL* (1867), 2 Ch. App. 307; 36 L. J. Ch. 433; 16 L. T. 130; 31 J. P. 659; 15 W. R. 467, L. JJ.

*Annotations*:—**Mentd.** *Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551; *Bradbury v. Beeton* (1869), 18 W. R. 33; *Dixon v. Holden* (1869), L. R. 7 Eq. 488; *Weldon v. Dicks* (1878), 10 Ch. D. 247; *Civil Service Supply Assn. v. Dean* (1879), 13 Ch. D. 512; *Levy v. Walker* (1879), 10 Ch. D. 436; *Kelly v. Byles* (1880), 13 Ch. D. 682; *Primrose Press Agency Co. v. Mark Knowles* (1886), 11 T. L. R. 404; *Licensed Victuallers' Newspaper Co. v. Bingham* (1888), 38 Ch. D. 139; *Lee v. Gibbings* (1892), 67 L. T. 263; *Walter v. Ashton*, [1902] 2 Ch. 282.

**1585. Payment on account—On basis that work approaching completion—Work not completed.**—A. contracted to build a shed for B. Terms, everything to be completed to satisfaction of B.'s engineers, payment 90 per cent. on completion of works, 10 per cent. to be held over for six months to answer defects in work. A. sent in his bill in Feb. as for completed shed with a letter containing these words "as the shed will be completed before the close of the month," & was paid 90 per cent.

of the price. In Oct. B., who had done repairs to the shed, which A. declined to do, offered to pay the residue, after deducting the cost of such repairs. In an action by A. for the whole of the residue:—*Held*: defts. were not estopped by the payment in Feb. from showing that the work was not completed, nor from going into the amount of the defective work.—*MOSS v. LONDON & NORTH WESTERN RY. CO.* (1874), 22 W. R. 532.

**1586. Proposal by execution creditor for assignment for benefit of creditors.**—(1) A creditor obtained judgment in the Q. B. Div. against a debtor for his debts & sued out a writ of *elegit*, the judgment & the writ being duly registered. An inquisition was held before the sheriff, & the jury found that the debtor was possessed of certain lands, & the sheriff delivered the same in execution to the creditor until the debt was satisfied.

The proceedings before the sheriff terminated at 12.30 p.m. At four o'clock on the same day the debtor filed a petition in bkpcy. in the county ct. & a receiving order was at once made. On the next day the sheriff returned the writ. The creditor had no notice of the presentation of any bkpcy. petition or of the commission of any available act of bkpcy. by the debtor. On petition under the Judgment Act, 1864 (c. 112):—*Held*: the return of the writ was a mere matter of formal procedure, the delivery in execution of the lands by the sheriff was a "seizure" within Bkpcy. Act, 1883 (c. 52), s. 45; the execution therefore was complete before the receiving order was made, & the creditor was entitled to priority over the trustee in bkpcy.

(2) Before recovering judgment the creditor had proposed that debtor should make an assignment for the benefit of creditors:—*Held*: he was not estopped from taking the benefit of the execution.—*Re HOBSON* (1886), 33 Ch. D. 493; 55 L. J. Ch. 754; 55 L. T. 255; 34 W. R. 786; 2 T. L. R. 884.

**1587. Provision of music for band—Whether estoppel from setting up infringement of copyright.**—An assignment of copyright in a musical composition must be in writing. So where pltf. had for some years acted as musical conductor at deft.'s music-hall & had composed pieces for performance, which had been performed there & for which he had been paid:—*Held*: the relations existing between the parties were no bar to an action by pltf. for infringement of copyright under Dramatic Copyright Act, 1833 (c. 15), & Copyright Act, 1842 (c. 45).—*EATON v. LAKE* (1888), 36 W. R. 277, C. A.

*See, generally*, COPYRIGHT, Vol. XIII., pp. 216, 217.

**1588. Proof of debt in foreign liquidation—Whether estopped from proving in receivership of English assets.**—Defts. having on Apr. 4, 1889, obtained a judgment against the Société des Metaux, a receivership order was made on Apr. 8, appointing a person to receive the interest of the Société in certain copper, & pay the proceeds towards satisfying the judgment. On Apr. 15 the Société, a French co., was placed in judicial liquidation, & pltf. were appointed liquidators. On May 11 defts. proved in the liquidation in Paris & were admitted. On an interpleader issue ordered to be tried between pltf. & defts.:—*Held*: defts. were not debarred from asserting their rights under the receivership order by the fact of their having proved in the French

excavate further soil, & re-erect the lining, which were dangerous operations, to the knowledge of S., the ground being treacherous. While this was being done the portion of the

tunnel which had been constructed collapsed, causing large additional expense & loss of material. It appeared that before the contract with S. there had been a slip in the

earth above the tunnel, leaving a cavity, which had been packed with brushwood & logs; & it was alleged that this was a latent defect of which S. had no knowledge, & that there was

*Sect. 3.—By representation: Sub-sect. 3, J.; sub-sect. 4, A.]*

liquidation.—*LEVASSEUR v. MASON & BARRY*, [1891] 2 Q. B. 73; 60 L. J. Q. B. 659; 64 L. T. 761; 39 W. R. 596; 7 T. L. R. 436, C. A.

*Annotations:—Mentd. Re Potts, Ex p. Taylor*, [1893] 1 Q. B. 648; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727; *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157; *Singer v. Fry* (1915), 84 L. J. K. B. 2025; *Re Pearce, Ex p. Official Receiver, The Trustee*, [1919] 1 K. B. 354.

**Proof of debt in bankruptcy—Whether estopped from filing fresh petition.]—See BANKRUPTCY**, Vol. IV., p. 132, No. 1211.

**1589. Delivery of goods under contract.]—A.** contracted to sell to N. & K. 100 tons of oil to be delivered alongside a vessel in the Thames, & paid for in cash in exchange for mate's receipt. N. & K. entered into a contract with defts., who were shipowners, whereby defts. agreed to give room in their ships for the export of 400 tons of oil during the season. There was a stipulation between N. & K. & defts. that no goods should be received on board unless a clean receipt could be given for them. A. in pursuance of his contract with N. & K. brought alongside one of defts.' vessels fifty barrels of oil, which were taken on board, but defts. failed to give a clean receipt. A. demanded re-delivery of the oil, & on this being refused, brought an action of trover against defts. The oil was subsequently sold by N. & K. who then paid A. the contract price:—*Held*: A. was precluded from saying that the goods were his when he demanded re-delivery; & he was not entitled to recover from defts. the loss of interest on the price caused by the delay in payment.—*ARMSTRONG v. ALLAN BROTHERS* (1892), 67 L. T. 738; 9 T. L. R. 38; 7 Asp. M. L. C. 293; 4 R. 107, C. A.

**1590. Certificate granted in respect of houses built on void plans.]—In 1894 a builder deposited a plan in accordance with the building bye-laws then in force, showing thereon a number of houses proposed to be erected. Some of the houses were commenced within the three years from the deposit; two were both commenced & completed after the three years & a certificate given in respect of the same. In 1901 the old bye-laws were repealed by new bye-laws, except as to any work commenced before the date of the new bye-laws, or any work not so commenced but of which plans should have been approved before such date. After these new bye-laws came into force the builder commenced to erect a stable which was one of the buildings shown on the plan. The corpn. objected on the ground that the plan did not comply with the new bye-laws:—*Held*: the fact that the corpn. had without objection allowed two of the houses to be commenced & completed after the plan had become void by the lapse of the three years & had given a certificate in respect thereof, did not create an estoppel against the corpn. or show that they had "otherwise determined" that a fresh deposit of plans was not requisite.—*HARROGATE CORPN. v. DICKINSON* (1903), 88 L. T. 299; 67 J. P. 100; 1 L. G. R. 275; *affd.*, [1904] 1 K. B. 468, C. A.**

*White v. Sunderland Corpn.* (1903), 88

**1591. Improper connection with drain of adjoining house.]—Semble**: where the original owner of two contiguous houses in the Metropolis,

an implied warranty against such latent defects. S. claimed from the sureties the loss & expense incurred by the collapse:—*Held*: there was no implied warranty; & if the extra

was not within the contemplation of the contract S. was entitled to refuse to do it unless under a new contract, but having gone on without

objection, he was precluded from claiming in respect of a resulting loss.—*SLOWEY v. LODDER* (1901), 20 N. Z. L. R. 321.—N.Z.

in respect of which an order for drainage by combined operation has been made, has improperly made a connection not sanctioned by the order between the drain on one of the houses & a sink on the other, his immediate successor in title to both the houses under a voluntary conveyance is estopped as completely as he would himself have been from alleging that the connection converts that drain into a sewer repairable at the expense of the public.—*HEAVER v. FULHAM BOROUGH COUNCIL*, [1904] 2 K. B. 383; 73 L. J. K. B. 715; 91 L. T. 31; 68 J. P. 278; 20 T. L. R. 383; 2 L. G. R. 672.

*Annotations:—Mentd. Harvey v. Busby* (1906), 95 L. T. 91; *Wilson's Music & General Printing Co. v. Finsbury B. C.*, [1908] 1 K. B. 563; *Kershaw v. Smith*, [1913] 2 K. B. 455.

**1592. Fictitious figure fixed as gross assessable value.]—HENDON PAPER WORKS CO. v. SUNDERLAND ASSESSMENT COMMITTEE**, No. 1219, *ante*.

**1593. Recognition that contract at an end.]—In Sept. 1913, defts. by their representative contracted to sell to pltfs. fifty dozen red Welsh roller skins at 27s. per dozen "delivery as required." Between the middle of Nov. 1913, & the end of Sept. 1914, defts. delivered twenty dozen skins at the request of pltfs. in four lots of five dozen each, but no further deliveries took place nor were requested by pltfs., their manager having forgotten the existence of the contract. In June, 1915, defts.' representative left their employ, & in July, 1915, pltfs. gave him a personal order for & accepted delivery of fifty dozen skins of the same kind & at the same price as that specified in the contract with defts. Between June, 1915, & Apr. 1916, another representative of defts. called upon pltfs. for orders, but was told there was nothing for him. In Nov. 1915, defts., by letter offered pltfs. twenty to thirty dozen skins similar to those previously supplied to them, & at the same price, but pltfs. replied that they had bought some time ago their requirements for the next year. In July, 1917, pltfs. requested the delivery of the remaining thirty dozen skins under the contract, but defts. refused to deliver them, alleging that the contract was no longer in existence.**

Pltfs. having brought an action to recover damages for defts.' breach of contract in refusing to deliver the remaining skins:—*Held*: (1) an inordinate delay on the part of both sides having taken place it was not necessary, in order to put an end to the contract, for defts. to give notice to pltfs. that if they did not request further deliveries defts. would cancel the contract; pltfs. were estopped from denying that the contract had come to an end.—*PEARL MILL CO. v. IVY TANNERY CO.*, [1919] 1 K. B. 78; 88 L. J. K. B. 134; 120 L. T. 28; 24 Com. Cas. 169, D. C.

*Annotation:—As to (2) Rejd. Hartley v. Hymans*, [1920] 3 K. B. 475.

**1594. Invalid notice to quit.]—A person who gives a bad notice to quit is not afterwards estopped from saying it is void.—Re BEBINGTON'S TENANCY, BEBINGTON v. WILDMAN**, [1921] 1 Ch. 559; 90 L. J. Ch. 269; 124 L. T. 661; 37 T. L. R. 409; 65 Sol. Jo. 343.

**Recognition of bankruptcy.]—See BANKRUPTCY**, Vol. V., p. 985, Nos. 8057–8060.

**Admission of money had & received.]—See CONTRACT**, Vol. XII., pp. 545, 546.



## SUB-SECT. 4.—BY NEGLIGENCE.

## A. When Estoppel by Negligence Arises.

**1595. Nature of estoppel by negligence.]**—The principle of estoppel by negligence has long been established, & its nature & limitations often discussed. Although the phrase "estoppel by negligence" is sometimes employed, yet I think that this so-called branch of estoppel is in fact a mere illustration of the rule indicated by *Pickard v. Sears*, No. 1032, *ante*, & *Freeman v. Cooke*, No. 1019, *ante*. I agree that the estoppel must be based on some substantial facts. But many decisions can be cited to show that apparently few circumstances may be deemed substantial & create an estoppel (*MCCARDIE, J.*).—*BRADFORD & SONS v. PRICE BROTHERS* (1923), 92 L. J. K. B. 871; 129 L. T. 408; 39 T. L. R. 272.

**1596. Must be neglect of duty owing to third party or general public.]**—*FREEMAN v. COOKE*, No. 1019, *ante*.

**1597. —.]**—*SWAN v. NORTH BRITISH AUSTRALASIAN CO.*, No. 1036, *ante*.

**1598. —.]**—Negligence, to amount to an estoppel, must be in the transaction itself, & be the proximate cause of leading the third party into mistake, & also must be the neglect of some duty which is owing to such third party or to the general public.—*ARNOLD v. CHEQUE BANK*, *ARNOLD v. CITY BANK* (1876), 1 C. P. D. 578;

45 L. J. Q. B. 562; 34 L. T. 729; 40 J. P. 711; 24 W. R. 759.

*Annotations*:—*Consd.* Merchants, etc. of Staple of England *v. Bank of England* (1887), 21 Q. B. D. 160; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777. *Reid.* *Keith v. Burrows* (1876), 1 C. P. D. 722; *Patent Safety Gun Cotton Co. v. Wilson* (1880), 49 L. J. Q. B. 713; *Bank of England v. Vagliano*, [1891] A. C. 107. *Mentd.* *Matthiessen v. London & County Bank* (1879), 5 C. P. D. 7; *London & South Western Bank v. Wentworth* (1880), 5 Ex. D. 96; *Fine Art Soc. v. Union Bank of London* (1886), 17 Q. B. D. 705; *Nähmaschinen Fabrik (Vormals Frister & Rossmann) Act. v. Pickford & Lee & Harris* (1888), 4 T. L. R. 617; *McEntire v. Potter* (1889), 22 Q. B. D. 438; *Brooklesby v. Temperance Bldg. Soc.* (1893), 2 R. 594; *Kleinwort v. Comptoir National d'Escompte de Paris*, [1894] 2 Q. B. 157; *Schofield v. Londesborough*, [1896] A. C. 514; *Lacave v. Crédit Lyonnais*, [1897] 1 Q. B. 148; *Bavins v. London & South Western Bank* (1899), 81 L. T. 655; *Gordon v. London City & Midland Bank*, *Gordon v. Capital & Counties Bank*, [1902] 1 K. B. 242; *Macbeth v. North & South Wales Bank* (1907), 97 L. T. 699; *Underwood v. Bank of Liverpool*, *Underwood v. Barclays Bank*, [1924] 1 K. B. 775.

**1599. —.]**—H., a merchant dealing in tobacco & a broker in that trade, had fifty hogsheads of that article lying in bond in his name in the K. dock. The warrants for them had been issued to him. Pltf. bought the tobacco from H. & paid for it, but he left the dock warrants in the possession of H. & took no steps to have any change made in the books of the dock co. as to the ownership of the tobacco. H. being the ostensible owner of the tobacco fraudulently obtained

## PART VI. SECT. 3, SUB-SECT. 4.—A.

**1596 i. Must be neglect of duty owing to third party or general public.]**—In intending to apply for shares in pltf. co., pursuant to the proposal, made through her husband, of the agent of the co. for obtaining such applications, M. was induced through the fraud of the agent to sign, without reading it, a document which she believed to be an application for shares but which, in fact, was a mtge. for securing a supposed loan to her & contained a covenant to repay the amount of the loan. M. was an intelligent woman, capable of reading & understanding the document:—*Held*: as M. was under no duty to exercise care to protect the co. against the possible frauds of its own agent, she was not guilty of negligence preventing her from setting up the plea of *non est factum*, which was a good defence to the co.'s action on the covenant.—*DOMINION PERMANENT LOAN CO. v. MORGAN* (1912), 17 B. C. R. 366; 50 S. C. R. 485.—CAN.

**1596 ii. —.]**—In an action for damages for trespass by defts. upon fifteen chains of pltf.'s timber limit, adjoining defts.' limit:—*Held*: pltf. were not estopped, by their neglect to have the fifteen chains included in their first survey, from asserting their rights.—*CHEW LUMBER CO. v. HOWE SOUND LUMBER CO.* (1913), 25 W. L. R. 105.—CAN.

**1596 iii. —.]**—In an action by a customer of deft. bank to recover the aggregate amount of a number of cheques forged by a confidential clerk employed by the customer, which were paid by the bank & charged to the customer's account, the fraud being skilfully concealed from both customer & bank:—*Held*: the duty or obligation arising from the contractual relationship between the bank & its customer, or from moral & commercial obligation, which will preclude the customer from asserting that his signature is not genuine, cannot arise unless there is knowledge; & when fraud is penetrated by one who has skill & ability to conceal his fraud from both parties, the case is an *a fortiori* one.—*COLUMBIA GRAPHOPHONE*

*CO. v. UNION BANK OF CANADA* (1916), 38 O. L. R. 326; 34 D. L. R. 743.—CAN.

**1596 iv. —.]**—A customer owes a duty to his banker to be careful not to facilitate any fraud which when it has been perpetrated is seen to have in fact flowed in natural & uninterrupted sequence from the customer's negligent act:—*Held*: a customer of a bank was estopped from denying that certain forged cheques were signed by him or by his authority, by reason of his conduct in not having notified the bank whom he learned of the forgery of previous cheques on his account by the same person.—*CABANA v. BANK OF MONTREAL*, [1919] 3 W. W. R. 969.—CAN.

**1596 v. —.]**—Deft. insurance co. sent to its local agent two documents, each referred to thereon as a "draft," & representing the amounts of certain insurance payable to pltf., & intended to effect payment thereof. These were not delivered to pltf., but by the agent's fraud & misrepresentation signatures by pltf. were procured on the backs of the documents. The agent indorsed them & deposited them to his own credit & they were later paid & charged to deft.'s account by its bank. Pltf. sued to recover under his insurance, & deft. pleaded payment & release:—*Held*: pltf.'s supposed negligence was immaterial because there was no duty owing by pltf. to deft.; & the supposed negligence was not the proximate cause of the loss.—*MARTIN v. NATIONAL UNION FIRE INSURANCE CO.*, [1923] 4 D. L. R. 574; 3 W. W. R. 897; 3 D. L. R. 220.—CAN.

**1596 vi. —.]**—D. & C. signed guarantee bonds for V. in favour of S., in consideration of which S. granted V. certain banking facilities. On an action being brought on these guarantees by S. against D. & C., the latter pleaded that they had signed relying on the fraudulent misrepresentations of V., that the documents were powers of attorney to pass certain transfers & that they did not read over & had no knowledge of the contents of the documents which they had signed:—*Held*: fraud had not clearly been proved & even if such fraud had been proved, it would have afforded no

defence to the action, as defts., by their negligence in signing, had prejudiced pltf.—*STANDARD BANK v. DU PLOOY, STANDARD BANK v. COETZEE* (1899), 16 S. C. 161.—S. AF.

**1596 vii. —.]**—Except in the case of banker & customer, there is no duty on the part of the drawer or maker of a negotiable instrument to use care in framing it so as, as far as possible, to prevent fraudulent interpolation or alteration, & the failure to use such care is not negligence which will estop the drawer or maker from setting up the defence that the instrument has been avoided as against him by material alteration without his consent.—*BROWN v. BENNET, COLONIAL BANK OF NEW ZEALAND v. BENNET* (1891), 9 N. Z. L. R. 487.—N.Z.

**1596 viii. —.]**—A mtgee. is under no duty to his mtgor. with respect to the registration of the mtge., & although if the mtge. has been registered fraud cannot be committed, the failure of the mtgee. to register his security is only an omission of a precaution for his own benefit, & does not debar him from enforcing the disputed mtge. as a valid security.—*CUTHBERT v. MCALLER* (1915), 34 N. Z. L. R. 942.—N.Z.

**1596 ix. —.]**—Pltf., as the holder in due course of a bill of exchange, sued deft., whose name appeared on the back of the bill as an endorser. Although admitting that the signature on the back of the bill was his, deft. alleged that owing to fraudulent misrepresentation on the part of the drawer of the bill his mind did not accompany the act of endorsing the bill. Deft. believed that he was merely witnessing the drawer's signature, & signed after a casual glance at the contents of the bill. He was a man of wide experience, & the drawer was practically unknown to him:—*Held*: deft. was guilty of negligence & was estopped from succeeding with the defence that he was fraudulently induced to sign the document in the belief that it was something other than a bill of exchange.—*HANCOCK & CO. (N. Z.), LTD. v. JOHNSTONE*, [1923] N. Z. L. R. 639.—N.Z.

*Sect. 3.—By representation: Sub-sect. 4,*

advances on the pledge of a portion of the tobacco from defts. respectively & handed to them the dock warrants. Both defts. acted in good faith, & took fresh dock warrants from the dock co.:—*Held*: the conduct of pltf., in leaving the *indici* of title in H.'s hands & thus enabling him to obtain advances on the security of the goods, was not such as to disentitle pltf. to recover its value from the defts.

Pltf. may have been negligent, & his negligence may have brought on defts. the loss of the money they have advanced. But pltf. owed no duty to defts., at least no duty which the law can recognise, either as individuals or as members of the general public.

The negligence of pltf. neither estops him from claiming the goods in question from defts., nor gives the latter a counter-claim for the money which they have advanced on the security of the goods (COCKBURN, C.J.).—JOHNSON v. CREDIT LYONNAIS CO., JOHNSON v. BLUMENTHAL (1877), 3 C. P. D. 32; 47 L. J. Q. B. 241; 37 L. T. 657; 42 J. P. 548; 26 W. R. 195, C. A.

*Annotations*:—*Consd.* Joseph v. Webb, Joseph v. Lyons, Joseph v. Pidcock, Joseph v. Jones (1883), Cab. & El. 262. *Refd.* Scholfield v. Londesborough, [1895] 1 Q. B. 536; Farquharson v. King, [1902] A. C. 325; Longman v. Bath Electric Tramways, [1905] 1 Ch. 646. *Mentd.* Attenborough v. London & St. Katharine's Dock Co. (1878), 3 C. P. D. 450.

**1600.** —.]—Where the estoppel is sought to be rested upon negligence, two things must be established in order to create the estoppel; first, the act of neglect, must be the neglect of some duty owing by the party to be estopped to the aggrieved person; &, secondly, this neglect must be the real & proximate cause of the aggrieved person being deceived (WILLIAMS, J.).—HALL v. WEST END ADVANCE CO., LTD. (1883), 1 Cab. & El. 161, N. I.

**1601.** —.]—There was no evidence to show what, as between a customer & his banker, is the implied contract as to the settlement of account by such a dealing with the pass book, or that, having regard to the ordinary course of dealing between a banker & his customers, pltf. had done anything which can be considered a neglect of his duty to the bank or negligence on his part (BOWEN, L.J.).

Negligence on the part of a customer of a bank in not exercising due supervision over the proceedings of his clerk will not estop him as against the bank from denying that the indorsement upon a bill of exchange which he has accepted & which has been stolen from him by such clerk, who obtains cash for it from the bank by forging the indorsement, is genuine, the negligence not being the proximate cause of the bank's loss (*per* CUR.).—VAGLIANO BROTHERS v. BANK OF ENGLAND (1889), 23 Q. B. D. 243; 58 L. J. Q. B. 357; 61 L. T. 419; 53 J. P. 564; 37 W. R. 640; 5 T. L. R. 489, C. A.; *revsd.* on other grounds, *sub nom.* BANK OF ENGLAND v. VAGLIANO BROTHERS, [1891] A. C. 107, H. L.

*Annotations*:—*Consd.* Kepitigalla Rubber Estates v. National Bank of India, [1909] 2 K. B. 1010. *Refd.* Lewes Sanitary Steam Laundry Co. v. Barclay (1906), 95 L. T. 444; London Joint Stock Bank v. Macmillan & Arthur, [1918] A. C. 777. *Mentd.* Robinson v. Canadian Pacific Ry. [1892] A. C. 481; *Re* English Bank of River Plate, *Ex p.* Bank of Brazil, [1893] 2 Ch. 438; *Re* Budgett, Cooper v. Adams, [1894] 2 Ch. 557; Scholfield v. Londesborough, [1896] A. C. 514; Clutton v. Attenborough, [1897] A. C. 90; Thames Conservators v. Smeed, Dean, [1897] 2 Q. B. 334; Jenkins v. Coomber (1898), 47 W. R. 48; Preist v. Last (1903), 89 L. T. 33; Vinden v.

Hughes, [1905] 1 K. B. 795; North & South Wales Bank v. Macbeth, North & South Wales Bank v. Irvine, [1908] A. C. 137; Holland v. Manchester & Liverpool District Banking Co. (1909), 14 Com. Cas. 241; Hall v. Hayman, [1912] 2 K. B. 5; Wimble v. Rosenberg, [1913] 3 K. B. 743; MacLaren v. A.-G. for Quebec, [1914] A. C. 258; Sanday v. British & Foreign Marine Insce., [1915] 2 K. B. 781; MacConnell v. Prill, [1916] 2 Ch. 57; R. v. Kennaway (1916), 86 L. J. K. B. 300; Quebec Ry., Light, Heat & Power Co. v. Vandry, [1920] A. C. 662; Despatie v. Tremblay, [1921] 1 A. C. 702; McDonald v. Nash, [1924] A. C. 625; Samuel v. Dumas, [1924] A. C. 431.

**1602.** —.]—The mere fact that the signer of a negotiable instrument has been negligent as regards the care taken by him in regard to a signed paper never renders him liable to be estopped from showing the conditions under which he parted with its possession, unless he has so dealt with the instrument or given such instructions with regard to it as raised a duty between himself & the commercial public. Mere negotiation by itself, unless it raises such a duty, cannot raise an estoppel; though it may be true to say that where the fraud of a third party has caused injury to one of two innocent parties, that one must be held liable whose negligence rendered the fraud possible. In that sense negligence is not equivalent to mere carelessness which may cause harm, but it is negligence in the performance of a duty to the person who sets up the estoppel (VAUGHAN WILLIAMS, L.J.).—SMITH v. PROSSER, [1907] 2 K. B. 735; 77 L. J. K. B. 71; 97 L. T. 155; 23 T. L. R. 597; 51 Sol. Jo. 551, C. A.

*Annotations*:—*Refd.* London Joint Stock Bank v. Macmillan & Arthur, [1918] A. C. 777. *Mentd.* Morison v. London County & Westminster Bank (1913), 108 L. T. 379.

**1603.** —.]—Deft. signed a document, which purported to be a continuing guarantee by him, up to a certain amount, of the payment by R. of any sum which might at any time thereafter be or become due from R. to pltf., a banking co., on the general balance of his banking account with them. In fact deft. had been induced by the fraud of R. to sign the document, without reading it, & not knowing that it was a guarantee, but supposing it to be a document of a different character. Subsequently to the signature of the document by deft., R. forged the signature of an attesting witness to it, & handed it to pltf. The jury, in answer to a question put to them by the judge, found that deft. was negligent in signing the document:—*Held*: in an action on the supposed guarantee, deft. was not estopped from denying that he had contracted to guarantee the debt of R., inasmuch as he was under no duty to pltf. in the matter, & the proximate cause of pltf.'s loss was the fraudulent action of R. & not deft.'s supposed negligence.—CARLISLE & CUMBERLAND BANKING CO. v. BRAGG, [1911] 1 K. B. 489; 80 L. J. K. B. 472; 104 L. T. 121, C. A.

**1604.** —.]—There must be negligence in the performance of a duty to the person who sets up the estoppel (COLERIDGE, J.).—MORISON v. LONDON COUNTY & WESTMINSTER BANK, LTD. (1913), 108 L. T. 379; 29 T. L. R. 342; 57 Sol. Jo. 427; 18 Com. Cas. 137; *revsd.* on other grounds, [1914] 3 K. B. 356, C. A.

*Annotations*:—*Mentd.* Crumplin v. London Joint Stock Bank (1913), 109 L. T. 856; John v. Dodwell, [1918] A. C. 563; Taxation Comrs. v. English, Scottish & Australian Bank, [1920] A. C. 683; Goldman v. Cox (1924), 40 T. L. R. 423; Underwood v. Bank of Liverpool, Underwood v. Barclays Bank, [1924] 1 K. B. 775.

**Application of rule—To Sale of Goods Act, 1893 (c. 71), s. 21 (1).**—*See* SALE OF GOODS.

**1605. Must be in transaction & proximate cause of misleading.**—Trustees of a charity incorporated

**1605 i. Must be in transaction & proximate cause of misleading.**—In trover for the value of a piano sold by the deft., as sheriff, under an execution, it appeared that an interpleader had been directed as to the piano, pltf. to give the usual security within twenty days for its value, to be appraised by deft. Deft., though



by statute, & having a common seal, possessed stock in the public funds, registered in the Bank of Ireland. A., their secretary, was allowed to have the seal in his possession. The seal of the trustees was affixed by the unauthorised act of A. to certain powers of attorney, the sealing of which was attested by witnesses without any fraudulent intention, & these powers of attorney were presented to the bank, & the stock was transferred. On discovery of the facts, the trustees authorised A. to transfer the stock, but the bank refused to make the transfer:—*Held*: assuming the trustees to have been negligent in custody of the seal, such negligence was not in or immediately connected with the unauthorised transfer.

The negligence which would deprive pltf. of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself. . . . If there was negligence in the custody of the seal it was only remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of that negligence (PARKE, B.).—*BANK OF IRELAND (GOVERNOR & CO.) v. EVANS' CHARITIES TRUSTEES* (1855), 5 H. L. Cas. 389; 3 C. L. R. 1066; 25 L. T. O. S. 272; 3 W. R. 573; 10 E. R. 950, H. L.

*Annotations*:—*Appld.* *Swan v. North British Australasian Co.* (1863), 7 H. & C. 175. *Consd.* *Arnold v. Cheque Bank*, *Arnold v. City Bank* (1876), 1 C. P. D. 578; *Merchants, etc. of Staple of England v. Bank of England* (1887), 21 Q. B. D. 160; *Bank of England v. Vagliano*, [1891] A. C. 107; *Farquharson v. King*, [1902] A. C. 325. *Expld.* *Longman v. Bath Electric Tramways*, [1905] 1 Ch. 646; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777. *Refd.* *Re North British Australasian Co., Ex p. Swan* (1859), 7 C. B. N. S. 400; *Baxendale v. Bennett* (1878), 3 Q. B. D. 525; *Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611; *Hall v. West End Advance Co.* (1883), Cab. & El. 161; *Crapp v. East Stonehouse L. B.* (1889), 5 T. L. R. 501; *Scholfield v. Londesborough*, [1896] A. C. 514; *Lewes Sanitary Steam Laundry Co. v. Barclay* (1906), 95 L. T. 444; *Smith v. Prosser*, [1907] 2 K. B. 735; *Kepitigalla Rubber Estates v. National Bank of India*, [1909] 2 K. B. 1010; *Morison v. London County & Westminster Bank* (1913), 108 L. T. 379. *Mentd.* *Cornish v. Abington* (1859), 28 L. J. Ex. 262; *D'Arcy v. Tamar, Kit Hill, & Callington Ry.* (1867), L. R. 2 Exch. 158; *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869; *London & South Western Bank v. Wentworth* (1880), 5 Ex. D. 96; *Marsh v. Joseph* (1896), 75 L. T. 558; *Ruben v. Groat Fingall Consolidated*, [1906] A. C. 439.

1606. —.]—*SWAN v. NORTH BRITISH AUSTRALASIAN Co.*, No. 1036, *ante*.

1607. —.]—*CARR v. LONDON & NORTH WESTERN RY. Co.*, No. 1020, *ante*.

applied to, neglected to appraise the piano until it was impossible for pltf. to give security within the required time. Security was, however, afterwards given, but deft. nevertheless sold the piano, contending that he was justified in so doing, as pltf. had not complied with the terms of the order:—*Held*: pltf. having been prevented by deft.'s neglect from complying with the order, deft. was estopped from saying that pltf.'s non-compliance therewith justified him in selling.—*BLACK v. REYNOLDS* (1878), 43 U. C. R. 398.—CAN.

1605 ii. —.]—M. had been in the habit of employing L. as a sharebroker, & signed & gave to him in the presence & hearing of B., who was L.'s partner, two blank transfers of shares for M. A. shares. B. got possession of one of these blank transfers & filled it up as a transfer of two shares which M. also held in C. Co., & negotiated with other sharebrokers, & the transfer ultimately came to F., in whose name the shares were afterwards registered. The blank transfer unattested had been seen by an officer of C. Co. before registration. The transfer did not require to be by deed. In an action brought by M. against C. Co. for

removing his name from the register:—*Held*: pltf. was not estopped from suing the co. by his negligence in giving L. the blank transfer because the negligence was not the proximate cause of the damage which ensued from B.'s fraud, & because the negligence was not connected with the fraudulent transfer itself, or with an actual transaction of the party to be estopped with the party setting up the estoppel.—*CALEDONIAN GOLD-MINING Co. v. MANNERS* (1872), 2 C. A. 174.—N.Z.

1605 iii. —.]—In order to establish a case of estoppel by negligence the negligence must be the proximate cause of the loss suffered.

Entrusting documents of title to an agent for the purpose of negotiating an advance on mtge. of property belonging to pltf. is not the proximate cause of the loss, where the agent forges a power of attorney under which a mtge. bond is passed in favour of deft. & then misappropriates the money. In such circumstances:—*Held*: pltf. was entitled to have the mtge. bond cancelled.—*KRISTAL v. ROWELL* (1904), T. H. 66.—S. AF.

1608. —.]—*ARNOLD v. CHEQUE BANK*, *ARNOLD v. CITY BANK*, No. 1598, *ante*.

1609. —.]—Deft. gave H. his blank acceptance on a stamped paper, & authorised H. to fill in his name as drawer. H. returned the blank acceptance to deft. in the same state in which he received it. Deft. put it into a drawer of his writing table at his chambers, which was unlocked, & it was lost or stolen. C. afterwards filled in his own name without deft.'s authority, & an action was brought on it by pltf. as indorsee for value:—*Held*: deft. was not liable on the bill.

If he [deft.] is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, & the doctrine should never be applied without a necessity for it (BRAMWELL, L.J.).

I confess I think he [deft.] has been negligent. . . . But then this negligence is not the proximate or effective cause of the fraud (BRAMWELL, L.J.).—*BAXENDALE v. BENNETT* (1878), 3 Q. B. D. 525; 47 L. J. Q. B. 624; 40 L. T. 23; 43 J. P. 204; 26 W. R. 899, C. A.

*Annotations*:—*Consd.* *London & South Western Bank v. Wentworth* (1880), 5 Ex. D. 96. *Appld.* *Lloyd's Bank v. Cooke*, [1907] 1 K. B. 794. *Consd.* *Smith v. Prosser*, [1907] 2 K. B. 735; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777. *Refd.* *Patent Safety Gun Cotton Co. v. Wilson* (1880), 49 L. J. Q. B. 713; *Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611; *Scholfield v. Londesborough*, [1896] A. C. 514; *Herdman v. Wheeler*, [1902] 1 K. B. 361; *De La Bero v. Pearson*, [1907] 1 K. B. 483. *Mentd.* *Marcussen v. Birkbeck Bank* (1889), 5 T. L. R. 179; *Brocklesby v. Temperance Permanent Bldg. Soc.* (1893), 42 W. R. 68; *Lewis v. Clay* (1897), 77 L. T. 653; *Nash v. De Freville*, [1900] 2 Q. B. 72; *Watkin v. Lamb* (1901), 85 L. T. 483.

1610. —.]—*HALL v. WEST END ADVANCE CO., LTD.*, No. 1600, *ante*.

1611. —.]—Pltfs., a corporate body, left their seal in custody of their clerk, who, without authority, affixed it to powers of attorney, under which certain stock in the public funds, property of pltfs., was sold. The clerk appropriated the proceeds. In an action in which pltfs. claimed to be entitled to the stock on the ground that it had been transferred without their authority by defts.:—*Held*: assuming pltfs. to have been negligent, their negligence was not the proximate cause of the loss, & did not disentitle them from recovering.—*STAPLE OF ENGLAND (MAYOR, ETC. OF MERCHANTS OF) v. BANK OF ENGLAND (GOVERNOR & CO.)* (1887), 21 Q. B. D. 160; 57

1605 iv. —.]—Pltf., having purchased shares in a Transvaal gold-mining co., & accepted as sufficient delivery a certificate indorsed in blank by the registered holder, deposited the certificate with his broker for safe custody. The broker delivered the certificate for valuable consideration to deft., who had no notice of pltf.'s interest in the shares, & he, having purchased them under stock-exchange rules, had them registered in his name. In an action for the return of the shares:—*Held*: although the instrument was not negotiable, the universal custom in South Africa being to accept certificates so indorsed as being in "order," pltf. was estopped by his conduct in leaving the instrument in that form in the hands of a sharebroker from asserting his right to the shares.—*VAN BLOMMESTEIN v. HOLLIDAY* (1904), 21 S. C. 11.—S. AF.

1605 v. —.]—In order that a customer may be estopped by negligence from disputing a forged cheque, it must be shown that such negligence was the real & proximate cause of loss to the bank.—*STANDARD BANK OF S. A. v. KAPLAN*, [1922] C. P. D. 214.—S. AF.

*Sect. 3.—By representation: Sub-sect. 4, A. & B. Sects. 4 & 5.]*

L. J. Q. B. 418; 52 J. P. 580; 36 W. R. 880; 4 T. L. R. 46, C. A.

*Annotations:—*Refd. *Bank of England v. Vagliano*, [1891] A. C. 107; *Scholfield v. Londesborough*, [1895] 1 Q. B. 538; *Ruben v. Great Fingall Consolidated*, [1904] 2 K. B. 712; *Kepitigalla Rubber Estates v. National Bank of India*, [1909] 2 K. B. 1010; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777.

1612. —.]—*SETON v. LAFONE*, No. 11, *ante*.

1613. —.]—*VAGLIANO BROTHERS v. BANK OF ENGLAND*, No. 1601, *ante*.

1614. —.]—Pltf. carried on business as a tobacco merchant in Melbourne, Australia, under a firm name. He also had a London office bearing the firm name, at which the business of purchasing & paying for goods in London & shipping them to Melbourne was carried on. While absent in Australia he appointed an agent at the London office under a power of attorney, describing him, pltf., as of Melbourne trading as a tobacco merchant under the firm name, & authorising the agent for him, pltf., & in his name, or in his trading name, to purchase & to make any contract for the purchase of any goods in connection with the business carried on by him, & to make such purchase either for cash or on credit, with power to modify or cancel the contracts for purchase, & where necessary in connection with his business, to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper in the premises & to sign pltf.'s name or his trading name to any cheques on his banking account in London.

The agent, purporting to act under the power of attorney, obtained a loan of £4,000 from defts., a firm of cigar merchants in London who had previously had frequent business dealings, including loan transactions, with pltf. On applying for the loan the agent, who was well known to defts., represented that the power of attorney authorised him to borrow money, & the loan was required for the purposes of the pltf.'s business. At the same time he produced to them the power itself, but, being satisfied with his assurances, they did not read it. On receiving the £4,000 the agent handed to defts. as security bills of exchange for the amount accepted in his own name *per pro* pltf.'s firm. He then paid the £4,000 into pltf.'s London banking account, drew it out by cheques drawn by him under the power & applied it to his own use.

Pltf. being at that time in Australia, had no knowledge of the loan transaction. In an action by him against defts. to restrain them from negotiating the bills upon the ground that they had been accepted without his authority, & upon a counter-claim by defts. against pltf. for the £4,000 as money had & received by him to their use:—*Held*: (1) the power of attorney gave the agent power to purchase only, with such powers as were necessarily implied by the appointment of the agent as purchasing agent, did not confer authority to borrow; (2) the primary cause of the loss of the £4,000 was the neglect by defts. of ordinary business precautions when lending the money to the agent, & they were estopped by this neglect, & also by constructive notice that the agent had no power to borrow, from claiming it as money had & received by pltf. to their use.

Their [def'ts.] omission to read the power was the proximate cause of the loss L.J.).

The primary cause of the loss is not anything done or omitted to be done by pltf. but the

neglect of ordinary business precautions by defts. (*STIRLING, L.J.*).—*JACOBS v. MORRIS*, [1902] 1 Ch. 816; 71 L. J. Ch. 363; 86 L. T. 275; 50 W. R. 371; 18 T. L. R. 384; 46 Sol. Jo. 315, C. A.

—.]—*BELL v. MARSH*, No. 1106, *ante*.

—.]—To entitle a pltf. to recover from deft., on the ground of estoppel, a loss occasioned through culpable neglect on the part of deft., pltf. must prove that the negligence complained of occurred in the particular transaction in which his loss arose, & also that such negligence was the proximate, direct, or real cause of the loss.—*LONGMAN v. BATH ELECTRIC TRAMWAYS, LTD.*, [1905] 1 Ch. 646; 74 L. J. Ch. 424; 92 L. T. 743; 53 W. R. 480; 21 T. L. R. 373; 12 Mans. 147, C. A.

*Annotation:—*Mentd. *Rainford v. Keith & Blackman Co.* (1905), 74 L. J. Ch. 531.

1617. —.]—*CARLISLE & CUMBERLAND BANKING Co. v. BRAGG*, No. 1603, *ante*.

1618. —.]—*LANCASHIRE & YORKSHIRE RY. Co., LONDON & NORTH WESTERN RY. Co. & GRAESER, LTD. v. MACNICOLL*, No. 1080, *ante*.

What amounts to negligence.]—See NEGLIGENCE & specific Titles *passim*.

Liability for negligence.]—See NEGLIGENCE & specific Titles *passim*.

#### *B. In Preparation and Custody of Documents.*

Negotiable instruments—Inchoate instruments.]

—See *BILLS OF EXCHANGE*, Vol. VI., pp. 69, 72–75.

—Forged or unauthorised signatures—Generally.]—See *BILLS OF EXCHANGE*, Vol. VI., pp. 103–108.

Fraudulent alteration of instrument.]

—See *BANKERS*, Vol. III., pp. 230 *et seq.*; *BILLS OF EXCHANGE*, Vol. VI., pp. 383, 384.

In connection with sale of goods.]—See *BAILMENT*, Vol. III., p. 78, Nos. 166, 167; *PAWNS & PLEDGES*; *SALE OF GOODS*.

Powers of attorney—Forged powers of attorney—For transfer of shares & stock.]—See *BANKERS*, Vol. III., pp. 124–127; *COMPANIES*, Vol. IX., pp. 389, 390; Vol. X., p. 1144.

Blank transfers of shares—Left in hands of brokers.]—See *COMPANIES*, Vol. IX., pp. 365 *et seq.*

#### SECT. 4.—ARISING IN PARTICULAR RELATIONSHIPS AND TRANSACTIONS.

Accounts—Generally.]—See *EQUITY*, Vol. XX., pp. 266 *et seq.*

—Agents' accounts.]—See *AGENCY*, Vol. I., pp. 441, 442, 445–447.

Auctioneers.]—See *AUCTION & AUCTIONEERS*, Vol. III., p. 30, Nos. 219, 220.

Ballor & ballee—Estoppel of ballee.]—See *BAILMENT*, Vol. III., pp. 77, 78, 100–106, Nos. 164, 281–306.

—Estoppel of joint ballors—Delivery to one.]—See *BAILMENT*, Vol. III., p. 117, No. 398.

Banker & customer—Generally.]—See *BANKERS*, Vol. III., pp. 175, 215, 276, Nos. 308, 540, 860.

—Forged or altered cheques, negotiable instruments & other documents.]—See *BANKERS*, Vol. III., pp. 230 *et seq.*, 235 *et seq.*; *BILLS OF EXCHANGE*, Vol. VI., pp. 383, 384.

—Entries in pass-book.]—See *BANKERS*, Vol. III., pp. 243 *et seq.*

Bankruptcy—Bankrupt & trustee in bankruptcy.]—See *BANKRUPTCY*, Vol. V., pp. 641, 729–738, 1011, Nos. 5763, 6324 *et seq.*, 8249

Estoppel of creditor as to proof of debt.]—



See **BANKRUPTCY**, Vol. IV., pp. 328 *et seq.*, 348 *et seq.*, Nos. 3079 *et seq.*, 3262 *et seq.*

**Bills of exchange & other negotiable instruments—Generally.]—See** **BILLS OF EXCHANGE**, Vol. VI., pp. 69, 72–75, 103–108, 452, 453, 456.

— **Estoppel of acceptor.]—See** **BILLS OF EXCHANGE**, Vol. VI., pp. 301–305.

— **Estoppel of drawer.]—See** **BILLS OF EXCHANGE**, Vol. VI., p. 307.

— **Estoppel of indorser.]—See** **BILLS OF EXCHANGE**, Vol. VI., p. 312.

— **Fraudulent alteration of instrument.]—See** **BILLS OF EXCHANGE**, Vol. VI., pp. 383, 384.

— **Waiver of presentment.]—See** **BILLS OF EXCHANGE**, Vol. VI., pp. 242 *et seq.*

— **Waiver of notice of dishonour.]—See** **BILLS OF EXCHANGE**, Vol. VI., pp. 281 *et seq.*

**Bills of lading.]—See** **SHIPPING**.

**Bills of sale.]—See** **BILLS OF SALE**, Vol. VII., pp. 108, 127, 145, Nos. 648, 722, 723, 802.

**Building contracts—Effect of certificate.]—See** **BUILDING CONTRACTS**, Vol. VII., pp. 356 *et seq.*, 381, 382.

— **Waiver of right to forfeit.]—See** **BUILDING CONTRACTS**, Vol. VII., pp. 407, 408.

**Carriers—Generally.]—See** **CARRIERS**, Vol. VIII., pp. 33, 34, 53, 123, 224, 225, Nos. 189, 190, 352, 353, 826, 1435.

— **Effect of misstatement to carrier.]—See** **CARRIERS**, Vol. VIII., pp. 24, 51, 52, Nos. 133–137, 343.

**Commons—Map with inclosure award.]—See** **BOUNDARIES**, Vol. VII., pp. 316, 317, Nos. 367–370.

**Companies—Issue of debentures.]—See** **COMPANIES**, Vol. X., pp. 775 *et seq.*

— **Issue of share certificates.]—See** **COMPANIES**, Vol. IX., pp. 287 *et seq.*; Vol. X., pp. 1129 *et seq.*

— **Issue of fully or partly paid shares.]—See** **COMPANIES**, Vol. IX., p. 299.

— **Transfer of shares—Generally.]—See** **COMPANIES**, Vol. IX., pp. 381, 382; Vol. X., p. 1144.

— **Blank transfers.]—See** **COMPANIES**, Vol. IX., pp. 365–367.

— **Estoppel of shareholder from claiming rights or denying liabilities.]—See** **COMPANIES**, Vol. IX., p. 198.

#### PART VI. SECT. 5.

**1619 i. Necessity for.]—In an action against a city for removing pltf.'s steps, it appeared in evidence that when the city engineer called on pltf. in reference to the alleged encroachment on the street, pltf. asked the engineer to give him the line of the street, whereupon the engineer marked it on the corner of the steps with a pencil. Deft.'s counsel contended that pltf. was bound by this proceeding, under sect. 270 of the Act of incorporation, & that not having appealed under sect. 271 he was estopped:—*Held*: deft. could not take advantage of the estoppel, not having pleaded it.—**EVANS v. HALIFAX CITY** (1882), 3 R. & G. 321.—**CAN.****

**1619 ii. —.]—Defts. in answer to an action for trespass to land by erecting a building thereon, set up in their statement of defence that the erection was upon land on defts.' side of boundaries, fixed by agreement between the parties, & also that pltf. was estopped by his conduct & representations from denying that the boundaries were as claimed by defts.:—*Held*: the specific acts & conduct causing the alleged belief relied on as an estoppel must be pleaded.—**GUICHON v. FISHERMAN'S CANNERY CO.** (1896), 4 B. C. R. 516.—**CAN.****

**1619 iii. —.]—An estoppel *in pais* need not be pleaded to make it obligatory.—**IMPERIAL BREWERS v. GELIN** (1908), 18 Man. L. R. 283.—**CAN.****

**1619 iv. —.]—In an action for the price of goods sold & delivered, of which an account was rendered, defts. gave evidence that, upon receiving a receipt for that account, which was for the whole amount due, they destroyed all prior accounts:—*Held*: if these facts had been pleaded, the plea of estoppel would have been a good one, showing that defts. had altered their position to their detriment; but as the facts were not pleaded, pltfs. were not estopped.—**SWIFT CANADIAN CO. v. EASTERBROOK & SON** (1913), 26 W. L. R. 142.—**CAN.****

**1619 v. —.]—In order to hold liable a person who places his name on a lien note, intending thereby merely to witness the maker's signature, either a promise to pay must be established or the principal of estoppel specially pleaded & its application proved.—**HAYES v. WILSON & RICHARDSON** (1914), 29 W. L. R. 381; 6 W. W. R. 1495; 20 D. L. R. 569.—**CAN.****

**1619 vi. —.]—The facts relied on to establish an estoppel of any kind including an estoppel *in pais*, should be pleaded; there is not, at least under**

**— Register of members—How far conclusive.]**

**—See** **COMPANIES**, Vol. IX., pp. 207, 208.

**Compositions & schemes & deeds of arrangement—Position of creditors.]—See** **BANKRUPTCY**, Vol. V., pp. 1110 *et seq.*

**Compulsory purchase of land—Abandonment of notice to treat.]—See** **COMPULSORY PURCHASE OF LAND**, Vol. XI., pp. 176, 177.

— **Consent to entry on land by promoters.]—See** **COMPULSORY PURCHASE OF LAND**, Vol. XI., pp. 217, 218.

**Conveyances.]—See** Part V., *ante*.

**Delivery orders.]—See** Nos. 1046, 1206, *ante*, & generally, **SALE OF GOODS**.

**Executions.]—See** **EXECUTION**.

**Insurance.]—See** **INSURANCE**.

**Invoices.]—See** Nos. 1211, 1212, *ante*.

**Landlord & tenant.]—See** **LANDLORD & TENANT**.

**Licensor & licensee—Of patent.]—See** **PATENTS**.

— **Generally.]—See** **EASEMENTS**, Vol. XIX., pp. 1 *et seq.*; **LANDLORD & TENANT**; **TRESPASS**.

**Mortgagor & mortgagee.]—See** **MORTGAGE**.

**Patents—Assignor & assignee.]—See** **PATENTS**.

— **Patentee & licensee.]—See** **PATENTS**.

**Pawnbrokers.]—See** **PAWNS & PLEDGES**.

**Principal & agent—Inter se.]—See** **AGENCY**, Vol. I., pp. 384, 441–443, 445–447, 454–456.

— **As regards third parties.]—See** **AGENCY**, Vol. I., pp. 316, 330 *et seq.*, 384, Nos. 373, 467 *et seq.*

**Principal & surety.]—See** **GUARANTEE**.

**Receipts.]—See** Part IV., Sect. 3, sub-sect. 2, B. (d), *ante*.

**Sheriffs.]—See** **SHERIFFS & BAILIFFS**.

**Transfers—Of shares & stocks.]—See** **BANKERS**, Vol. III., pp. 124–127; **COMPANIES**, Vol. IX., pp. 365–367, 381, 382; Vol. X., p. 1144.

**Trustee & cestui que trust.]—See** **TRUSTS & TRUSTEES**.

#### SECT. 5.—PLEADING ESTOPPEL.

*See, now, R. S. C., Ord. 19, r. 15, & generally, PLEADING.*

**1619. Necessity for.]—A waiver of privilege in one action estops a man from pleading it in any other. If pltf., however, will avail himself of the estoppel,**

modern practice, a right to set up estoppel *in pais* without pleading it.—**MACKENZIE v. WILLIAM GRAY & SONS CO., LTD.** (1914), 28 W. L. R. 322.—**CAN.**

**1619 vii. —.]—Where liability only arises by virtue of agency by estoppel, then agency by estoppel should be pleaded. If defts.' conduct & representations are such as to give pltf. good reason for considering that there was actual agency, although the facts do not support such a finding, pltf. should be allowed to amend his pleadings at the close of the trial & plead agency by estoppel, where the facts will support such a finding.—**IMPERIAL ELEVATOR & LUMBER CO. v. HILLMAN** (1915), 30 W. L. R. 951; 8 W. W. R. 381.—**CAN.****

**1619 viii. —.]—In an action to recover certain live stock, which deft. had removed from a farm, which pltf. had leased, together with the farm, to deft., deft. admitted the removal of the stock, but claimed to have substituted other stock of equal value. On the trial the judge directed the jury that deft. had no right to remove the stock & substitute other stock instead, even though such substituted stock was of equal or greater value than that removed. Notwithstanding this direction the**

*Sect. 5.—Pleading estoppel. Part VII.]*

he must set it forth & rely upon it in his replication.

—JONES v. BODEENOR (1697), 1 Ld. Raym. 135; 1 Salk. 2; 5 Mod. Rep. 310; 91 E. R. 986.

1620. —.]—STROUD v. GERRARD (LADY) (1707), 1 Salk. 8; 91 E. R. 7.

Annotation:—*Refd.* Meredith v. Hodges (1807), 2 Bos. & P. N. R. 453.

1621. —.]—When a receipt has been given by one partner in the name of the firm, but without the knowledge of the other partners, such receipt is not conclusive evidence against the firm in an action by them for their demand.

If the receipt operates as an estoppel, you should

have pleaded it (LITTLEDALE, J.).—FARRAR v. HUTCHINSON (1839), 9 Ad. & El. 641; 1 Per. & Dav. 437; 2 Will. Woll. & H. 106; 8 L. J. Q. B. 107; 112 E. R. 1355.

Annotation:—*Mentd.* Wallace v. Kolsall (1840), 8 Dowl. 841.

1622. —.]—FREEMAN v. COOKE, No. 1019, *ante.*

1623. —.]—COLLINS v. SMITH (1896), 12 T. L. R. 474.

— Estoppel by matter of record.]—*See* Part II., Sect. 5, *ante.*

— Estoppel by deed.]—*See* Part V., Sect. 9, *ante.*

1624. *Mode of.*]—KEITH v. GANCIA (R.) & Co., LTD., No. 1213, *ante.*

## Part VII.—Pleading Estoppel.

Estoppel by matter of record.]—*See* Part II., Sect. 5, *ante.*

Estoppel by deed.]—*See* Part V., Sect. 9, *ante.*

Estoppel in pais.]—*See* Part VI., Sect. 5, *ante.*

jury found the stock removed belonged to deft.:—*Held*: as estoppel had not been pleaded or raised on the trial it was not open to deft. to contend, on the motion to set aside the verdict or for a new trial, that pltf. by his conduct allowed deft. to assume that he could substitute stock for that removed & was estopped from claiming title to the stock removed.—RUSH v. CLARK (1918), 45 N. B. R. 393.—CAN.

1619 ix. —.]—Although estoppel was not pleaded, the question was argued in the ct. below after the evidence had been taken, & as pltf. did not show

that any further evidence could be procured the ct. held that deft. was entitled to judgment. On appeal:—*Held*: as estoppel was not pleaded at the trial pltf. should have the option of a new trial on this issue.—DUNBAR v. HOSKINS (J. S.) LUMBER CO., LTD. (1919), 47 N. B. R. 178.—CAN.

1619 x. —.]—Not only is it necessary that estoppel be specially pleaded before the plea is available but it is further necessary that the plea be drafted with great particularity & clearness, & where these qualities are absent the pleadings will be

sufficient to set up estoppel.—WHITE v. KIRKMAN, [1923] 3 D. L. R. 741; 3 W. W. R. 254.—CAN.

1619 xi. —.]—An estoppel *in pais* need not be pleaded in order to make it obligatory.—CIVA RAU NANAJI v. JEVANA RAU (1863), 2 Mad. 31.—IND.

1624 i. *Mode of.*]—Where estoppel by representation is alleged, sufficient particulars of the representation must be given to prevent a surprise on the opposite party.—NEW BRIGHTON TRAMWAY CO. v. KNIGHT (1893), 12 N. Z. L. R. 371.—N.Z.



## ESTOVERS.

*See* COMMONS AND RIGHTS OF COMMON.

## ESTRAYS.

*See* ANIMALS ; CONSTITUTIONAL LAW.

## ESTREAT OF RECOGNISANCE.

*See* CRIMINAL LAW AND PROCEDURE.

## EVICTIION.

*See* COUNTY COURTS ; LANDLORD AND TENANT.

## EVIDENCE.

*(See* VOLUME XXII.)

*Owing to the extent of the above Title it was not feasible to include it in the present Volume, and it will, therefore, form Volume XXII. It is believed that this plan will be more serviceable than if the Title was divided and appeared in two Volumes.*

## EXAMINERS.

*See* COURTS ; EVIDENCE ; PRACTICE AND PROCEDURE.

## EXCHANGE.

*See* COMPULSORY PURCHASE OF LAND AND COMPENSATION ; REAL PROPERTY AND CHATTELS  
REAL ; STOCK EXCHANGE.

## EXCHEQUER.

*See* CONSTITUTIONAL LAW ; REVENUE.

## EXCHEQUER BILLS.

*See* BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS.

## EXCISE.

*See* INTOXICATING LIQUORS ; REVENUE.

## EXCOMMUNICATION

*See* ECCLESIASTICAL LAW.



# EXECUTION.

	PAGE
PART I. IN GENERAL . . . . .	415
PART II. MATTERS COMMON TO ALL MODES OF EXECUTION . . . . .	415
SECT. 1. IN RESPECT OF WHAT JUDGMENTS OR ORDERS EXECUTION MAY BE ISSUED . . . . .	415
SUB-SECT. 1. IN GENERAL . . . . .	415
SUB-SECT. 2. CONDITIONAL JUDGMENTS OR ORDERS . . . . .	416
SUB-SECT. 3. ARBITRATION PROCEEDINGS. . . . .	416
SECT. 2. CONDITIONS PRECEDENT TO EXECUTION . . . . .	416
SUB-SECT. 1. IN GENERAL . . . . .	416
SUB-SECT. 2. SERVICE OF JUDGMENT OR ORDERS—DEMAND . . . . .	417
SECT. 3. TIME FOR ISSUE OF EXECUTION . . . . .	418
SECT. 4. HOW LONG WRIT IN FORCE—RENEWAL . . . . .	419
SECT. 5. BY WHOM EXECUTION MAY BE ISSUED . . . . .	420
SECT. 6. AGAINST WHOM EXECUTION MAY ISSUE . . . . .	420
SUB-SECT. 1. IN GENERAL . . . . .	420
SUB-SECT. 2. JOINT DEBTORS . . . . .	422
SUB-SECT. 3. JOINT TORTFEASORS . . . . .	422
SUB-SECT. 4. PERSONS NOT PARTIES TO CAUSE OR ACTION . . . . .	422
SUB-SECT. 5. PARTNERS AND PARTNERSHIP PROPERTY. <i>See</i> PARTNERSHIP. . . . .	
SUB-SECT. 6. COMPANIES. . . . .	422
SUB-SECT. 7. CORPORATIONS . . . . .	423
A. In General . . . . .	423
B. Municipal Corporations . . . . .	423
SUB-SECT. 8. MARRIED WOMEN. <i>See</i> HUSBAND AND WIFE. . . . .	
SUB-SECT. 9. EXECUTORS AND ADMINISTRATORS. <i>See</i> EXECUTORS. . . . .	
SUB-SECT. 10. LUNATICS . . . . .	423
SUB-SECT. 11. FOREIGN SOVEREIGNS AND AMBASSADORS . . . . .	423
SECT. 7. FOR WHAT SUMS EXECUTION MAY ISSUE . . . . .	424
SECT. 8. LEAVE TO ISSUE EXECUTION . . . . .	424
SUB-SECT. 1. IN WHAT CASES NECESSARY . . . . .	424
A. In General . . . . .	424
B. After Six Years . . . . .	425
C. Change of Parties . . . . .	426
(a) By Death . . . . .	426
(b) By Bankruptcy . . . . .	427
(c) By Assignment . . . . .	427
(d) Change in Civil Status of Judgment Debtor . . . . .	427
D. Husband and Wife . . . . .	427
E. Judgment of Assets in futuro . . . . .	427
F. Shareholders in Joint Stock Companies . . . . .	427
G. Conditional Judgments . . . . .	427
H. Other Cases . . . . .	427
SUB-SECT. 2. HOW OBTAINED . . . . .	428
SUB-SECT. 3. UNDER COURTS (EMERGENCY POWERS) ACTS . . . . .	428
SECT. 9. FORM OF WRITS OF EXECUTION . . . . .	429
SUB-SECT. 1. IN GENERAL . . . . .	429
SUB-SECT. 2. AMENDMENT . . . . .	431

	PAGE
SECT. 10. BY WHOM WRITS OF EXECUTION MAY BE SUED OUT . . . . .	434
SECT. 11. SIMULTANEOUS ISSUE OF SEVERAL WRITS . . . . .	434
SECT. 12. ISSUE OF SEVERAL WRITS IN SUCCESSION . . . . .	436
SUB-SECT. 1. NECESSITY FOR RETURN TO EARLIER WRIT . . . . .	436
SUB-SECT. 2. WHAT SUBSEQUENT WRITS MAY BE ISSUED . . . . .	437
A. After Writ of fieri facias . . . . .	437
B. After Writ of capias ad satisfaciendum . . . . .	438
C. After Writ of elegit . . . . .	439
SECT. 13. EXECUTION OF THE WRIT . . . . .	440
SUB-SECT. 1. IN GENERAL . . . . .	440
SUB-SECT. 2. TO WHOM DELIVERED . . . . .	440
SUB-SECT. 3. BY WHOM EXECUTED . . . . .	441
SECT. 14. PRIORITIES . . . . .	442
SUB-SECT. 1. BETWEEN EXECUTION CREDITORS . . . . .	442
A. The Crown . . . . .	442
B. Writ of fieri facias . . . . .	442
C. Writ of elegit . . . . .	442
D. Writ of capias ad satisfaciendum . . . . .	442
SUB-SECT. 2. BETWEEN EXECUTION CREDITORS AND THIRD PARTIES . . . . .	442
A. Attachment of Debts . . . . .	442
B. Charging Orders . . . . .	442
C. Stop Orders . . . . .	442
D. Equitable Execution—Receiver . . . . .	442
SECT. 15. STAY OF EXECUTION . . . . .	442
SUB-SECT. 1. WHAT OPERATES AS STAY WITHOUT ORDER . . . . .	442
SUB-SECT. 2. JURISDICTION TO ORDER STAY . . . . .	444
SUB-SECT. 3. APPLICATION FOR STAY . . . . .	445
A. To Whom Made . . . . .	445
B. How Made . . . . .	446
C. Time for Making . . . . .	447
D. Costs of Application . . . . .	447
SUB-SECT. 4. WHEN GRANTED . . . . .	447
A. In General—Discretion of Court . . . . .	447
B. In Particular Cases . . . . .	448
(a) Where Further Proceedings Pending . . . . .	448
i. Appeals . . . . .	448
ii. Other Proceedings . . . . .	451
(b) Matters arising after Judgment . . . . .	452
(c) Death, Bankruptcy, Winding-up . . . . .	452
(d) Other Cases . . . . .	452
SUB-SECT. 5. TERMS ON WHICH GRANTED . . . . .	453
SUB-SECT. 6. EFFECT OF STAY . . . . .	454
SECT. 16. RETURN OF THE WRIT . . . . .	454
SUB-SECT. 1. IN GENERAL . . . . .	454
SUB-SECT. 2. AFTER EXPIRATION OF SHERIFF'S TERM OF OFFICE . . . . .	455
SECT. 17. EFFECT OF SUPERVENING BANKRUPTCY OR INSOLVENCY . . . . .	455
SUB-SECT. 1. ON POSITION OF EXECUTION CREDITOR IN RELATION TO OTHER CREDITORS . . . . .	455
SUB-SECT. 2. ON RIGHTS OF EXECUTION CREDITOR . . . . .	455
SUB-SECT. 3. ON DUTIES AND LIABILITIES OF SHERIFF . . . . .	456
SUB-SECT. 4. ON RIGHTS OF EXECUTION DEBTOR . . . . .	456
SECT. 18. EFFECT OF EXECUTION . . . . .	456
SUB-SECT. 1. IN GENERAL . . . . .	456
SUB-SECT. 2. AS ACT OF BANKRUPTCY . . . . .	456
SUB-SECT. 3. AS PROTECTED TRANSACTION IN BANKRUPTCY . . . . .	456
SECT. 19. SETTING ASIDE EXECUTION . . . . .	



	PAGE
SECT. 20. WRONGFUL AND IRREGULAR EXECUTION . . . . .	456
SUB-SECT. 1. WRONGFUL EXECUTION . . . . .	456
A. Process Wrongly Issued . . . . .	456
(a) In General . . . . .	456
(b) Issue of Process after Judgment Fully Satisfied . . . . .	457
(c) Issue of Process for More than Amount due . . . . .	458
B. Process Wrongly Executed . . . . .	460
C. Setting Aside Writ . . . . .	460
SUB-SECT. 2. IRREGULAR EXECUTION . . . . .	460
A. What Constitutes Irregular Execution . . . . .	460
B. Setting Aside Writ . . . . .	462
(a) The Application . . . . .	462
i. Who can Apply . . . . .	462
ii. How Made . . . . .	462
(b) Terms Imposed . . . . .	463
(c) Effect of . . . . .	463
(d) Costs of . . . . .	464
C. Waiver of Irregularity . . . . .	464
SUB-SECT. 3. MALICIOUS EXECUTION . . . . .	464
SUB-SECT. 4. ACTION FOR . . . . .	465
A. Justification under Judgment . . . . .	465
(a) Existing Judgment . . . . .	465
(b) Judgment Set Aside . . . . .	466
B. Justification under Process . . . . .	466
(a) Existing Process . . . . .	466
(b) Void or Irregular Process . . . . .	467
SECT. 21. RESTITUTION. . . . .	469
SECT. 22. REMEDIES FOR INTERFERENCE WITH SHERIFF . . . . .	469
PART III. PARTICULAR FORMS OF EXECUTION . . . . .	470
SECT. 1. WRIT OF FIERI FACIAS . . . . .	470
SUB-SECT. 1. WHEN APPLICABLE . . . . .	470
SUB-SECT. 2. ISSUE AND DELIVERY OF THE WRIT . . . . .	470
SUB-SECT. 3. PRIORITIES OF CREDITORS WHERE SEVERAL WRITS . . . . .	471
SUB-SECT. 4. EXECUTION OF THE WRIT . . . . .	471
A. In General . . . . .	471
B. Where Several Writs . . . . .	472
(a) In General . . . . .	472
(b) Priority of Creditors . . . . .	472
C. By Whom Executed . . . . .	475
D. Time for Execution . . . . .	475
E. Seizure . . . . .	475
(a) How Made . . . . .	475
(b) What Amounts to . . . . .	475
(c) Where Made . . . . .	477
i. In General . . . . .	477
ii. Forcible Entry . . . . .	478
(d) What Amount to be Seized . . . . .	479
(e) What Property may be Seized . . . . .	480
i. Rule at Common Law . . . . .	480
ii. Animals . . . . .	480
iii. Chattels Real . . . . .	480
iv. Choses in Action . . . . .	481
v. Crops . . . . .	481
vi. Deeds and Documents . . . . .	482
vii. Equitable Interests . . . . .	483
viii. Fixtures . . . . .	484
ix. Goods Subject to Building Contracts . . . . .	486
x. Money and Securities . . . . .	486
xi. Railway Stock . . . . .	488
xii. Salaries, Pensions, etc. . . . .	488

	PAGE
xiii. Ships . . . . .	489
xiv. Term of Years . . . . .	490
xv. Wearing Apparel, Bedding, Tools . . . . .	492
xvi. Other Property . . . . .	493
(f) Whose Property may be Seized . . . . .	494
i. Goods of Execution Debtor . . . . .	494
ii. Goods of Third Party . . . . .	495
iii. Goods of Debtor Jointly with Third Party . . . . .	496
iv. Goods of Bankrupt . . . . .	496
v. Goods Subject to Bill of Sale . . . . .	496
vi. Goods of Clergyman . . . . .	496
vii. Goods of Companies . . . . .	496
viii. Goods Distrained . . . . .	496
ix. Goods Held in Fiduciary Capacity . . . . .	496
x. Goods Fraudulently Assigned . . . . .	497
xi. Goods of Husband and Wife . . . . .	498
xii. Goods Let or Hired . . . . .	501
xiii. Goods Subject to Lien . . . . .	502
xiv. Goods Mortgaged . . . . .	503
xv. Goods Pawned or Pledged . . . . .	504
xvi. Goods of Testator in Hands of Personal Representative . . . . .	505
(g) Effect of Seizure . . . . .	506
i. Where Several Writs . . . . .	506
ii. On Property in Goods Seized . . . . .	507
iii. As Discharge of Judgment Debts . . . . .	508
F. Possession . . . . .	508
(a) In General . . . . .	508
(b) Withdrawal . . . . .	509
(c) Abandonment . . . . .	509
(d) Re-Entry . . . . .	510
G. Inquest as to Property . . . . .	510
H. Sale . . . . .	511
(a) In General . . . . .	511
(b) Duty of Sheriff to Sell . . . . .	511
(c) To whom Sheriff can Sell . . . . .	512
(d) Time for Sale . . . . .	512
(e) Amount to be Sold . . . . .	513
(f) Mode of Sale . . . . .	514
(g) Must Obtain Best Price . . . . .	514
(h) Receipt for Proceeds . . . . .	515
(i) Effect of Sale . . . . .	515
i. Title of Sheriff . . . . .	515
ii. Title of Purchaser . . . . .	515
(j) Duty of Sheriff as to Proceeds . . . . .	518
SUB-SECT. 5. PAYMENT OF RENT, RATES, AND TAXES BY SHERIFF . . . . .	521
A. Rent . . . . .	521
B. Rates and Taxes . . . . .	524
SUB-SECT. 6. FROM WHEN DEBTOR'S PROPERTY BOUND . . . . .	524
SUB-SECT. 7. AGAINST WHOM PROPERTY BOUND . . . . .	527
SUB-SECT. 8. EFFECT OF DEATH OF EXECUTION CREDITOR OR DEBTOR . . . . .	528
SUB-SECT. 9. EFFECT OF PAYMENT OF DEBT . . . . .	528
SUB-SECT. 10. RETURN OF WRIT . . . . .	528
A. In General . . . . .	528
B. When Necessary . . . . .	529
C. How Obtained . . . . .	530
D. Time for . . . . .	530
E. Form and Sufficiency of Return . . . . .	531
(a) In General . . . . .	531
(b) Nulla bona . . . . .	532
(c) Want of Buyers . . . . .	534
(d) Other Returns . . . . .	535



	PAGE
F. Liability for Non-Return or False Return . . . . .	535
(a) Non-Return. . . . .	535
(b) False Return—Action for . . . . .	536
SUB-SECT. 11. REMEDIES FOR RECOVERY OF PROCEEDS . . . . .	539
SUB-SECT. 12. LIABILITY FOR WRONGFUL OR IRREGULAR SEIZURE, ETC. . . . .	542
A. Sheriff . . . . .	542
(a) In General . . . . .	542
(b) Illegal Entry . . . . .	543
(c) Wrongful or Irregular Seizure . . . . .	543
(d) Improper Sale . . . . .	545
(e) For Acts of Officers . . . . .	545
B. Bailiff . . . . .	546
C. Execution Creditors . . . . .	547
D. Solicitors . . . . .	551
E. Of Other Persons . . . . .	552
F. Rights of Third Parties . . . . .	552
SUB-SECT. 13. WRITS IN AID . . . . .	555
A. Venditioni exponas . . . . .	555
B. Distringas nuper vicecomitem . . . . .	556
SECT. 2. WRIT OF ELEGIT . . . . .	556
SUB-SECT. 1. IN GENERAL . . . . .	556
SUB-SECT. 2. WHEN APPLICABLE . . . . .	557
SUB-SECT. 3. ISSUE AND DELIVERY OF WRIT . . . . .	557
SUB-SECT. 4. PROCEEDINGS UNDER WRIT. . . . .	557
A. In General . . . . .	557
B. The Inquisition . . . . .	558
C. The Return . . . . .	558
SUB-SECT. 5. WHAT MAY BE TAKEN UNDER WRIT OF ELEGIT . . . . .	559
A. Lands in Possession . . . . .	559
B. Leases, Remainders, and Reversions . . . . .	560
C. Equitable Interests in Land . . . . .	562
D. Goods and Chattels . . . . .	564
E. Ecclesiastical Property . . . . .	564
F. Land held by Public Authorities . . . . .	565
G. Other Property . . . . .	565
SUB-SECT. 6. WHAT QUANTUM OF LAND TO BE SEIZED . . . . .	566
SUB-SECT. 7. REGISTRATION . . . . .	566
SUB-SECT. 8. POSSESSION . . . . .	571
A. In General . . . . .	571
B. Delivery of Possession . . . . .	571
SUB-SECT. 9. TENANCY BY WRIT OF ELEGIT . . . . .	572
A. In General . . . . .	572
B. Relation to Incumbrancers . . . . .	573
C. Where Term of Years Seized . . . . .	573
D. Rent . . . . .	574
E. Accountability by Creditor to Debtor . . . . .	574
F. Determination of Tenancy . . . . .	575
SUB-SECT. 10. SALE . . . . .	575
A. In General . . . . .	575
B. Under Judgments Act, 1864 . . . . .	578
SUB-SECT. 11. RECOVERY OF POSSESSION BY DEBTOR . . . . .	579
SECT. 3. WRIT OF CAPIAS AD SATISFACIENDUM . . . . .	580
SUB-SECT. 1. ISSUE OF THE WRIT . . . . .	580
SUB-SECT. 2. FORMALITIES OF WRIT AND WARRANT. . . . .	580
SUB-SECT. 3. EXECUTION OF WRIT . . . . .	580
A. In General . . . . .	580
B. Right of Sheriff to Enter . . . . .	581
SUB-SECT. 4. RETURN TO THE WRIT . . . . .	582

	PAGE
SUB-SECT. 5. DISCHARGE OF THE WRIT . . . . .	582
A. In General . . . . .	582
B. Where Joint Debtors . . . . .	583
SECT. 4. WRIT OF DELIVERY AND WRIT OF ASSISTANCE . . . . .	583
SUB-SECT. 1. WRIT OF DELIVERY . . . . .	583
SUB-SECT. 2. WRIT OF ASSISTANCE . . . . .	584
SECT. 5. WRIT OF POSSESSION . . . . .	585
SUB-SECT. 1. IN GENERAL . . . . .	585
SUB-SECT. 2. EXECUTION OF WRIT . . . . .	587
A. In General . . . . .	587
B. Dispossession of Party Recovering . . . . .	588
C. Completion of Execution . . . . .	589
SUB-SECT. 3. REVERSAL OF JUDGMENT AND SETTING ASIDE EXECUTION . . . . .	590
SECT. 6. WRIT OF SEQUESTRATION . . . . .	591
SUB-SECT. 1. NATURE OF WRIT . . . . .	591
SUB-SECT. 2. IN WHAT CASES WRIT MAY ISSUE . . . . .	592
A. In General . . . . .	592
B. Disobedience to Injunctions by Corporate Bodies . . . . .	593
C. Disobedience to Orders in Matrimonial Causes . . . . .	594
D. Payment of Costs . . . . .	594
E. Payment of Money into Court . . . . .	595
SUB-SECT. 3. ISSUE OF WRIT . . . . .	595
A. In General . . . . .	595
B. Against Whom Writ may Issue . . . . .	596
C. The Order or Judgment . . . . .	597
D. Order Nisi for Sequestration . . . . .	597
SUB-SECT. 4. EXECUTION OF WRIT . . . . .	597
A. In General . . . . .	597
B. The Sequestrators . . . . .	597
C. What Property may be Taken . . . . .	598
D. Management of Property . . . . .	600
(a) In General . . . . .	600
(b) Under Order of Court . . . . .	601
i. In General . . . . .	601
ii. Sale . . . . .	601
SUB-SECT. 5. RETURN TO WRIT . . . . .	602
SUB-SECT. 6. EFFECT OF WRIT . . . . .	602
A. Binding the Property . . . . .	602
B. Position of Third Parties . . . . .	602
(a) Rights as against Sequestrators . . . . .	602
(b) Remedies . . . . .	603
SUB-SECT. 7. EFFECT OF DEATH OF PARTY . . . . .	604
SUB-SECT. 8. DISCHARGE OF SEQUESTRATION . . . . .	605
SECT. 7. EXECUTION AGAINST ECCLESIASTICAL PERSONS . . . . .	605
SECT. 8. EXTENTS . . . . .	605
PART IV. COSTS AND EXPENSES OF EXECUTION . . . . .	606
SECT. 1. IN GENERAL . . . . .	606
SECT. 2. SHERIFF'S REMUNERATION . . . . .	607
SUB-SECT. 1. IN GENERAL . . . . .	607
SUB-SECT. 2. POUNDAGE . . . . .	608
SUB-SECT. 3. POSSESSION MONEY . . . . .	611
SUB-SECT. 4. FEES . . . . .	612
SUB-SECT. 5. RECOVERY OF FEES AND POUNDAGE . . . . .	613
SUB-SECT. 6. OVERCHARGE AND EXTORTION . . . . .	616
PART V. ANALOGOUS PROCEEDINGS . . . . .	617
SECT. 1. ATTACHMENT OF DEBTS—GARNISHEE ORDER . . . . .	617
SUB-SECT. 1. NATURE OF PROCESS . . . . .	617

	PAGE
SUB-SECT. 2. AVAILABILITY OF PROCESS . . . . .	
A. In Respect of What Judgments and Orders . . . . .	618
B. To Whom Available . . . . .	619
C. Against Whom Available . . . . .	620
SUB-SECT. 3. TO WHAT DEBTS APPLICABLE . . . . .	621
A. Must be a Debt . . . . .	621
B. Debt Owing or Accruing . . . . .	624
C. Part of Debt . . . . .	627
D. Certain or Ascertainable Amount . . . . .	627
E. Legally Enforceable by Judgment Debtor . . . . .	629
F. Due to Judgment Debtor in Own Right . . . . .	629
G. Debts Due to Judgment Debtor in Representative Capacity . . . . .	631
H. Debts Assigned by Judgment Debtor . . . . .	631
I. Rent . . . . .	632
J. In respect of Wages, Salaries, Pensions, Allowances, etc. . . . .	632
K. Debts under Banking Accounts . . . . .	635
SUB-SECT. 4. APPLICATION FOR GARNISHEE ORDER . . . . .	635
SUB-SECT. 5. ORDER NISI . . . . .	637
A. Discretion to Make . . . . .	637
B. Service . . . . .	637
C. Effect Before Service . . . . .	638
D. Effect After Service . . . . .	638
(a) In General . . . . .	638
(b) Stay of Proceedings . . . . .	640
(c) Forfeiture . . . . .	640
(d) In Bankruptcy and Winding Up . . . . .	640
SUB-SECT. 6. PROCEEDINGS SUBSEQUENT TO ORDER NISI . . . . .	640
A. On Failure of Garnishee to attend . . . . .	640
B. Where Garnishee attends . . . . .	640
(a) Dispute as to Liability . . . . .	640
(b) Proceedings to determine Liability . . . . .	641
C. Order Absolute . . . . .	641
(a) Effect of Order . . . . .	641
(b) Setting Aside Order . . . . .	642
(c) Appeal from Order . . . . .	643
D. Enforcing Payment . . . . .	643
SUB-SECT. 7. PRIORITIES. . . . .	643
SUB-SECT. 8. DISCHARGE OF GARNISHEE . . . . .	645
SUB-SECT. 9. COSTS . . . . .	647
SECT. 2. CHARGING ORDERS ON STOCKS, SHARES, ETC. . . . .	647
SUB-SECT. 1. IN GENERAL . . . . .	647
SUB-SECT. 2. BY WHOM MADE . . . . .	648
SUB-SECT. 3. IN RESPECT OF WHAT JUDGMENTS OR ORDERS . . . . .	648
SUB-SECT. 4. IN WHAT CASES ORDERS MAY BE MADE . . . . .	649
SUB-SECT. 5. WHAT STOCKS, ETC., MAY BE CHARGED . . . . .	650
A. Government Stocks, Funds, etc. . . . .	650
B. Public Companies . . . . .	651
(a) In General . . . . .	651
(b) "Standing in his own Name in his own Right" . . . . .	651
(c) "In the Name of any Person in Trust for him" . . . . .	652
SUB-SECT. 6. PROCEDURE TO OBTAIN ORDER . . . . .	653
A. Order Nisi . . . . .	653
B. Order Absolute . . . . .	654
SUB-SECT. 7. EFFECT OF ORDER . . . . .	655
SUB-SECT. 8. PRIORITIES. . . . .	656
SUB-SECT. 9. ENFORCEMENT OF ORDER . . . . .	658
SECT. 3. STOP ORDERS . . . . .	658
SUB-SECT. 1. IN GENERAL . . . . .	658



	PAGE
SUB-SECT. 2. THE APPLICATION . . . . .	659
A. Who may Apply. . . . .	659
B. How Application Made . . . . .	659
C. On Whom Served . . . . .	659
D. What must be Shown . . . . .	660
SUB-SECT. 3. FORM OF ORDER . . . . .	660
SUB-SECT. 4. TO WHAT FUNDS APPLICABLE . . . . .	660
SUB-SECT. 5. EFFECT OF ORDER . . . . .	661
SUB-SECT. 6. PRIORITIES. . . . .	661
SUB-SECT. 7. PAYMENT OUT . . . . .	662
SUB-SECT. 8. COSTS . . . . .	662
SECT. 4. RESTRAINING TRANSFER OF STOCK IN BOOKS OF COMPANY . . . . .	662
SUB-SECT. 1. NOTICE IN LIEU OF DISTINGAS . . . . .	662
SUB-SECT. 2. INTERIM INJUNCTION OR RESTRAINING ORDER . . . . .	663
A. In General . . . . .	663
B. The Application . . . . .	663
C. Costs . . . . .	664
SECT. 5. EQUITABLE EXECUTION . . . . .	664
SUB-SECT. 1. NATURE OF PROCESS . . . . .	664
SUB-SECT. 2. JURISDICTION OF COURT . . . . .	665
SUB-SECT. 3. IN WHAT CASES GRANTED . . . . .	665
A. Where Impediment to Legal Remedy . . . . .	665
(a) In General . . . . .	665
(b) What amounts to an Impediment . . . . .	667
B. To Enforce Order for Payment into Court . . . . .	667
C. Particular Instances . . . . .	668
SUB-SECT. 4. IN RESPECT OF WHAT JUDGMENTS OR ORDERS . . . . .	670
SUB-SECT. 5. THE APPLICATION . . . . .	670
A. How Made . . . . .	670
B. Service . . . . .	671
C. Interim Injunction . . . . .	672
SUB-SECT. 6. EFFECT OF APPOINTMENT OF RECEIVER . . . . .	672
A. On Realty . . . . .	672
B. On Personalty . . . . .	672
SUB-SECT. 7. PRIORITIES. . . . .	673
SUB-SECT. 8. ACCOUNTS . . . . .	674
PART VI. DISCOVERY IN AID OF EXECUTION . . . . .	674
PART VII. EXECUTION IN INFERIOR COURTS . . . . .	677
SECT. 1. IN GENERAL . . . . .	677
SECT. 2. COUNTY COURTS . . . . .	677
SECT. 3. MAYOR'S AND CITY OF LONDON COURT. <i>See MAYORS COURT, LONDON.</i>	
SECT. 4. REMOVAL OF PROCEEDINGS AND JUDGMENTS TO THE HIGH COURT FOR PURPOSES OF EXECUTION. <i>See JUDGMENTS.</i>	

PART VIII. INTERPLEADER. *See INTERPLEADER.*

<i>Act of Bankruptcy</i> . . . . .	<i>See</i> BANKRUPTCY.	<i>Distress when Execu-</i>	
<i>Amendment of Writ</i> . . . . .	„ PLEADING ; PRACTICE.	<i>tion pending</i> . . . . .	<i>See</i> DISTRESS ; LANDLORD
<i>Attachment</i> . . . . .	„ CONTEMPT OF COURT.		AND TENANT.
<i>Bailiffs</i> . . . . .	„ COUNTY COURTS,	<i>Documents, Execution</i>	
	SHERIFFS AND	<i>of</i> . . . . .	„ DEEDS.
	BAILIFFS.	<i>Execution in County</i>	
<i>Debtors' Acts</i> . . . . .	„ BANKRUPTCY ; CON-	<i>Courts</i> . . . . .	„ COUNTY COURTS.
	TEMPT OF COURT.	<i>Execution in Mayor's</i>	
<i>Diplomatic Privileges</i> . . . . .	„ CONSTITUTIONAL LAW.	<i>and City of London</i>	
		<i>Court</i> . . . . .	„ MAYOR'S COURT.

<i>Execution of Judgment of Death</i> . . . . .	See SHERIFFS AND BAILIFFS.	<i>Receivers, Appointment and Duties of</i> . . . . .	See RECEIVERS.
<i>Execution of Judgment of Imprisonment</i> . . . . .	PRISONS.	<i>Receiving Order</i> . . . . .	BANKRUPTCY.
<i>Fees</i> . . . . .	SHERIFFS AND BAILIFFS.	<i>Registration</i> . . . . .	JUDGMENTS.
<i>Extents</i> . . . . .	CROWN PRACTICE.	<i>Removal of Judgments and Orders from Inferior Courts for Execution</i> . . . . .	CONFLICT OF LAWS; COUNTY COURTS; CROWN PRACTICE; JUDGMENTS.
<i>Husband's Liability for Wife's Debts</i> . . . . .	HUSBAND AND WIFE.	<i>Sequestration of Benefices</i> . . . . .	ECCLESIASTICAL LAW.
<i>Imprisonment for Debt</i> . . . . .	BANKRUPTCY.	<i>Sheriffs and Officers</i> . . . . .	SHERIFFS AND BAILIFFS.
<i>Interpleader</i> . . . . .	INTERPLEADER.	<i>Specific Performance</i> . . . . .	SPECIFIC PERFORMANCE.
<i>Judgments of Scottish and Irish Courts, enforcing</i> . . . . .	CONFLICT OF LAWS; JUDGMENTS.	<i>Trustee in Bankruptcy, Rights of, as against Person issuing Writ</i> . . . . .	BANKRUPTCY.
<i>Malicious Execution</i> . . . . .	MALICIOUS PROSECUTION.	<i>Winding-Up Order</i> . . . . .	COMPANIES.
<i>Mandamus</i> . . . . .	CROWN PRACTICE.		
<i>Poundage</i> . . . . .	SHERIFFS AND BAILIFFS.		

## Part I.—In General.

**Writs of execution.]—See R. S. C., Ord. 42.**  
**Appointment of receiver.]—See Part V., Sect. 5, sub-sect. 1.**  
**Attachment of debts.]—See Part V., Sect. 1, sub-sect. 1, post.**

**Attachment & committal.]—See CONTEMPT OF COURT, Vol. XVI., pp. 46 *et seq.***

**Charging order as execution.]—See Part V., Sect. 2, sub-sect. 1, post.**

## Part II.—Matters Common to all Modes of Execution.

### SECT. 1.—IN RESPECT OF WHAT JUDGMENTS OR ORDERS EXECUTION MAY BE ISSUED.

#### SUB-SECT. 1.—IN GENERAL.

**See R. S. C., Ord. 42.**  
**Recovery of money.]—See R. S. C., Ord. 42, r. 3.**  
**Payment of money to any person.]—See R. S. C., Ord. 42, r. 3.**  
**Payment of money into court.]—See R. S. C., Ord. 42, r. 4.**  
**Recovery or delivery of possession of land.]—See R. S. C., Ord. 42, r. 5.**

**Recovery of property other than land or money.]—See R. S. C., Ord. 42, r. 6.**

**To do any act other than the payment of money.]—See R. S. C., Ord. 42, r. 7; & see CONTEMPT OF COURT, Vol. XVI., pp. 41 *et seq.***

**To abstain from doing anything.]—See R. S. C., Ord. 42, r. 7.**

**For costs only.]—See R. S. C., Ord. 42, r. 18.**

**Orders of Probate Division.]—See EXECUTORS.**

**"Final judgments or orders"—Within Bankruptcy Act.]—See BANKRUPTCY, Vol. IV., pp. 90–92, Nos. 813–834.**

#### PART I.

**a. General rule.]—Execution is a proceeding to enforce a decree of a ct., & comes under the head of purely adjective law.—PASUPATI LUTOMIA v. PASUPATI MUTHAMBHATLU (1876), 1 L. R. 1 Mad. 52.—IND.**

**b. Execution bad in part—Whether bad for whole.]—An execution bad for part is bad for the whole.—SCOTT v. MCCAFFREY (1888), M. L. R. 5 S. C. 202.—CAN.**

**c. Issuing of writ—Judicial act.]—The issuing of a writ of execution is a judicial act, & an action for damages does not lie for refusing to issue such writ.—LYNCH v. WOOD, Mac. 179.—N.Z.**

#### PART II. SECT. 1, SUB-SECT. 1.

**d. Judgment—For costs.]—Execution is not the proper process to enforce decrees of the Probate Ct. except as to costs.—Re McWILLIAMS' ESTATE (1890), 22 N. S. R. 367.—CAN.**  
**—Where a judge's**

**order requires debt. to pay interlocutory costs to plts., & the judge makes an oral direction that costs previously awarded to debt. should be set off *pro tanto*, the deduction should be made before execution issues on the judge's order.—PEOPLE'S BUILDING & LOAN ASSOCN. v. STANLEY (1902), 4 O. L. R. 644; 2 O. W. R. 122.—CAN.**

**f. — Costs of appeal—Whether recoverable by execution.]—Where an appeal from the decision of a judge in equity is dismissed with costs, the costs of the appeal are recoverable by attachment & not by execution under 17 Vict. c. 18.—SMITH v. ARMSTRONG (1872), (1826–1897), N. B. Dig. 206.—CAN.**

**g. — —.]—Debt. appealed from so much of a decree as related to the amount of costs payable by him to pltf. The decree of the Appellate Ct. directed "that the order of the lower ct. be upheld, & the appeal be dismissed: applt. to pay the costs":—*id.*: the amount of costs awarded**

**by the lower ct., although they were not specified in the Appellate Ct.'s decree, were recoverable in execution of that decree, inasmuch as those costs were the subject-matter of the appeal.—HIMAYAT HUSSAIN v. JAI DEVI (1883), 1 L. R. 5 All. 589.—IND.**

**h. — Of foreign court.]—If the "addition" of debt. is not stated in the memorial of a foreign judgment filed in N.S.W., the ct. cannot allow execution to issue on it.—BERRY v. SHEAD (1886), 7 N. S. W. L. R. 39.—AUS.**

**k. — —.]—Execution may be issued under Winding-up Act, R. S. C. c. 129, s. 85, upon the order of a ct. of another province, upon the mere production to the officer of the High Ct. of a properly certified copy of such order.—Re DOMINION COLD STORAGE CO. (1898), 18 P. R. 68.—CAN.**

**l. — —.]—The judgment of a foreign ct., obtained on a decree of a ct. in British India, is no bar to the execution of the original decree.—**

*Sect. 1.—In respect of what judgments or orders execution may be issued: Sub-sects. 1, 2 & 3. Sect. 2: Sub-sects. 1 & 2.]*

**Judgments & orders removed by certiorari—For purposes of execution or coercive process.]—***See CROWN PRACTICE, Vol. XVI., pp. 478–479, Nos. 3598–3608.*

**Conditional judgments or orders.]—See Subsect. 2, post.**

*See, generally, JUDGMENTS.*

#### SUB-SECT. 2.—CONDITIONAL JUDGMENTS OR ORDERS.

*See R. S. C., Ord. 42, rr. 2, 9.*

**1. Condition to be performed by third party—Execution postponed.]—**In an action of trover, by churchwardens, to recover a parish book, the judge, to whom the cause was referred after verdict, by consent of the parties, made an order, which was made a rule of ct., that the costs of both sides should be paid by the parish. The cause came on for trial a second time, when, on Aug. 10, 1852, it was ordered that defts. pay pltfs. their costs on Mar. 1, 1853, "unless in the meantime the sum be paid to pltfs. out of the parish funds." This order was made a rule of ct. in Michaelmas term 1852, & defts. not having paid the money on Mar. 1, 1853, execution was issued against them:—*Held*: the order being conditional was not an "order to pay money" within Judgments Act, 1838 (c. 110), upon which execution could issue.—*GIBBS v. FLIGHT* (1853), 13 C. B. 803; 1 C. L. R. 329; 22 L. J. C. P. 256; 17 Jur. 1034; 138 E. R. 1417.

**2. Condition to be performed by defendant—Leave granted on terms.]—**The decree in a vendor's action for specific performance directed that, on pltf. executing an assignment & delivering to deft. the deeds & writings relating to the property, deft. should pay to pltf. the amount certified to be due for purchase money, interest, & costs. Pltf. executed the assignment, & tendered the deeds to deft. Deft. refused to receive the deeds, or to pay the money. Pltf. moved for leave to issue execution for the amount certified to be due, on the ground that he had performed the condition:—*Held*: pltf. must deposit the executed assignment & the deeds in ct., & on such deposit an order should be drawn up that pltf. should pay the amount certified & the costs of the motion within four days.—*BELL v. DENVER* (1886), 54 L. T. 729; 34 W. R. 638.

**3. Conditional distinguished from absolute order.]—**On motion for judgment in default of defence in an action for specific performance by vendors against a purchaser, it was ordered that an account should be taken of what was due to pltfs., & that deft. should pay to pltfs. what should be certified to be due at a time & place to be appointed by the judge when the conveyance should have been approved, & thereupon it was ordered that pltfs. should deliver to deft. the conveyance & title deeds. The chief clerk certified the amount due, & fixed a day & place for pay-

ment. Pltfs. attended at the time & place fixed with the conveyance & title deeds, but deft. did not attend. Motion by pltfs. that deft. might pay the amount certified to be due from him into ct. within four days after service of the order, & that thereupon pltfs. might execute a proper conveyance to him & deliver to him the title deeds. The original order was never served on deft.:—*Held*: an order for payment into ct. would not, under the circumstances, be made, as the original order was an absolute order for payment to pltfs., & a complete & final order directly the certificate was made finding the amount due; but pltfs. were entitled to a four or seven days' order for payment to themselves personally, such order being only a working out of, & ancillary to, the original order. On such an order execution will issue, notwithstanding the order directs delivery of a conveyance, as such an order is divided into two separate & distinct parts—an absolute order for payment & an absolute order for the delivery of a conveyance; & such execution may be by *fi. fa.*, *elegit*, or writ of sequestration.—*ROBINSON v. GALLAND* (1889), 60 L. T. 697; 37 W. R. 396.

#### SUB-SECT. 3.—ARBITRATION PROCEEDINGS.

*See Arbitration Act, 1889 (c. 49), s. 12; R. S. C., Ord. 42, r. 31A.*

**Enforcement of award by judgment & execution.]—***See ARBITRATION, Vol. II., p. 567, Nos. 1982 et seq.*

**Abortive reference to arbitration—Verdict subsequent to reference.]—***See ARBITRATION, Vol. II., p. 383, Nos. 447 et seq.*

**Recovery of costs.]—***See ARBITRATION, Vol. II., p. 611, Nos. 2422 et seq.*

### SECT. 2.—CONDITIONS PRECEDENT TO EXECUTION.

#### SUB-SECT. 1.—IN GENERAL.

*See, now, R. S. C., Ord. 42, r. 1; Ord. 64, r. 13.*

**4. Notice of intention to execute judgment—Judgment more than year old.]—**"Proceeding" in R. S. C., Ord. 64, r. 13, means a proceeding towards & not after judgment; therefore, when more than one year has elapsed after judgment, it is not necessary for a party who desires to issue execution to give a month's notice to the other party of his intention to proceed.—*HOULSTON v. WOODALL* (1884), 78 L. T. Jo. 113, C. A.

*Annotation:—Consd. Taylor v. Roe* (1893), 62 L. J. Ch. 391.

**5. ———.]—**A motion was made in an action commenced in 1882 for leave, under R. S. C., Ord. 42, r. 23, to issue a writ of sequestration against deft. for non-compliance with certain orders made in 1884 & 1885 directing accounts to be brought in & the payment of costs to pltf. No effective proceeding in the action had been taken since Aug. 1884, & it was objected that a month's notice of the intention to proceed should have been given by pltf., under R. S. C., Ord. 64, r. 13:

*FAKURUDDEN MAHOMED ASSAN v. BENGAL OFFICIAL TRUSTEE* (1881), 1 L. R. 7 Cal. 8.—*IND.*

**m. ——— Execution for non-payment of costs—Delay.]—**An execution for non-payment of costs ordered though the costs had been taxed nearly five years previously, it appearing that the delay was caused by an expectation that the costs would be

credited against an account due to the execution debtor.—*BORDEN v. SUMNER* (1887), 26 N. B. R. 587.—*CAN.*

**n. ——— Against executor—Whether heir bound.]—**For the purposes of an execution against lands, heirs are *prima facie* bound by a judgment against the exor. or administrator of their ancestor, in the same way as next-of-kin are bound.—*LOWELL v.*

*GIBSON* (1872), 19 Gr. 280.—*CAN.*

**o. ——— Under Supreme Court Act, 1860.]—**An execution issued since the coming into force of Supreme Court Act, 1882, on a judgment obtained under Supreme Court Act, 1860, must be issued in accordance with the rules under the Act of 1882.—*COUPLAND v. BEEDELL* (1885), 4 N. Z. L. R. 175.—*N.Z.*



—*Held*: the issue of execution as to costs was not a proceeding in the action of which notice was necessary under Ord. 64, r. 13, & leave was given to issue the writ of sequestration to enforce payment of the costs; but such leave was refused as to the accounts.—*TAYLOR v. ROE* (1893), 62 L. J. Ch. 391; 68 L. T. 253; 3 R. 306.

**6. Registration of consent order—Bankruptcy Act, 1849 (c. 106), s. 137.]**—A. having commenced an action of debt in the Queen's Bench against B., a trader, B. proposed that a judge's order should be made for stay of proceedings upon payment of debt & costs, & sent to A. a summons for that purpose, upon which a consent was indorsed by A. A judge's order was thereupon made, at the instance of B., directing proceedings to be stayed on payment of debt & costs; in default of payment, judgment to be signed & execution to issue. B. served a copy of this order on A. Neither the original order, nor any copy of it, was filed with the clerk of the dockets & judgments in the Queen's Bench, as directed by the above Act. Judgment was signed, & execution taken out, under the order; & the sheriff paid to A., from proceeds of the sale of certain goods of B., the debt & costs for which execution had issued. After the execution & payment B. became bkpt.:—*Held*: (1) under the above Act the order, judgment & execution were void as against B.'s assignees, the order not having been filed; (2) the assignees might recover from A. the amount paid him under the execution, as money had & received to their use as assignees.—*FARROW v. MAYES* (1852), 18 Q. B. 516; 19 L. T. O. S. 139; 17 Jur. 132; 118 E. R. 195.

*Annotations*:—As to (1) *Refd.* *Gowan v. Wright* (1886), 18 Q. B. D. 201. As to (2) *Expld. & Apprvd.* *Re Smith, Ex p. Brown* (1887), 20 Q. B. D. 321.

**7. — Debtors Act, 1869 (c. 62).]**—Where a judgment obtained by consent is void for non-compliance with sect. 27 of the above Act, the ct. will refuse to grant leave to issue execution upon & in pursuance of R. S. C., Ord. 42, r. 23.—*JONES v. JAGGAR* (1886), 54 L. T. 731, D. C.

*Annotation*:—*Consd.* *Gowan v. Wright* (1886), 18 Q. B. D. 201.

**8. — — —.]**—Sect. 27 of the above Act provides that a judge's order for judgment made by consent of deft. in a personal action shall be filed in the Ct. of Q. B. in the manner required by the sect. within twenty-one days after the making thereof, "otherwise the order & any judgment signed or entered up thereon, & any execution issued or taken out on such judgment, shall be void":—*Held*: the effect of non-compliance with the requirements of the sect. is only to render such an order & judgment void as against the creditors of such deft., but not as against himself; &, therefore, deft. who had consented to such an order could not get the judgment signed upon it set aside on the ground that the order had not been filed in accordance with the sect.—*GOWAN v. WRIGHT* (1886), 18 Q. B. D. 201; 56 L. J. Q. B. 131; 35 W. R. 297; 3 T. L. R. 258, C. A.; *affg.* S. C. *sub nom.* *GAVAN v. WRIGHT*, 3 T. L. R. 137, D. C.

*Annotations*:—*Consd.* *Re Russell, Ex p. Guest* (1888), 37 W. R. 21; *Taylor v. Sturrock, Sturrock v. Sturrock*, [1900] A. C. 225. *Refd.* *Crawshaw v. Harrison*, [1894] 1 Q. B. 79.

**9. — — —.]**—Sect. 27 of the above Act provides that a judge's order for judgment, made by consent of deft. in a personal action, shall be

filed in the manner required by the sect. within twenty-one days after the making thereof, otherwise the order & any judgment signed or entered up thereon & any execution issued or taken out on such judgment shall be void. Deft. in an action consented to a judge's order for judgment against him, which was accordingly signed & a garnishee order having been made upon the judgment the garnishee paid the debt attached to the judgment creditors before the expiration of twenty-one days from the date of the making of the order. The order was not filed as required by the above mentioned sect. Deft. subsequently committed an act of bkpcy. & was thereupon adjudged bkpt.:—*Held*: although the moneys attached under the judgment had already been paid to the judgment creditors before the act of bkpcy., nevertheless the judgment being avoided by failure to file the judge's order, the trustee in bkpcy. was entitled to recover from the judgment creditors the amount paid to them by the garnishee as money received to his use. In the absence of fraud, the payment by the garnishee discharges him although the judgment is afterwards set aside.

A form of procedure [attachment of debts under a garnishee order], as to which it is, to say the least, doubtful whether it can be accurately described as an execution (FRY, L.J.).—*Re SMITH, Ex p. BROWN* (1888), 20 Q. B. D. 321; 57 L. J. Q. B. 212; 36 W. R. 403; 4 T. L. R. 259, C. A.

**10. Entry of judgment — Not essential.]**—Judgment having been signed in an action against a married woman, execution upon which was limited to her separate estate not subject to any restraint upon anticipation, it was sought to attach in execution a sum of money recovered by her as damages in an action against the garnishee & for which the judge at the trial had directed judgment to be entered for her:—*Held*: the fact that judgment in the action against the garnishee was not in fact entered until after the commencement of the garnishee proceedings did not affect the right of pltf. to a garnishee order.

The intention of the rule [R. S. C., Ord. 41, r. 3] clearly is that, from the moment when the judge has pronounced judgment, & entry of the judgment has been made, the judgment is to take effect, not from the date of the entry, but from the date of its being pronounced; it is an effective judgment from the day when it is pronounced by the judge in ct. (LORD ESHER, M.R.).—*HOLTBY v. HODGSON* (1889), 24 Q. B. D. 103; 59 L. J. Q. B. 46; 62 L. T. 145; 38 W. R. 68; *sub nom.* *Re HOLTBY*, 6 T. L. R. 24, C. A.

*Annotations*:—*Consd.* *Deighton v. Cockle*, [1912] 1 K. B. 206. *Refd.* *Hambleton v. Brown*, [1917] 2 K. B. 93. *Mentd.* *Aylesford v. G. W. Ry.*, [1892] 2 Q. B. 626; *Polton v. Harrison*, [1892] 1 Q. B. 118; *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559; *Re Hewett, Ex p. Levone*, [1895] 1 Q. B. 328; *Softlaw v. Welch*, [1899] 2 Q. B. 419; *Bolitho v. Gidley*, [1905] A. C. 98.

**Conditional orders.]**—See Sect. 1, sub-sect. 2, *ante*.

#### SUB-SECT. 2.—SERVICE OF JUDGMENT OR ORDERS — DEMAND.

See, now, R. S. C., Ord. 41, r. 5; 42, r. 1.

**11. Necessity for service—Judgment or order for payment of money or costs.]**—Pltf. having obtained an order for taxation of his attorney's bill

#### PART II. SECT 2, SUB-SECT. 2.

**p. Necessity for service — Or demand—Judgment or order for payment of money or costs.]**—The ct. will not grant an attachment against an overholding

tenant, under 4 Wm. IV. c. 1, s. 53, for non-payment of costs, until an order to pay the costs has been first served upon the tenant & a demand made.—*Re MCLACHLAN* (1847), 3

U. C. R. 331.—CAN.

**q. — — —.]**—A party who has to pay debt & costs on a final judgment on verdict, nonsuit, demurrer, or otherwise, in the ordinary course of

**Sect. 2.—Conditions precedent to execution: Subsect. 2. Sects. 3 & 4.]**

of costs, it was taxed accordingly, but the *allocatur* was not served on pltf. in the regular way, but was sent to him by post, & no demand was made on him for the amount. The attorney afterwards obtained on an *ex p.* application an order on pltf. to pay the amount found by the master to be due, which, without any notice of it to pltf., he made a rule of ct., & issued a *fi. fa.* thereon, under Judgments Act, 1838, s. 18 :—*Held* : the execution was irregular.—*RICKARDS v. PATTERSON* (1841), 8 M. & W. 313; 10 L. J. Ex. 272; 151 E. R. 1058; *sub nom.* *RICHARDS v. PATTERSON*, 5 Jur. 894.

12. ———.]—On June 4, 1827, A. was ordered to pay certain sums of money within eight days after the date of the chief clerk's certificate. The certificate was made, & was dated Aug. 8 following. The certificate was not approved until after the long vacation, & was not served on A. until Nov. A. refused to pay on account of this irregularity. A notice of motion was served on him to obtain an order for him to pay. He did not appear, & on Nov. 19, on affidavit of service, an order was made for him to pay the amount mentioned in the certificate, "on or before Dec. next, or within four days of service upon him of this order." The order was not served on A. or his solr., & was not passed & entered until Dec. 2. After a month's delay from the last-named day a writ of *fi. fa.* was issued for each sum mentioned in the certificate, under which the sheriff levied on the goods of A. :—*Held* : the order of Nov. 19, not being perfected till Dec. 2, was until that time a nullity, & A. had no opportunity of complying with the first part of it, & the order not being served upon A. the period limited in the latter part had never arrived, wherefore the writs were wholly irregular & void.—*ADKINS v. BLISS* (1858), 2 De G. & J. 286; 44 E. R. 999; *sub nom.* *ADKINS v. BLISS, VALE v. BLISS*, 27 L. J. Ch. 486; 31 L. T. O. S. 78; 4 Jur. N. S. 1162; 6 W. R. 453,

———.]—(1) Service of a decree or order directing payment of money or costs is not requisite as a preliminary to issuing a writ of *fi. fa.* under Ord. 29, r. 6.

Where an order for payment of a sum of money is made against several persons, process can be issued separately against one of them, though the order is not in terms joint & several.—*LAND CREDIT CO. OF IRELAND v. FERMOY (LORD), Ex p. MUNSTER* (1870), 5 Ch. App. 323; 39 L. J. Ch. 477; 22 L. T. 394; 18 W. R. 393, L. J.

*Annotation* :—*As to* (1) *Consd.* *Hopton v. Robertson* (1884), 23 Q. B. D. 126, n.

—A. obtained a common order for taxation of the costs of his former solr. B., the order directing payment by A. to B. of the amount of the taxed costs within 21 days after the service of the order & of the certificate of taxation. The order & certificate were served, not on A. personally but on the solr. then acting for him in the taxation. A. failed to pay the amount within 21 days after service of the order & certificate on the solr., & B. applied for the issue of a writ of *fi. fa.* against A. for the amount; but the officer

of the ct. refused to issue the writ, on the ground that A. had not been personally served with the order & certificate :—*Held* : B. might have the writ at his own risk, without service of the order & certificate on A. personally.—*Re* ——— (A SOLICITOR) (1884), 33 W. R. 131.

15. ———.]—An order giving leave to sign judgment under R. S. C., Ord. 14, unless a sum is paid before a day named need not be served upon deft. before judgment is signed upon it.—*HOPTON v. ROBERTSON* (1884), 23 Q. B. D. 126, n.; Bitt. Rep. in Ch. 203.

*Annotation* :—*Consd.* *Farden v. Richter* (1889), 23 Q. B. D. 124.

**To found application for attachment.]**

See CONTEMPT OF COURT, Vol. XVI., pp. 51–57, Nos. 547–644.

———.]—See JUDGMENTS.

**16. Statement of time for compliance—Judgment or order other than for payment of costs.]**

A decree was made by consent ordering deft. to give a bond for payment of a certain sum to pltf., & to deposit certain shares as security. Subsequently a compromise was come to by which pltf. agreed to accept a smaller sum on the ground of the poverty of deft. Pltf. afterwards moved to enforce the decree, notwithstanding the compromise, on the ground that he had been induced to enter into the compromise by misrepresentation. An order having been made giving pltf. leave to enforce the decree notwithstanding the compromise :—*Held* : (1) on appeal, the question whether the compromise was invalid ought to have been made the subject of a new action, & ought not to have been tried on a motion of this nature; but as the case had been argued on the merits in the ct. below without this objection being insisted on, the objection could not be taken in the Ct. of Appeal; & the Ct. being of opinion that the order was right on the merits, it was affirmed.

(2) Now it happens . . . that the judgment required a further motion to enforce it because it fixed no date for the acts to be done. The one act is directed to be done "forthwith" & the other act is simply directed to be done without any reference to time. Therefore, technically, no doubt a motion for fixing a day was required, & until a day was fixed the order could not be enforced (*JESSEL, M.R.*).—*GILBERT v. ENDEAN* (1878), 9 Ch. D. 259; 39 L. T. 404; 27 W. R. 252, C. A.

*Annotations* :—*As to* (1) *Reid. Re Gaudet Frères S.S. Co.* (1879), 12 Ch. D. 882; *Charles v. Butson* (1895), 39 Sol. Jo. 346; *Ainsworth v. Wilding*, [1896] 1 Ch. 673; *Stephenson v. Garnett*, [1898] 1 Q. B. 677. *As to* (2) *Consd.* *Halford v. Hardy* (1899), 81 L. T. 721; *Townend v. Townend* (1905), 93 L. T. 680. *Reid. Carter v. Roberts*, [1903] 2 Ch. 312; *Re Launder, Launder v. Richards* (1908), 98 L. T. 554. *Generally, Mendt. Arkwright v. Newbold* (1881), 17 Ch. D. 301; *Turner v. Green* (1895), 43 W. R. 537.

.]—See CONTEMPT OF COURT, Vol. XVI., pp. 49–51, Nos. 529–544.

**SECT. 3.—TIME FOR ISSUE OF EXECUTION.**

See, now, R. S. C., Ord. 42, rr. 17, 18, 22.

**17. On taxation of costs—Without waiting reasonable time.]**—A party who has signed judg-

a cause, is not entitled to any time to pay them after proper proceedings had to entitle the other party to collect them; nor is any demand for payment before execution required.—*COOLIDGE v. BANK OF MONTREAL* (1873), 1 P. R. 73.—CAN.

r. a party to the writ for non-payment of money it is not necessary to show that the order for payment & a demand thereunder have been personally served on the party ordered to pay.—*LONG v. LONG* (1874), 6 P. R. 137.—CAN.

**PART II. SECT. 3.**

17 i. *On taxation of costs—Without waiting reasonable time.]*—A party entitled to costs may proceed to collect the same by execution immediately after revision, without waiting



ment is entitled to issue execution without waiting for a return of post.

*Semble*: he is entitled to issue execution immediately, & is not bound to wait a reasonable time.—SMITH v. SMITH (1874), L. R. 9 Exch. 121; 43 L. J. Ex. 86; 30 L. T. 429.

18. —.]—HARRIS v. JEWELL, [1883] W. N. 216; Bitt. Rep. in Ch. 100.

19. —.]—Judgment having been given for debt in an action, the judgment was drawn up in the ordinary form, with a blank left for the amount of the costs. The costs were subsequently taxed & a certificate given for the amount, but the blanks in the judgment were not filled up. A bkpcy. notice was issued for the amount of the taxed costs, on which a petition was presented & a receiving order made against debtor:—*Held*: inasmuch as no execution could issue on the judgment as it then stood, nor upon the taxing master's certificate alone, there was no final judgment, & therefore the receiving order made against debtor must be set aside.—*Re CRUMP, Ex p. CRUMP* (1891), 64 L. T. 799; 7 T. L. R. 556; 8 Morr. 174, D. C.

*Annotation*:—*Consd. Hambleton v. Brown*, [1917] 2 K. B. 93.

*After six years.*—*See* Sect. 8, sub-sect. 1, B., *post*.

*Compare* No. 2268, *post*.

20. *After twelve years*—*Statute of limitation*—*Not limited to judgments operating on charge on land*—*Real Property Limitation Act, 1833* (c. 27), s. 40.]—Sect. 40 of the above Act applies to a case in which a judgment is sought to be enforced against the personal estate, as well as to a case in which it is sought to be enforced against the land of debtor.

A., a creditor of a person deceased, filed a bill on behalf of himself alone, against B., the personal representative of debtor, & C., who had in his possession certain papers belonging to debtor, on which he claimed a lien for a debt alleged to be due to him from deceased. The bill prayed for the usual accounts of deceased's estate, & that it might be applied in a due course of administration; that A. might have access to the papers; & that the amount of C.'s lien, if any, might be ascertained & paid. The decree in the cause directed an account to be taken of A.'s debt, & the amount

to be paid out of a fund in ct.; &, if the fund should be more than sufficient for that purpose, that what should be found due to the other incumbrancers should be paid to them; but it did not direct any account to be taken of those incumbrances; &, accordingly, the master took an account of A.'s debt only. After it had been paid, C. presented a petition in the suit, praying for an account of what was due to him, & for payment of it out of the remainder of the fund. The order made on that petition, directed the master to inquire & state who were the incumbrancers, other than A. referred to by the decree:—*Held*: neither the institution of the suit, nor any of the proceedings in it, prevented the statute of limitations from running against C.'s claim.—WATSON v. BIRCH (1847), 15 Sim. 523; 16 L. J. Ch. 188; 8 L. T. O. S. 531; 11 Jur. 198; 60 E. R. 721.

*Annotation*:—*Consd. Jay v. Johnstone*, [1893] 1 Q. B. 189.

21. —.]—*Real Property Limitation Act, 1874* (c. 57), s. 8.]—By sect. 8 of the above Act, "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mtge., judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same," etc.:—*Held*: the expression "judgment" in the sect. refers to judgments generally, & is not restricted to judgments which operate as charges upon land.—HEBBLETHWAITE v. PEEVER, [1892] 1 Q. B. 124; 40 W. R. 318.

*Annotation*:—*Folld. Jay v. Johnstone* (1892), 62 L. J. Q. B. 128.

22. *S. P. JAY v. JOHNSTONE*, [1893] 1 Q. B. 189; 62 L. J. Q. B. 128; 68 L. T. 129; 57 J. P. 309; 41 W. R. 161; 9 T. L. R. 125; 37 Sol. Jo. 114; 4 R. 196, C. A.

*Annotation*:—*Refd. Taylor v. Hollard*, [1902] 1 K. B. 676.

*See, generally, LIMITATION OF ACTIONS.*

#### SECT. 4.—HOW LONG WRIT IN FORCE—RENEWAL.

*See, now, R. S. C., Ord. 42, rr. 20, 21.*

23. *Writ remains in force till completely*

a "reasonable time" for payment.—COOLIDGE v. BANK OF MONTREAL (1873), 6 P. R. 242.—CAN.

17 ii. —.]—The word "immediately" means "*instantly*"; & a party to whom costs are awarded by an order may issue execution thereon on the day of the taxation.—CLARKE v. CREIGHTON (1890), 14 P. R. 34.—CAN.

s. *On signing of judgment.*—Under Con. Rule (1897), No. 843, a judgment creditor is entitled to sue out a writ of *fi. fa. instant* on judgment being signed, & without waiting until it is duly entered.—ROSSITER v. TORONTO RY. CO. (1907), 15 O. L. R. 297; 10 O. W. R. 923.—CAN.

t. —.]—*Garnishee summons.*—A judgment or order is effective from the day when it is pronounced by the judge in ct. A default judgment was set aside by the master but was restored by a judge on appeal:—*Held*: a garnishee summons based upon the default judgment & issued after the judge's order was made but before it was entered was good.—INTERNATIONAL HARVESTER CO. v. MCCURRACH (1920), 1 W. W. R. 158; 51 D. L. R. 139.—CAN.

u. *Application of Statutes of Limitation to judgments*—*Statutory period during which execution may issue.*—Under 4th R. S., c. 94, s. 188,

a pltf. has six years in which he may issue execution upon a judgment recovered. Having sued out a first execution within six years of judgment, it is not necessary to issue the next execution within six years from the issuing of the one last previously issued.—COCHRAN v. BELL (1874), 9 N. S. R. 488.—CAN.

y. —.]—R. S. O., 1877, c. 161, s. 61, providing as to mutual insurance cos., that no execution shall issue against such co. upon any judgment until after the expiration of three months from the recovery thereof, does not apply where the judgment has been recovered on a policy issued by the co. on the cash principle.—LOWSON v. CANADA FARMERS' MUTUAL FIRE INSURANCE CO. (1883), 8 A. R. 613.—CAN.

a. —.]—Act of Assembly, 43 Vict. c. 8, s. 10, applies only to the matter of pleadings & not to the issuing of an execution within the period of twenty years from the signing of judgment.—GLEESON v. DOMVILLE (1896), 33 N. B. R. 548.—CAN.

b. —.]—*Non-payment of costs*—*Delay in issuing execution.*—An execution for non-payment of costs ordered under Consol. Stat. c. 38, s. 27, though the costs had been taxed nearly five years previously, it appearing that the

delay was caused by an expectation that the costs would be credited against an account due to the execution debtor.—BORDEN v. SUMNER (1887), 26 N. B. R. 587.—CAN.

c. *Writ against lands*—*Issued on same day as writ against goods.*—In ejectment against deft. claiming under a sheriff's deed:—*Held*: the fact that the writ against lands appeared by the deed to have been issued on the same day as that against goods was no objection.—EADES v. MAXWELL (1859), 17 U. C. R. 173.—CAN.

d. *Alias writ*—*When regular.*—Where the writ was issued within one year after entry of judgment, an alias writ issued more than six years thereafter is regular without reviving the judgment.—JOHNSTON v. MCKENNA (1863), 1 P. R. 229.—CAN.

e. *Time laid down by decree.*—Where a decree ordered payment forthwith after the making of a report, an execution issued before the report had been filed, was set aside with costs.—JELLETT v. ANDERSON (1880), 8 P. R. 387.—CAN.

#### PART II. SECT. 4.

f. *Time for.*—The taking a writ from the sheriff for renewal, is not an abandonment, giving priority to other writs then in his hands, but the replacing the writ in his hands upon



**Sect. 4.—How long writ in force—Renewal. Sects. 5 & 6: Sub-sect. 1.]**

**executed—Former law.]**—On an application to set aside an attachment issued against the sheriff, for not returning a writ of *fi. fa.*, it appeared that the writ was issued on Aug. 2, & that a levy of part of the amount of debt's debt was made on the following day. On Sept. 4 the sheriff was ruled to return the writ in eight days, but on the 12th of the same month debt. died. The writ was not returned until Nov. 1:—*Held*: pltf. had lost nothing by the delay on the part of the sheriff, & the attachment might be set aside on payment of costs.

As the old writ, however, which issued first, was not returned until Nov. 1, there was nothing to prevent pltf., if he got any information as to the goods, which belonged to debt., from going on with the execution, giving notice to the sheriff, the writ having full operation, until it was completely satisfied (TINDAL, C.J.).—*R. v. ESSEX, SHERIFF* (1839), 6 Bing. N. C. 150; 8 Dowl. 5; 8 Scott, 363; 9 L. J. C. P. 126; 133 E. R. 59.

**24. ———.]**—A *fi. fa.* "returnable immediately after the execution thereof," under 3 & 4 Will. 4, c. 67, s. 2, is in force until it has been completely executed; & where a portion only of the amount for which the writ issued was realised by levy, a second levy under the same writ for the balance, eleven years afterwards, was held good.—*JORDAN v. BINCKES* (1849), 13 Q. B. 757; 7 Dow. & L. 30; 18 L. J. Q. B. 277; 13 L. T. O. S. 255; 13 Jur. 732; 116 E. R. 1453.

**Renewal at end of year.]**—See R. S. C., Ord. 42, r. 20.

**SECT. 5.—BY WHOM EXECUTION MAY BE ISSUED.**

**Companies—After winding-up order.]**—See COMPANIES, Vol. X., p. 967, No. 6641.

**Executors & administrators.]**—See EXECUTORS.

**Married persons.]**—See HUSBAND & WIFE.

**Partners.]**—See PARTNERSHIP.

**By whom writs of execution may be granted.]**—See Sect. 10, *post*.

such renewal, gives it the same position as it held previous to the removal of it, the question of the object of such removal always being a matter of fact for decision upon the circumstances.—*MUIR v. MUNRO* (1863), 23 U. C. R. 139.—CAN.

**g. ———.]**—*ROWE v. JARVIS* (1863), 13 C. P. 495.—CAN.

**h. ———.]**—A renewal of a writ of execution can only operate as a renewal if it be received by the registrar within two years of the receipt of the original writ, or is accompanied by a judge's order under Land Titles Act, s. 192; but if it be received by the registrar after such two years & without a judge's order permitting it to operate as a renewal, it operates in the Land Titles Office as an independent writ.—*Re BEAVER LUMBER CO., LTD.*, [1917] 3 W. W. R. 760.—CAN.

**k. ———.]**—A Hindu widow obtained a decree, dated Sept. 7, 1865, directing that a certain sum should be paid to her every year on account of her maintenance. The judgment-debtors paid the annuity for some years. In 1881 the widow applied for execution of the decree, & recovered three years' arrears. In 1885, payments having again fallen into arrear, she again applied for execution but her application was rejected as barred by limitation, having been made more

than three years after the last preceding application:—*Held*: the application was not time-barred.—*LAKSHMIBAI BAPUJI OKA v. MADHAVRAV BAPUJI OKA* (1887), 1 L. R. 12 Bom. 65.—IND.

**l. ———.]**—*Writs received too late.]*—Writs of execution were issued on Dec. 12, 1881, in T., & forwarded to the sheriff of an outer county. On Dec. 9, 1882, pltf. wrote to the sheriff to forward the writs for renewal, & on Dec. 11 telegraphed him to the like effect & he replied that he had just mailed them. On the same day pltf. filed a *præcipe* requiring the renewal. The writs were received on Dec. 12. On an application for an order for leave to renew *nunc pro tunc*:—*Held*: the delay was not the fault of the sheriff or other officer of the ct., & there was no power to make the amendment.—*LOWSON v. CANADA FARMERS' MUTUAL FIRE INSURANCE CO.* (1882), 9 P. R. 309.—CAN.

**m. Loss of writ.]**—Where a writ of execution after renewal has been lost in transmission to the sheriff through the post office, an order may be made for the issue of a new writ *nunc pro tunc* to bear the same indorsements & evidence of renewal as the original writ; also that the substituted writ should have the same force & effect as the original.—*FAIRCHILD v.*

**SECT. 6.—AGAINST WHOM EXECUTION MAY ISSUE.**

**SUB-SECT. 1.—IN GENERAL.**

*See, now, R. S. C., Ord. 42.*

**25. All persons against whom judgment given.]**

—*PENOYER v. BRACE*, No. 76, *post*.

**Joint debtors.]**—See Nos. 40-45, *post*.

**26. Process issued in wrong name.]**—If debt. omits to plead a misnomer he may be taken in execution in the wrong name.—*CRAWFORD v. SATCHWELL* (1744), 2 Stra. 1218; 93 E. R. 1141.

*Annotations*:—*Consd.* *Fisher v. Magnay* (1843), 5 Man. & G. 778. *Refd.* *Finch v. Cocken* (1835), 1 Cr. M. & R. 196.

**27. ———.]**—Plea of justification by an officer to trespass for taking the goods of A. B. that he took them under a *distringas* against C. B., meaning the said A. B., to compel an appearance, with an averment that A. B. & C. B. are the same person, cannot be supported unless A. B. appeared in that action & did not plead the misnomer in abatement. If he did appear in that action & omitted to plead in abatement he is concluded by it.—*COLE v. HINDSON* (1795), 6 Term Rep. 234; 101 E. R. 528.

*Annotations*:—*Consd.* *Shadgett v. Clipson* (1807), 8 East, 328; *Hoye v. Bush* (1840), 1 Man. & G. 775. *Refd.* *Wilks v. Lorek* (1810), 2 Taunt. 399; *Price v. Harwood* (1811), 3 Camp. 108; *Binfield v. Maxwell* (1812), 15 East, 159; *Shee v. Jupp* (1832), 1 L. J. K. B. 145; *Finch v. Cocken* (1835), 2 Cr. M. & R. 196; *Fisher v. Magnay* (1843), 6 Scott, N. R. 588; *Jarmain v. Hooper, Pilcher & Heenan* (1843), 13 L. J. C. P. 63; *Norris v. Seed* (1849), 3 Exch. 782.

**28. ———.]**—Deft. cannot justify an assault & false imprisonment of A. B. by showing a *latitat* issued against C. B. & averring that it was issued against A. B. by the name of C. B. & that they are one & the same person; there being no averment that A. B. was known as well by the name of C. B.—*SHADGETT v. CLIPSON* (1807), 8 East, 328; 103 E. R. 368.

*Annotations*:—*Refd.* *Scandover v. Warne* (1809), 2 Camp. 270; *Wilks v. Lorek* (1810), 2 Taunt. 399; *Finch v. Cocken* (1835), 2 Cr. M. & R. 196; *Hoye v. Bush* (1840), 1 Man. & G. 775; *Fisher v. Magnay* (1843), 12 L. J. C. P. 276; *Jarmain v. Hooper, Pilcher & Heenan* (1843), 13 L. J. C. P. 63.

**29. ———.]**—If a person whose real name is W. is asked before process issues against him, whether his name is not J., & he says it is, he cannot maintain trespass for what is done in execution

*CRAWFORD* (1896), 11 Man. L. R. 330.—CAN.

**n. Renewal of expired writ.]**—*Semble*: there is no power to renew writs of execution which have expired; even if there is any such power, its exercise is purely discretionary.—*LABROSSE v. CHOQUETTE*, [1917] 1 W. W. R. 491.—CAN.

**PART II. SECT. 6, SUB-SECT. 1.**

**o. Defendant sued in representative capacity—Trustee.]**—Although *primâ facie* a trustee or other person suing in a representative capacity should be held personally liable for the costs of an unsuccessful action, yet if the judgment gives costs against him without ordering that they be paid *de bonis propriis*, a writ of execution should be against him in his representative capacity.—*STANDARD BANK v. JACOBSON'S TRUSTEE* (1899), 16 S. C. 352; 9 C. T. R. 365.—S. AF.

**p. Pro formâ defendant.]**—Where in a suit for possession & mesne profits no specific mention as to mesne profits is made in the decree, the decree merely declaring that pltf.'s suit be decreed, the ct. executing the decree must look to the plaint to see from whom the relief granted is to be obtained, & ought not to allow execution to issue against a *pro formâ* debt. against whom no relief was claimed.—*MONAJAN v.*

of the process against him by the wrong name.—**PRICE v. HARWOOD** (1811), 3 Camp. 108, N. P.

*Annotations*:—**Refd.** *Fisher v. Magnay* (1843), 5 Man. & G. 778; *Freeman v. Cooke* (1848), 2 Exch. 654. **Mentd.** *R. v. Lilley, Ex p. Taylor* (1910), 104 L. T. 77.

**30.** —.]—Where A. B. executed a warrant of attorney in the name of C. B., & judgment was entered up, & a *fi. fa.* issued against him by that name:—**Held**: this was right, & that the sheriff was bound to execute it.—**REEVES v. SLATER** (1827), 7 B. & C. 486; 1 Man. & Ry. K. B. 265; 6 L. J. O. S. K. B. 77; 108 E. R. 804.

**31.** —.]—Where a party is sued by a wrong name, & suffers judgment to go against him, without attempting to rectify the mistake, he cannot afterwards, in an action against the sheriff for false imprisonment, complain of an execution issued against him by that name.—**FISHER v. MAGNAY** (1843), 5 Man. & G. 778; 1 Dow. & L. 40; 6 Scott, N. R. 588; 12 L. J. C. P. 276; 1 L. T. O. S. 109; 134 E. R. 774.

*Annotation*:—**Distd.** *Walley v. McConnell* (1849), 13 Q. B. 903.

**32.** —.]—A warrant issued from the Palace Ct., at the instance of a commission agent, who had been directed by the then pltf. to sue the then deft. A wrong person was taken in execution:—**Held**: (1) if such person be taken in consequence of misrepresentations of his own—that he was the proper deft., he cannot complain. But where he represents himself as deft. until judgment only, & before execution the then pltf. has notice that he is not the right deft.—execution ought not to issue against him; *semble*: (2) he may maintain trespass, if it does issue after such notice.—**JOYCE v. WALKER** (1850), 16 L. T. O. S. 538, N. P.

**33.** —.]—A., having been served with a writ of summons under Bills of Exchange Act, 1704 (c. 8), by mistake for B., told the process server it was a mistake, but took no further notice. He was arrested on a *ca. sa.* & paid the money to get out. On application at chambers to set aside the proceedings, the judge was willing to make an order without costs & on the condition that appct. bring no action.

On motion to set aside the judgment, the ct., holding that the proper course was to appear & defend the action or apply at once at chambers to set aside the writ, refused the application.—**MEGGITT v. SCHUSTER** (1863), 1 New Rep. 280; 7 L. T. 680.

*Annotation*:—**Refd.** *Kelly v. Lawrence* (1864), 10 L. T. 195.

**34.** —.]—A writ of summons in an action against A. was served on B. who told the person so serving him that his name was B., not A., that he was not the person against whom the writ was issued & knew nothing of the matter. B. having taken no notice of the service judgment was signed & a writ of *ca. sa.* issued under which he was taken in execution. Thereupon B. brought an action of trespass against the sheriff who justified under a writ of *ca. sa.* directed to him against B. in the name of A.:—**Held**: the above facts did not prove the plea & the sheriff was liable.—**KELLY v. LAWRENCE** (1864), 3 H. & C. 1; 3 New Rep. 525; 33 L. J. Ex. 197; 10 L. T. 195; 10 Jur. N. S. 636; 12 W. R. 413; 159 E. R. 424, Ex. Ch.

*Annotations*:—**Refd.** *R. v. Mullany* (1865), 11 Jur. N. S. 492; *De Mesnil v. Dakin* (1867), 37 L. J. Q. B. 42.

**KASHI NATH PANDAY** (1879), 5 C. L. R. 305.—**IND.**

**q. Judgment against agents—**  
*Principals not mentioned in proceedings.*—B. sued A. & Co., the proprietors of a rice mill, for moneys due in respect of contracts connected with the mill & obtained a money decree

against A. & Co. While the suit was pending A. & Co. sold the business with all its assets and liabilities to another co. C., of which A. & Co. were managing agents & the suit was defended by A. & Co. on behalf of C., but the fact was not brought to the notice of the ct. After decree A. & Co.

became insolvent & B. sought execution against C. as the legal representative of A. & Co.:—**Held**: B. was not so entitled. The fact that A. & Co., after the transfer of the business, defended the suit on behalf of C., made no difference as the decree was merely a personal decree against A.

**35.** —.]—Pltf. having been arrested by a sheriff's officer under a *capias* to hold to bail against another person, protested that he was not the right person, but in order to obtain his release he paid the sum indorsed, etc.; & the officer released him under 43 Geo. 3, c. 46, s. 2. The money having been paid into ct. by the sheriff the usual summons was taken out & served on pltf., but he did not appear & the money was paid to the person at whose suit pltf. had been arrested:—**Held**: pltf. was not precluded from recovering the money from the sheriff.—**DE MESNIL v. DAKIN** (1867), L. R. 3 Q. B. 18; 8 B. & S. 650; 37 L. J. Q. B. 42; *sub nom.* *DAKIN v. DE MESNIL*, 16 W. R. 145.

**36. Defendant sued in representative capacity under statute—Clerk to turnpike trustees.**—In an action against the clerk of the trustees of a turnpike road, under a statute which permits the trustees to sue & be sued in the name of their clerk, execution cannot issue against the clerk personally.—**WORMWELL v. HAILSTONE** (1830), 6 Bing. 668; 4 Moo. & P. 512; 8 L. J. O. S. C. P. 264; 130 E. R. 1438.

*Annotations*:—**Consd.** *Cobbett v. Wheeler* (1860), 3 E. & E. 358. **Refd.** *R. v. St. Katherine Dock Co.* (1832), 4 B. & Ad. 360; *Parrott v. Eyre* (1833), 10 Bing. 283; *Emery v. Day* (1834), 4 Tyr. 695; *Northwaite v. Bennett* (1834), 2 Cr. & M. 316; *Cane v. Chapman* (1836), 5 Ad. & El. 647; *Kendall v. King* (1856), 17 C. B. 483; *Laskey v. Runtz* (1908), 24 T. L. R. 496; *Collis v. Amphlett* (1918), 87 L. J. Ch. 216.

**37.** — Clerk to commissioners.]—By a local Act the comrs. thereby appointed for improving the town of B. were empowered to sue & be sued in the name of their clerk, who was expressly exempted from personal liability in respect of any such action, & they were also empowered to appoint a clerk & other officers, & it was enacted that they should & might, out of the moneys to arise by virtue of the Act, pay such officers such salaries as the said comrs. should think reasonable.

An action was brought by the exors. of a former clerk to the comrs. against deft., the present clerk, for arrears of salary due to deceased, in which judgment was entered up against deft. & a *fi. fa.* issued under which the sheriff seized goods of the comrs. vested in them by the said Act for public purposes, & a rule *nisi* having been obtained to set aside the judgment & *fi. fa.* on the ground that execution could not be had against different persons from the party sued, & that a *mandamus* to compel the comrs. to pay the debt out of the rates, etc., was the proper remedy:—**Held**: the rule must be discharged on the ground that if the comrs. were right they had other means of redress, as by action of trespass, etc., but that, if the rule were made absolute, there were no means of reviewing the decision of the ct.—**SAUNDERS v. SLACK** (1864), 11 L. T. 484.

*Annotation*:—**Mentd.** *Worral Waterworks Co. v. Lloyd* (1866), L. R. 1 C. P. 719.

**38.** — Treasurer of company.]—By authority of Act of Parliament, a co. were enabled to sue & to be sued in the name of their treasurer. It was also provided, that goods of individuals should not be taken in execution upon judgment against the co. Certain actions depending between pltf. & the treasurer of the co., & all matters in difference between the parties were referred to an



**Sect. 6.—Against whom execution may issue: Sub-sects. 1, 2, 3, 4, 5, 6 & 7, A. & B.; sub-sects. 8, 9, 10 & 11.]**

arbitrator, who awarded certain sums to be paid to pltf.:—*Held*: there was no mode of obtaining execution on a judgment against the treasurer, in an action brought upon the award.—*R. v. ST. KATHARINE DOCK CO.* (1832), 4 B. & Ad. 360; 1 Nev. & M. K. B. 121; 110 E. R. 491; *sub nom. CORPE v. GLYNN*, 2 L. J. K. B. 66.

*Annotations*:—*Refd.* *Harrison v. Timmins* (1838), 4 M. & W. 510; *Moffatt v. Dickson* (1853), 1 C. L. R. 294.

**39. — Director of company.]—**Under the powers given by certain Acts of Parliament a director of a co. was sued & judgment recovered in an action on a contract for work & labour done for the co.:—*Held*: the ct. had no power to order execution to issue against him, the statutes in question not making such a director personally liable.—*HARRISON v. TIMMINS* (1838), 4 M. & W. 510; 7 Dowl. 28; 1 Horn & H. 410; 8 L. J. Ex. 94; 3 Jur. 173; 150 E. R. 1531.

*Annotations*:—*Refd.* *Myers v. Rawson* (1860), 5 H. & N. 99. *Mentd.* *Vigers v. Pike* (1842), 8 Cl. & Fin. 562.

**Where leave of court required.]—***See* Sect. 8, *post*.

#### SUB-SECT. 2.—JOINT DEBTORS.

**40. Joint debtors — Whether execution may issue against one.]—***HOLLAND v. LEE* (1623), 1 Roll. Rep. 57, 301; 2 Roll. Rep. 368, 392; 81 E. R. 325, 500, 857, 873; *sub nom. HOLLAND v. DAUNTZEY*, Cro. Eliz. 739.

*Annotations*:—*Refd.* *Adams v. Savage* (1704), 2 Salk. 601; *Swaine v. Stevens* (1705), 11 Mod. Rep. 65; *Fowler v. Rickerby* (1841), 9 Dowl. 682. *Mentd.* *Stone v. Newman* (1635), Cro. Car. 427; *Wynne v. Wynne* (1743), 1 Wils. 42.

**41. — — —.]—***GILBURN v. RACK* (1657), 2 Sid. 12; 82 E. R. 1228.

*Annotations*:—*Consd.* *Treviban v. Lawrence* (1704), 2 Ld. Raym. 1048. *Refd.* *Day v. Gilford* (1661), 1 Sid. 54; *Rock v. Layton* (1700), 1 Com. 87; *Earle v. Hinton* (1726), 2 Stra. 732.

**42. — — —.]—**On a writ in debt for £1,066 pltf. declared for £1,000 borrowed by deft. of pltf., & in a second count for £66 for interest of money lent by pltf. to deft. Deft. pleaded in abatement of the writ that "the said sum of money in the said writ mentioned, & thereby supposed to be borrowed from pltf.," was borrowed by deft. & others, & not by deft. separately. On demurrer, because this plea answered only one of the causes of action, that mentioned in the first count:—*Held*: the plea was bad. *Semble*: debt will lie for interest of money.

If judgment had been recovered against all the contracting parties, pltf. might have obtained the fruits of it against one only, though indeed the others would have been liable to contribute their proportion to that other (*LORD KENYON, C.J.*).—*HERRIES v. JAMIESON* (1794), 5 Term Rep. 553; 101 E. R. 310.

*Annotations*:—*Mentd.* *Powell v. Fullerton* (1801), 2 Bos. & P. 420; *Dickenson v. Harrison* (1817), 4 Price, 282; *Hill v. White* (1839), 6 Bing. N. C. 23; *Davies v. Thomson* (1845), 14 M. & W. 161.

**43. — — —.]—**A separate *ca. sa.* against one deft. on a joint judgment against two cannot be supported.—*CLARKE v. CLEMENT & ENGLISH* (1796), 6 Term Rep. 525; 101 E. R. 683.

*Annotations*:—*Refd.* *Tanner v. Hague* (1797), 7 Term Rep.

& Co. & did not profess to bind the properties of C.—*ARBUTHNOT'S INDUSTRIALS, LTD. v. MUTHU CHETTIAR* (1908), 1 L. R. 31 Mad. 464.—*IND.*

#### PART II. SECT. 6, SUB-SECT. 2.

**40 i. Joint debtors—Whether execution may issue against one.]—**The ct.

will not restrain pltf. from levying the whole of his debt on one of several debtors.—*ZAVITZ v. HOOVER* (1838), (1823-1900) 2 Ont. Dig. 2622.—*CAN.*

**40 ii. — — —.]—**COMMERCIAL BANK v. VANKOUGHNET, REED & OSBORNE (1850), 1 C. L. Ch. 260.—*CAN.*

420; *Naden v. Paten* (1804), 1 Smith, K. B. 362; *Herring v. Dorrell* (1840), 4 Jur. 800; *Denton v. Godfrey* (1847), 11 Jur. 800; *Cattlin v. Kernot* (1858), 3 C. B. N. S. 796. *Mentd.* *Good v. Wilks* (1817), 6 M. & S. 413; *Haines v. East India Co.* (1856), 6 Moo. Ind. App. 467.

**44. — — —.]—**LAND CREDIT CO. OF IRELAND v. FERMOY (LORD), *Ex p. MUNSTER*, No. 13, *ante*.

**45. — — —.]—**In an action against two debtors to recover a debt in which one deft. submits to judgment & pays part of the debt, but the other deft. obtains leave to defend upon a summons under R. S. O., Ord. 14, pltf. may, under rule 5 of that order, proceed with the action against the remaining deft., & on obtaining judgment may issue execution for so much of the debt as remains unpaid.—*WEALL v. JAMES* (1893), 68 L. T. 515; 4 R. 356, C. A.

*Annotations*:—*Refd.* *McLeod v. Power* (1898), 67 L. J. Ch. 551; *Morel v. Westmorland* (1902), 87 L. T. 635.

#### SUB-SECT. 3.—JOINT TORTFEASORS.

**46. Execution may issue against one.]—***COBBE v. HEYDON* (1614), 1 Roll. Rep. 30; Cro. Jac. 349; 81 E. R. 305.

**47. — — —.]—**At common law an individual being one of several joint tortfeasors might be sued alone & compelled by execution to pay the damages compensating for the whole loss; nay, more if all were sued & judgment obtained against all execution might go against one & the whole of the damages obtained from him (*VAUGHAN-WILLIAMS, L.J.*).—*THE SEACOMBE, THE DEVONSHIRE*, [1912] P. 21; 81 L. J. P. 36; 106 L. T. 246; 28 T. L. R. 107; 56 Sol. Jo. 140; 12 Asp. M. L. C. 142, C. A.; *on appeal, sub nom. DEVONSHIRE (OWNERS) v. LESLIE (OWNERS)*, [1912] A. C. 634, H. L.

*Annotations*:—*Mentd.* *The Devonshire & St. Winifred* [1913] P. 13; *The Cairnbahn*, [1914] P. 25; *The Umona*, [1914] P. 141; *The Harlow*, [1922] P. 175; *The Ran*, *The Graygarth*, [1922] P. 80; *The Kursk*, [1924] P. 140.

#### SUB-SECT. 4.—PERSONS NOT PARTIES TO CAUSE OR ACTION.

*See, now*, R. S. C., Ord. 42, r. 26.

#### SUB-SECT. 5.—PARTNERS AND PARTNERSHIP PROPERTY.

*See, generally*, PARTNERSHIP.

#### SUB-SECT. 6.—COMPANIES.

**Companies registered under Companies Act, 1908.]—***See* COMPANIES, Vol. IX., p. 679, Nos. 4527-4532.

**Effect of winding-up order by court.]—***See* COMPANIES, Vol. X., pp. 963-967, Nos. 6640.

**Effect of voluntary winding up.]—***See* COMPANIES, Vol. X., pp. 1013, 1014, Nos. 7031-7039.

**Banking companies.]—***See* BANKERS, Vol. III.,

**40 iii. — — —.]—***SREENATH GHOSE v. SAHIB RAM ROY* (1869), 12 B. L. R. 504, n.; 12 W. R. 304.—*IND.*

**40 iv. — — —.]—***CHOWDHRY SHEIKH WAHED ALI v. MULLICK ENAYET HOSSEIN ALI* (1873), 12 B. L. R. 500; 20 W. R. 31.—*IND.*



pp. 148–152, Nos. 176–207; COMPANIES, Vol. X., p. 1065, Nos. 7465–7467.

**Companies under private Acts.]—See COMPANIES, Vol. X., p. 1220, No. 8629.**

**Statutory companies for public purposes.]—See COMPANIES, Vol. X., pp. 1121–1124, Nos. 7875–7908.**

**Railway companies.]—See RAILWAYS.**

#### SUB-SECT. 7.—CORPORATIONS.

##### A. In General.

*See* R. S. C., Ord. 42, r. 31.

*See, generally,* CORPORATIONS, Vol. XIII., pp. 426–428, Nos. 1490–1513.

**48. Board of guardians—Moneys raised by rate.]—**A judgment creditor of a board of guardians, in respect of a debt incurred prior to the year for which a rate was raised, had been restrained by order of one of the vice-chancellors from levying upon money in the hands of the treasurer, or upon goods purchased since the commencement of the year for which the rate was raised, but on appeal the Lords Justices extended the injunction against the levying execution against the goods, chattels, lands, hereditaments, moneys & property of the board, as prayed by a bill & information filed against the judgment creditor & sheriff.—*A.-G. v. WILKINSON* (1859), 29 L. J. Ch. 41, L. J.J.

*Annotations:—Distd. Worrall Waterworks Co. v. Lloyd* (1866), L. R. 1 C. P. 719. *Consd. Jersey v. Uxbridge Union R. S. A.* (1891), 64 L. T. 858.

*See, generally,* POOR LAW.

**49. Industrial & friendly society—Liability of member.]—**A *sci. fa.* lies against the member of an industrial & friendly society, constituted under Industrial & Provident Societies Act, 1852 (c. 81), to levy the amount of a judgment recovered against the registered trustees, there being no property of the society to answer the claim.—*MYERS v. RAWSON* (1860), 5 H. & N. 99; 29 L. J. Ex. 217; 24 J. P. 392; 8 W. R. 417; 157 E. R. 1116; *sub nom. MEYERS v. RAWSON*, 1 L. T. 405.

*Annotations:—Refd. Dean v. Mellard* (1863), 32 L. J. C. P. 282; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 1 Ch. 352.

*See, generally,* FRIENDLY SOCIETIES; INDUSTRIAL SOCIETIES.

##### B. Municipal Corporations.

*See, generally,* LOCAL GOVERNMENT.

**50. Whether property of new corporation liable for debts of old—Municipal Corporations Act, 1835 (c. 76).]**—Execution cannot, by virtue of sect. 92 of the above Act, be had against the property of a corpn., acquired since the passing of that statute, in satisfaction of a debt contracted by the old corpn.—*ARNOLD v. RIDGE* (1853), 13 C. B. 745; 1 C. L. R. 309; 22 L. J. C. P. 235; 21 L. T. O. S. 141; 17 J. P. 375; 17 Jur. 896; 1 W. R. 389; 138 E. R. 1394.

*Annotation:—Dbtd. Arnold v. Gravesend Corpn.* (1856), 2 K. & J. 574.

**51. —.]—**The property of a corpn. acquired subsequently to the passing of the above Act, is liable to be taken in execution for debts contracted by the old corpn., prior to the passing of the Act.—*ARNOLD v. GRAVESEND CORPN.* (1856), 2 K. & J. 574; 25 L. J. Ch. 530; 27 L. T. O. S. 97; 20 J. P. 358; 2 Jur. N. S. 703; 4 W. R. 478; 69 E. R. 911.

*Annotations:—Mentd. A.-G. v. Newcastle-upon-Tyne Corpn., & N. E. Ry.* (1889), 23 Q. B. D. 492; *Re Thompson, Bedford v. Teal* (1890), 45 Ch. D. 161.

#### SUB-SECT. 8.—MARRIED WOMEN.

*See, generally,* HUSBAND & WIFE.

#### SUB-SECT. 9.—EXECUTORS AND ADMINISTRATORS.

*See* EXECUTORS.

#### SUB-SECT. 10.—LUNATICS.

*See, generally,* LUNATICS.

**52. After appointment of receiver.] — (1)** Where the property of a lunatic has become subject to the control of the Ct. of Lunacy by the appointment of a receiver, it cannot be seized under a writ of *fi. fa.* by an execution creditor of the lunatic; & the ct. will make an order for bringing the lunatic's property into ct., & for payment thereof of costs & of an allowance for the maintenance of the lunatic, though not of his wife also, in priority to any claim of the execution creditor; but, subject to such allowance & to the costs incurred in relation to the lunatic's property, the order will be made without prejudice to any charge or priority which the creditor may have acquired by lodging his writ of *fi. fa.* with the sheriff.

(2) Form of order for maintenance of a lunatic where a judgment creditor has obtained execution.—*Re WINKLE*, [1894] 2 Ch. 519; 63 L. J. Ch. 541; 70 L. T. 710; 42 W. R. 513; 38 Sol. Jo. 455; 7 R. 255, C. A.

*Annotations:—As to (1) Distd. Re Clarke*, [1898] 1 Ch. 336. *Refd. Re Brown, Llewellyn v. Brown*, [1900] 1 Ch. 489. *Generally, Mentd. Re Farnham* (No. 2) (1896), 65 L. J. Ch. 456; *Winkle v. Bailey*, [1897] 1 Ch. 123; *Re Tye* (1899), 81 L. T. 743; *Davies v. Thomas*, [1900] 2 Ch. 462.

**53. — Property seized before appointment.]**—The Ct. in Lunacy will not allow property of a lunatic in its custody to be applied in paying his creditors without first providing for his maintenance; but it has no jurisdiction to interfere with the rights of creditors to seize & sell by legal process property of the lunatic which at the time of seizure is not in the custody of the ct. The issuing of a summons in lunacy does not withdraw the property of the lunatic from legal process by a creditor until an order is made showing that the Crown has actually taken the property under its protection.

A judgment creditor of a person not found lunatic by inquisition, after receiving notice of the pendency of a summons in lunacy for the appointment of a receiver under Lunacy Act, 1890 (c. 5), s. 116, issued a *fi. fa.* under which the goods of the debtor were seized before any order was made upon the summons. A receiver was afterwards appointed while the goods were in the possession of the sheriff:—*Held*: the ct. had no jurisdiction to order a sale of the goods under Lunacy Act, 1890 (c. 5), s. 117, for the maintenance of the alleged lunatic in priority to the claims of the creditor.—*Re CLARKE*, [1898] 1 Ch. 336; 67 L. J. Ch. 234; 78 L. T. 275; 46 W. R. 337; 14 T. L. R. 274; 42 Sol. Jo. 324, C. A.

*Annotations:—Consd. Re Brown, Llewellyn v. Brown*, [1900] 1 Ch. 489. *Refd. The James W. Elwell*, [1921] P. 351. *Mentd. Davies v. Thomas*, [1900] 2 Ch. 462; *Re E. G.*, [1914] 1 Ch. 927.

#### SUB-SECT. 11.—FOREIGN SOVEREIGNS AND AMBASSADORS.

**Foreign Sovereign.]—See ACTION, Vol. I., pp. 45–50, Nos. 354–409.**

*Sect. 6.—Against whom execution may issue: Sub-sect. 11. Sects. 7 & 8: Sub-sect. 1, A. & B.]*

*Ambassadors & other diplomatic persons.]—See CONSTITUTIONAL LAW, Vol. XI., pp. 519–521, Nos. 242–271.*

## SECT. 7.—FOR WHAT SUMS EXECUTION MAY ISSUE.

**54. Debt payable by instalments—Default in payment of instalment.]—**Where debts gave a warrant of attorney to secure a sum certain, to be paid half-yearly by instalments, with interest, on specified days, & that pltf. should be at liberty to enter judgment thereon immediately, but no execution to be issued till default made in payment of the sum, with interest, by the instalments, & in the manner mentioned:—*Held*: pltf. might take out execution for the whole on default in payment of the first instalment.—*LEVERIDGE v. FORTY* (1813), 1 M. & S. 706; 105 E. R. 263.

*Annotations:—Consd. Rose v. Tomblinson* (1834), 3 Dowl. 49. *Refd. Atkinson v. Bayntun* (1835), 1 Bing. N. C. 444.

**55. ———.]—**Deft. gave a *cognovit* to recover £72, the original debt, but judgment was not to be entered up till default of payment of such sum, with costs to be taxed; which debt & costs were to be paid by instalments: a default having been made in the payment of an instalment, pltf. signed judgment for the balance of the debt due, without having had the costs taxed:—*Held*: the judgment was regular, but the costs must be taxed before execution could issue.—*BARRETT v. PARTINGTON* (1839), 5 Bing. N. C. 487; 2 Arn. 30; 7 Scott, 595; 132 E. R. 1187.

**56. Part money paid into court—Execution for balance.]—**Where money was deposited in ct. in lieu of putting in & perfecting bail above, pursuant to Imprisonment for Debt Act, 1827 (c. 71), & pltf. obtained a verdict:—*Held*: he was not at liberty to issue execution for the whole sum recovered, but was bound to take the sum deposited

out of ct., & to limit his execution to the surplus only.—*HEWS v. PYKE* (1832), 2 Cr. & J. 359; 1 Dowl. 322; 2 Tyr. 313; 1 L. J. Ex. 120.

*Annotation:—Mentd. Sinclair v. G. E. Ry.* (1870), L. R. 5 C. P. 391.

**57. Agreement that judgment should not be entered if part paid—Failure to pay—Execution for full amount.]—***CHEATLE v. PIDDOCKE* (1843), 1 L. T. O. S. 171.

**58. Execution for costs — Subsequent costs set off.]—**Where pltf. had been ordered to pay costs to debts. & debts. issued execution for those costs, but the sheriff had made no return on the writ, & the same debts. were subsequently ordered to pay pltf. costs of a less amount, the ct. granted debts. leave to set off the costs debts. had been ordered to pay pltf. on debts. undertaking not to levy more on the execution than the balance of costs remaining due to them after such set-off. Debts. not having asked for a set-off when the order against them for costs was made:—*Held*: there must be an order for a set-off without costs.—*BRYON v. METROPOLITAN SALOON OMNIBUS CO.* (1859), 4 Drew. 546; 28 L. J. Ch. 798; 33 L. T. O. S. 142; 7 W. R. 423; 62 E. R. 209.

*Annotations:—Mentd. Roberts v. Buée* (1878), 47 L. J. Ch. 414; *Blakey v. Latham* (1889), 41 Ch. D. 518.

**Indorsement for more than amount due.]—***See Sect. 20, sub-sect. 1, A. (c), post.*

## SECT. 8.—LEAVE TO ISSUE EXECUTION.

### SUB-SECT. 1.—IN WHAT CASES NECESSARY.

#### A. In General.

*See R. S. C., Ord. 42, r. 23.*

**59. Discretion of court.]—**Upon motion for a sequestration against a railway co. for breach of an injunction restraining a nuisance the ct. ordered the motion to stand over for a short period, as the co. were using their best endeavours to remove the nuisance, which there appeared every probability they would be able effectually to do:—*Held*: on appeal, the discretion of the ct. had been

## PART II. SECT. 7.

**r. Sums due from third parties.]—**Persons who had been brought in as third parties under Ord. 16 had in writing guaranteed to pay debts. up to the sum of £1,000, whatever debts. paid to pltf. under a contract of guaranty between debts. & pltf. Debts. paid nothing to pltf., were sued by them, & had judgment entered against them:—*Held*: execution was not to issue against the third parties except for such sums as debts. had paid to pltf.—*BANK OF AUSTRALASIA v. MERCANTILE FINANCE, TRUSTEES & AGENCY CO. OF AUSTRALIA, LTD.* (1894), 20 V. L. R. 302.—*AUS.*

**s. Costs—Effect of delay.]—**Pltf. recovered a verdict, but delayed for some months in seeking to enforce it. He then, notwithstanding the repeated offers of deft.'s attorneys to pay the debt & costs when taxed immediately after taxation entered judgment, & without notice to deft. put a *fi. fa.* in the sheriff's hands to levy on his goods forthwith. On an application by deft. for relief:—*Held*: deft. should be discharged from the *fi. fa.* upon payment of the judgment, less the costs struck off on revision, & the costs of the *fi. fa.* & part of the interest.—*ANON.* (1867), 4 P. R. 242.—*CAN.*

**t. ——— What costs included.]—**Costs referred to in Creditor's Act, 1910, s. 5 (2), in respect to which an execution creditor has priority, include the taxed costs of the

action under which the execution was made.—*VASELENAK v. VASELENAK*, [1922] 1 W. W. R. 483.—*CAN.*

**—.]—**Where an order was made for the sale of deft.'s equitable interest in land, the costs of the application were directed to be taxed, & inserted in the indorsement as part of the costs to be levied under the writ of *fi. fa.*—*WATTS v. HOBSON* (1878), 7 P. R. 334.—*CAN.*

**b. ———.]—**The costs in the Ct. of Appeal should have been added to the costs of the action, & only one execution issued thereon.—*HOFFMAN v. CRERAR* (1899), 18 P. R. 473.—*CAN.*

**c. Charge for registration of judgment.]—**A charge for registering the judgment cannot be endorsed on the writ of *fi. fa.*—*WILT v. LAI* (1849), 1 C. L. Ch. 216.—*CAN.*

**d. Interest — Computed from date of pronouncing judgment.]—**In indorsing a writ of execution to levy interest upon the amount of the judgment, the interest is to be computed from the day of pronouncing the judgment.—*KELEHER v. MCGIBBON* (1883), 10 P. R. 89.—*CAN.*

**e. ———.]—**When the order of the Privy Council awards costs, but is silent as to interest on the costs so awarded, it is not competent for the ct. executing the order to direct payment of the costs with interest.—*TOKHAN SINGH v. GIRWAR SINGH* (1905), 1 L. R. 32 Calc. 494.—*IND.*

**54 i. Debt payable by instalments—Default in payment of instalment.]—***RANDHAN MITTER v. KAILAS NATH DUTT* (1869), 4 B. L. R. A. C. 20; 12 W. R. 457.—*IND.*

**f. ——— Interest.]—**Where a decree was obtained for a sum of money, & afterwards by an arrangement between the judgment-debtor & the decree-holder, it was agreed that the decree should be payable by instalments with interest at a very high rate:—*Held*: the decree-holder could not recover in execution of the decree any sum beyond what was stated in the decree.—*KANNYALAL PUNDIT v. CUTTACK COLLECTOR* (1871), 14 B. L. R. 291; 1 W. R. 276.—*IND.*

## PART II. SECT. 8, SUB-SECT. 1.—A.

**59 i. Discretion of court.]—**The ct. has a discretion as to the issue of a writ of execution under Ord. 6 of 1843, s. 127, & will not direct a writ to issue unless there is reason to believe that sufficient assets will be found to give an appreciable dividend to creditors.—*GREEFF'S TRUSTEE v. FOURIE'S EXECUTOR* (1899), 16 S. C. 576.—*S. AF.*

**59 ii. ———.]—**A writ against an unrehabilitated insolvent for the deficiency in his estate does not issue under Insolvent Ordinance, s. 127, as a matter of course, but the ct. must first be satisfied that there are reasonable grounds for believing there are assets belonging to the insolvent capable of satisfying the writ, wholly



properly exercised, & the appeal must be dismissed.—*COCKS v. GREAT WESTERN RY. CO.* (1886), 3 T. L. R. 92, C. A.; *subsequent proceedings* (1887), 3 T. L. R. 505.

60. —.]—When application is made for leave to issue a sequestration for non-payment of costs the ct. or judge should be satisfied that the application is reasonable, but it is not necessary to point to any particular property which may be made available for the payment of the costs by sequestration.

When the ct. or judge to whom the application is made has exercised a discretion & made an order, that order ought not to be interfered with by a superior ct. unless it is shown that there has been an improper exercise of the discretion or some miscarriage of justice.—*HULBERT & CROWE v. CATHCART*, [1896] A. C. 470; 65 L. J. Q. B. 644; 75 L. T. 302; *sub nom.* *HURLBERT v. CATHCART*, 12 T. L. R. 379, H. L.

61. — One judgment need not be set off against another.]—A judge in chambers has a discretion under R. S. C., Ord. 42, r. 23, & is not bound to allow one judgment to be set off against another.—*BRYANT v. TORKINGTON* (1897), 13 T. L. R. 315, C. A.

62. —.]—The rule [R. S. C., Ord. 42, r. 23] contains no negative words, but it seems to say that, as a change has been made in the parties entitled to issue execution, no execution shall issue without special leave; & it is to be remarked that under the rule the ct. has a discretion as to granting leave for execution to issue (*WRIGHT, J.*).—*Re CLEMENTS, Ex p. CLEMENTS*, [1901] 1 K. B. 260; 49 W. R. 176; 45 Sol. Jo. 81; *sub nom. Re CLEMENTS, Ex p. DAVIS*, 70 L. J. Q. B. 58; 8 Mans. 27; *sub nom. Re CLEMENTS, Ex p. CLEMENTS v. DAVIS*, 83 L. T. 464, D. C.

*Annotation:—Reid. Re Bagley*, [1911] 1 K. B. 317.

63. —.]—Pltf. under an agreement in writing made in 1916 agreed, in consideration of certain persons jointly & severally guaranteeing the repayment with interest, to advance £1,000 to a co. In 1924 pltf. obtained judgment for the £1,000 & interest against the guarantors, & shortly afterwards M. & F., two of the guarantors, paid pltf. the amount of the judgment. One of the guarantors having satisfied his proportion of the judgment, M. & F., in accordance with Mercantile Law Amendment Act, 1856 (c. 97), s. 5, obtained from pltf. an assignment of the judgment & all rights thereunder to S. as a trustee for them. Under R. S. C., Ord. 42, r. 23, where a change of parties entitled or liable to execution had taken place it became necessary to apply to the ct. for leave to issue execution. S. applied in chambers for leave to issue execution against the other guarantors, defts. H. & H., who, however, set up a claim against M. & F. for a larger sum than their proportion of the judgment in respect of other transactions between the parties & were cross-examined on their claim with the result that the

master refused leave to issue execution. An appeal was dismissed on the ground that it was right that a claim to a set-off should be taken into consideration in deciding whether leave to issue execution should be given. From that decision S. appealed on the ground that no leave to issue execution was necessary in the case of the assignment of a judgment under sect. 5 of the Act:—*Held*: (1) the fact that an assignment of the judgment had been obtained under sect. 5 did not absolve pltf. from the necessity to obtain leave to issue execution under R. S. C., Ord. 42, r. 23, as the Rules of the Supreme Ct. were made under the statutory authority of the Jud. Acts which were passed subsequently to Mercantile Law Amendment Act, & it was immaterial that sect. 5 of the Act made no reference to the requirement by C. L. P. Act, 1852 (c. 76), s. 129, that where a change of parties had occurred leave to issue execution must be obtained; (2) under R. S. C., Ord. 42, r. 23, one judgment was not bound to be set off against another, & leave to issue execution refused, but the judge in chambers had a discretion in the matter.—*KAYLEY v. HOTHERSALL* (1925), 94 L. J. K. B. 348; 132 L. T. 468; 69 Sol. Jo. 310, C. A.

#### B. After Six Years.

*See, now*, R. S. C., Ord. 42, rr. 8, 22, 23.

64. Whether leave necessary—Garnishee proceedings.]—A garnishee against whom proceedings under R. S. C., Ord. 45, have been duly taken, may be ordered to pay to a judgment creditor a debt due from such garnishee to the judgment debtor, although more than six years have elapsed since the judgment.

In my opinion, on the strict construction of the words [of R. S. C., Ord. 42, r. 8], they do not include what is ordinarily called attachment of debts but are confined, by Ord. 44, to writs of attachment attaching a person for non-compliance with an order of the ct., for contempt, for offences against the discipline of the cts. & other like cases. Such a writ cannot be issued without the leave of the ct. (*LORD COLERIDGE, C.J.*).

When a judgment has been obtained & is not satisfied, the garnishee may be required to show cause why he should not pay the money to the judgment creditor. No doubt the garnishee may, on showing cause, urge before the judge that a long time has elapsed since the judgment, & any other defence, but when he has done so, if the judge is satisfied that there is no good reason why the order should not issue, it may be made. I think Ord. 45, for attachment of debts, stands by itself, & that rr. 8, 22, & 23 of Ord. 42 have application to Ord. 44, & not to Ord. 45 (*LORD COLERIDGE, C.J.*).

The primary & ordinary meaning of the word "attachment" is attaching the person, & putting him in prison. But when attachment of a debt is ordered, we say to the man from whom the

or in part.—*SEYDELL v. BOLTMAN* (1900), 17 S. C. 271.—S. AF.

#### PART II. SECT. 8, SUB-SECT. 1.—B.

g. Whether leave necessary—For second execution—First execution issued within six years of judgment.]—Pltf. recovered a judgment against deft. on Oct. 25, 1881, & on the same day issued an execution which was returned unsatisfied. On Dec. 10, 1888, a second execution was issued, without an order therefor having been obtained:—*Held*: an execution having been issued within six years after the date of the judgment, it was not

necessary to obtain an order before the issue of the second execution.—*ANDERSON v. CUNNINGHAM* (1889), 21 N. S. R. 344.—CAN.

h. — *Ex parte application*—Necessity for notice to judgment debtor.]—A judgment for payment of money by deft. was pronounced in favour of pltf. on Apr. 19, 1894, but was not entered until Apr. 15, 1914. On that day an order was made on the *ex p.* application of pltf., allowing him to issue execution on the judgment. The order was subsequently set aside:—*Held*: notwithstanding that the judgment was unsatisfied, & that

the right to enforce it might be lost by pltf.'s slip, the order was rightly set aside, Rule 213 being explicit as to the necessity for notice of the application being given to deft.—*Joss v. FAIRGRIEVE* (1914), 32 O. L. R. 117.—CAN.

k. — — —.]—Leave will not be given, in the absence of special circumstances, to issue execution on a judgment more than six years old, without notice to the party liable.—*NATIONAL BANK v. CULLEN*, [1894] 2 I. R. 683.—IR.

l. — — —.]—Where six years have elapsed since a judgment,



**Sect. 8.—Leave to issue execution: Sub-sect. 1, B.**  
**C. (a), (b), (c) & (d), D., E., F., G. & H.]**

money is owing: "Pay that debt to some one else or we shall attach you & send you to prison" (STEPHEN, J.).—**FELLOWS v. THORNTON** (1884), 14 Q. B. D. 335; 54 L. J. Q. B. 279; 52 L. T. 389; 33 W. R. 258; 1 T. L. R. 167, D. C.

### C. Change of Parties.

#### (a) By Death.

See R. S. C., Ord. 42, r. 23.

**65. Death of judgment creditor—After writ of execution issued.]—A. had execution against B. B. dies, & the sheriff levies upon the exors. of B.**

That was nought, for the writ was *fi. fa. de bonis et catallis* B. which cannot be after his death. But if after execution awarded pltf. dies yet the sheriff may levy the money (*per* CUR.).—**THOROUGHGOOD'S CASE** (1598), Noy, 73; 1 Dyer, 76 b, n.; 74 E. R. 1041.

**Annotations:—****Consd.** **Ellis v. Griffith** (1846), 16 M. & W. 106. **Refd.** **Clerk v. Withers** (1704), 2 Ld. Raym. 1072. **Mentd.** **Giles v. Grover** (1832), 9 Bing. 128.

**66. ———.]—(1)** The death of a party who has sued out, a *fi. fa.* after the seizure of goods but before the sale of them will not abate the execution, or entitle the party against whom the execution was sued out to a restitution.

(2) When deft.'s goods are seized on a *fi. fa.* the debt is discharged.

(3) A man who has been sheriff may after he is out of office, sell goods he seized under a *fi. fa.* while he was in.

(4) An execution is an entire thing, & that sheriff that takes the goods in execution, shall go on, & sell, though he is out of his office, & not the new sheriff (**POWELL, J.**).

Though the sheriff is out of his office, yet he is bound to sell the goods, for when he has returned, that he has seized the goods, & that they remain in his hands *pro defectu emptorum*, that is no discharge to the sheriff, but only an excuse to the ct. (**HOLT, J.**).

(5) He must still sell the goods even without a *venditioni exponas*, & he is compellable to do it, though he is out of office, & for that purpose a *distringas nuper vicecomitem* lies against him, of which writ there are two sorts. The [new] sheriff must return issues against the old sheriff upon it, & so *in infinitum*. The other sort is to distrain the old sheriff, to sell the goods, & have the money himself in ct. at the return of the writ. Then since the sheriff is compellable to sell the goods what hinders him from doing it, though pltf. is dead (**HOLT, C.J.**).

(6) The sheriff is answerable for the value of the goods after he has seized them, & he is bound to sell them at all events, & he is bound to the value he has returned them to be of, & though the goods are lost or rescued from him, he is bound, not to that value they may after appear, or be found to be of, but to the value he returned them to be of; that is the value he is bound to, & an action of debt lies against him for that value (**HOLT, C.J.**).—**CLERK v. WITHERS** (1704), 2 Ld. Raym. 1072; **Holt, K. B.** 303, 646; 6 Mod. Rep. 290; 11 Mod. Rep. 34; 1 Salk. 322; 92 E. R. 211.

**Annotations:—****As to (1)** **Expld.** **Wharam v. Broughton** (1748), 1 Ves. Sen. 180. **Consd.** **White v. Hayward** (1752), 2 Ves. Sen. 461; **Giles v. Grover** (1832), 9 Bing. 128; **Stimson v. Farnham** (1871), L. R. 7 Q. B. 175.

**Refd.** **Cooper v. Chitty & Blackiston** (1756), 1 Burr. 20. **Refd.** **Morland v. Pellatt** (1828), 8 B. & C. 722. **Refd.** **Drewe v. Lainson** (1840), 11 Ad. & El. 529. **As to (3), (4), (5) & (6)** **Consd.** **Cooper v. Chitty & Blackiston** (1756), 1 Burr. 20; **Doe d. Stevens v. Donston** (1818), 1 B. & Ald. 230; **R. v. Giles** (1820), 8 Price, 293. **Refd.** **Wilcox & Litchey v. Pokinhorn** (1728), 1 Barn. K. B. 81; **Meriton v. Stevens** (1741), Willes, 271; **Clutterbuck v. Jones** (1812), 15 East, 78; **Holmes v. Newlands** (1843), 5 Q. B. 367; **Levy v. Hale** (1859), 29 L. J. C. P. 127; **Stimson v. Farnham** (1871), L. R. 7 Q. B. 175; **Re Davies, Ex p. Williams** (1872), 7 Ch. App. 314.

**67. ———.]—(1)** Original writs do abate by death of the party but writs of execution do not, & therefore if the party is in execution he continues in execution until he satisfies the end thereof. . . . An execution does not abate by death of pltf. for whose benefit it is, after it is sued out (**LORD HARDWICKE, C.**).

(2) If a sequestration issues for a duty decreed, or costs, & the party dies; that sequestration must be revived . . . in a reasonable time by the representatives of the party dying (**LORD HARDWICKE, C.**).—**WHITE v. HAYWARD** (1752), 1 Dick. 173; 2 Ves. Sen. 461; 28 E. R. 295, L. C.

**Annotations:—****As to (1)** **Refd.** **Troup v. Troup** (1868), 37 L. J. Ch. 390. **As to (2)** **Consd.** **Morgan v. Scudamore** (1796), 3 Ves. 195. **Refd.** **Morgan v. Scudamore** (1794), 2 Ves. 313; **Lowten v. Colchester Corpn.** (1817), 2 Mer. 113.

**68. ———.]—Deft. arrested on a ca. sa.** is not entitled to be discharged out of custody by reason of pltf.'s death after the delivery of the writ to the sheriff, & before the arrest.

With respect to a *fi. fa.* the law is perfectly clear. . . . That writ directs the sheriff to seize the goods & chattels of deft.; & whatever goods & chattels he had at the time of the teste of the writ, or which may have come to his possession before the return of it, may be seized in the hands of his exors., except so far as Stat. Frauds may have effected an alteration in favour of purchasers (**PARKER, B.**).—**ELLIS v. GRIFFITH** (1846), 16 M. & W. 106; 4 Dow. & L. 279; 16 L. J. Ex. 66; 8 L. T. O. S. 166; 10 Jur. 1014; 153 E. R. 1118.

**69. ———.]—Where a change had taken place by death in the parties entitled to execution on a judgment, the exors. of the party who obtained the judgment obtained leave to issue execution on an *ex p.* application.—****MERCER v. LAWRENCE** (1878), 26 W. R. 506.

**70. ———.]—The executor of a creditor who has obtained final judgment is not entitled to issue a bkcpy. notice against the judgment debtor unless he has obtained leave from the ct. under R. S. C., Ord. 42, r. 23 to issue execution on the judgment.—****Re WOODALL, Ex p. WOODALL** (1884), 13 Q. B. D. 479; 53 L. J. Ch. 966; 50 L. T. 747; 32 W. R. 774; 1 Morr. 201, C. A.

**Annotations:—****Expld.** **Re Keeling, Ex p. Blanchett** (1886), 17 Q. B. D. 303. **Consd.** **Re Goldring, Ex p. Harper** (1888), 22 Q. B. D. 87. **Appld.** **Re Bagley**, [1911] 1 K. B. 317. **Refd.** **Re Ford, Ex p. Ford** (1886), 18 Q. B. D. 369; **Re Ide, Ex p. Ide** (1886), 17 Q. B. D. 755; **Re Clements, Ex p. Clements**, [1901] 1 K. B. 260. **Mentd.** **Goodman v. Robinson** (1886), 18 Q. B. D. 332.

**71. Death of one co-judgment creditor—Right of survivor to issue execution.]—**An action survives to one of two partners in whose favour judgment had been given so that he could issue execution, although the other partner was dead (**FIELD, J.**).—**DAVIS (THOMAS) & SON v. ANDREWS**, [1884] W. N. 94; Bitt. Rep. in Ch. 102.

**72. Death of judgment debtor.]—**Execution may be executed after the death of the party, for the exor. being privy is bound as well as testator.—

the ct. may grant leave to issue execution on an *ex p.* application  
 NATIONAL BANK OF NEW YORK

N.Z.

### PART II. SECT. 8, SUB-SECT. 1.— C. (a).

**65 i. Death of judgment creditor—After writ of execution issued.]—**When

judgment is obtained by several exors. & one of them dies after the entering of judgment the survivors may issue execution in the name of all the pltf's. & it is unnecessary to have any order

HORTON v. RUESBY (1686), Comb. 33; 90 E. R. 326; *sub nom.* HOUGHTON v. RUSHBY, Skin. 257.

73. ———. Before delivery of writ to sheriff.]—THOROUGHGOOD'S CASE, No. 65, *ante*.

74. ———. ———.]—If deft. die after execution awarded & before it is served yet the teste of the writ binds the goods in the hands of his administrator; but in favour of a purchaser no writ of execution shall bind the property but from the time of its delivery to the sheriff.—FARRER v. BROOKS (1673), 1 Mod. Rep. 188; 86 E. R. 819.

75. ———. ———.]—*Fi. fa.* delivered to the sheriff after deft.'s death but teste'd before is well enough.—SPRINGER v. SOMMERVILLE (1729), Bunb. 271; 145 E. R. 670.

76. ———. After testing of writ.]—A writ of error does not abate by the death of one of several defts. But it does by the death of one of several plffs. Execution must be sued out against all the persons against whom a judgment is given, unless cause for omitting any appears on the record. Execution may be taken out after the death of the party against whom it issues, if tested before.—PENNOYER v. BRACE (1698), Carth. 404; 1 Ld. Raym. 244; 91 E. R. 1059; *sub nom.* PENNOYER v. BRACE, Comb. 441; 8 Mod. Rep. 108; 1 Salk. 319; *sub nom.* BRACE v. PENNOYER, 5 Mod. Rep. 338; *sub nom.* BENNOYER v. BRACE, Holt, K. B. 640; 12 Mod. Rep. 130.

*Annotations:—*Reid. Turner v. Brewer (1719), 11 Mod. Rep. 321; Kinnaird v. Lyall (1806), 3 Smith, K. B. 280; Whittenbury v. Law (1840), 6 Bing. N. C. 345; Barnwall v. Sutherland (1850), 9 C. B. 380.

77. ———. ———.]—A *fi. fa.* taken out before, may be executed after, the death of deft. without suing out a *sci. fa.*—ANON. (1724), 8 Mod. Rep. 225; 88 E. R. 161.

78. ———. ———.]—If a *fi. fa.* be teste'd before deft.'s death, but delivered to the sheriff & executed after, the execution is regular.—WAGHORNE v. LANGMEAD (1796), 1 Bos. & P. 571; 126 E. R. 1071.

*Annotation:—*Reid. Calvert v. Tomlin (1828), 5 Bing. 1.

79. ———. ———.]—ELLIS v. GRIFFITH, No. 68, *ante*.

80. ———. Time of death.]—CHICK v. SMITH, No. 420, *post*.

#### (b) By Bankruptcy.

See BANKRUPTCY, Vol. V., p. 1020, Nos. 8331, 8332.

#### (c) By Assignment.

See, now, R. S. C., Ord. 42, r. 23 (a).

81. Assignee of part of judgment debt.]—A judgment creditor having assigned part of the judgment debt for valuable consideration, the assignee applied under R. S. C., Ord. 42, r. 23, for leave to issue execution:—*Held*: the assignee was not entitled to such leave, on the grounds (1) (BRAY, J.) there cannot be an absolute assignment within Jud. Act, 1873, c. 66, s. 25 (6), of a definite part of an existing debt or other legal chose in action; (2) (CT. OF APPEAL) as the original judgment creditor could only issue a single execution upon his judgment, & could not split

for leave to do so.—BAIRD v. THOMPSON (1884), 14 L. R. Ir. 497.—IR.

m. ———. ———. Revival of proceedings—Right of legal representative.]—Where a decree-holder, whose right of execution has been, by injunction restraining him pending another suit from executing the decree, temporarily suspended, dies, his representative has the same rights as he had himself to apply for & obtain a revival of the proceedings.—KALYANBHAI DIPCHAND v. GHANASHAMLAL JADUNATHJI

(1880), I. L. R. 5 Bom. 29.—IND.

#### PART II. SECT. 8, SUB-SECT. 1.—C. (c).

n. Assignee of judgment debt.]—In certain cases the party alleging himself to be entitled to execution may apply to the ct. or judge for leave to issue execution accordingly. The rule does not enable an assignee of a judgment to issue execution in his own name.—JOSE v. MCNEILL (1887), 20 N. S. R. (8 R. & G.) 159.—CAN.

up the judgment debt & issue separate executions upon the different parts, he could not give to an assignee of a part of the judgment debt a right which he did not himself possess.—FORSTER v. BAKER, [1910] 2 K. B. 636; 79 L. J. K. B. 664; 102 L. T. 29, 522; 26 T. L. R. 421, C. A.; *sub nom.* BOWLES v. BAKER, 26 T. L. R. 243.

*Annotations:—*As to (1) Reid. Re Steel Wing Co., [1921] 1 Ch. 349. As to (2) Reid. Rothschild v. Fisher, [1920] 2 K. B. 243. Generally, Mendt. Re Freshwater, Yarmouth & Newport Ry. (1913), 29 T. L. R. 568.

82. Assignment under Mercantile Law Amendment Act, 1856 (c. 97), s. 5.]—KAYLEY v. HOTHERSALL, No. 63, *ante*.

See CHOSSES IN ACTION, Vol. VIII., p. 484, Nos 524–527.

#### (d) Change in Civil Status of Judgment Debtor.

See, now, Forfeiture Act, 1870 (c. 23); R. S. C., Ord. 42, r. 23 (a).

83. Felon.]—The ct. will give a man leave to serve a felon with process, though he is under sentence of death & likely to have his sentence changed for transportation, if the felony did not occasion any forfeiture, & the party applying will undertake not to sue out execution against his person.—COPPIN v. GUNNER (1730), 2 Ld. Raym. 1572; 92 E. R. 518; *sub nom.* COFFIN v. GUNNER, 2 Stra. 873; *sub nom.* METSCOFFEN v. GUNNER, 1 Barn. K. B. 356.

*Annotation:—*Expld. Ramsay v. McDonald (1745), 1 Wm. Bl. 30.

84. Person in custody for criminal offence.]—When a person is in custody for a criminal offence he may be charged with a civil action.—ANON. (1731), 1 Barn. K. B. 449; 94 E. R. 302.

#### D. Husband and Wife.

Husband entitled to execution upon judgment or order in favour of wife.]—See HUSBAND & WIFE.

Husband liable to execution upon judgment or order against wife.]—See HUSBAND & WIFE.

#### E. Judgment of Assets in futuro.

See, now, R. S. C., Ord. 42, r. 23 (c).

See EXECUTORS.

#### F. Shareholders in Joint Stock Companies.

See, now, R. S. C., Ord. 42, r. 23 (d).

See Sect. 6, sub-sect. 5, *ante*.

#### G. Conditional Judgments.

See, now, R. S. C., Ord. 42, r. 9.

See Sect. 1, sub-sect. 2, *ante*.

#### H. Other Cases.

85. Property in hands of sequestrator.]—

(1) Where a receiver is in possession, an ejectment cannot be brought without leave of the ct.  
(2) Contempt to disturb sequestrators in possession.

(3) If the sequestration is executed, a judgment creditor, though prior, can only claim to be examined *pro interesse suo*; if not executed, he may take execution.

o. ———.]—Where the ct. the assignee of a decree to proceed with the execution even if he has omitted to make a formal application for execution, it is an error of procedure.—DWAR BUKSH SIKKAR v. FATIK JALI (1898), I. L. R. 26 Calc. 250; 3 C. W. N. 222.—IND.

#### PART II. SECT. 8, SUB-SECT. 1.—H.

p. Foreign judgment.]—A *ca. sa.* cannot be issued merely upon the filing of a memorial of a foreign judgment,



**Sect. 8.—Leave to issue execution: Sub-sect. 1, H.; sub-sects. 2 & 3. Sect. 9: Sub-sect. 1.]**

(4) Where sequestrators are in possession under the process of the ct. but especially where they are in possession for the purpose of raising a duty their possession is not to be disturbed, even by an adverse title, without leave (LORD ELDON, C.).—*ANGEL v. SMITH* (1804), 9 Ves. 335; 32 E. R. 632.

*Annotations:—As to (1) Refd.* *Musadee Mahomed Cazum Sherazee v. Meerza Ally Mahomed* (1854), 6 Moo. Ind. App. 27. *As to (2) Refd.* *Johnes v. Claughton* (1822), Jac. 573; *Lane v. Capsey*, [1891] 3 Ch. 411; *Whadcoat v. Shropshire Ry.* (1893), 37 Sol. Jo. 650. *As to (3) Refd.* *Brooks v. Groathed* (1820), 1 Jac. & W. 176. *Generally, Refd.* *Johnson v. Chippindall* (1828), 2 Sim. 55; *Empringham v. Short* (1844), 3 Hare, 461.

**86. Property in hands of receiver.]—**A party to whom a sum of money was payable by a receiver under an order in a cause demanded payment from the receiver, notwithstanding that proceedings had been commenced by other persons, & were still pending, to discharge the order & impound the money in the receiver's hands; & payment being refused, his solr. sued out & executed a writ of *fi. fa.* against the receiver. In these circumstances, the ct., although it expressed an opinion that the *fi. fa.* had been improperly issued, yet refused to direct an inquiry as to the damages sustained by the receiver, but gave him leave to bring an action at law against the party & his solr., they insisting on their right to have the question tried at law.—*WHITEHEAD v. LYNES* (1865), 34 Beav. 161; 34 L. J. Ch. 201; 11 L. T. 615; 11 Jur. N. S. 74; 13 W. R. 306; 55 E. R. 596.

**87. —.]—**After judgment had been pronounced in a Chancery action for dissolution of a partnership, & a receiver had been appointed, a creditor obtained judgment in the Q. B. Div. against the firm for the amount of his debt & costs. On an application in the Chancery action by the judgment creditor an order was made giving him a charge for his debt & costs on all the partnership moneys come or coming to the receiver; he, the creditor, undertaking to deal with the charge according to the order of the ct.; the intention of the ct. being to preserve to him all the rights he would have had if he had issued execution & the sheriff had seized & sold the assets on the day the application was made.—*KEWNEY v. ATTRILL* (1886), 34 Ch. D. 345; 56 L. J. Ch. 448; 55 L. T. 805; 35 W. R. 191.

*Annotations:—Apld.* *Brand v. Sandground* (1901), 85 L. T. 517. *Consd.* *Ridd v. Thorne*, [1902] 2 Ch. 344. *Refd.* *Willis v. Cooper, Slattery v. Cooper, Willis v. Cooper* (1900), 44 Sol. Jo. 698.

*See, generally, RECEIVERS.*

**88. Judgment imposing necessity for leave.]** Deft. in a suit in Chancery gave judgment in an action at law "to be dealt with as the ct. shall direct":—*Held*: although liberty to enforce the judgment would not generally be given until the merits of the case were disposed of, the ct. was not precluded from allowing execution to issue at an earlier stage of the cause.—*HODGES v. FINCHAM* (1875), 1 Ch. D. 9; 33 L. T. 711; 24 W. R. 36, C. A.

**Writ of sequestration.]—***See* Part III., Sect. 6, *post*.

**Writ of attachment.]—***See* CONTEMPT OF COURT, Vol. XVI., pp. 61 *et seq.*

but an order must be first made for leave to issue execution.—*MORROW v. AUS.* (1873), 3 Q. S. C. R. 190.—

**q. Rule served for landlord to defend.]—**Where a rule has been taken out & served for the landlord to defend, the lessor of pltf., though he may sign judgment against the casual

ejector, has no right to take out a *habere facias possessionem*, without leave of ct.—*DOE d. MATHEWS v. ROE* (1850), 1 C. L. Ch. 160.—*CAN.*

## PART II. SECT. 8, SUB-SECT. 3.

**93 i. Discretion of court.]—**An order made under the Cts. (Emergency

**Writ of assistance.]—***See* Part III., Sect. sub-sect. 2, *post*.

**Writ of delivery.]—***See* Part III., Sect. 4, sub-sect. 1, *post*.

**Between firm & members of firm.]—***See* R. S. C. Ord. 48A., rr. 8, 10.

**In applications under Workmen's Compensation Rules, 1907, r. 67.]—***See* MASTER & SERVANT.

## SUB-SECT. 2.—HOW OBTAINED.

*See* R. S. C., Ord. 42, rr. 11, 12.

**89. Affidavit in support—By whom made—Party or his solicitor at time of judgment.]—**The affidavit of the existence of the debt on which to ground a motion for a *sci. fa.* to revive the judgment, ought either to be made by pltf. himself or by some person who was his attorney at the time of the judgment.—*NORFOLK (DUKE) v. LEICESTER* (1836), 1 M. & W. 204; Tyr. & Gr. 249; 5 L. J. Ex. 90; 150 E. R. 407.

**90. — Party infant residing abroad at time of judgment.]—**Motion for a *sci. fa.* to revive a judgment, may be granted on an affidavit by the attorney of the party seeking to enforce the judgment, although he was not the attorney of the party at the time of the judgment obtained; if it appear that the parties on whose behalf it is moved were infants at the time of obtaining the judgment residing abroad, & that the judgment is more than fifteen years old as in that case the rule is only a rule *nisi* in the first instance.—*SMITH v. MEE* (1844), 1 Dow. & L. 907; 7 Scott, N. R. 799; 13 L. J. C. P. 121.

**91. — Change of parties by death—Proof of grant of probate to executors.]—**An affidavit in support of a rule absolute for judgment on a *sci. fa.* at the suit of exors., must show that probate has been granted to them.—*VOGEL v. THOMPSON* (1847), 1 Exch. 60; 5 Dow. & L. 114; 16 L. J. Ex. 309; 154 E. R. 25.

## SUB-SECT. 3.—UNDER COURTS (EMERGENCY POWERS) ACTS.

**92. Application made to Court of Appeal.]—***EVANS v. MAIN COLLIERY CO., LTD.* (1914), 31 T. L. R. 127, C. A.

**93. Discretion of court.]—***LYRIC THEATRE LONDON, LTD. v. L. T. LTD. & CYRIL THEATRICAL SYNDICATE, LTD.* (1914), 84 L. J. K. B. 712; 31 T. L. R. 88, C. A.

**94. —.]—***DE BINGHAM v. LONDON LIFE ASSOCN., LTD.* [1915] W. N. 165, C. A.

**95. —.]—***STIRLING v. NORTON* (1915), 31 T. L. R. 293, C. A.

**96. Winding-up petition.]—***Re A COMPANY*, [1915] 1 Ch. 520; 84 L. J. Ch. 382; 31 T. L. R. 241; 59 Sol. Jo. 302; [1915] H. B. R. 65; *sub nom. Re Two Companies* (0022 & 0023 of 1915), 112 L. T. 1100, C. A.

*Annotation:—Apld. Re Globe Trust* (1915), 84 L. J. Ch. 903.

**97. —.]—***Re GLOBE TRUST, LTD.* (1915), 84 L. J. Ch. 903; 113 L. T. 80; 31 T. L. R. 280; 59 Sol. Jo. 529; [1915] H. B. R. 228.

Powers) Act, 1914, s. 1 (2), giving pltf. liberty to proceed to execution on a judgment, will not be disturbed upon appeal unless it is shown that the "absolute discretion" which is vested in the judge in chambers was not exercised upon legal grounds.—*PHILCO PUBLISHING CO. v. NOLAN* (1915), 49 I. L. T. 65.—*IR.*



98. *Costs.*]—TORRES v. TORRES (1917), 33 T. L. R. 547.

99. —.]—EETEN v. POLLARD (1917), 87 L. J. K. B. 356; 62 Sol. Jo. 231.

100. —.]—DOBB v. DOBB (HENRY), LTD., [1918] 1 Ch. 443; 87 L. J. Ch. 321; 118 L. T. 244; 34 T. L. R. 336; 62 Sol. Jo. 422, C. A.

*Annotation*:—*Apld.* *Re* Wachter, *Ex p.* Grant Hughes (1918), 62 Sol. Jo. 603.

101. *Member of reserve forces.*]—*Re* A DEBTOR, [1919] 1 K. B. 169; 88 L. J. K. B. 267; 120 L. T. 169; 35 T. L. R. 58; 63 Sol. Jo. 83; [1919] B. & C. R. 76, C. A.

*Annotation*:—*Apld.* *Re* Debtor (No. 206 of 1920) (1920), 90 L. J. K. B. 513.

102. — *After demobilisation.*]—*Re* DEBTOR (No. 206 of 1920) (1920), 90 L. J. K. B. 513; 124 L. T. 369; 37 T. L. R. 154; 65 Sol. Jo. 219; [1920] B. & C. R. 200, C. A.

103. *Bankruptcy petition.*]—*Re* A DEBTOR, [1919] 1 K. B. 169; 88 L. J. K. B. 267; 120 L. T. 169; 35 T. L. R. 58; 63 Sol. Jo. 83; [1919] B. & C. R. 76, C. A.

*Annotation*:—*Apld.* *Re* Debtor (No. 206 of 1920) (1920), 90 L. J. K. B. 513.

## SECT. 9.—FORM OF WRITS OF EXECUTION.

### SUB-SECT. 1.—IN GENERAL.

*See, now*, R. S. C., Ord. 42, rr. 13, 14, 16; & Appendix H.

104. *To whom directed—Sheriff of county.*]—GRANT v. BAGGE, No. 242, *post*.

105. —.]—Writs issued out of the ct. [of King's Bench], against persons within the borough of Southwark are to be directed to the sheriff of the county, who issues his mandate thereupon to the bailiff of the borough, & not to the bailiff in the first instance.—BOWRING v. PRITCHARD (1811), 14 East, 289; 104 E. R. 612.

106. — *Sheriff an interested party—Coroner.*]—GRANT v. BAGGE, No. 242, *post*.

107. —.]—*Other of two sheriffs for county.*]—*Testatum capias* directed to the coroner where one of the two sheriffs of Bristol was party to the

suit:—*Held*: irregular, for it ought to have gone to the other.—LETSOM v. BICKLEY (1816), 5 M. & S. 144; 105 E. R. 1004.

108. — *Sheriffs & coroners interested parties—Elisors.*]—GRANT v. BAGGE, No. 242, *post*.

109. —.]—*As members of plaintiff corporation—Elisors.*]—Where the sheriffs & coroners are members of a corporate body who sue in such character, the ct. will direct the prothonotary to name & appoint elisors to whom the process may be directed, & the rule is absolute in the first instance.—NORWICH CORPN. v. GILL (1831), 8 Bing. 27; 1 Moo. & S. 91; 1 L. J. C. P. 46; 131 E. R. 310.

110. —.]—*Fact of interest need not be recited.*]—A writ of *ca. sa.* directed to the coroner, on the ground of the sheriff being interested, need not recite that fact, nor need any suggestion to that effect be entered on the record previous to suing out such writ.—BARSTON v. TRUTCH (1835), 4 Dowl. 6.

111. —.]—*In franchise or liberty—Sheriff of county.*]—GRANT v. BAGGE, No. 242, *post*.

112. —.]—*In Berwick-upon-Tweed—Mayor & bailiffs.*]—The town & liberties of Berwick-upon-Tweed are not for any purpose within or part of the county of Northumberland.

The sheriff of Northumberland has no jurisdiction whatever within the borough. He is expressly excluded by the charter. . . . The charter directs to whom the King's writs are to be directed, *viz.* the mayor & bailiffs (BEST, C.J.).—BERWICK CORPN. v. SHANKS (1826), 3 Bing. 459; 11 Moore, C. P. 372; 4 L. J. O. S. C. P. 152; 130 E. R. 590.

*Annotation*:—*Mentd.* Clayton v. Best (1863), 11 W. R. 888.

— *In County Palatine.*]—*See* C. L. P. Act, 1852 (c. 76), s. 122; Statute Law Revision & Civil Procedure Act, 1883 (c. 49), s. 7.

— *In Cinque Ports.*]—*See* Cinque Ports Act, 1855 (c. 48), s. 2.

— *Writ of sequestration.*]—*See* R. S. C., Appendix H., No. 13.

— *Writ de bonis ecclesiasticis.*]—*See* R. S. C., Appendix H., Nos. 5, 6, 7.

98 i. *Costs.*]—In an action on a pre-war contract debts succeeded, & were awarded judgment for their costs:—*Held*: Cts. (Emergency Powers) Act, 1914, applied to a judgment for costs only, & leave to proceed to execution was necessary.—GORDON & Co. v. KIRK & Co., [1918] 2 I. R. 455.—IR.

98 ii. —.]—Cts. (Emergency Powers) Act, 1914, s. 1 (1), must be read & construed as extending to any judgment, or order for the payment of any sum, unless such is expressly excluded by the terms of the Act itself, or some subsequent statute or Order in Council, & that a pltf.'s costs do not constitute a sum payable in pursuance of a contract &, therefore, leave of the ct. was necessary before issuing execution for such costs even in the case of *post bellum* contracts.—HUGHES (TRADING AS DUROLINE OIL CO.) v. McDONNELL & Co. (1918), 52 I. L. T. 149.—IR.

r. *Defendant represented in court—Summons necessary.*]—Pltf. upon obtaining an order for final judgment, applied under Cts. (Emergency Powers) Act, 1914, Rule 4 (2), for leave to execute on the ground that as debt. was represented in ct. no summons was necessary, but the ct. directed that a summons should be served.—WOOLF v. COWAN (1914), 48 I. L. T. Jo. 332.—IR.

s. *Service of order appointing equitable receiver—Order obtained before passing of Act.*]—Pltf., before the passing of Cts. (Emergency Powers)

Act, 1914, had obtained an order appointing him equitable receiver over certain monies alleged to be payable to debt., & the order was served after the passing of the Act without the leave of the ct. having been first obtained. On the application of debt. the ct. set aside the order.—THOMPSON v. WAFER (1914), 48 I. L. T. Jo. 332.—IR.

t. *Service of summons out of the jurisdiction.*]—In a case in which debts. were a limited co. who had their registered office in England, & who carried on business in Ireland, pltfs. obtained a judgment in England which they extended to Ireland, & the ct., upon an *ex p.* application by pltf., gave leave to issue & serve upon debts. out of the jurisdiction a summons under Cts. (Emergency Powers) Act, 1914, for leave to proceed to execution in Ireland upon the extended judgment.—RUANE v. WEST OF IRELAND FISHERIES, LTD. (1915), 49 I. L. T. 136.—IR.

a. *Crown debts.*]—A purchase annuity payable to the Irish Land Commission under Irish Land Act, 1903, is a Crown debt & as such does not fall within the provisions of the Cts. (Emergency Powers) Act, 1914.—IRISH LAND COMMISSION v. O'NEILL, [1915] 2 I. R. 66.—IR.

b. *Debtor summons.*]—Procedure by debtor summons is not execution or enforcement of a judgment or order of any ct. within Cts. (Emergency Powers) Act, 1914, s. 1 (1) (a), & it is not necessary to obtain leave of the

ct. before issuing such a summons.—*Re* A DEBTOR'S SUMMONS, [1917] 2 I. R. 417.—IR.

c. *Action on dishonoured promissory note.*]—When pltf. obtains judgment in an action taken on foot of the dishonour of a promissory note after Aug. 4, 1914, he is entitled to execute the judgment, without application for liberty to do so under Cts. (Emergency Powers) Act, 1914, s. 1 (1a), notwithstanding that the note sued upon is a renewal note given in respect of a debt incurred prior to Aug. 4, 1914.—PROVINCIAL BANK OF IRELAND v. O'DONNELL, [1917] 2 I. R. 43.—IR.

d. *Application unopposed—Costs.*]—STANDARD PROPERTY INVESTMENT CO., LTD. v. SCOTT (1914), 52 Sc. L. R. 112.—SCOT.

## PART II. SECT. 9, SUB-SECT. 1.

e. *Must be in accordance with præcipe—In writing.*]—A writ of execution is not valid unless issued upon & in accordance with a *præcipe* for that purpose, which *præcipe* must be in writing.—FONCIER FRANCO BELGE v. IMPERIAL BANK OF CANADA & SUPPLE, [1921] 2 W. W. R. 588.—CAN.

f. *Should conform to judgment—Slight variance from amount for which judgment given.*]—A *fi. fa.* was for £47 2s. 9d. & the judgment upon which it was founded for £46 11s. 9d.:—*Held*: this variance would not defeat the sale made under such execution,

## Sect. 9.—Form of writs of execution: Sub-sects. 1

**113. Direction to "sheriff" where two sheriffs—Effect of.]**—The copy of a *capias* directed to the "sheriff" instead of the "sheriffs" of London is defective.—*NICOL v. BOYN* (1833), 10 Bing. 339; 2 Dowl. 761; 3 L. J. C. P. 72; 131 E. R. 935.

**114. ———.]**—A writ of *capias* was directed to "Sheriff of London" instead of "Sheriffs":—*Held*: it was bad on that account, & also because the words "endorsed hereon" were omitted in the writ which purported to have been issued in an action on the case.—*BARKER v. WEEDON* (1834), 1 Cr. M. & R. 396; 2 Dowl. 707; 4 Tyr. 860; 3 L. J. Ex. 341; 149 E. R. 1134.

**115. Direction to "sheriffs" where one only—Effect of.]**—A writ of *capias* directed to the "sheriffs" of Middlesex is irregular.—*JACKSON v. JACKSON* (1834), 1 Cr. M. & R. 438; 3 Dowl. 182; 5 Tyr. 136; 4 L. J. Ex. 32; 149 E. R. 1152.

**116. ———.]**—Where, in a writ of *capias* & in the copy thereof served on deft. it was directed to the "sheriffs" instead of the "sheriff" of Middlesex:—*Held*: (1) this was an irregularity; (2) though the ct. or a judge might amend the writ, they had no power over the copy, & deft. was entitled to his discharge, though the writ was amended, on the ground of the variance from it of the copy.—*MOORE v. MAGAN* (1846), 16 M. & W. 95; 4 Dow. & L. 267; 16 L. J. Ex. 57; 8 L. T. O. S. 143; 153 E. R. 1114.

**117. Insertion of "sheriff" instead of "sheriffs"—But not in direction—Whether material.]**—If a writ of *capias* be directed to the "sheriffs" of London the subsequent insertion of the word "sheriff" in the singular will not vitiate it.

You may leave out the word "sheriff," & then, as the writ is properly directed, it will be sufficient (*per CUR.*).—*IRVING v. HEATON* (1836), 4 Dowl. 638; 1 Hodg. 430.

*Annotation*:—*Mentd.* *Crosby v. Clarke* (1836), 1 M. & W. 296.

**118. Name of county misspelt—Whether material.]**—The ct. will not amend a writ of *capias* in the direction. *Semble*: "Middesex," put by mistake for "Middlesex" in a writ of *capias*, does not vitiate the writ, so as to entitle deft. to set it aside, & to a discharge from custody.—*COLSTON v. BERENDS* (1835), 1 Cr. M. & R. 833; 3 Dowl. 253; 5 Tyr. 511; 4 L. J. Ex. 54; 149 E. R. 1317.

**Amendment of writ.]**—*See* Sub-sect. 2, *post*.

**119. Necessity to follow judgment—As to amount recoverable—Insertion of smaller amount.]**—(1) A writ of *fi. fa.* whereby the sheriff is directed to levy a sum different in amount from that mentioned in the judgment, although smaller, is irregular, unless the reason of the variation be shown on the face of the writ.

(2) The ct. will not amend the writ where the rights of third persons have intervened: as where deft. has become bkpt. since execution of writ.—*WEBBER v. HUTCHINS* (1841), 8 M. & W. 319;

1 Dowl. N. S. 95; 10 L. J. Ex. 354; 151 E. R. 1060.

*Annotations*:—*As to* (1) *Refd.* *Phillips v. Birch* (1842), 4 Man. & G. 403; *Sherwood v. Clark* (1846), 15 M. & W. 764. *Generally, Mentd.* *Weedon v. Garcia* (1842), 2 Dowl. N. S. 64.

**120. ———.]**—A warrant of attorney authorised judgment to be signed for £500, judgment had been signed, but it did not distinctly appear for what amount:—*Held*: a *fi. fa.* directing the sheriff to cause to be made "£269 9s. 4d., parcel of a certain debt of £500" was irregular as not following the judgment, & was such an irregularity as entitled deft. to costs.—*COBBOLD v. CHILVER* (1842), 4 Man. & G. 62; 1 Dowl. N. S. 726; 4 Scott, N. R. 678; 11 L. J. C. P. 173; 6 Jur. 346; 134 E. R. 26.

*Annotations*:—*Refd.* *Elwood v. Bullock* (1844), 6 Q. B. 383. *Mentd.* *Rayment v. Smith* (1843), 12 L. J. Q. B. 279; *Bate v. Lawrence* (1844), 7 Man. & G. 405; *Bird v. Manning* (1844), 13 L. J. Q. B. 123; *Jarvis v. South* (1844), 13 M. & W. 152; *Alcock v. Sutcliffe* (1847), 16 L. J. Q. B. 129.

**121. ———.]**—In debt, pltf. having signed judgment by *nil dicit*, the minute of the judgment was entered in the master's book, mentioning the whole amount demanded by the declaration; a *fi. fa.* was then issued for the amount really due, & costs; a summons having been taken out to set aside the *fi. fa.* for irregularity, by reason of its not corresponding with the judgment, pltf., before the summons was attendable, perfected the roll by entering up judgment for the amount mentioned in the *fi. fa.*, & entering a *remittitur* for the residue of the sum demanded by the declaration; at the hearing of the summons, the record so perfected was produced before the judge, who nevertheless made an order to set aside the *fi. fa.* This order was rescinded by the ct.—*PHILLIPS v. BIRCH* (1842), 4 Man. & G. 403; 2 Dowl. N. S. 97; 5 Scott, N. R. 178; 11 L. J. C. P. 297; 134 E. R. 165.

*Annotation*:—*Refd.* *Deacon v. Allison* (1848), 6 C. B. 434.

**122. ——— Costs to both parties—Amount named for balance.]**—Issues being joined in law & in fact, pltf. after judgment against him on the former, the latter being untried, obtained a rule to discontinue on payment of costs; on taxation, the master made his *allocatur* for pltf.'s & deft.'s costs respectively, not striking a balance; pltf. to whom the larger sum was due, took out execution for the balance between his costs & deft.'s:—*Held*: execution was not irregular.—*ELWOOD v. BULLOCK* (1844), 6 Q. B. 383; 115 E. R. 147.

*Annotations*:—*Mentd.* *Dawes v. Hawkins* (1860), 7 Jur. N. S. 262; *Gerring v. Barfield* (1864), 16 C. B. N. S. 597; *Arnold v. Blaker* (1871), L. R. 6 Q. B. 433; *Simpson v. Wells* (1872), L. R. 7 Q. B. 214; *Neeld v. Hendon* U. D. C. (1899), 81 L. T. 405; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

**123. Judgment not delivered—Discontinuance of action—Fi. fa. for costs.]**—Form of the writ of *fi. fa.* to recover deft.'s costs where pltf. has given notice of discontinuance of the action under R. S. C., & has made default in payment of deft.'s costs of the action.—*BOLTON v. BOLTON* (1876), 3

it not being questioned that the execution had in fact issued upon the judgment.—*LINTON v. WILSON* (1841) 1 Kerr, 223.—*CAN.*

*g.* ———.]—*Re* *LANGSTAFF ESTATE*, [1923] 3 W. W. R. 626; 13 Sask. L. R. 265.—*CAN.*

*h.* ———.]—Where a separate *fi. fa.* against one issued on a joint order for payment of costs against several, the ct. set aside the writ as irregular, but without costs, & paid

back the money levied, on the party undertaking not to bring an action in respect of the seizure & sale by the sheriff.—*MONEYPENNY v. DE MASSY* (1851), 1 I. Ch. R. 597.—*IR.*

*k.* ———.]—A *ca. sa.* marked for £18 1s. 5d., the amount of the judgment, when there was less than £10 actually due at the time the writ issued, will be set aside.—*SHULDAM v. BOLES*, [1851] 2 I. C. L. R. 140; 4 Ir. Jur. 52.—*IR.*

*l.* ——— *Should follow statutory form.]*—An execution issued is sufficient, if it substantially follows the form of a statute, & any person resisting a constable executing it is liable to an indictment. It is sufficient if the execution is made returnable in a certain number of days from the date, so that it may be ascertained by calculation.—*R. v. McDONALD* (1860), 4 All. 440.—*CAN.*

*m.* ——— *Material deviation.]*—



Ch. D. 276; 3 Char. Pr. Cas. 114; 35 L. T. 358; 24 W. R. 663.

**124. Indorsement of writ—Second writ after return to first.]**—If on a *fi. fa.* all the money is not levied, the writ must be returned before a second execution can be taken out, for that must be grounded upon the first writ & recite that all the money was not levied upon the first; but if upon the first all the money had been levied the writ need not have been returned, for no further process was necessary.—*OVIAT v. VYNER* (1689), 1 Salk. 318; 91 E. R. 281.

**125. ———.]**—I am of opinion that the second writ was irregular, because the first had not been returned, the sum of £500 having been levied by virtue of the first writ. It is true there was an agreement between the parties, that *pltf.* should re-enter on default being made in payment of the instalments; but there is nothing in that agreement which precludes *deft.* from objecting to the irregularity of the future process. The law on this subject is clear. If a writ of *fi. fa.* issues, under which any thing is levied, that writ must be returned, & any subsequent process must issue for the whole sum due, minus the amount that has been so recovered, & must recite the first writ. In *Miller v. Parnell*, No. 189, *post*, the *ct.* held that *pltf.* who has issued & executed a *fi. fa.*, cannot abandon it & sue out a *ca. sa.*, before he has returned it. Here the sheriff entered upon the possession of the goods, & by the compulsion of the levy, *deft.* has been compelled to pay the sum of £500, part of the debt, the sheriff became thereby entitled to poundage, & so also it constituted a levy, that being so, the first writ ought to have been returned, & the second ought to have recited the first, stating the amount recovered under it, & should have been indorsed to levy the whole debt, minus that amount (PARKE, B.).—*CHAPMAN v. BOWLBY* (1841), 8 M. & W. 249; 1 Dowl. N. S. 83; 10 L. J. Ex. 299; 151 E. R. 1030.

**Annotations:—***Consd. Re Ford, Ex p. Ford* (1886), 18 B. D. 369. *Refd. Andrews v. Saunderson* (1857), 1 B. & N. 725; *Re Bates, Ex p. Lindsey* (1887), 4 Morr. 192; *Lee v. Dangar, Grant*, [1892] 1 Q. B. 231; *Re A Debtor, Ex p. Smith*, [1902] 2 K. B. 260; *R. v. Birmingham County Court Judge* (1902), 71 L. J. K. B. 881. *Mentd. Sneary v. Abdy* (1876), 1 Ex. D. 299; *Roe v. Hammond* (1877), 2 C. P. D. 300; *Mortimore v. Cragg* (1878), 3 C. P. D. 216.

**126. ———.]**—A second *fi. fa.* cannot be issued until the first is returned, for, if anything has been recovered under the first writ, the second must recite it, & must be indorsed with a direction to levy the balance only (CAVE, J.).—*Re FORD, Ex p. FORD* (1886), 18 Q. B. D. 369; 56 L. J. Q. B. 188; 56 L. T. 166; 3 Morr. 283, D. C.

**Annotations:—***Refd. Re Bates, Ex p. Lindsey* (1887), 4 Morr. 192; *Re Phillips, Ex p. Phillips* (1888), 5 Morr. 40; *Lee v. Dangar, Grant*, [1892] 1 Q. B. 231; *Re Follows, Ex p. Follows*, [1895] 2 Q. B. 521; *Re A Debtor, Ex p. Judgment Creditor* (1902), 71 L. J. K. B. 664; *Re H. B.*, [1904] 1 K. B. 94.

**127. ——— Description of party liable—Residence & station in life.]**—The omission to indorse upon a writ of *ca. sa.* a description of *deft.*'s residence & situation in life, is not in general a ground for setting aside the writ as between parties, but in special circumstances, it may be a ground for setting aside the writ, where, if it were allowed to

remain, it might subject the sheriff to an action, at the suit of *pltf.*, who had been guilty of the omission.—*CLARKE v. PALMER* (1829), 9 B. & C. 153; 4 Man. & Ry. K. B. 141; 7 L. J. O. S. K. B. 165; 109 E. R. 57.

**Annotation:—***Refd. Esdalle v. Davies* (1838), 2 Jur. 154.

**128. ——— Inclusion of expenses of levy—Whether proper.]**—*BRENT v. HUGHES* (1847), 9 L. T. O. S. 106.

**129. ——— Inclusion of interest.]**—A *fi. fa.* was sued out directing the sheriff to levy £9 6s. 8d. as the sum which had been ordered to be paid by the rule of *ct.*, together with interest at 4 per cent., pursuing the form No. 8 appended to Rules Hilary Term, 1838:—*Held*: the *fi. fa.* & the levy thereunder were irregular, the form being applicable only to cases where the payment of a specific sum of money is ordered.—*BADMAN v. PUGH* (1843), 5 Man. & G. 381; 6 Scott, N. R. 150; 12 L. J. C. P. 126; 134 E. R. 611.

**Annotation:—***Mentd. Hills v. Haymen* (1848), 2 Exch. 323.

**130. ——— Date from which interest claimed—Date of judgment.]**—*PYMAN & CO. v. BURT & BOULTON* (1884), 28 Sol. Jo. 428; Bitt. Rep. in Ch. 97.

**Annotations:—***Refd. Re London Wharfing & Warehousing Co.* (1885), 53 L. T. 112; *Eardley v. Knight* (1889), 60 L. T. 780; *Taylor v. Roe*, [1894] 1 Ch. 413.

**Unless otherwise directed.]**—An action dismissed, or on which judgment is given in favour of *pltf.*, although at an end so far as the ascertainment of the rights of parties to it is concerned, is still pending for the purpose of enforcing the judgment pronounced in it & working out the rights under the judgment.

Where an action was dismissed with costs before R. S. C., 1883, came into force, but taxation of costs had not been completed till after that date:—*Held*: the action was still a pending proceeding within the preface to R. S. C. 1883, & those rules accordingly applied with the result that interest upon the costs was to run, not from the date of the taxing master's certificate, in accordance with the rules in force at the commencement of, & judgment in, the action, but from date of judgment.

The form of order will only be varied when the judge in any particular case in giving judgment for costs directs the interest to run from any other date.—*BOSWELL v. COAKS* (1887), 57 L. J. Ch. 101; 57 L. T. 742; 36 W. R. 65, C. A.

**Annotations:—***Refd. Taylor v. Roe*, [1894] 1 Ch. 413.

*Mentd. Re Boswell, Merritt v. Boswell*, [1906] 2 Ch. 359.

**].—See, further, R. S. C., Ord. 42, rr. 13, 16.**

**Teste.]—See R. S. C., Ord. 2, r. 8.**

#### SUB-SECT. 2.—AMENDMENT.

*See, now, R. S. C., Ord. 28, r. 12, Ord. 70, r. 1; & generally, PRACTICE.*

**132. Name of county—Where omitted.]**—Process directed to a sheriff, omitting the name of the county, may be amended.—*LEA v. LACON* (1605), Cro. Jac. 78; 79 E. R. 67; *sub nom. LEE v. LACON*, Yelv. 69.

**Annotation:—***Refd. R. v. Tutchin* (1704), 2 Ld. Raym. 1061.

**133. ——— Where misspelt.]**—*COLSTON v. BERENDS*, No. 118, *ante*.

*Semble*: the writ of execution should follow the judgment.—*HAROLD v. STEWART* (1864), 3 P. R. 335.—CAN.

**n. Prothonotary—Whether signature necessary to writ of execution.]**—In N. S. writs of execution need not be signed by the prothonotary of the *ct.* It is the seal of the *ct.* which gives

validity to such writs, & not the signature of the officer.—*ARCHIBALD v. HUBLEY* (1890), 18 S. C. R. 116.—CAN.

**o. Clerk of court—Signature for.]**—An execution signed "H. C. D. for clerk of *ct.*" is good.—*CREW v. DALLAS* (1908), 9 W. L. R. 598.—CAN.

**p. Writ tested in name of particular judge—Presumption of regularity.]**—A *fi. fa.* against lands was tested in the name of the then senior puisne judge of the *ct.*:—*Held*: it would be presumed to be regular until the contrary appeared.—*LINNEY v. ROSE* (1866), 17 C. P. 186.—CAN.



*Sect. 9.—Form of writs of execution: Sub sect. 2.]*

**134. Name of party.]—**BROWNE *v.* HAMMOND 1738), Barnes, 10 ; 94 E. R. 781.

*Annotation:—*Refd. Hunt *v.* Kendrick (1772), 2 Wm. Bl. 836.

**135. — Death before judgment of one of two plaintiffs.]—**One of two pltf's. died before interlocutory judgment, but the suit went on to execution in the name of both ; after this, & after a motion to set aside the proceedings for this irregularity the ct. permitted pltf. to suggest the death of the other before interlocutory judgment on the roll, & to amend the *ca. sa.* without paying costs.—NEWNHAM *v.* LAW (1794), 5 Term Rep. 577 ; 101 E. R. 323.

*Annotation:—*Refd. Arnell *v.* Wetherby (1835), 4 L. J. Ex. 128.

**136. — Name in writ differing from that in judgment.]—**A writ of execution to satisfy "James," the debt awarded to "John," was amended after execution executed, upon payment of costs.—MACKIE *v.* SMITH (1812), 4 Taunt. 322 ; 128 E. R. 354.

**137. — —.]—**In *sci. fa.* on a judgment more than a year old, if the writs of *sci. fa.*, which have been returned *nil*, the award of execution, the *ca. sa.*, & the warrant, are issued in a different Christian name from the one stated in the judgment as that of pltf., the ct. will allow the proceedings to be amended by substituting the one stated in the judgment, although the *ca. sa.* has been executed & returned.—THORPE *v.* HOOK (1832), 1 Dowl. 501.

*Annotation:—*Consd. Bicknell *v.* Weatherell (1841), 1 Q. B. 914.

**138. "Sheriffs" instead of "Sheriff"—Power to amend copy of writ—After service effected.]—**MOORE *v.* MAGAN, No. 116, *ante*.

**139. Amount recoverable — Claim of costs against joint defendant—In respect of appeal to which he was not party.]—**If pltf. recover a judgment against two defts., & one of them bring a writ of error pltf. cannot charge the other deft. in execution till the record be remitted, notwithstanding the writ of error might have been quashed immediately, because not brought by both defts. In such a case where the judgment was affirmed & costs given of the writ of error, & both defts. were taken under a writ of execution on the whole sum, including the costs of the writ of error as well as the original sum recovered, the ct. permitted pltf. to amend his writ of execution as to deft. who did not join in the writ of error, by altering it to the original sum recovered.

The justice of the case requires that we should permit pltf. to amend ; if deft. had in deed suffered by the excess in the execution, that might have varied the case, but here he has not sustained any damage by it (LORD KENYON, C.J.).—

LAROCHE *v.* WASBROUGH & MAILAND (1788), 2 Term Rep. 737 ; 100 E. R. 397.

*Annotations:—*Fold. M'Cormack *v.* Melton (1834), 1 Ad. & El. 331. Refd. Sampayo *v.* De Payba (1813), 3 Taunt. 82 ; Arnell *v.* Wetherby (1835), 4 L. J. Ex. 128.

**140. — Indorsement for amount in excess of judgment—Mistake—No damage to defendant.]—**Rule calling on pltf. to show cause why the execution should not be set aside for irregularity, the execution being for £3,400 by mistake & the judgment only for £700. As pltf. had not levied more than £700 the execution was amended.—MOUYS *v.* LEAKE (1799), 8 Term Rep. 416, n. ; 101 E. R. 1464, n.

*Annotation:—*Consd. M'Cormack *v.* Melton (1834), 1 Ad. & El. 331.

**141. — — — —.]—**Pltf. having recovered £33, arrested deft. on a *ca. sa.* for £34. The ct. refused to discharge deft. out of custody & allowed the process to be amended by inserting the true sum, it not being shown that the variance was intentional or that deft. was damnified.—M'CORMACK *v.* MELTON (1834), 1 Ad. & El. 331 ; 3 Nev. & M. K. B. 881 ; 110 E. R. 1232.

**142. — — — —.]—**The ct. refused to allow the amendment [of the amount] of a writ of *ca. sa.* to the prejudice of the bail ; but granted it on payment of all costs & giving the bail time to render deft.—BRADLEY *v.* BAILEY (1834), 3 Dowl. 111 ; 1 Scott, 78.

—Where, in the body of a *ca. sa.* the sum recovered was stated to be £100, but the writ was properly indorsed for £88 only, the amount of the damages & costs, & deft. was only taken in execution for that sum :—*Held* : the *ca. sa.* should be amended, on payment of costs, & a prior rule, which had been obtained to set it aside discharged without costs.—ARNELL *v.* WEATHERBY (1835), 1 Cr. M. & R. 831 ; 5 Tyr. 485 ; 4 L. J. Ex. 128.

*Annotation:—*Consd. Bicknell *v.* Weatherell (1841), 1 Q. B. 914.

**144. — — — —.]—**A writ of indorsed by mistake for a larger sum than the amount really due & after debtor had been taken in execution, the mistake was corrected by a judge's order :—*Held* : the sheriff's claim for poundage must be regulated accordingly, & he was only entitled to poundage upon the debt really due.—EVANS *v.* MANERO (1841), 7 M. & W. 463 ; H. & W. 153 ; 10 L. J. Ex. 209 ; 5 Jur. 153 ; 151 E. R. 848.

**145. — Indorsement for less than amount due.]—**Where pltf. from mistake has taken out a *fi. fa.* for less than the sum for which he has obtained judgment the ct. will on conditions allow him to take out a *fi. fa.* for the residue.—HUNT *v.* PASSMORE (1833), 2 Dowl. 414.

**146. — — — —.]—**WEBBER *v.* HUTCHINS, No. 110, *ante*.

## PART II. SECT. 9, SUB-SECT. 2

**134 i. Name of party.]—**D. & W. entered into partnership as merchants, & carried on business as D. W. & Co. D. died & W. carried on the business in the firm's name for some time, & then presented a petition for the sequestration of the estate of D. W. & Co. Upon this petition an order was made sequestrating the estate of D. W. & Co. The executrix of D. then applied to the Ct. of Insolvency to strike out the name of D. from the order of sequestration, & amend the order, so as to sequester the estate of W. only. The Ct. of Insolvency thereupon made the order that the order of sequestration be amended by substituting for the words D. W. & Co. in the order the name of W. only.—*Re*

DOBSON, WATSON & Co. (1890), 16 V. L. R. 700.—AUS.

**134 ii. —.]—**One of defts., Edmund M., correctly styled in the summons, was by mistake named in the judgment roll & execution as Edward M. :—*Held* : amendable.—MCKENZIE *v.* MCNAUGHTON (1861), 3 P. R. 35.—CAN.

**134 iii. —.]—**(1) The affidavit upon which a *ca.* issued disclosed a good cause of action ; (2) the affidavit gave deft.'s name as "J. Berkwin Johnson." His proper name was "Berkwin Johnson," but he had been sued & had pleaded as "J. B. Johnson." In the writ the name was "J. B. Johnson" :—*Held* : the writ was defective, but might be amended upon payment of costs.—ANDERSON *v.* JOHNSON (1889), 6 Man. L. R. 113.—CAN.

**q. Description of party.]—**In an action the writ of summons described pltf. as "Trustee of the estate of H.," followed by the name of the trustee, A. On judgment being entered for deft., a writ of *fi. fa.* was issued for the costs against A. :—*Held* : the writ of *fi. fa.* was irregular in that it should have been directed against pltf. not by his name, but merely as creditors' trustee, but upon being so amended the sheriff could levy on the goods of A., who was personally liable for the costs.—HENDERSON & FARRAR'S TRUSTEES *v.* EVANS (1879), O. B. & F. 173.—N.Z.

**r. Amount recoverable.]—**A *ca. sa.* omitting to state any sum for which judgment has been recovered is void, & cannot be amended after execution.

**147. — Omission to claim interest.]—**I have inquired what would be the practice in a case where a judgment creditor issued a writ in a county for execution of a judgment for costs, & omitted to insert anything about interest, & the writ being unsatisfied he were to desire to issue another in [a different] county; the first writ would have to be returned, & were the judgment creditor to wish to supply in the second writ mention of interest, the officer would not permit any such addition or alteration in the new writ, nor the judgment creditor's mistake to be rectified without obtaining leave of the ct. or judge; it seems to me that it would be a matter of course for the ct. or judge to allow the writ to go with the desired alteration where the omission was shown to be a mere mistake made without any intention of splitting up execution or of acting vexatiously (CHITTY, J.).—*Re LONDON WHARFING & WAREHOUSING CO.* (1885), 54 L. J. Ch. 1137; 53 L. T. 112; 33 W. R. 836.

*Annotation:—Reid.* Boswell v. Coaks (1887), 57 L. J. Ch. 101.

**148. Date of teste—Date previous to judgment.]—**If a *ca. sa.* is tested of a term previous to the judgment or when issued under 1 Will. 4, c. 7, s. 13, if not tested on the day it issues, it is irregular, but the ct. will permit the teste to be amended, on payment of costs, even as against the bail.—*INGLEHART v. DUNBAR* (1833), 2 Dowl. 202.

**149. Date of return.]—Fi. fa.** being made returnable on a King's Bench return day, instead of a Common Pleas return day, was amended by the award of execution on the roll.—*ATKINSON v. NEWTON* (1800), 2 Bos. & P. 336; 126 E. R. 1313.

*Annotation:—Reid.* Simon v. Gurney (1814), 5 Taunt. 605.

**150. Date on which judgment recovered—Where not correctly stated in writ.]—**The date of a judgment in the judgment roll did not correspond with the date as stated in a writ of *ca. sa.* issued in execution of the judgment, but was anterior to the writ of *ca. sa.*:—*Held*: this was mere matter of irregularity which the ct. would amend.—*Re COBBETT* (1861), 10 W. R. 40.

**151. Action on which judgment based—Judgment entered up trespass & criminal conversation—Writ issued for trespass.]—**After a rule obtained to show cause why the *testatum ca. sa.* should not be set aside, because not warranted by the judgment, & because there was not an original *ca. sa.*, the ct. will permit pltf. to amend the *testatum ca. sa.* agreeably to the judgment & direct the sealer of the writs to seal an original *ca. sa.* to warrant it.—*SHAW v. MAXWELL* (1795), 6 Term Rep. 450; 101 E. R. 643.

*Annotation:—Reid.* Arnell v. Wetherby (1835), 4 L. J. Ex. 128.

**152. — & judgment entered up irregularly.]—**If pltf. enter up judgment in debt on a *mutuatus* on a warrant of attorney "to enter up judgment in debt or bond" the ct. will set it aside as irregular.

—*BILLINGS v. RAPELJE* (1841), 2 P. R. 194, 200.—**CAN.**

**s. —.]—**On a motion to set aside an execution on the ground that the execution differed in amount from the judgment, a cross-application to amend the execution was granted on payment of costs.—*LYNOTT v. SEELY* (1848), 1 All. 35.—**CAN.**

**t. —.]—**A referee has the power to amend a writ of *fi. fa.* by changing the rate of interest claimed in the indorsement thereon to the legal rate.—*CASE v. GODIN* (1914), 29 W. L. R. 763; 7 W. W. R. 396; 24 Man. L. R. 788; 20 D. L. R. 19.—**CAN.**

**a. Wrong sheriff.]—**Where deft. was arrested on a writ issued & tested on Jan. 1852, & directed to the sheriff

J.—VOL. XXI.

of the united counties of W. & H.:—*Held*: (1) since Jan. 1, 1852, there was no such officer: & the arrest was set aside with costs; (2) the writ might be amended, but the copy not.—*LYMAN v. BRETHRON* (circa 1852), 2 C. L. Ch. 108.—**CAN.**

**b. Date of judgment.]—**A *fi. fa.* may be amended so as to relate to the day of entering the judgment.—*ANDRUSS v. PAGE* (1826), Tay. 348.—**CAN.**

**c. Long lapse.]—**An application to amend a *ca. sa.* issued sixteen years ago, by inserting a *testatum* clause, will not be granted unless the writ is found on file, or some record of it is produced. *Qu.*: whether such an amendment would be made after such

Leave to amend by entering up judgment at a date subsequent to bkpcy. of deft.—*PARIS v. WILKINSON* (1799), 8 Term Rep. 153; 101 E. R. 1319.

*Annotations:—Reid.* Hunt v. Pasman (1815), 4 M. & S. 329; Brooks v. Hodson (1844), 7 Man. & G. 529.

**153. — Judgment entered up for debt—Writ issued for damages in assumpsit.]—**On a warrant of attorney to confess judgment in debt, & judgment entered up accordingly, a *ca. sa.*, returnable on execution, was issued, by mistake, for damages in *assumpsit*. Deft. being in custody under the writ, took out a summons for setting aside the execution, which summons, on argument at chambers, within a year of the arrest, was dismissed. A rule *nisi* was then obtained for the same purpose, & on cause shown, discharged. The variance between the writ & judgment was not alleged on the summons or motion. A year & a half after the arrest, deft. being still in custody, moved, on the objection of variance, to set the execution aside:—*Held*: the *ca. sa.* was amendable by 8 Hen. 6, c. 12, s. 2, & ought in this case to be amended, on pltf.'s motion.—*BICKNELL v. WETHERELL* (1841), 1 Q. B. 914; 1 Gal. & Dav. 460; 10 L. J. Q. B. 345; 6 Jur. 366; 113 E. R. 1381.

**154. Effect of intervention of rights of third parties—Bankruptcy of defendant.]—***PARIS v. WILKINSON*, No. 152, *ante*.

**155. —.]—**The ct. refused to allow pltf. to amend a *fi. fa.* where deft. had become bkpt. before sale of the goods taken under it.

We are very unwilling at all times to interfere with the rights of parties which have accrued by bkpcy. (LORD ELLENBOROUGH, C.J.).

Pltf.'s own mistake makes it necessary for him to come to the favour of the ct., which might have been extended to him, if the rights of third persons had not intervened (DAMPIER, J.).—*HUNT v. PASMAN* (1815), 4 M. & S. 329; 105 E. R. 856.

*Annotations:—Reid.* King v. Birch (1842), 3 Q. B. 425; Phillips v. Birch (1842), 4 Man. & G. 403.

**156. —.]—***WEBBER v. HUTCHINS*, No. 119, *ante*.

**157. —.]—**An irregular *fi. fa.* cannot be amended to the prejudice of the intervening rights of assignees. Goods were taken on Mar. 1 under *fi. fa.* upon an irregular judgment; on Mar. 15, a *fiat* was awarded against execution debtor, & assignees were chosen on Apr. 12; the judgment roll was carried in on Apr. 19:—*Held*: a motion on Apr. 25 to set aside the proceedings was not made too late.—*BROOKS v. HODSON* (1844), 7 Man. & G. 529; 8 Scott, N. R. 223; 13 L. J. C. P. 202; 3 L. T. O. S. 162; 135 E. R. 212.

**158. — Death of defendant.]—**The ct. refused to allow a *fi. fa.* to be amended, by the insertion of the *testatum* clause, where deft. had died after issuing of writ, but before time of application,

lapse of time, & after deft. had been arrested on a second execution, which was also irregular.—*BROWN v. PARTELOW* (1847), 3 Kerr, 324.—**CAN.**

**d. After sale of real estate.]—**To support a sale of lands under a *fi. fa.*, the writ must correspond with the judgment, but the amendment thereof, even after sale, will cure the defect.—*HELM v. CROSSIN* (1866), 17 C. P. 156.—**CAN.**

**e. Issue of second writ without authority.]—**Amendment of an alias *fi. fa.* lands issued without authority, refused, it appearing that before argument the original writ had been returned & filed, & that nothing had been made thereunder, nor any levy made.—



**Sect. 9.—Form of writs of execution: Sub-sect. 2. Sects. 10 & 11.]**

on the ground that the interests of third parties might be affected by it.—**PHILLIPS v. TANNER** (1829), 6 Bing. 237; 3 Moo. & P. 562; 8 L. J. O. S. C. P. 41; 130 E. R. 1271.

**Annotation:—Reid.** **Brooks v. Hodson** (1844), 7 Man. & G. 529.

**159. Enlarging time for return.]—ATKINSON v. NEWTON**, No. 149, *ante*.

**160. — Power of court.]—HILDYARD v. BAKER**, No. 1343, *post*.

**161. Application to amend—Where several execution creditors—Necessity to join other creditors & sheriff—Amendment as to amount recoverable.]—Where an application is made by one of several execution creditors to amend the indorsement on a writ by increasing the amount of the sum to be levied, the other creditors & the officer to whom it is directed should be made parties to the rule.**

Pltf. is not entitled to recover costs of the interpleader rule as costs of the execution; the statute [43 Geo. 3, c. 46, s. 5], applies only to poundage, sheriff's fees & the like (**PARKE, B.**).—**HAMMOND v. NAIRN** (1841), 9 M. & W. 221; 1 Dowl. N. S. 351; 11 L. J. Ex. 14; 152 E. R. 94.

**162. At what time allowed—After writ executed.]—After writ of *ca. sa.* executed deft.'s name changed from Edward to Edmund.—**BROWNE v. HAMMOND** (1738), Barnes, 10; 94 E. R. 781.**

**Annotation:—Folld.** **Hunt v. Kendrick** (1772), 2 Wm. Bl. 836.

**163. — — —.]—*Ca. sa.* may be amended after it has been executed.—**HUNT v. KENDRICK** (1772), 2 Wm. Bl. 836; 96 E. R. 493.**

**164. — — —.]—**MACKIE v. SMITH**, No. 136, *ante*.**

**SMITH v. SMITH** (1868), 4 P. R. 354.—**CAN.**

**f. Writ not indorsed.]—Where a *ca. sa.* in debt has been issued on a judgment in *assumpsit*, & not indorsed as required by the rule of ct., it may be amended.—**KEEFER v. HAWLEY** (1850), 1 P. R. 1.—**CAN.****

**g. Sale before writ amended.]—On a judgment in *assumpsit* a *fi. fa.* was issued in debt, & afterwards amended by rule of ct. Before the amendment the sheriff had sold the land & given the deed, under which pltf. claimed:—**Held**: the sale was not void as having been made under an erroneous writ.—**DOE d. ELMSLEY v. MCKENZIE** (1852), 9 U. C. R. 559.—**CAN.****

**h. Amendment in teste—Writ tested in name of retired judge.]—A writ of *ca. sa.* tested in the name of a retired chief justice, after his successor has been gazetted, but before acceptance of office by taking the necessary oaths of office:—**Held**: irregular, but amendable.—**NELSON v. ROY** (1863), 3 P. R. 226.—**CAN.****

**k. — After delivery to sheriff.]—If a writ of *fi. fa.* is altered in the teste & return day after delivery of it to the sheriff, & has not been resealed, it will be set aside.—**FERGUSON v. AMOS** (1886), 26 N. B. R. 359.—**CAN.****

## PART II. SECT. 10.

**l. Sheriff—Transmission of writ—By usual channels.]—A writ of execution is considered duly issued within 7 Vict., c. 32, s. 7, when it is sent by the attorney for the *bond fide* purpose of its reaching the hands of the sheriff in the usual course for the transmission of such documents.—**LUNT v. ESTABROOKS** (1846), 3 Kerr, 291.—**CAN.****

**m. Sheriff holding office in company—Direction of writ.]—A writ of *fi. fa.***

**against a railway co. which was directed to a sheriff before he became a director in the co., was properly directed & returnable by him, & his becoming a director before the return of the writ did not invalidate it.—**SMITH v. SPENCER** (1862), 12 C. P. 277.—**CAN.****

**n. — — —.]—A sheriff, being president of a railway co., returned a *fi. fa.* against the co. *nulla bona*. Upon an action brought against a stockholder founded upon that return:—**Held**: the writ & return were not of themselves a nullity on account of the sheriff, being president, executing them, & no application having been made to set the writ or return aside, the objection failed.—**RAY v. BLAIR** (1862), 12 C. P. 257.—**CAN.****

**o. To constables—Direction to any constable of county.]—Since the Act 22 Vict., c. 27, authorising constables to serve processes in any part of the county in which they are appointed, an execution issued out of a justice's ct., under 1 Rev. Stat., c. 137, may be directed to any constable of the county. The deviation from the form prescribed by c. 137 does not affect the substance of the execution.—**ATKINSON v. DESMOND** (1863), 5 All. 564.—**CAN.****

**p. Necessity for direction to sheriff—Under statute.]—Collection Act, s. 29, sub-sect. 4, made it clear that the execution issued for failure to comply with an order to pay by instalments must be directed to the sheriff.—**Re McDONALD** (1909), 7 E. L. R. 92.—**CAN.****

**q. Assignee of decree—Under oral assignment—Discretion of court to recognise assignment.]—An assignee of a decree under an oral assignment has no *locus standi* at all to supply for execution of a decree, but as regards one who claims to be an assignee in writing or by operation of law, the ct. has a discretion under Code of Civil**

**165. — — — & returned.]—**THORPE v. HOOK**, No. 137, *ante*.**

**166. — — — Defendant in custody for eighteen months under *capias ad satisfaciendum*.]—**BICKNELL v. WETHERELL**, No. 153, *ante*.**

**Costs—Discretion of court.]—See R. S. C., Ord. 28, r. 12.**

**See, further, PRACTICE.**

## SECT. 10.—BY WHOM WRITS OF EXECUTION MAY BE SUED OUT.

**See R. S. C., Ord. 42, rr. 8, 11, 12, & generally, PRACTICE.**

**167. May be sued out by solicitor—Other than solicitor on record.]—Pltf. may sue out execution by a different attorney from the attorney in the cause, without obtaining an order of ct. for changing the attorney.—**TIPPING v. JOHNSON** (1801), 2 Bos. & P. 357; 126 E. R. 1325.**

**Annotations:—Reid.** **Bevins v. Hulme** (1846), 15 M. & W. 88. **Mentd.** **Butler v. Knight** (1867), 15 L. T. 621.

**To whom writs delivered.]—See Sect. 13, sub-sect. 2, *post*.**

## SECT. 11.—SIMULTANEOUS ISSUE OF SEVERAL WRITS.

**See R. S. C., Ord. 42, rr. 17, 18.**

**168. Writs of the same kind—Issued into different counties—Seizure under each writ.]—**COOPER v. ROWE** (1811), 2 Tidd's Practice 9th ed. 995.**

**Annotation:—Folld.** **Lee v. Dangar, Grant**, [1892] 1 Q. B. 231.

**169. — — — Conditions governing execution of any one writ.]—Another effect of seizure**

**Procedure (Act, XIV. of 1882), s. 232, whether to recognise such assignment or not. When an assignee of a decree applied for execution, & the judgment-debtor contended that the decreesought to be executed had been obtained by fraud & was, therefore, a nullity & incapable of execution:—**Held**: it was not open to the judgment-debtors to raise the defence of fraud in the course of the execution-proceedings.—**PARVATA v. DIGAMBAR** (1890), 1 L. R. 15 Bom. 307.—**IND.****

**r. — Right to execution.]—The person appearing on the face of the decree as the decree-holder is entitled to execution, unless it be shown by some other person, under Civil Procedure Code, s. 232, that he has taken the decree-holder's place.—**JASODA DEYE v. KIRTIBASH DAS** (1891), 1 L. R. 18 Cal. 639.—**IND.****

**s. Suit against several defendants—Appeal by one defendant—Whether other defendants entitled to execution.]—A suit brought against several defts. was dismissed with costs. Pltfs. appealed, & the case was remanded to the ct. of first instance under Code of Civil Procedure, s. 562. One of defts. appealed against the order of remand to the High Ct., which set aside the order of remand & restored the decree of the first ct.:—**Held**: the decree of the first ct. being restored in its entirety, defts., who had not appealed, were entitled to take out execution of that decree for the costs awarded to them by it, notwithstanding that they were not parties to the decree of the High Ct.—**MUL CHAND v. RAM RATAN** (1898), 1 L. R. 20 All. 493.—**IND.****

## PART II. SECT. 11.

**t. Several writs—Appropriation of money—Priority.]—It is a matter of indifference under what writ a sheriff seizes & sells the property of a debtor**



is this ; there may be a number of writs issued into different counties, & when goods are seized under one of them, until it is known how much is seized, no other can be executed (MELLISH, L.J.).—*Re DAVIES, Ex p. WILLIAMS* (1872), 7 Ch. App. 314 ; 41 L. J. Bcy. 38 ; 26 L. T. 303 ; 36 J. P. 484 ; 20 W. R. 430, L. JJ.

*Annotations* :—*Appld.* *Lee v. Dangar, Grant*, [1892] 1 Q. B. 231. *Mentd.* *Emanuel v. Bridger* (1874), L. R. 9 Q. B. 286 ; *Re Jones, Ex p. Jones* (1875), 33 L. T. 61 ; *Lowe v. Blakemore* (1875), L. R. 10 Q. B. 485 ; *Re Balbirnie, Ex p. Jameson* (1876), 3 Ch. D. 488 ; *Re Watt, Ex p. Joselyne* (1878), 8 Ch. D. 327 ; *Re Hoare, Ex p. Nelson* (1880), 14 Ch. D. 41 ; *Re Clarke*, [1898] 1 Ch. 336 ; *Davies v. Thomas*, [1900] 2 Ch. 462 ; *The James W. Elwell* [1921] P. 351.

**170.** ——— **Duty to inform respective sheriffs of other writs.**—(1) Sheriff's Act, 1887 (c. 55), s. 29, imposes a penalty of £200 upon any sheriff's officer who (*inter alia*) "takes or demands any money or reward under any pretext whatever, other than the fees or sums allowed by or in pursuance of this or any other Act," or "is guilty of any offence against or breach of the provisions of this Act" :—*Held* : the penalty is inflicted for the doing of an act in the nature of a criminal offence ; to constitute such an offence there must be a *mens rea* ; & consequently a sheriff's officer is not liable to the penalty if he makes an over-charge by mistake.

(2) In order to constitute an offence under the Act, it is necessary that the improper demand or taking of money should be made a condition precedent to the officer's doing his duty.

An execution debtor brought an action against the execution creditors, their solrs. & the sheriff's officers for the county of London, for alleged illegal conduct in levying execution ; the solrs. had issued two writs of *fi. fa.* for the amount of the judgment debt & costs, one directed to the sheriff for the City of London, the other to the sheriff for the county of London, & had given each set of sheriff's officers notice of the other writ, & requested them to be careful to prevent a double execution. Possession was taken under both writs. The execution in the city of London having been paid off, the sheriff's officers for the county of London demanded from pltf. payment of a sum which consisted in part of fees payable by the execution creditors, & did not withdraw till payment of this amount had been made under protest. They also claimed, but did not insist on, payment of poundage. There was no evidence of malice on the part of either execution creditors or their solrs. or of want of reasonable cause for the course adopted :—*Held* : (3) neither the issue of, nor the seizure under, the two writs of *fi. fa.* was illegal ; (4) the sheriff's officers for the county of London were not entitled to poundage ; (5) they were liable to pltf. in nominal damages for not having sooner withdrawn ; (6) they were not liable to the penalty of £200 under sect. 29 of the above Act.

(7) It was argued that the seizure of the property of a debtor, without sale or valuation, is a satisfaction of the debt, to the extent of the amount which the property ultimately produces. It seems to me that that proposition is almost on the face of it untenable. How property can be a satisfaction of a debt at a time when the value of the property is not ascertained, but is to be

ascertained at a subsequent time is extremely difficult for me to understand (FRY, L.J.).—*LEE v. DANGAR, GRANT & Co.*, [1892] 2 Q. B. 337 ; 61 L. J. Q. B. 780 ; 66 L. T. 548 ; 56 J. P. 678 ; 40 W. R. 469 ; 8 T. L. R. 494, C. A.

*Annotations* :—*As to* (1) *Consd.* *Shopee v. Nathan*, [1892] 1 Q. B. 245. *Appld.* *Moore v. Brompton County Court, High Bailiff* (1893), 62 L. J. Q. B. 498. *As to* (3) *Reid. Re Debtor, Ex p. Smith*, [1902] 2 K. B. 260. *As to* (4) *Reid. Madeley v. Greenwood* (1897), 42 Sol. Jo. 34 ; *Re Thomas, Ex p. Middlesex Sheriff*, [1899] 1 Q. B. 460. *As to* (6) *Folld. Bagge v. Whitehead*, [1892] 2 Q. B. 355. *As to* (7) *Reid. Re Debtor, Ex p. Smith*, [1902] 2 K. B. 260.

**171.** ——— **Issue contrasted with enforcement.]**

—*LEWIS v. MORRIS*, No. 450, *post*.

**172. Writs of different kinds—Enforced concurrently—In respect of lands & goods—In diverse counties.]**—*ANON.* (1558), Ben. 59 ; 123 E. R. 46.

**173.** ——— **]**—If a *fi. fa.* & a *ca. sa.* be taken out, the *fi. fa.* cannot be executed after the party is taken on the *ca. sa.*—*STAMPER v. HODSON* (1724), 8 Mod. Rep. 302 ; 88 E. R. 215.

**174.** ——— **Invalidity of process as distinct from issue.]**—Pltf. cannot have concurrent writs of *fi. fa.* & *ca. sa.*, & act under both ; & therefore, where deft. was taken under a *ca. sa.* before the return of a *fi. fa.* under which pltf. had seized, though the whole amount of the levy was swallowed up by the landlord's claim for rent, except 17s. 6d. which went towards the expenses of the execution, the ct. discharged deft. out of custody.

The record would be irregular if this rule [to discharge deft. out of custody] were not made absolute, for there would appear an award of both a *fi. fa.* & a *ca. sa.* at the same time. No doubt, both may issue together, because the practice is not to enter them upon the record if nothing is done, but, if you execute one, you must make an entry of the return of that, before you can award the other. It is clear on principle that you cannot have two writs & act under both at the same time (*BAYLEY, B.*).—*HODGKINSON v. WHALLEY* (1831), 2 Cr. & J. 86 ; 1 Dowl. 298 ; 2 Tyr. 174 ; 1 L. J. Ex. 68.

*Annotations* :—*Appld.* *Lewis v. Morris* (1834), 2 Cr. & M. 712. *Consd.* *Andrews v. Saunderson* (1857), 1 H. & N. 725 ; *Lee v. Dangar, Grant*, [1892] 1 Q. B. 231 ; *Re A Debtor, Ex p. Smith*, [1902] 2 K. B. 260.

**175.** ——— ***Fi. fa.* & *ca. sa.*]**—A writ of *ca. sa.* may be taken against the person of deft. at the same time that a *fi. fa.* is issued against his goods.—*PRIMROSE v. GIBSON* (1822), 2 Dow. & Ry. K. B. 193 ; *sub nom.* *GIBSON'S CASE*, 1 L. J. O. S. K. B. 33.

*Annotation* :—*Consd.* *Smith v. Johnson* (1835), 2 Cr. M. & R. 350.

*See, further*, Part III., Sects. 1–6, *post*.

*Compare* No. 178, *post*.

**176. Against joint debtors—Validity of separate issue against each—Of same or different kinds of writ.]**—If a man have a judgment against two men upon a joint bond he cannot have several executions, *viz.* a *ca. sa.* against the one & an *elegit* against the other, for he ought to have but one satisfaction, although he sue them by several actions.—*ANON.* (1610), Godb. 181 ; 78 E. R. 110.

*See, also*, Sect. 6, sub-sect. 2, *ante*.

**177. In respect of each of several parts of judgment debt—Debt cannot be divided & parts assigned for that purpose.]**—*FORSTER v. BAKER*, No. 81, *ante*.

*See, further*, Sect. 8, sub-sect. 1, C. (c), *ante*.

such seizure having relation to all the writs at the time in his hands. He must appropriate the money according to the priority of the writs.—*ROWE v. JARVIS* (1863), 13 C. P. 495.—*CAN.*

**a.** ——— **Actions—Not allowed concurrently.]**—A pltf. cannot act upon two

concurrent writs of *ca. sa.* & *fi. fa.* at the same time. When, therefore, a *fi. fa.* & a *ca. sa.* having issued together, & a small sum only levied under the former, & before the return to the *fi. fa.* was made, deft. was taken in execution under the *ca. sa.*, the ct. discharged her out of

custody.—*FENNELL v. DEMPSEY* (1848), 1 Ir. Jur. 64.—*IR.*

**b.** ——— **]**—Pltf. may issue as many concurrent writs of execution as he pleases on foot of the same judgment, but he cannot act upon them concurrently ; & where a *ca. sa.* was

*Sect. 11.—Simultaneous issue of several writs.*  
*Sect. 12: Sub-sects. 1 & 2, A.]*

**178. — Arising out of different causes—Invalidity of different kinds of writ.]**—I am not aware of my authority for splitting up a judgment debt which on the face of it is for one sum, & saying that part of it can be traced for a particular cause, & another part of it for another cause, & that as to the first part execution on the judgment may be given in one way, & as to the second part execution shall be restricted to another way (SCRUTTON, L.J.).—ROTHSCHILD v. FISHER, [1920] 2 K. B. 243; 89 L. J. K. B. 521; 123 L. T. 188, C. A.

**In respect of judgment debt & costs respectively.**  
 —See R. S. C., Ord. 42, r. 18.

For writs issued successively, see Sect. 12, *post*.

## SECT. 12.—ISSUE OF SEVERAL WRITS IN SUCCESSION.

### SUB-SECT. 1.—NECESSITY FOR RETURN TO EARLIER WRIT.

**179. General rule.]**—There can be no second execution granted out before the first be returned.  
 —ANON. (1639), March, 47; 82 E. R. 405.

**180. —.]**—*Re FORD, Ex p. FORD*, No. 126, *ante*.

**181. Levy made under earlier writ—Debt partly satisfied.]**—OVIAT v. VYNER, No. 124, *ante*.  
*Compare* No. 201, *post*.

**182. —.]**—COPPENDALE v. DEBONAIRE (1757), Barnes, 213; 94 E. R. 882.

**183. —.]**—Where a *fi. fa.* has been issued & goods taken under it have been sold for a part of the debt, a *ca. sa.* for the remainder cannot be issued until the sheriff has finally returned the *fi. fa.*—WILSON v. KINGSTON (1816), 2 Chit. 203; 1 Chit. 134, n.

**184. —.]**—**Effect of premature return.]**—Where a *fi. fa.* has issued & a levy less than *pltf.*'s debt has been made, a *ca. sa.* cannot issue till after the return day of the *fi. fa.* although in fact the sheriff has made a return to it & the *ca. sa.* recites the writ & the sheriff's return.

If you execute the *fi. fa.* you cannot take another step till the following term, for that writ cannot be returned into ct. until the ct. in contemplation of law, is sitting. You have been too rapid, you should have waited till the return of the *fi. fa.* before you issued the *ca. sa.* (PARKE, B.).—LAWES v. CODRINGTON (1831), 1 Dowl. 30; *sub nom.* LEWES v. CODRINGTON, 9 L. J. O. S. K. B. 72.

*Annotations:—*Consd. Dicas v. Warne (1833), 3 Moo. & S. 814. *Refd.* Chapman v. Bowlby (1841), 8 M. & W. 249.

**185. —.]**—As soon as a writ of *fi. fa.*

lodged with the sheriff while a *fi. fa.*, on foot of the same judgment, was still in his hands in full force, the writ of *ca. sa.* was set aside, & the party arrested under it discharged from custody.—CARLIN v. CONROY (1871), 1 R. 5 C. L. 555.—IR.

### PART II. SECT. 12, SUB-SECT. 1.

**179 i. General rule.]**—No *ca. sa.* can be acted upon while a *fi. fa.* on which proceedings have been taken remains

**179 ii. —.]**—A justice of the peace is not liable to an action of trespass for issuing a second execution for a balance due upon a judgment recovered

under 4 Wm. IV., c. 45, before the first execution is returned the matter being within the justice's jurisdiction. Such execution may be irregular, but is not void.—STEWART v. HAZEN (1851), 2 All. 254.—CAN.

**179 iii. —.]**—A *fi. fa.* having been issued, *pltf.*, after the return day, but before the return, took out a second writ for the full amount, directed to another sheriff. The first writ was afterwards returned, £10 levied, & goods on hand for the residue; & a *ven. ex.* issued upon it:—*Held:* *pltf.* should have procured a return of the first before issuing the second writ, & should have issued it only for the residue; & that the fact of the indorsement on the second writ having been

is returned, a writ of *ca. sa.* may be issued for the sum remaining unsatisfied.

*Semble:* the ct. will not receive affidavits to negative the truth of the sheriff's return of the execution of the *fi. fa.*—GARDNER v. COVER (1835), 1 Gale, 45.

*Annotation:—*Mentd. Chadwick v. Hough (1835), 1 Gale, 142.

**186. — Total amount levied satisfying landlord's claim only.]**—HODGKINSON v. WHALLEY, No. 174, *ante*.

**187. — How fact of levy having been made tested.]**—CHAPMAN v. BOWLBY, No. 125, *ante*.

**188. —.]**—A *ca. sa.* & *fi. fa.* cannot be in concurrent existence against same debt. at the suit of same *pltf.*—ALDRIDGE v. RAWDEN (1853), 22 L. T. O. S. 107.

**189. Seizure under earlier writ—Subsequent abandonment.]**—If a sheriff makes a seizure under a writ of *fi. fa.*, *pltf.* cannot take debt. in execution under a writ of *ca. sa.*, till the writ of *fi. fa.* is returned, though he abandons the seizure of the goods.—MILLER v. PARNELL (1815), 6 Taunt. 370; 2 Marsh. 78; 128 E. R. 1078.

*Annotations:—*Consd. Dicas v. Warne (1833), 10 Bing. 341. *Distd.* Knight v. Coleby (1839), 5 M. & W. 274. *Consd.* Chapman v. Bowlby (1841), 8 M. & W. 249. *Apld.* Andrews v. Saunderson (1857), 1 H. & N. 725. *Distd.* Lee v. Dangar, Grant, [1892] 1 Q. B. 231; *Re A Debtor, Ex p. Smith*, [1902] 2 K. B. 260. *Refd.* Edmond v. Ross (1821), 9 Price, 5; Smith v. Johnson (1835), 2 Cr. M. & R. 350.

*Compare* No. 170, *ante*.

**190. — Induced by fraud of debtor.]**—Where the sheriff had withdrawn from possession under a *fi. fa.* in consequence of debt. having informed him that he had sold the goods to cheat *pltf.*:—*Held:* he might take debt. under a *ca. sa.* for the same debt without previously returning the *fi. fa.*—KNIGHT v. COLEBY (1839), 5 M. & W. 274; 151 E. R. 116.

*Annotations:—*Refd. Chapman v. Bowlby (1841), 8 M. & W. 249; *Re A Debtor, Ex p. Smith*, [1902] 2 K. B. 260.

**191. — Induced by claim of third party—How return obtained.]**—Where the execution of a *fi. fa.* is entrusted to a special bailiff appointed by the judgment creditor, who seizes goods which, upon a claim being made by a third party, he afterwards relinquishes; the proper course for the judgment creditor to take, if he wishes to issue a *ca. sa.*, without pledging himself to show the validity of the claim made, is to request the sheriff to return the *fi. fa.*, such request to be accompanied by a statement of the object for which such a return is required, & by an offer to indemnify. A judgment creditor having, however, ruled the sheriff to return the writ without any such statement or offer, the sheriff obtained a rule *nisi* to set aside the rule to return the writ, the ct. discharged the rule obtained by the sheriff, on the terms of the payment of the sheriff's costs, & of giving an undertaking to bring no action against him.—HARDING v. HOLDEN (1841), 2 Man. & G. 914;

lessened, could not cure the irregularity.—MCMURRICH v. THOMPSON (1853), 1 P. R. 258.—CAN.

**179 iv. —.]**—A return of a *fi. fa.* goods in the county where the venue is laid, is sufficient to warrant a *fi. fa.* lands to any other county without a writ against goods there also; but both writs cannot run together in the same county. In this case a *fi. fa.* goods had issued both to W., where the venue was, & to H. That to W. was returned *nulla bona*, & *pltf.* then issued a *fi. fa.* lands to H. where the writ against goods was still current, & a seizure had been made under it:—*Held:* the *fi. fa.* lands was irregular, & must be set aside.—OSWALD v. RYKERT (1863), 22 U. C. R. 306.—CAN.



0 Dowl. 659; 3 Scott, N. R. 293; Woll. 207; 10 L. J. C. P. 229; 133 E. R. 1014.

**192. — Second writ against other joint debtor.]—**(1) Upon a judgment against two debtors. if the sheriff makes a seizure of the goods of one under a *fi. fa.*, though he afterwards abandons the seizure, *pltf.* cannot take the other debt. under a *ca. sa.* till the writ of *fi. fa.* has been returned.

(2) Where a *fi. fa.* is issued against the goods of debt. & anything has been done under it which might render it necessary for the sheriff to defend himself in an action by resorting to the writ a *ca. sa.* cannot be issued until the *fi. fa.* is returned. —ANDREWS v. SAUNDERSON (1857), 1 H. & N. 725; 26 L. J. Ex. 208; 28 L. T. O. S. 293; 3 Jur. N. S. 118; 5 W. R. 317; 156 E. R. 1393.

*Annotations:—*As to (1) *Distd. Lee v. Dangar, Grant, [1892] 1 Q. B. 231.* *Consd. Re A Debtor, Ex p. Smith, [1902] 2 K. B. 260.*

**193. —**—When the sheriff has seized goods of a judgment debtor under a *fi. fa.*, the judgment creditor cannot have another *fi. fa.* upon the judgment until a return has been made to the first, even though he has abandoned the seizure. But, if under a *fi. fa.* the sheriff has seized only goods not belonging to the judgment debtor, the principle of *Miller v. Parnell*, No. 189, *ante*, does not apply, & in such a case there is nothing illegal or irregular in the issue of a second writ of *fi. fa.* before any return has been made to the first. In those circumstances there is nothing to prevent the judgment creditor from issuing a *bkpcy.* notice in respect of the judgment debt.

Seizure by the sheriff deprives the debtor of the power of selling his goods. The moment the sheriff takes possession the debt is *pro tanto* absolutely discharged, not indeed finally, but so long as that state of things continues (VAUGHAN WILLIAMS, L.J.).—*Re A Debtor, Ex p. Smith, [1902] 2 K. B. 260*; 87 L. T. 314; *sub nom. Re A Debtor, Ex p. Judgment Creditor*, 71 L. J. K. B. 664; 50 W. R. 609; 18 T. L. R. 683; 46 Sol. Jo. 614; 9 Mans. 243, C. A.

**194. Prior seizure of same goods by third party—As distress for rent.]—***Semble*: a *ca. sa.* may be sued out, & debt. arrested thereon, before the return of a writ of *fi. fa.* previously executed by entering on the possession of debt.'s goods as soon as the writ of *fi. fa.* is withdrawn, if, during the whole time of such possession by the sheriff, a person is also in possession of the same goods under a distress for rent.—EDMOND v. ROSS (1821), 9 Price, 5; 147 E. R. 2.

*Annotations:—**Apld. Dicas v. Warne (1833), 10 Bing. 341.* *Distd. Chapman v. Bowlby (1841), 8 M. & W. 249.* *Refd. Knight v. Coleby (1839), 5 M. & W. 274.*

**195. — Goods in custodia legis.]—**A *fi. fa.* sued out by *pltf.* proving ineffectual by reason of

debt.'s goods being already in *custodia legis* & assigned under a bill of sale:—*Held*: *pltf.* might issue a *ca. sa.* before the return of the *fi. fa.*—*DICAS v. WARNE (1833), 10 Bing. 341*; 2 Dowl. 762; 3 Moo. & S. 814; 3 L. J. C. P. 60; 131 E. R. 936.

*Annotations:—**Apld. Knight v. Coleby (1839), 5 M. & W. 274.* *Distd. Chapman v. Bowlby (1841), 8 M. & W. 249.* *Consd. Andrews v. Saunderson (1857), 1 H. & N. 725.*

**196. Earlier writ not executed.]—**If final process, which is now returnable upon execution, be duly issued within a year & a day of the time of signing final judgment, & remain in the hands of the sheriff unexecuted, fresh process may be issued at any time afterwards, without previously returning the first, or suing out a *sc. fa.*

Where final judgment was signed in June, 1843, & a *ca. sa.* forthwith issued against two debtors, one of whom was arrested, & discharged under Insolvent Act, whilst the writ remained unexecuted against the other:—*Held*: a writ of *fi. fa.* was regularly issued in 1846 against such other debt. although no *sci. fa.* was previously issued, nor any return made to the writ of *ca. sa.*—*FRANKLIN v. HODGKINSON (1846), 3 Dow. & L. 551*; 15 L. J. Q. B. 132; 10 Jur. 249.

**197. —**—*SMITH v. JACKSON*, No. 809, *post*. Compare No. 23, *ante*.

*See, further, Part III., Sect. 3, post.*

**198. Earlier writ sheriff's justification — For acts done thereunder.]—**ANDREWS v. SAUNDERSON, No. 192, *ante*.

**199. Seizure of third party's goods—Including no goods of debtor.]—***Re A Debtor, Ex p. Smith*, No. 193, *ante*.

**Form of subsequent writ—After return to first.]—***See Sect. 9, sub-sect. 1, ante.*

**Second levy under same writ.]—***See Part III., Sect. 1, sub-sect. 4, A., post.*

*See, also, R. S. C., Ord. 42, r. 11, & Part III., Sect. 1, sub-sect. 10, B.; Sect. 2, sub-sect. 4, C.; Sect. 3, sub-sect. 4; Sect. 6, sub-sect. 5, post.*

#### SUB-SECT. 2.—WHAT SUBSEQUENT WRITS MAY BE ISSUED.

##### A. After Writ of fieri facias.

*See R. C. S., Ord. 42, r. 29.*

**As to issue of capias ad satisfaciendum.]—***See, now, Debtors Act, 1869 (c. 62).*

**200. After return of devastavit.]—***Elegit* granted on *devastavit* returned.—*MEADE v. CHEYNEY (1591), Oro. Eliz. 216*; 2 Leon. 188; 78 E. R. 471.

**201. Process of no effect.]—**(1) If I take out *capias* or *fi. fa.* & they take no effect, I may have

#### PART II. SECT. 12, SUB-SECT. 2.—A.

**c. As to issue of ca. sa.]—**It is irregular to issue a *ca. sa.* upon a judgment more than a year old, even though a *fi. fa.* has been issued within the year, but not returned, without a *sci. fa.*—*SEWELL v. THOMPSON (1840), 3 Ont. Dig. 6308.—CAN.*

**d. —**—It is irregular to issue a *ca. sa.* upon a judgment more than a year old, even though a *fi. fa.* has been issued within the year, but not returned without a *sci. fa.*—*WILSON v. JAMIESON (1843), 6 O. S. 481.—CAN.*

**e. —**—A debt. cannot be arrested on a *ca. sa.* where a *fi. fa.* has been taken out & acted upon, but not returned.—*ROSS v. CAMERON (1846), 1 C. L. Ch. 21.—CAN.*

**f. After return of nulla bona.]—**A judgment against an exor. to recover *de bonis testatoris*, will warrant an

execution against testator's lands, on the return of *nulla bona.*—*DOE d. JESSUP v. BARTLET (1833), 3 O. S. 206.—CAN.*

**g. —**—It is an irregularity only, & not a nullity, to issue an *alias* after a return of "goods on hand" to the original *fi. fa.* & a *ven. ex.* upon it, on which the sheriff returns "that the goods had been exhausted by prior writs"; & the irregularity is waived by delay in the application against it.—*COMMERCIAL BANK v. McDONELL (1843), 1 U. C. R. 406.—CAN.*

**h. Receipt given for unpaid debt—Wrongful information of sheriff—As to mode of staying execution.]—**Where, with a view of giving debt. time, *pltf.* had, upon the misinformation of the deputy sheriff, given a receipt for the debt, as the only proper mode of staying the execution, which receipt the sheriff had stated in the return of the

writ of *fi. fa.*, the ct. ordered an *alias* to issue.—*HINNERLEY v. GOULD (1824), Tay. 143.—CAN.*

**k. First writ in sheriff's hand for twelve months—Sale under second writ.]—**Where a *fi. fa.* against lands had been in the sheriff's hands for twelve months, & returned, nothing having been done upon it, the sheriff might sell under an *alias* issued thereon without waiting for a year from its receipt.—*NICKALL v. CRAWFORD (1826), Tay. 277.—CAN.*

**l. Right to seize goods — In different county from which goods purchased.]—**Goods of a judgment debtor were sold & delivered to *pltf.* in the county of Carleton, & were afterwards brought into the county of York:—*Held*: the sheriff of the county of York could not seize them under an execution subsequently issued against the debtor, though at the time of the delivery to *pltf.* there was an execution against



**Sect. 12.—Issue of several writs in succession :  
sect. 2, A., B. & C.]**

one of them after another, or an *elegit* after both, if they fail. But if I take out an *elegit* & enter it of record, & it be returned *nihil* without effect, the question is whether [I] be utterly remediless, & in this divers books are peremptory that I am without remedy, because I have made (say they) my election, & that entered upon record, & therefore I can never resort to any other, & to this effect are the books. But an *alias elegit* or an *elegit* in divers counties one after another *pltf.* may have, these books notwithstanding. I hold the law to be clean contrary, & that where the party takes an *elegit*, & can have no fruit of it he may resort to another execution, though the election be entered of record (HOBART, C.J.).

(2) Now of executions that have their effect in part. If upon a *fi. fa.* the debt be satisfied in part, the next may be served either by *capias* or *elegit* (HOBART, C.J.).—FOSTER v. JACKSON (1615), Hob. 52 ; 80 E. R. 201 ; *sub nom.* FORSTERS CASE, Moore, K. B. 857.

**Annotations :—**As to (1) *Reid*. R. v. Baden (1694), Show. Parl. Cas. 72 ; Beacon v. Peck (1719), 11 Mod. Rep. 311 ; Lancaster v. Fielder (1727), 1 Ld. Raym. 1451 ; Bircham v. Tucker (1840), 8 Scott, 469 ; Thompson v. Parish (1859), 5 C. B. N. S. 685. *Generally*, *Mentd.* R. v. Patrick (1667), 2 Keb. 164 ; Phillips v. Bury (1694), Skin. 447 ; R. v. Gripe (1696), 1 Ld. Raym. 256 ; Beal v. Simpson (1697), 1 Ld. Raym. 408 ; Barber v. Palmer (1701), 1 Ld. Raym. 693 ; Thorp v. Thorp (1701), 12 Mod. Rep. 455 ; Vaspor v. Edwards (1701), 12 Mod. Rep. 658 ; Worsenholm v. Berks Manucaptors (1701), 12 Mod. Rep. 599 ; Lodge v. Jennings (1727), Gilb. Ch. 255 ; Bank of England v. Morrice (1736), Lee temp. Hard. 219 ; R. v. Cotton (1751), Park. 112 ; Hawks v. Crofton (1758), 2 Burr. 698 ; Camplin v. Bullman (1761), Park. 198 ; Mitchell v. Torup (1766), Park. 227 ; Giles v. Grover (1832), 9 Bing. 128 ; Lucas v. Nicholls (1833), 10 Bing. 157 ; Canadian Prisoners' Case, Watson's Case, Re Parker, R. v. Batchelder (1839), 1 State Tr. N. S. 963 ; Lehaine v. Philpott (1875), 33 L. T. 98.

**202. Process effectual for part of debt only.]—**FOSTER v. JACKSON, No. 201, *ante*.

**203. —.]—**BERRY v. WHEELER (1662), 1 Sid. 91 ; 82 E. R. 989.

**Annotations :—***Reid*. Den v. Abington (1780), 2 Doug. K. B. 473. *Mentd.* Fowke v. Berington, [1914] 2 Ch. 308.

**204. —.]—**Effects sequestered falling short of a duty decreed, the order for the Serjeant at

the debtor in the same suit in the hands of the sheriff of Carleton.—CONNELL v. MILLER (1841), 1 Kerr, 302.—CAN.

**m. Refusal of registrar—To register transfers of land by sheriff.]—**Re TRANSFER OF LAND STATUTE, *Ex p.* PATERSON (1872), 3 V. R. (Law) 128.—AUS.

**n. Rejection of second writs—Insufficiently connected.]—**Where the original & *alias* writs are not sufficiently connected, the ct. will reject the *alias* clause as surplusage, & sustain the writ as a second original.—HOLLAND v. BOVVER (1853), James, 45.—CAN.

**o. Issue of fieri facias lands—Before return of fieri facias goods.]—**M. devised lands to his two sons, John & James, & died in 1834. The will was registered in 1852, soon after James came of age the title having been a registered one since 1833. In 1850, John, the eldest son & heir-at-law of M., conveyed the south half of the land to debt., who registered his deed the same year. In 1856, the other half was sold to debt. under an execution against the exors. obtained on their confession. In ejectment by James:—*Held*: it was no objection that the *fi. fa.* goods had not been returned before the *fi. fa.* lands issued, & the exors. had accepted the confession.—(1859), 16

**p. —.]—**The issue of an execution against lands before the return of an execution against goods is an irregularity only, & not a void proceeding, the provision of both statute being in effect the same.—ROSS v. MALONE (1884), 7 O. R. 397.—CAN.

**q. Seizure under prior execution—Vacation of office by sheriff.]—**K., a sheriff, on Jan. 11, 1862, received for execution *fi. fa.* against the goods of R. & M., at the suit of *pltf.* An execution against the goods of R. at the suit of S. & another at the suit of O. had been previously placed in his hands, & while they were in force a seizure was supposed to be made on O.'s writ, & a return of goods on hand to the value of £200, & *nulla bona* as to residue was made thereon, & upon this return a *ven. ex. & fi. fa.* residue was sued out by O., & delivered to the sheriff for execution, on Feb. 1, 1862. K. then ceased to be sheriff, & debt. was appointed, & the writs in K.'s hands were transferred by indenture to debt. for execution. Upon an action for neglecting to seize the goods of R., the writs of S. & O., & the return to the latter, were pleaded in answer, & that debt. R. had no more goods & chattels whereof the amount could be made. On the trial it appeared that debt. took the office of sheriff on Apr. 12, 1862, & that no goods of R. or M. were

Arms revived for the residue.—HOPKINS v. ADCOCK (1772), 2 Dick. 443 ; 21 E. R. 342.

**205. Failure by sheriff to deliver goods seized—Whether party entitled to further process.]—**If the sheriff, upon a writ of execution served, does deliver the goods which are taken in execution to *pltf.*'s attorney, it is as well as if he had delivered the same to *pltf.* himself ; but if the sheriff takes goods in execution, if he keep them & do not deliver them to the party at whose suit they are taken in execution, the party may have a new execution because the other was not an execution with satisfaction.—STROWBRIDGE & ARCHER'S CASE (1613), Godb. 217 ; 78 E. R. 132.

**206. After return of nulla bona—Action for recovery of penalties—Conditions on which elegit may issue.]—**A *pltf.* having recovered damages for a libel against the proprietor of a newspaper, is not entitled to an extent against the principal & sureties in the recognizance, given by them to secure the payment of penalties, merely by getting a return of *nulla bona* to a *fi. fa.* issued against the principal, but he must convince the ct. by affidavit that every exertion has been made to obtain satisfaction from debt.—BENNETT v. THOMPSON (1833), 2 Dowl. 137.

**For judgment debt & costs respectively.]—**See R. S. C., Ord. 42, rr. 17, 18.

*See, also*, Nos. 182–187, 189–193, *ante*.

**B. After Writ of capias ad satisfaciendum.**

*See* R. S. C., Ord. 42, r. 29.

*See, now*, Debtors Act, 1869 (c. 62), s. 5 ; &, *generally*, BANKRUPTCY, Vol. V., pp. 1038 *et seq.*, Nos. 8490 *et seq.*

**207. Whether further process may issue.]—**A return to an *elegit* that the sheriff hath divided the land, but could not deliver it by reason of an extent, is no bar to a new execution.

He may have execution by *capias*, for this is the highest execution which can be, for it concerneth the body & the difference is that after a *capias* he cannot have an *elegit*, nor other execution, but after an *elegit*, if he be not satisfied, he may have a *capias* (GAWDY, J.).—KNOWLES v. PALMER (1589), Cro. Eliz. 160 ; 78 E. R. 418.

**208. — Elegit—Or fi. fa.—Where former**

delivered to him to be sold as goods on hand. It appeared, also, that S.'s writ was delivered on Oct. 20, 1861, O.'s first writ on Nov. 26, 1861, & his *ven. ex. & fi. fa.* on Feb. 1, 1862. It further appeared that the return of £200 on hand on O.'s writ was false, there having in fact, been no seizure:—*Held*: the return upon O.'s writ being false, & the goods not being under seizure on that execution, it was debt.'s duty to have seized them on *pltf.*'s writ, which was delivered to the sheriff before O.'s *alias* writ ; & therefore a verdict for *pltf.* was upheld.—MCKEE v. WOODRUFF (1863), 13 C. P. 583.—CAN.

**r. Second writ issued—While action pending.]—**A *fi. fa.* lands was placed in the sheriff's hands, &, before the return day filed their bill in respect of property of the debtor fraudulently conveyed away. During the pendency of this suit sheriff returned the writ "no lands," & *pltf.* thereupon delivered an *alias* writ to the sheriff:—*Held*: *pltf.* had not thereby lost their right to proceed with the suit in equity.—STEVENSON v. FRANKLIN (1869), 16 Gr. 139.—CAN.

**PART II. SECT. 12, SUB-SECT. 2.—B.**

**207i. Whether further process may issue.]—**ROBERTSON v. MEYERS (1850), 7 U. C. R. 423.—CAN.

process not effectual.]—FOSTER v. JACKSON, No. 201, *ante*.

209. ———.]—If the obligee of a joint & several bond obtains by two actions, separate judgments against the obligors, & sue out an *elegit* against one, he cannot take the other in execution on a *ca. sa.* after the *elegit* is returned served, nor have a re-extent; for the delivery of the lands is a satisfaction of the debt.

The reasons yielded in the books are that after an *elegit* taken, he shall not have a *capias*; for it is intended *quod elegit sibi executionem*, when it appears so upon the record (LORD COKE, C.J.).—CRAWLEY v. LIDGEAT (1614), Cro. Jac. 338; 79 E. R. 288; *sub nom.* COWLEY v. LYDEOT, 2 Bulst. 97.

Annotations:—*Refd.* Denton v. Godfrey (1847), 11 Jur. 800. *Mentd.* Goslyn v. Williams (1719), Fortes. Rep. 378.

210. ———.]—If upon an *elegit* brought, it be executed, he can never have an execution; & if a man be taken upon a *capias*, the party now may have another execution (HURTON, J.).

If a man had a judgment, & taken a *capias*, & done nothing upon it, but died, the exor. is not bound by that. But after a *sci. fa.* he may have an *elegit*, or what other execution he will (HURTON, J.).—CAVE v. FLEETWOOD (1629), Het. 159; 124 E. R. 420.

211. ——— *Fi. fa.*].—If a *ca. sa.* is executed no *fi. fa.* can issue, but after a *fi. fa.* is executed *pltf.*, is not satisfied, may sue out a *ca. sa.*—HOPKINS v. ADCOCK (1772), 2 Dick. 443; 21 E. R. 342.

212. ——— When execution debtor allowed his liberty.]—A writ of *fi. fa.* cannot be issued after a *ca. sa.*, not even where debt. is allowed to go at liberty, on an agreement that he will pay the money on a certain day.—ANON. (1823), 1 L. J. O. S. K. B. 87.

213. ——— Death of party under arrest.]—If debt. in debt die in execution, *pltf.* may have a new execution by *elegit* or *fi. fa.*—BLUMFIELD'S CASE (1596), 5 Co. Rep. 86 b.; 77 E. R. 185.

Annotations:—*Refd.* Crawley v. Lidgeat (1614), Cro. Jac. 338; Foster v. Jackson (1615), Hob. 52; Coke's Case (1623), Godb. 289; Cave v. Fleetwood (1629), Het. 159; Taylor v. Waters (1816), 5 M. & S. 103; Giles v. Grover (1832), 9 Bing. 128.

214. ———.]—If debt. die in execution on a *ca. sa.* *pltf.* cannot have recourse to a *fi. fa.*—WILLIAMS v. CUTTERIS (1607), Cro. Jac. 143; 79 E. R. 125.

*But, see*, 21 Jac. 1, c. 24.

215. ——— Discharge under prior irregular *ca. sa.*].—Where debt. taken in execution, obtains his discharge on the ground that the *ca. sa.* was irregular, he may be taken again under a fresh writ.—COLLINS v. BEAUMONT (1839), 10 Ad. & El. 225; 2 Per. & Dav. 363; 9 L. J. Q. B. 35; 113 E. R. 87.

Annotation:—*Refd.* Towers v. Newton (1841), 1 Q. B. 319.

216. ——— Attachment of debt.]—A declaration, after setting out a writ of attachment, whereby J. sought to attach £200, which P. owed to O., towards satisfying the sum of £1,008 for which J. had recovered judgment against O. stated that P. had appeared to the writ, & went on to pray execution for the said sum of £200 against P. Plea, that before the issuing of the said writ of attachment *pltf.* caused debt. to be taken in execution on a *ca. sa.* to satisfy him the sum recovered by the said judgment; & that debt. had been, & still was, in execution at the suit of *pltf.*:—*Held*: a good plea.

It is a rule . . . that goods cannot be taken in execution after a *ca. sa.* has issued against the debtor, & I think the Act of Parliament [O. L. P. Act, s. 61] merely intended to place debts in the

same position as the other property of the debtor which you could take in execution (POLLOCK, C.B.).

—JORALDE v. PARKER (1861), 9 W. R. 346.

*See, also*, Part. V., Sect. 1, *post*.

*See, further*, Part III., Sect. 3, *post*.

*See, further*, Sect. 20, *post*.

### C. After Writ of *elegit*.

R. S. O., Ord. 42, r.

As to issue of *ca. sa.*, *see, now*, Debtors Act, 1869 (c. 62).

For judgment debt & costs respectively.]—*See* R. S. O., Ord. 42, rr. 17, 18.

217. Whether *elegit* a bar to other modes of execution—Effect of entry upon record.]—FOSTER v. JACKSON, No. 201, *ante*.

218. ———.]—CRAWLEY v. LIDGEAT, No. 209, *ante*.

219. ——— Construction of Statute of Westminster II, 1285 (c. 18).]—It was not the intention of the statute by a nice construction of the word *elegit* to say it was such an election of the writ so as that he should never after have any other writ when it appears the statute intended to add a larger remedy; & the levying of goods for parcel only upon the *elegit* is no impediment but that he shall have another *elegit* & take the lands for the residue. But when an *elegit* is sued & lands are taken & that returned & filed, he shall not have any further execution.—GLASCOCK v. MORGAN (1664), 1 Lev. 92; 1 Keb. 692; 1 Sid. 184; 83 E. R. 313.

Annotations:—*Refd.* Lancaster v. Fielder (1727), 2 Ld. Raym. 1451; Hesse v. Stevenson (1804), 1 Bos. & P. N. R. 133. *Mentd.* London (Bp.) v. Mercers' Co. (1731), 2 Barn. K. B. 108; Kent v. Kent (1734), 2 Barn. K. B. 441.

220. ——— Effect of levy made partly on goods.]—GLASCOCK v. MORGAN, No. 219, *ante*.

221. ———.]—HALL v. THOMAS (1686), 2 Cas. in Ch. 186; 22 E. R. 904; *sub nom.* HALE v. THOMAS, 1 Vern. 349, L. C.

222. ———.]—A judgment creditor having taken his remedy by writ of *elegit* against the lands of his debtor, is for the future shut out from all other remedies, except other writs of *elegit*; & the sale of the lands taken, by a decree of the Ct. of Chancery on the petition of the creditor, as an equitable incumbrancer within Judgments Act, 1838 (c. 110), is not an eviction so as to entitle him to proceed to revive the judgment under 32 Hen. 8, c. 5.

We seem to be bound by all the authorities to hold that *pltf.*, having taken his remedy by *elegit*, is bound to it for better or worse. He was so bound even in the case of a subsequent eviction, until 32 Hen. 8, c. 5; but it is impossible to say that this was a case of eviction (LORD CAMPBELL, C.J.).—MACKLEY v. SMITH (1856), 27 L. T. O. S. 122; 4 W. R. 511.

223. Where no lands found under *elegit*—Further *elegits* may issue—Into different counties.]—FOSTER v. JACKSON, No. 201, *ante*.

224. ——— *Ca. sa.* may issue.]—If there be a *nihil* returned as to the lands there may be a *ca. sa.* after an *elegit*.

If nothing come of the process on return, the party may have another execution, & this is no more than a *fi. fa.* . . . On execution, the cases that you shall not take out another are when the first is effectual (EYRE, J.).

The question seems to be only whether one may take execution by *ca. sa.* after *fi. fa.* An *elegit* is only a *fi. fa.* with the addition of land. The taking out of the writ is only in order to an election, & until the return he has none. If *nihil* is returned the election is gone (FORTESCUE, J.).—



. 12.—*Issue of several writs in succession: Sub-sect. 2, C. Sect. 13: Sub-sects. 1, 2 & 3.*

BEACON *v.* PECK (1719), 11 Mod. Rep. 311; 1 Stra. 226; 88 E. R. 1059.

225. ——— Though goods levied under former process—But insufficient to satisfy debt.]—Though pltf. takes out an *elegit* upon a judgment & levies goods thereon, yet if the sheriff return that deft. had no lands, & the goods levied were insufficient to discharge the whole debt, pltf. may proceed against the person of deft. for the residue.—LANCASTER *v.* FIELDER (1726), 2 Ld. Raym. 1451; 92 E. R. 444.

226. Where lands already extended—Ca. sa. may issue.]—KNOWLES *v.* PALMER, No. 207, *ante*.

227. ——— Other lands of debtor in same county—Subsequent *elegit* for such lands.]—On a suggestion that deft. has other lands in the same county, a second *elegit* may be awarded, on the return of the first *elegit*.—HANGER *v.* FRY (1593), Cro. Eliz. 310; 78 E. R. 561.

228. ——— No interest left in debtor capable of further extent.]—CARTER *v.* HUGHES, No. *post*.

229. Where lands found & *elegit* returned served—Whether further process may issue—Ca. sa.]—CRAWLEY *v.* LIDGEAT, No. 209, *ante*.

230. ——— Further *elegit*.]—CRAWLEY *v.* LIDGEAT, No. 209, *ante*.

231. ———.]—One cannot have an *elegit* after a former *elegit*, if lands be thereby found, & the *elegit* filed (GLYN, C.J.).—STROWD *v.* KECKWITH (1655), Sty. 454; 82 E. R. 857.

232. ———.]—CAVE *v.* FLEETWOOD, No. 210, *ante*.

233. ———.]—GLASCOCK *v.* MORGAN, No. 219, *ante*.

234. ———.]—PULLEN *v.* PURBECK, No. 1419, *post*.

235. Where process effectual.]—BEACON *v.* PECK, No. 221, *ante*.

236. Process against land of public company ineffectual—Subsequent execution against member of company—Companies Clauses Consolidation Act, 1845 (c. 16), s. 36.]—A judgment creditor of a railway co. within the operation of the above Act, is entitled to issue execution against a shareholder although he has before issued an *elegit* against the lands of the co., but such lands are insufficient to satisfy the judgment debt.

The intention of the Act was that the property of the co. should be sought for & exhausted before the shareholders were applied to, & there is nothing in the case of an *elegit* issued against the co. different from any other kind of execution, so as to deprive the judgment creditor who has had recourse to it from the statutory remedy against the shareholders. The debt is not satisfied although an *elegit* has issued, since a fresh *elegit* can always be had against other lands (ERLE, J.).—R. *v.* DERBYSHIRE, STAFFORDSHIRE & WORCESTERSHIRE JUNCTION RY. CO. (1854), 3 E. & B. 784; 2 C. L. R. 1653; 23 L. J. Q. B. 333; 23 L. T. O. S. 155; 18 Jur. 1054; 118 E. R. 1335;

#### PART II. SECT. 13, SUB-SECT. 2.

a. *Constable*.]—A constable of any town within the county in which a warrant of attachment is issued under 12 Vict. c. 69, s. 1, may execute such warrant.—DELANEY *v.* MOORE (1852), 9 U. C. R. 294.—CAN.

t. *Coroner*.]—An execution directed to "the coroners" of a county may be executed, & the land conveyed by one.—POURRIER *v.* HARDING (1873), 15 N. B. R. (2 Pug.) 120.—CAN.

a. *Sworn bailiff*.]—Upon an application of a bank, whose head office was in O., for an order adjudicating & awarding shares:—*Held*: an execution from the superior ct. of M. might be validly executed by a sworn bailiff of that ct., instead of by the sheriff, & the bailiff might fulfil the duty imposed on the sheriff.—*Re BANK OF ONTARIO* (1879), 44 U. C. R. 247.—CAN.

b. ———.]—"Sheriff" as used in Sask. Rules of Court, r. 545, providing

subsequent proceedings, *sub nom.*

DERBYSHIRE & STAFFORDSHIRE RY. CO. (1855), 24 L. T. O. S. 263.

Annotation:—*Folld. Addison v. Tate* (1855), 11 Exch. 250.

See, generally, COMPANIES, Vol. XI., pp. 1122 *et seq.*, Nos. 7881 *et seq.*

237. Where execution creditor evicted—Effect of 32 Hen. 8, c. 5.]—MACKLEY *v.* SMITH, No. *ante*.

238. Sale of lands extended—On petition of execution creditor—Not an eviction.]—MACKLEY *v.* SMITH, No. 222, *ante*.

Effect of death of execution debtor.]—See 21 Ja. 1, c. 24.

#### SECT. 13.—EXECUTION OF THE WRIT.

##### SUB-SECT. 1.—IN GENERAL.

Seizure & sale of goods.]—See Part III., Sect. 1, sub-sect. 4, D., E., H., *post*.

Priorities between several creditors.]—See Part III., Sect. 1, sub-sect. 4, B. (b), *post*.

Liabilities arising under.]—See Part III., Sect. 1, sub-sect. 12, *post*.

Extent of lands.]—See Part III., Sect. 2, sub-sects. 4–6, *post*.

Arrest under ca. sa.]—See Part III., Sect. 3, sub-sect. 3, *post*.

Writ of possession.]—See Part III., Sect. 5, sub-sect. 2, *post*.

Writ of sequestration.]—See Part III., Sect. 6, sub-sect. 4, *post*.

Within precincts of Royal Palaces.]—See CONSTITUTIONAL LAW, Vol. XI., p. 520, Nos. 245–250, 253.

In Cinque Ports.]—See Cinque Ports Act, 1855 (c. 48), s. 2.

In borough being also county.]—See Municipal Corporations Act, 1882 (c. 50), s. 170 (1); & compare Nos. 112, *ante*, 245, *post*.

Wrongful or irregular execution.]—See Sect. 20, sub-sects. 1, 2; Part III., Sect. 1, sub-sect. 12; Sect. 5, sub-sect. 3, *post*.

##### SUB-SECT. 2.—TO WHOM DELIVERED.

239. Delivery to sheriff's deputy in London—Equivalent to delivery to sheriff.]—C., a trader, on June 5, 1838, assigned his effects in trust for the benefit of creditors. On the same day, but before the execution of the assignment, a *fi. fa.* against C. was delivered to the sheriff's agent in London, under which a sheriff's officer levied upon his goods on June 6. The trustees under the assignment paid him the amount of the levy under protest, & he withdrew from possession. It afterwards appeared that C. had committed an act of bkpcy. on June 2, upon which a fiat issued on June 18:—*Held*: the trustees could not recover back from the sheriff the money so paid by them to the officer, as having been paid under a mistake of fact.

It is said the delivery of the writ was not to the

that a writ of attachment should be executed by the sheriff, includes a duly appointed bailiff.—FLETCHER *v.* WILCOX (1914), 29 W. L. R. 591.—CAN.

c. ——— *Substitute of*.]—A bailiff may lawfully employ a substitute to make a seizure of goods under an execution issued to him, the bailiff.—R. *v.* POLSKY, [1917] 1 W. W. R. 451; 27 Man. L. R. 271; 27 Can. Crim. Cas. 319.—CAN.

d. *Sheriff*.]—The sheriff of the



sheriff but only to his agent in London. I think that makes no difference whatever (LORD ABINGER, C.B.).

There can be no doubt that the delivery [of the writ of execution] to the deputy in London is a delivery to the sheriff; the deputy is appointed for that very purpose (ALDERSON, B.).—HARRIS v. LOYD (1839), 5 M. & W. 432; 9 L. J. Ex. 95; 151 E. R. 183.

*Annotation*:—Mentd. Townsend v. Crowdy (1860), 8 C. B. N. S. 477.

**240.** ———.—Delivery of a *fi. fa.* to the sheriff's deputy in London is equivalent to delivery to the sheriff in the country.

The goods of the debtor are bound therefore by such delivery to the deputy in London, & the execution creditor cannot be defeated by a vesting order subsequently made by the Insolvent Ct.—WOODLAND v. FULLER (1840), 11 Ad. & El. 859; 3 Per. & Dav. 570; 9 L. J. Q. B. 181; 4 Jur. 743; 113 E. R. 611.

*Annotations*:—Reid. Holmes v. Tutton (1855), 5 E. & B. 65; Bridge v. Tattersall (1857), 29 L. T. O. S. 76; Bothamley v. Heyward (1862), 8 Jur. N. S. 1156; Johnson v. Pickering, [1908] 1 K. B. 1.

**Duty of sheriff to appoint deputy in London.**—See Sheriffs Act, 1887 (c. 55), s. 24; & generally, SHERIFFS & BAILIFFS.

**241. Delivery to sheriff's officer or clerk—Insufficiency of—Effect of authority of officer or clerk to receive.**—It is no part of the duty of a sheriff's officer to receive writs of execution from the parties; deft.'s clerk, therefore, in receiving the writ was not acting in the ordinary course of business as a sheriff's officer & his receiving it could not bind his employer unless he had authority from him to receive writs.—TRIMINGER v. KEENE, [1882] W. N. 106, C. A.

**Necessity for sheriff to acknowledge receipt—& date of delivery.**—See Sheriff's Act, 1887 (c. 55), s. 10 (1).

**Form & indorsement.**—See Sect. 9, ante.

**Consequences of defective indorsement.**—See Sect. 20, sub-sect. 1, C.; sub-sect. 2, B., post.

#### SUB-SECT. 3.—BY WHOM EXECUTED.

See Sheriffs Act, 1887 (c. 55).

**242. General rule—Sheriff of county.**—(1) A writ of *fi. fa.*, directed in the first instance to the bailiff of the Isle of Ely out of the ct. [of King's Bench], is erroneous & void, & the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution. The bishop of Ely has not a palatinate jurisdiction within the Isle, though exercising *jura regalia* there. Process issued out of the cts. at Westminster into the Isle goes in the first instance to the sheriff of Cambridgeshire, who thereupon issues his mandate to the bailiff of the franchise.

(2) Public convenience requires that there should be known responsible persons answerable to the ct. for the due execution of its process, & to whom alone it ought, in the first instance, to be directed. These are, generally speaking, the sheriffs of counties, or if the sheriff be a party interested, then it issues to the coroner, & if he also be interested, to elisors (LORD ELLENBOROUGH, C.J.).

(3) In all cases of ordinary process issuing out of the superior courts of Westminster, the writ is to be directed to the sheriff of the county into which it issues, whose known & sworn duty it is to execute it (LORD ELLENBOROUGH, C.J.).—GRANT v. BAGGE (1802), 3 East, 128; 102 E. R. 546.

*Annotations*:—As to (1) Distd. Carrett v. Smallpage (1808), 9 East, 330. Generally, Mentd. R. v. Isle of Ely (1850), 14 Jur. 956.

**243. Sheriffs warrant to officer—Necessity for compliance with.**—RHODES v. HULL, No. 437, post.

**244. ——— Delivery by post—Postage unpaid.**—Where pltf.'s attorney obtained from the sheriff's deputy in London a warrant which he sent to an officer in the country by post, but did not pay the postage, & the officer having in consequence refused to take in the letter, it was returned to the dead letter office:—Held: in these circumstances the sheriff could not be called on to return the writ.—HART v. WEATHERLEY (1835), 4 Dowl. 171.

**245. City having sheriff apart from county—Statutory creation of city sheriff's office—Municipal Corporations Act, 1835 (c. 76), s. 61.**—Sect. 61 of the [above] Act affects to deal with places which had & with places which had not sheriffs before the passing of the Act; it directs that the town council shall on a given day appoint a fit person to execute the office of sheriff, & it goes on to state what shall be the duties of the person so appointed, "the like duties & powers as the sheriff or the person filling the office of sheriff in the said towns & counties respectively would have had if this Act had not passed." It appears here that the city of Oxford had no sheriff, no person filling the office, no person whose duty it was to receive & return the process of the cts. at Westminster. I think the power to execute such process is still limited to the sheriffs of those places which had sheriffs before upon whom that duty rested. The writ in the present case ought not to have been directed to the sheriff of the city. I cannot help thinking, that, if the legislature had intended to take away from the sheriff of the county any of the powers or authorities he possessed before the passing of the Act, they would have expressed themselves in direct terms to that effect, or at least the Act would have contained words of direction to the cts. (TINDAL, C.J.).—GRANGER v. TAUNTON (1836), 3 Bing. N. O. 64; 2 Hodg. 196; 132 E. R. 333; sub nom. GRAINGER v. TAUNTON, 5 Dowl. 190; 3 Scott, 393; 5 L. J. O. P. 300.

See, further, Municipal Corporations Act, 1882 (c. 50), s. 170.

**246. Franchise or liberty—Balliff of liberty.**—The bailiff of a liberty may execute an *elegit* by warrant from the sheriff; but the jury shall find all the land, & the officer shall deliver the moiety.—SPARROW v. MATTERSOCK (1633), Cro. Car. 319; 79 E. R. 878.

*Annotation*:—Mentd. Den v. Abingdon (1780), 2 Doug. K. B. 473.

**247. ——— Necessity for sheriff's warrant—General warrant for all writs.**—In case for a false return to a writ against the bailiff of a liberty, if the declaration sets out the substance of the writ, & avers that the sheriff for the execution thereof made his mandate to deft., it will after verdict at least be good, though it does not

Edmonton judicial district, either as such or as former deputy sheriff of the Northern Alberta judicial district, to whom the writ was directed & delivered, has no authority to sell lands, which were in the district of another sheriff, who was the successor of the deputy sheriff of Northern

Alberta, in so far as the lands in his district are concerned.—RELiance LOAN & SAVINGS Co. v. GOLDSMITH (1910), 15 W. L. R. 53; 3 Alta. L. R. 197.—CAN.

e. Persons named in warrant of execution.]—The person named in a

warrant of execution issued by a magistrate's ct. is the only person who can execute it, though peace officers & others may aid him. If an assistant bailiff be employed he must be named in the warrant.—MOCUTCHEON v. CAMPBELL (1894), 12 N. Z. L. R. 615.—N.Z.

**Sect. 13.—Execution of the writ: Sub-sect. 3. Sect. 14: Sub-sect. 1, A., B., C. & D.; sub-sect. 2, A., B., C. & D. Sect. 15: Sub-sect. 1.]**

state specifically the tenor of the mandate. The bailiff of a liberty cannot execute process unless he has a warrant from the sheriff; such warrant must be in writing, but there is no occasion for a separate warrant upon every writ, a general warrant to execute all writs, is sufficient; a declaration cannot be amended in substance after a verdict.—*HAMON v. JERMYN* (LORD) (1697), 1 *Ld. Raym.* 189; 91 *E. R.* 1022.

**248. — Election to act as sheriff's officer.]**—In an action against the bailiff of the liberty of P. in the county of Y. for the escape of a prisoner in execution, the declaration alleged a mandate by the sheriff of Y. to deft. as chief bailiff of the liberty of P., or his deputy, to take T., if found in his liberty, etc. The instrument produced in proof of the averment was in the form of a common sheriff's warrant, & was addressed by the sheriff to the keeper of the county gaol, "the chief bailiff of P., his deputies, & D., my bailiffs," & commanded them, jointly & severally, to take T., if found "in my bailiwick," etc., "that I may have the bodies," etc. The deputy of deft. thereupon arrested & conveyed T. to the county gaol out of the liberty:—*Held*: the averment was not proved; for the precept was not a mandate to deft. as bailiff of a liberty but a warrant to him as sheriff's bailiff, & acted upon as such; though it was shown that deft., when ruled by pltf. to return "the mandate," had obtained time to do so, & had not then set it up as a common warrant.

Where a bailiff of a franchise is addressed as an officer or bailiff of the sheriff, he may waive his franchise & act upon the warrant as an ordinary sheriff's officer (*PATTESON, J.*).—*JACKSON v. HILL* (1839), 10 *Ad. & El.* 477; 2 *Per. & Dav.* 455; 8 *L. J. Q. B.* 253; 3 *Jur.* 976; 113 *E. R.* 181; *previous proceedings* (1838), 2 *Jur.* 180.

**249. — Effect of "non omittas" clause in writ—Ouster of bailiff's authority.]**—By the long established & recognised practice of the ct., a writ of *capias*, with a *non omittas* clause, may issue in the first instance, & be executed by the sheriff within a particular liberty, the bailiff of which has the execution & return of writs, without a prior writ of *latitat* first issued, & a return made by the sheriff of *mandavi ballivo qui nullum dedit responsum*; & therefore no action on the case lies by the bailiff of such liberty against the party suing out such writ, upon an allegation that it was wrongfully, injuriously & deceitfully caused to be issued by him.—*CARRETT v. SMALLPAGE* (1808), 9 *East*, 330; 103 *E. R.* 598.

*Annotation*:—*Refd. Jackson v. Hill* (1839), 2 *Per. & Dav.* 455.

**— Failure of bailiff to execute.]**—*See Sheriff's Act*, 1887 (c. 55), s. 34.

*See, further*, Part III., Sect. 1, sub-sect. 4, C.; Sect. 2; Sect. 3, sub-sect. 3; Sect. 4; Sect. 5, sub-sect. 2, C.; Sect. 6, sub-sect. 4, *post*.

**250. Retirement of sheriff from office—Execution not completed—Duty to complete.]**—*CLERK v. WITHERS*, No. 66, *ante*.

*Compare Nos.* 377–383, *post*.

#### SECT. 14.—PRIORITIES.

##### SUB-SECT. 1.—BETWEEN EXECUTION CREDITORS.

###### A. The Crown.

**251. Crown entitled to priority—If writ delivered before sale under prior writ.]**—Process sued

out by the Crown against a deft. to recover penalties upon which judgment for the Crown is afterwards obtained, entitles the King's execution to have priority within 33 *Hen. 8*, c. 39, s. 74, before the execution of a subject, whose execution had issued & been commenced on a judgment recovered against same deft. prior to the King's judgment, but subsequent to the commencement of the King's process: the King's writ of execution having been delivered to the sheriff before the actual sale of deft.'s goods under pltf.'s execution.—*BUTLER v. BUTLER* (1801), 1 *East*, 338; 102 *E. R.* 131.

*Annotations*:—*Consd. R. v. Sloper & Allen* (1818), 6 *Price*, 114. *Refd. Giles v. Grover* (1832), 9 *Bing.* 128.

*See, further*, CONSTITUTIONAL LAW, Vol. XI., pp. 581, 582, Nos. 830–833.

**Under extents.]**—*See CROWN PRACTICE*, Vol. XVI., pp. 222, 225, 226, Nos. 115–119, 164–170, 172, 173.

###### B. Writ of fieri facias.

*See* Part III., Sect. 1, sub-sect. 3, *post*.

###### C. Writ of elegit.

*See* Part III., Sect. 2, *post*.

###### D. Writ of capias ad satisfaciendum.

*See* Part III., Sect. 3, *post*.

##### SUB-SECT. 2.—BETWEEN EXECUTION CREDITORS AND THIRD PARTIES.

###### A. Attachment of Debts.

*See* Part V., Sect. 1, sub-sect. 7, *post*.

###### B. Charging Orders.

*See* Part V., Sect. 2, sub-sect. 8, *post*.

###### C. Stop Orders.

*See* Part V., Sect. 3, sub-sect. 6, *post*.

###### D. Equitable Execution—Receiver.

*See* Part V., Sect. 5, *post*.

#### SECT. 15.—STAY OF EXECUTION.

##### SUB-SECT. 1.—WHAT OPERATES AS STAY WITHOUT ORDER.

For stay of proceedings generally, *see PRACTICE. Action for administration.]*—*See EXECUTORS.*

**Interpleader proceedings.]**—*See BANKRUPTCY*, Vol. IV., pp. 86, 87, Nos. 778–781.

**252. Garnishee proceedings.]**—Deft., a judgment creditor, levied execution on pltf. after he had notice that all the moneys due under the judgments were at that time attached in pltf.'s hand by a garnishee order of the High Ct.:—*Held*: pltf. could not maintain trespass in respect of such execution.—*CRONMIRE v. MACCOLLA* (1893), 58 *J. P.* 149; 9 *T. L. R.* 549; 37 *Sol. Jo.* 615, C. A.

—*See, further*, *BANKRUPTCY*, Vol. IV., p. 87, Nos. 784–787.

**Proceedings under Debtors Act, 1869 (c. 62).]**—*See, BANKRUPTCY*, Vol. V., p. 1038, Nos. 8485–8487.

**Winding-up proceedings.]**—*See COMPANIES*, Vol. X., pp. 963–967, Nos. 6607–6640.

**253. Summons for stay of proceedings—From date when returnable.]**—A summons for a stay of proceedings on payment of debt & costs, in an action in which judgment had been given by default, was taken out on Apr. 24, returnable on



the 25th. Before the summons was returnable, by agreement between the parties, the matter was postponed until three o'clock on the 26th. On the morning of the 26th, pltf. executed a writ of inquiry, of which notice had been previously given:—*Held*: as the summons operated as a stay of proceedings from the time at which it was originally returnable on the 26th, the execution was bad & must be set aside.—*SERJEANT v. BROWN* (1843), 7 Jur. 700.

**254. Appeal from judgment—Not ipso facto a stay.]**—An appeal is now no stay of proceedings or execution, & therefore, when an application is made to stay for the purposes of an appeal, appct. will be put on terms (*QUAIN, J.*).—*ANON.* (1875), 1 Char. Cham. Cas. 129.

**255. ———.]**—*OPPERT v. BEAUMONT*, No. 264, *post*.

*See, also, R. S. C., Ord. 58, r. 16.*

**256. Release of judgment debt—Notification to sheriff.]**—Trespass for false imprisonment. Plea, justifying the trespass under a writ of *ca. sa.*, directed to deft. as sheriff, & sued out by one F. on a judgment in the Q. B. Replication, that before the writ was delivered or executed, F. released the debt, & gave notice to deft. of the release, & thereby then discharged & forbade deft. from executing the writ." Rejoinder, that T., an attorney of the Ct. of Q. B., was retained by F. to prosecute an action of debt in the Ct. of Exch. against the now pltf., upon the terms, that when judgment should be recovered therein, T., as such attorney, should have a lien thereon for his fees; that judgment had been recovered therein, & that, while the fees were unpaid, & before the making of the release, it was corruptly & fraudulently agreed between the now pltf. & F., for the purpose of defrauding T. of his lien, that F. should execute a release of the judgment, & that, in pursuance of such agreement, F. executed the release in the replication mentioned; that afterwards, deft., having notice of the premises, did, at the request of T., as such attorney, execute the writ in the plea mentioned, & committed the trespass *modo et formâ*:—*Held*: (1) an attorney's lien on a judgment being merely a claim to the equitable interference of the ct. to have the judgment held as a security for his costs, he has no authority over the execution of a writ of *ca. sa.*, so as to carry it into effect against the order of pltf., even though pltf. & deft. should collude to deprive him of his lien; (2) after a direction of pltf. not to execute a writ of *ca. sa.*, the sheriff, if he does so, becomes a trespasser; so also, if he detain deft. after notice from pltf. that he has released the debt.—*BARKER v. ST. QUINTON* (1844), 12 M. & W. 441; 1 Dow. & L. 542; 13 L. J. Ex. 144; 2 L. T. O. S. 330; 152 E. R. 1270.

*Annotations*:—As to (1) *Apld.* *Hough v. Edwards* (1856), 1 H. & N. 171. *Consd.* *Brunsdon v. Allard* (1859), 2 E. & E. 19; *Re Williams v. Lloyd, Ex p. Games* (1864), 3 H. & C. 204. *Refd.* *Hooper v. Lane* (1857), 6 H. L. Cas. 443; *The Leader* (1868), L. R. 2 A. & E. 314; *Mercer v. Graves* (1872), L. R. 7 Q. B. 499. As to (2) *Consd.* *Langley v. Headland* (1865), 19 C. B. N. S. 42. *Apld.* *Shaw v. Kirby* (1888), 4 T. L. R. 314. *Refd.* *Hunt v. Hooper* (1844), 1 Dow. & L. 626; *Walker v. Hunter* (1845), 2 C. B. 324. *Generally, Mentd.* *Lloyd v. Mansell* (1853), 22 L. J. Q. B. 110; *Butler v. Knight* (1867), 15 L. T. 621.

**257. Agreement of parties to postpone execution—Authority of solicitor to make agreement.]**—An attorney retained for the conduct of an action has no implied authority, after judgment in favour of the client, to enter into an agreement on his behalf to postpone execution.—*LOVEGROVE v. WHITE* (1871), L. R. 6 C. P. 440; 40 L. J. C. P. 253; 24 L. T. 554; 19 W. R. 823.

*Annotation*:—*Consd.* *Re Commonwealth Land Building Estate & Auction Co., Ex p. Hollington* (1873), 43 L. J. Ch. 99.

**258. ———.]**—An agreement by a debtor to pay, & the creditor to accept payment of, an existing debt by instalments is *nudum pactum*. Therefore where a judgment creditor put in an execution upon the goods of the judgment debtor, an agreement by the debtor to pay part of the debt at once & the balance by monthly instalments affords no consideration for a promise by the execution creditor to withdraw the sheriff.—*HOOKHAM v. MAYLE* (1906), 22 T. L. R. 241.

**259. Withdrawal of sheriff without making return—After seizure of stranger's goods—How far operative as stay.]**—*Re A DEBTOR, Ex p. SMITH*, No. 193, *ante*.

**260. Appointment of receiver—Not preventing payment of debt—How far operative as stay.]**—Where a judgment creditor has obtained the appointment of a receiver by way of equitable execution, but the debtor is not thereby prevented from paying the judgment debt, the existence of the receiver is not a "stay" of execution within Bkpcy. Act, 1883 (c. 43), s. 4 (1) (g), & the judgment creditor may serve a bkpcy. notice upon the debtor in respect of his judgment.—*Re BOND, Ex p. CAPITAL & COUNTIES BANK, LTD.*, [1911] 2 K. B. 988; 81 L. J. K. B. 112; 19 Mans. 22, D. C.

*Annotations*:—*Apld.* *Re Renison, Ex p. Greaves*, [1913] 2 K. B. 300. *Mentd.* *Chetwynd's Trustee v. Boltons Library* (1912), 82 L. J. K. B. 217.

**261. Judgment for payment at future date—To be fixed by court—Not a stay.]**—In an action against the debtor for specific performance of a contract to purchase real estate, an order was made on Feb. 17, 1911, that upon pltf's. executing a conveyance, to be settled by the judge in case the parties differed, deft. should pay to pltf's. at such time & place to be agreed upon or fixed by the judge, but not before July 6, 1911, the sum of £2,400, representing the agreed amount of principal & interest payable under the contract on Mar. 1, 1911, & it was ordered that pltf's. costs should be taxed & paid by deft., & that all further proceedings in the action be stayed, except for the purpose of carrying the order into effect. On Jan. 12, 1912, the master certified that the conveyance had been settled & executed & fixed Feb. 12, 1912, as the date for the payment of the £2,400. On Mar. 23, 1912, pltf's. issued & served upon the debtor a bkpcy. notice to pay the £2,400 due on a final judgment or order "whereon execution has not been stayed":—*Held*: the notice was accurate in stating that execution upon the judgment had not been stayed.

It was said, & this was the view which the registrar acted upon, that the notice was inaccurate because it said "whereon execution has not been stayed." I have looked through this judgment & I cannot find anything like a stay of execution; the mere fact that the judgment is for a sum to be settled & paid by a subsequent date to be ascertained by the ct. is no ground for holding that there has ever been a stay of execution. The right to issue execution never arose until Feb. 12, 1912, the date fixed by the master (*COZENS-HARDY, M.R.*).

There cannot be any stay of execution until the right to issue execution has arisen (*FARWELL, L.J.*).—*Re A DEBTOR*, [1912] 3 K. B. 242; 81 L. J. K. B. 1225; 107 L. T. 506; 19 Mans. 317, C. A.

*Annotation*:—*Mentd.* *Re Clark, Ex p. Pope & Owles*, [1914] 3 K. B. 1095.

**262. Judgment for payment by instalments—Action in county court on High Court judgment.]**—If a creditor, who has recovered judgment against his debtor in the High Ct., afterwards obtains



**Sect. 15.—Stay of execution: Sub-sects. 1, 2 & 3, A**

from a county ct. judge an order under Debtors Act, 1869 (c. 62), s. 5, for payment of the debt by instalments, he cannot, so long as that order is in force, issue execution upon his judgment in the High Ct.—**MONTGOMERY & Co. v. DE BULMES**, [1898] 2 Q. B. 420; 67 L. J. Q. B. 768; 78 L. T. 671; 47 W. R. 22; 42 Sol. Jo. 590, C. A.

**Annotations:—****Consd.** *Re A Debtor* (No. 112 of 1903), *Ex p. Rock Red Brick Co.* (1904), 90 L. T. 64. **Apld.** *Nesom v. Metcalfe*, [1921] 1 K. B. 400. **Refd.** *Woodham Smith v. Edwards*, Haslam (1908), 77 L. J. K. B. 1056; *White, Son & Pill v. Stennings* (1911), 104 L. T. 876.

—**]**—**See, also**, Execution Act, 1844 (c. 96), s. 61.

**263. Order for payment by instalments—By judge in bankruptcy—Of amount of judgment debt.]—**Where judgment has been recovered in the High Ct. for a sum of money & an order made by a judge in bkpcy. under Debtors Act, 1869 (c. 62), s. 5, for payment of the judgment debt by instalments, execution may issue under R. S. C., Ord. 42, r. 24, for the amount of instalments which have become due & are unpaid.—**WOODHAM SMITH v. EDWARDS**, [1908] 2 K. B. 899; 77 L. J. K. B. 1056; 99 L. T. 710; 24 T. L. R. 864; 52 Sol. Jo. 680; 15 Mans. 322, C. A.

**Annotation:—****Apld.** *Nesom v. Metcalfe*, [1921] 1 K. B. 400.

**Party entitled becoming alien enemy.]—****See** **ALIENS**, Vol. II., pp. 157, 158, 159, Nos. 277, 292,

**SUB-SECT. 2.—JURISDICTION TO ORDER STAY.**

**264. Master—When appeal pending.]—**A master has jurisdiction under Ord. 58, r. 16, to stay execution on a judgment pending an appeal to the Ct. of Appeal.

An appeal itself cannot operate as a stay of execution; it is the order of the ct. or judge which has that effect (**BOWEN, L.J.**).—**OPPERT v. BEAUMONT** (1887), 18 Q. B. D. 435; 56 L. J. Q. B. 216; 35 W. R. 266; 3 T. L. R. 674, C. A.

**See, further**, Sub-sect. 5, B., *post*.

**265. Judge in chambers—Where subsequent arrangement made.]—**Where a judgment has been obtained & an arrangement is subsequently entered into which would render it inequitable to carry the judgment into effect, execution will be stayed by a judge in chambers (**QUAIN, J.**).—**ANON.** (1875), 1 Char. Cham. Cas. 6; *Bitt. Prac. Cas.* 36.

**266. Judge of Chancery Division—Where judgment recovered in common law division—Judicature Act, 1873 (c. 66), s. 24 (5).]**—First of all pltf. says that defts. brought an action at law for the recovery of an item of £1,650; pltf. pleaded, & when the action came on for trial it was at the last moment, under great pressure, referred to arbitration. The arbitrator, on May 29, 1876, made an award against pltf. for £500 5s. 8d. & costs. That was an award in an action not pending in this division. Pltf. now asks for an injunction to restrain the banking co. from enforcing the award, by execution or otherwise, until some deeds & documents are delivered over. The answer is that this is a proceeding pending in another division of the High Ct. of Justice. Of course the award in an action can be enforced by entering up judgment in the division in which the action is brought, & by issuing execution on that judgment. Now, if deft., in such a case has anything to complain of, it must either be something which he could have alleged by way of defence to the action, or it must be something which he could

not have so alleged, because it came to his knowledge after the award was made. If it is in the first category, he should have pleaded to the action: if it is in the second, he should have made a motion in the division of the High Ct. to which the action belongs to stay proceedings in the action, either wholly or partially, according to the remedy which he has discovered himself to have become entitled. But in no way & under no circumstances can a judge of another division interfere at all as regards that action by way of injunction to restrain proceedings in it (**JESSEL, M.R.**).—**POWELL v. JEWESBURY** (1878), 9 Ch. D. 34; 39 L. T. 213; 27 W. R. 142, C. A.

**267. ————.]—**Goods having been taken in execution under a *fi. fa.* against W., the trustee of Mrs. W.'s settlement claimed them as separate estate of the wife. The sheriff thereupon took out an interpleader summons in C. P. Div., upon which an order was made that upon the trustee paying £115 into ct. within a limited time, the sheriff should withdraw, but in default of such payment being made, should sell & pay the proceeds into ct., & that the parties should proceed to the trial of an issue as to the title to the goods. The money was not paid into ct. by the trustee within the time, & the sheriff advertised the goods for sale. Mrs. W. thereupon commenced an action in Ch. Div. to have the trusts of the settlement carried into execution, a new trustee appointed, & in the meantime, for the appointment of a receiver. An injunction to restrain the sheriff from selling the goods or remaining in possession of them was granted. On appeal:—**Held**: this order was a restraining by injunction a proceeding pending in C. P. Div., & was inconsistent with Jud. Act, 1873 (c. 66), s. 24 (5), & must be discharged.—**WRIGHT v. REDGRAVE** (1879), 11 Ch. D. 24; 40 L. T. 206; 27 W. R. 562, C. A.

**Annotation:—****Refd.** *Aylwin v. Evans* (1882), 52 L. J. Ch. 105.

**268. Court of appeal—On ex parte application.]—****MACLEAN v. VAUGHAN** (1876), 20 Sol. Jo. 723, C. A.

**Annotation:—****Refd.** *Cropper v. Smith* (1883), 24 Ch. D. 305.

**269. ———— Where no prior application made to divisional court.]—**(1) Where an order *nisi* for a new trial has been refused by a Div. Ct., & granted on appeal by the Ct. of Appeal, such order should not include a stay of proceedings. A stay of proceedings in such a case must be obtained by a substantive application to a Div. Ct. or a judge in chambers or from the Ct. of Appeal on appeal from such substantive application.

(2) The Ct. of Appeal has no original jurisdiction in any case to order a stay of execution.

Till an application has been made to the ct. below, we have no jurisdiction either *ex p.* or on an original motion to stay proceedings as in the case of an order *nisi* in a Div. Ct. (**BRETT, L.J.**).—**GODDARD v. THOMPSON** (1878), 47 L. J. Q. B. 382; 38 L. T. 166; 26 W. R. 362, C. A.

**Annotation:—****Refd.** *Morton v. Palmer* (1882), 9 Q. B. D. 89.

**270. ———— R. S. C., Ord. 58, r. 16.]—****CROPPER v. SMITH**, No. 280, *post*.

**271. ———— Appeal entered to court of appeal.]—**The Ct. of Appeal has jurisdiction to hear an application for a stay of execution in a cause in which an appeal has been entered in that ct., although no application for a stay has previously been made to the judge who tried the cause.—**BROWN v. BROOK** (1902), 86 L. T. 373; 18 T. L. R. 383; 46 Sol. Jo. 336, C. A.

**272. Stay derogating from right established by judgment—Verdict for damages vesting property in defendant—Application for stay till plaintiff**

perfects defendant's title.]—The ct. will not interfere to stay execution on a judgment recovered in trover against deft., till pltf. shall do any act, however reasonable, to make deft. a title to the subject matter of the action. They have no jurisdiction to do so.—*BUTTS v. BILKE & HAVELOCK* (1817), 4 Price, 291; 146 E. R. 468.

**273. — Successful defendant's right to costs.]—**An action for infringement of a patent & a cross action under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, for damages for groundless threats of legal proceedings were set down together for trial. At the trial of the first action the judge gave judgment for pltf. & consequently dismissed the cross action. On appeal, the ct. held that deft. had not infringed, & dismissed pltf.'s action, with costs, & remitted the cross action to the judge below for trial. Subsequently to the hearing before the Ct. of Appeal pltf. applied that execution might be stayed until after the hearing of the cross action, so that if deft. was directed to pay pltf. any costs of that action they might be set off against the costs of the first action, payable by pltf. Deft. had been ordered to give security for the costs of the appeal:—*Held*: deft. had a present right to the payment of a sum of money for costs, of which the ct. could not deprive him.

*Semble*: if an application for a stay of taxation of the costs of the first action until after the trial of the cross action had been made when the Ct. of Appeal gave judgment in the first action, it would have been granted.—*AUTOMATIC WEIGHING MACHINE CO. v. COMBINED WEIGHING & ADVERTISING MACHINE CO.* (1889), 58 L. J. Ch. 647; 61 L. T. 536; 37 W. R. 636, C. A.

**274. To prevent abuse of process of court—Jurisdiction inherent in court.]—***CARR v. ROYAL EXCHANGE ASSURANCE CORPN.*, No. 351, *post*.

**275. Extent of jurisdiction of court or judge.]—**

#### PART II. SECT. 15, SUB-SECT. 2.

**275 i. Extent of jurisdiction of court or judge.]—**The Supreme Ct. has no power to stay execution on a judgment of the High Ct. pending an appeal therefrom to the Privy Council.—*MACKINTOSH v. DUNN* (1906), 6 S. R. N. S. W. 451.—*AUS.*

**275 ii. —.]—**The ct. or a judge may at any time interfere, as exercising the powers of the Ct. of Exch. to restrain undue harshness or haste in the execution of a writ issued for the Crown, although what is complained of may be strictly authorised.—*R. v. DESJARDINS CANAL CO.* (1869), 29 U. C. R. 165.—*CAN.*

**275 iii. —.]—***NESTLER v. DOMINION MEAT & CATTLE RANCHING CO.* (1910), 13 W. L. R. 241.—*CAN.*

**275 iv. —.]—***McILWEE & SONS v. FOLEY BROTHERS, WELSH & STEWART* (1917), 24 B. C. R. 1.—*CAN.*

**275 v. —.]—**Pltfs. had recovered judgment against defts. for damages & costs in an action of tort & had issued execution for the amount, defts., in a cross-action, had judgment against pltfs. directing payment of damages to be ascertained upon a reference, & applied for an order staying the execution in the first action until after the completion of the reference in the second action, with a view to a set off:—*Held*: the ct. had no jurisdiction to make such order.—*LEONARD v. WHARTON* (1921), 50 O. L. R. 609; 64 D. L. R. 609.—*CAN.*

**275 vi. —.]—**A decree for arrears of rent is a "decree for money" within Code of Civil Procedure, s. 546, & execution of such decree may therefore be stayed under that sect.—*BANKU BEHARY SANYAL v. SYAMA*

*CHURN BHUTTACHARJEE* (1897), I. L. R. 25 Calc. 322.—*IND.*

**275 vii. —.]—***Re TOBIQUE GYPSUM CO.* (1903), 23 C. L. T. 303; 6 O. L. R. 515; 2 O. W. R. 868.—*CAN.*

**f. Court of Appeal.]—**Where pltfs. were appealing to the Privy Council from a judgment of the Ct. of Appeal dismissing with costs an appeal from the judgment of the Q. B. Div. in favour of defts. with costs, & had given security in \$2,000, as required by s. 2 of R. S. O., 1887, c. 41:—*Held*: if an order for payment out of the High Ct. of money therein, awaiting the result of the litigation, was "execution" within the meaning of sect. 3, it was stayed by the allowance of the security, & required no order; if it was not execution, a judge of the Ct. of Appeal had no jurisdiction to stay proceedings in the ct. below; & it was for the High Ct. to determine whether such an order was "execution," & if not, whether the money should be paid out.—*McMASTER v. RADFORD* (1894), 16 P. R. 20.—*CAN.*

**g. —.]—**The Appellate Ct. has power to stay execution, when an appeal is pending from another ct.—*PASUPATI NATH BOSE v. NANDA LAL BOSE* (1901), I. L. R. 28 Calc. 734.—*IND.*

**h. —.]—**When an appeal has been filed against a decree for money, the Appellate Ct. has jurisdiction to stay the sale of immovable property of the judgment-debtor in execution of that decree, pending the disposal of the appeal.—*TRIBENI SAHU v. BHAGWAT BUX* (1907), I. L. R. 34 Calc. 1037.—*IND.*

**k. Fieri facias acted upon—Before writ of appeal allowed.]—**Where

The only jurisdiction which [the judge] could have would be under R. S. C., Ord. 42, r. 17, which provides that the ct. or a judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit. This is made more clear by R. S. C., Ord. 58, r. 16: An appeal shall not operate as a stay of execution except so far as the ct. appealed from, or any judge thereof, or the Ct. of Appeal may order. The distinction is obvious. Ord. 42, r. 17, applies simply to judgments for a sum of money, while Ord. 58, r. 16, is more extensive, & applies to many kinds of orders & judgments. Under Ord. 42, r. 17, the judge has no jurisdiction to do more than stay execution by *fi. fa.* or *elegit* (*FARWELL, L.J.*).—*BROOK v. EMERSON* (1906), 95 L. T. 821, C. A.

*Annotation*:—*Reid. Re Gentry*, [1910] 1 K. B. 825.

#### SUB-SECT. 3.—APPLICATION FOR STAY.

##### A. To Whom Made.

*See* R. S. C., Ord. 58, rr. 16, 17, &, generally, PRACTICE.

**276. Where action pending—Court to which action attached.]—**A person who is prejudiced by the conduct of a receiver appointed in an action by way of equitable execution, ought not, without leave of the ct., to commence a fresh action to restrain the proceedings of the receiver even though the act complained of was beyond the scope of the receiver's authority, but ought to make an application for such relief as he is entitled to in the action in which the receiver was appointed.

The whole tenor of the Jud. Acts is to require all proceedings as far as possible to be taken in one action & as there was a pending action in the

a *fi. fa.* has been acted upon before the writ of appeal has been allowed, there can be no stay of execution.—*GILMOUR v. HALL & PLATT* (1853), 10 U. C. R. 508.—*CAN.*

**l. On ex parte order.]—**An *ex p.* order was granted staying proceedings on a judgment given in favour of pltf., & on the execution issued thereon, pending an appeal to the full ct.—*MADDEN v. MCINNES* (1892), 24 N. S. R. 293.—*CAN.*

**m. Right of judge—To hear appeal from his own decision—As member of Divisional Court—No jurisdiction to refuse stay.]—**Ontario Judicature Act, R. S. O. 1897, c. 51, s. 70 (2), a judge is disabled from sitting as a member of a Divisional Ct. hearing an appeal from a judgment or order made by himself, & he has, therefore, no jurisdiction, after the setting down of an appeal from his judgment, to make an order that execution shall not be stayed.—*MULLIN v. PROVINCIAL CONSTRUCTION CO.* (1907), 16 O. L. R. 241; 10 O. W. R. 1116; 11 O. W. R. 362.—*CAN.*

**n. County court judge.]—**County Courts Act (B. C.), is wide enough to allow a county ct. judge to stay execution on a county ct. judgment, when the judgment-debtor has a judgment in the Supreme Ct. for a greater amount.—*BUTTERFIELD v. JACKSON*, [1917] 2 W. W. R. 362; 23 B. C. R. 489.—*CAN.*

#### PART II. SECT. 15, SUB-SECT. 3.—A.

**o. Where appeal pending—Court of Appeal.]—**Application for stay of execution of a decree, an appeal from which has been filed, should, under Act VIII. of 1859, s. 338, be made to



*Sect. 15.—Stay of execution: Sub-sect. 3, A., B., C. & D.; sub-sect. 4, A.]*

Q. B. Div., the proper course for pltf. would have been to have made his application in that action (COTTON, L.J.).—SEARLE v. CHOAT (1884), 25 Ch. D. 723; 53 L. J. Ch. 506; 50 L. T. 470; 32 W. R. 397, C. A.

277. Where motion for new trial pending—Divisional court or judge in chambers.]—GODDARD v. THOMPSON, No. 269, ante.

Compare No. 254, ante.

278. — First trial by jury—Judge of trial.]—MONK v. BARTRAM, No. 340, post.

279. Where appeal pending—Court of first instance—Application in respect of costs of dismissed action.]—Where an action has been dismissed with costs, an application to stay proceedings for costs pending an appeal must be made in the first instance to the ct. below & not to the Ct. of Appeal.—OTTO v. LINDFORD (1881), 18 Ch. D. 394; 51 L. J. Ch. 102; 30 W. R. 418, C. A.

Annotations:—Consd. Cropper v. Smith (1883), 24 Ch. D. 305. Mentd. Otto v. Steel, Otto v. Sterne (1886), Griffin's Patent Cases, 179; Ellington v. Clark, Bunnett (1887), 58 L. T. 40; Thomson v. American Braided Wire Co. (1889), 6 R. P. C. 518; Gadd & Mason v. Manchester Corpn. (1892), 67 L. T. 569; Pirrie v. York Street Flax Spinning Co. (1894), 11 R. P. C. 429; Cassel Gold Extracting Co. v. Cyanide Gold Recovery Syndicate (1895), 12 R. P. C. 232; Shrewsbury & Talbot S. T. Cab Co. v. Sterckx (1895), 12 T. L. R. 122; Re Lewis & Stirckler's Patent (1896), 14 R. P. C. 24; Pneumatic Tyre Co. v. Leicester Pneumatic Tyre & Automatic Valve Co. (1899), 16 R. P. C. 50; Taylor & Scott v. Annand & Northern Press & Engineering Co. (1899), 16 R. P. C. 547; True & Variable Electric Lamp Syndicate v. Bryant Trading Syndicate (1908), 25 R. P. C. 461.

280. — — —.]—Ct. of Appeal has, under R. S. C., Ord. 58, r. 16, original jurisdiction to stay execution, though, under r. 17, an application must be made in the first instance to the ct. below. Therefore, where such an application has been refused by the judge below, & is renewed in the Ct. of Appeal, it is not an appeal, but an original motion, & consequently can be made at any time, although 21 days may have elapsed since the refusal below.—CROPPER v. SMITH (1883), 24 Ch. D. 305; 53 L. J. Ch. 170; 49 L. T. 548; 32 W. R. 212, C. A.

281. — Court of Appeal—Resignation of judge of first instance before application made.]—HELMORE v. SMITH (No. 2) (1886), 31 Sol. Jo. 60, C. A.

Annotations:—Mentd. Re Gent, Gent-Davis v. Harris (1892), 40 W. R. 267; Re Evelyn, Ex p. General Public Works & Assets Co., [1894] 2 Q. B. 302; Robb v. Green (1895), 64 L. J. Q. B. 593; R. v. Davies, [1906] 1 K. B. 32; King v. Dopson (1911), 56 Sol. Jo. 51; R. v. Daily Mail, Ex p. Farnsworth (1921), 90 L. J. K. B. 871.

282. — — —.]—BROWN v. BROOK, No. 271, ante.

283. — — — Appeal to House of Lords.]—An application for a stay of execution pending an appeal to the House of Lords from the Ct. of Appeal ought in all cases to be made to the Ct. of Appeal.—HAMILL v. LILLEY (1887), 19 Q. B. D. 83; 56 L. J. Q. B. 337; 56 L. T. 620; 35 W. R. 437; 3 T. L. R. 549, C. A.

Annotation:—Distd. Manks v. Whiteley (1913), 57 Sol. Jo. 391.

Master.]—See No. 264, ante.

284. Where application refused by court of

the Ct. of Appeal, & not to the ct. which passed the order under appeal.—ABBASSEE BEGUM v. MAHARANEE RAJ ROOP KOORER (1877), 1 C. L. R. 368.—IND.

PART II. SECT. 15, SUB-SECT. 3.—B.

287 i. Notice to be given to opponent.]

first instance—Court of Appeal—Whether an appeal from refusal or original motion.]—GODDARD v. THOMPSON, No. 269, ante.

285. — — —.]—A.-G. v. SWANSEA IMPROVEMENTS & TRAMWAYS Co., No. 296, post.

286. — — —.]—CROPPER v. SMITH, No. 280, ante.

In action against company in liquidation.]—See COMPANIES, Vol. X., pp. 971, 972, Nos. 6685–6696.

#### B. How Made.

See R. S. C., Ord. 58, r. 17; Ord. 52, r. 1, & generally, PRACTICE.

287. Notice to be given to opponent.]—An application to set aside a judgment & execution for irregularity will not be granted, with a stay of proceedings, unless notice of the application has been given to pltf.—ROLFE v. BROWN (1835), 1 Hodg. 27.

288. — Otherwise terms imposed—Payment into court of amount of judgment debt.]—The ct. declined to grant *ex p.* an injunction to restrain defts., who had been successful in an action at law against them, from levying execution for the costs, except upon the terms of pltf's. bringing the amount of the costs into ct.—FISHER v. BALDWIN (1853), 1 Eq. Rep. 367; 22 L. J. Ch. 966; 1 W. R. 484, C. A.; previous proceedings, 11 Hare, 352.

289. — — —.]—Notice must be given to the other side of any application to stay execution under a decision that is appealed from.

I do not think such an application can be made *ex p.* . . . Applt. is not entitled to a stay of execution as of right, but it is in the discretion of the ct. to grant it or not as they think fit (GROVE, J.).—PERU REPUBLIC v. WEGUELIN (1876), 24 W. R. 297; 3 Char. Pr. Cas. 461.

Annotation:—Folld. Emma Mining Co. v. Lewis (1879), 48 L. J. Q. B. 504.

290. — — —.]—MACLEAN v. VAUGHAN (1876), 20 Sol. Jo. 723, C. A.

Annotation:—Refd. Cropper v. Smith (1883), 24 Ch. D. 305.

291. — — —.]—Upon an appeal being brought, an original application to the Ct. of Appeal for a stay of execution upon the decision appealed from, is a motion of which notice must be given to the other side & which cannot be made *ex p.*—EMMA SILVER MINING Co. v. LEWIS & SON (1879), 48 L. J. Q. B. 504, C. A.; previous proceedings, 4 C. P. D. 396.

See, also, R. S. C., Ord. 52, r. 6.

292. Must be supported by affidavit—Application to Divisional Court.]—When an application is made to the Div. Ct. for a stay of execution pending an appeal to the Ct. of Appeal, such application should be supported by affidavit.—WELDON v. JOHNSON (1884), 1 T. L. R. 168, C. A.

293. — Showing special circumstances relied on.]—THE ANNOT LYLE, No. 315, post.

294. — — —.]—An application to stay execution under the judgment in an action should, unless it is made the moment after the judgment has been pronounced, be supported by an affidavit showing the special circumstances on which appct. relies.—TUCK v. SOUTHERN COUNTIES DEPOSIT

—On a motion for a stay of execution pending an appeal it is not necessary to give fourteen days' notice. The ordinary notice is sufficient.—HEENAN v. DEWAR (1871), 3 Ch. Ch. 199.—CAN.

293 i. Must be supported by affidavit—Showing special circumstances relied on.]—Where a bill is filed to restrain

the seizure of the goods of A. on an execution against B., on the ground that the goods have a peculiar value which damages would not compensate, there should be distinct & precise allegations of the necessary facts & a general allegation that the damage will be irreparable is not sufficient, on demurrer.—GARTSHORE v. GORE BANK (1867), 13 Gr. 187.—CAN.

BANK (1889), 42 Ch. D. 471; 58 L. J. Ch. 699; 61 L. T. 348; 37 W. R. 769; 5 T. L. R. 719, C. A.  
*Annotations*:—*Mentd.* Thomas v. Searles, [1891] 2 Q. B. 408; Thomas v. Roberts, [1898] 1 Q. B. 657.

295. — Unless made immediately after judgment pronounced.]—TUCK v. SOUTHERN COUNTIES DEPOSIT BANK, No. 294, *ante*.

296. After refusal by court of first instance—Whether necessary to enter appeal—On motion to Court of Appeal.]—An application to the Ct. of Appeal under R. S. C., Ord. 58, rr. 16, 17, to stay proceedings under a judgment pending an appeal to that ct., inasmuch as it cannot be made until after an application has been made to the ct. of first instance, is not an original motion but a motion by way of appeal, though it need not be formally entered as an appeal.—A.-G. v. SWANSEA IMPROVEMENTS & TRAMWAYS CO. (1878), 9 Ch. D. 46; 48 L. J. Ch. 72; 26 W. R. 840, C. A.

*Annotation*:—*Consd.* Cropper v. Smith (1883), 24 Ch. D. 305.

*Compare* Nos. 269, 280, *ante*.

#### C. Time for Making.

*See, generally*, PRACTICE.

297. Immediately after judgment.]—TUCK v. SOUTHERN COUNTIES DEPOSIT BANK, No. 294, *ante*.

298. — On hearing of appeal—Dismissed cross action remitted to judge of first instance.]—AUTOMATIC WEIGHING MACHINE CO. v. COMBINED WEIGHING & ADVERTISING MACHINE CO., No. 273, *ante*.

299. Not till right to issue arises.]—*Re* A DEBTOR, No. 261, *ante*.

300. To court of appeal—After refusal by inferior court.]—CROPPER v. SMITH, No. 280, *ante*.

#### D. Costs of Application.

301. Where appeal pending—To abide result of appeal—Discretion of court.]—The costs of an application to stay the execution of a decree pending an appeal are in the discretion of the ct. The proper rule is that they should ordinarily abide the result of the appeal.—BURDICK v. GARRICK (1870), 5 Ch. App. 453; 39 L. J. Ch. 661; 22 L. T. 502; 18 W. R. 530, L. J.

*Annotations*:—*Expld.* Lamb v. Eames (1870), 23 L. T. 135. *Consd.* Beattie v. Ebury (1873), 28 L. T. 458; Merry v. Nickalls (1873), 42 L. J. Ch. 479. *Refd.* Touche v. Metropolitan Ry. Warehouse Co. (1871), 40 L. J. Ch. 496.

302. — Whether to be paid by applicant.]—There is no inflexible rule that a person applying to stay proceedings under a decree pending an appeal must pay the costs of the application.—SHREWSBURY (EARL) v. TRAPPES (1860), 2 De G. F. & J. 172; 45 E. R. 588, L. J.

*Annotation*:—*Refd.* Burdick v. Garrick (1870), 5 Ch. App. 453.

#### PART II. SECT. 15, SUB-SECT. 3.— D.

302i. Where appeal pending—Whether to be paid by applicant.]—Where applt. who had given the statutory notice of appeal to the Ct. of Appeal, but had not served his reasons, moved to stay execution under R. S. C., 1877, c. 38, ss. 27, 28, the ct. examined the pleadings to ascertain whether the appeal was frivolous, but ordered applt. to pay the costs of the application.—NORVAL v. CANADA SOUTHERN RY. CO. (1879), 7 P. R. 462.—CAN.

p Paid by applicant.]—An application for a stay of execution is an application for an indulgence, & applt. should pay the costs.—ALEXANDER v. WALTERS (1909), 14 B. C. R. 250.—CAN.

q. Taxation of costs.]—A motion to stay execution upon an order of the Dominion Board of Railway Comrs. made a rule of the Supreme Ct. of Ontario, while neither an interlocutory motion in an action nor an ordinary motion upon originating notice, has such analogy to the latter as to justify the taxation of the costs of it according to the provisions of the tariff of fees applicable to motion upon originating notices.—*Re* CITY OF TORONTO & TORONTO RY. CO. (1918), 42 O. L. R. 413; 14 O. W. N. 44.—CAN.

#### PART II. SECT. 15, SUB-SECT. 4.— A.

309i. In discretion of court.]—Under R. S. C., Ord. 58, r. 16, the granting of a stay of execution pending appeal to be taken, is a matter of each particular

303. — — — Appeal to House of Lords.]—The costs of an application to stay the execution of a decree pending an appeal to the House of Lords are to be paid by applt.—TOPHAM (LADY) v. PORTLAND (DUKE) (1863), 1 De. G. J. & Sm. 603; 32 L. J. Ch. 606; 8 L. T. 679; 11 W. R. 813; 46 E. R. 239, L. J.

*Annotations*:—*Consd.* Burdick v. Garrick (1870), 5 Ch. App. 453. *Refd.* Galloway v. London Corp'n. (1865), 11 Jur. N. S. 537.

304. — — —.]—MERRY v. NICKALLS, No. 323, *post*.

305. — — —.]—BEATTIE v. EBURY (LORD) (1873), 28 L. T. 458, L. J.

*Annotation*:—*Mentd.* Boswell v. Coaks (1887), 36 Ch. D. 444.

306. — — —.]—The costs of an application to stay proceedings pending an appeal must be paid by applt.—COOPER v. COOPER (1876), 2 Ch. D. 492; 45 L. J. Ch. 667; 24 W. R. 628; 3 Char. Pr. Cas. 466, C. A.

*Annotations*:—*Expld.* Morgan v. Elford (1876), 25 W. R. 136. *Consd.* Adair v. Young (1879), 40 L. T. 598. *Refd.* A.-G. v. Swansea Improvements & Tram. Co. (1878), 48 L. J. Ch. 72; Grant v. Banque Franco-Egyptienne (1878), 38 L. T. 622; Cropper v. Smith (1883), 24 Ch. D. 305.

307. — — —.]—NATIVE GUANO CO. v. SEWAGE MANURE CO. (1888), 4 T. L. R. 438, C. A.

308. Where appeal dismissed—Costs of application caused by appeal.]—Where a contributory of a co. was ordered to pay a certain sum of money to the liquidator, the contributory took out a summons to stay execution pending an appeal, & stay of execution was ordered upon the terms of his paying the money & £50 for costs into ct., no order being made as to the costs of the summons to stay. The appeal was dismissed with costs, but no reference was made as to the costs of the summons to stay, & the taxing master disallowed the costs of that summons. On summons to review the taxation:—*Held*: the contributory was ordered to pay the £50 into ct. to satisfy such costs as the court should think he ought to pay, & the costs of the summons to stay being caused by the appeal must be paid out of the £50 in ct., & the ct. had jurisdiction at any time to make such order.—*Re* BRIGHTON LIVERY STABLES CO. (1885), 52 L. T. 745.

#### SUB-SECT. 4.—WHEN GRANTED.

##### A. In General—Discretion of Court.

309. In discretion of court.]—PERU REPUBLIC v. WEGUELIN, No. 289, *ante*.

310. — — —.]—R. S. C., Ord. 58, r. 16, gives the ct. against whose decision an appeal is pending a discretion to refuse applt. a stay of proceedings,

case.—REYNOLDS v. MCPHAIL (1907), 13 B. C. R. 159.—CAN.

309ii. — — —.]—The power to stay execution pending an appeal is purely discretionary, & may be exercised in a proper case though the application is not made on affidavit. Execution stayed pending an appeal by a railway co., defts., from an order refusing a new trial, on the terms of their lodging in ct. the amount of the verdict & a sum to cover costs, although the application was not grounded upon affidavit stating special circumstances.—M'CARTHY v. CORK STEAM PACKET CO. (1885), 16 L. R. Ir. 194.—IR.

309iii. — — —.]—In an action for rent the ct. gave judgment for pltf. but directed a stay of execution in consideration of the poverty of deft.—FLAHAVAN v. GAMBLE (1817), 1 Nfld. L. R. 36.—NFLD.



**Sect. 15.—Stay of execution: Sub-sect. 4, A. & B.**  
(a) i.

& no practice binding on the cts. has, or can be, established to the effect that the ct. will only refuse a stay of proceedings as to costs upon the terms that resp.'s solr. shall give an undertaking to repay, in the event of the appeal being successful, the costs paid to him by applt.—*A.-G. v. EMERSON* (1889), 24 Q. B. D. 56; 59 L. J. Q. B. 192; 62 L. T. 21; 38 W. R. 102, C. A.

*Annotation:—Folld. Castner Kellner Alkali Co. v. Commercial Development Corpn.* (1899), 68 L. J. Ch. 402.

**311. — Circumstances of each case.]—THE RATATA**, No. 327, *post*.

**312. —.]—Pltf. succeeded in an action in which nominal damages & an injunction were claimed on the ground of an alleged nuisance by noise. At the trial defts. did not ask for a stay, but subsequently objected to pay the taxed costs except on the personal undertaking of pltf.'s solrs. This undertaking the solrs. declined to give. Application for a stay was then made to the judge, but he refused to make an order:—*Held*: the matter was one in the absolute discretion of the ct., & no special circumstances were shown, which would *prima facie* entitle resps. to the order they sought.—*BECKER v. EARL'S COURT, LTD.* (1911), 56 Sol. Jo. 206, C. A.**

**313. — Matters which must not influence judge—Opinion of jury as to costs.]—By R. S. C., Ord. 58, r. 16, "An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the ct. appealed from, or any judge thereof, or the Ct. of Appeal, may order, & no intermediate act or proceeding shall be invalidated, except so far as the ct. appealed from may direct":—*Held*: where in a libel action the jury find a verdict for pltf. for a farthing, & at the conclusion of the trial the judge refuses to deprive pltf. of costs, & on a subsequent day it appears from communications which have taken place with the jurymen since the trial that it was the opinion of the majority of the jury that pltf. should be deprived of costs, the judge is not entitled, in deciding whether he will grant a stay of execution pending an appeal, to take into consideration the opinion of the jury on the question of costs.—*WOOTTON v. SIEVIER* (1913), 30 T. L. R. 165.**

*See, further, Sub-sect. 4, B., post.*

**B. In Particular Cases.**

**(a) Where Further Proceedings Pending.**

**i. Appeals.**

Stay of proceedings generally, *see PRACTICE*.

*See R. S. C., Ord. 58, r. 16.*

**314. General rule—Special circumstances must be shown—Appeal to House of Lords.]—Except under special circumstances the ct. will not stay the proceedings under a decree pending an appeal to the House of Lords.—*THORPE v. MATTINGLEY* (1838), 3 Y. & C. Ex. 254; 8 L. J. Ex. Eq. 9; 160 E. R. 696.**

**315. —.]—When an appeal is brought from the Ct. of Appeal to the House of Lords in an Admlty. action, in which bail has been given by the parties, an application by applt. to stay execution pending the appeal, will not be granted,**

**unless special circumstances are shown by affidavit.—*THE ANNOT LYLE* (1886), 11 P. D. 114; 55 L. T. 576; 34 W. R. 647; 6 Asp. M. L. O. 50; *sub nom.* *NENUPHAR (OWNERS) v. ANNOT LYLE (OWNERS)*, 55 L. J. P. 62, C. A.**

*Annotations:—Reid. The Ratata*, [1897] P. 118. *Mentd. Re Ship Albano* (1892), 8 T. L. R. 425; *The Merchant Prince*, [1892] P. 179; *The Schwan, The Albano*, [1892] P. 419.

**316. —.]—We were also asked to stay execution unless deft.'s solr. gave his personal undertaking to repay the costs in the event of our decision being reversed in the House of Lords. But ever since *A.-G. v. Emerson*, No. 310, *ante*, this ct. has said that it will not make any such order without some reason to justify it. There is none in this case (*LINDLEY, M.R.*).—*CASTNER KELLNER ALKALI Co. v. COMMERCIAL DEVELOPMENT CORPN.* (1899), 68 L. J. Ch. 402; 80 L. T. 476; 47 W. R. 534; 43 Sol. Jo. 436, C. A.; *on appeal* (1900), 17 R. P. C. 593, H. L.**

*Annotations:—Mentd. Osmond v. Mutual Cycle & Manufacturing Supply Co.* (1899), 68 L. J. Q. B. 1027; *Kelvin v. Whyte, Thompson* (1907), 25 R. P. C. 177.

**317. — Irreparable injury resulting from execution.]—The ct. will not stay the execution of a decree, pending an appeal to the House of Lords, unless it can be satisfactorily proved that its being issued will create irreparable injury.—*A.-G. v. MURDOCK* (1852), as reported in 21 L. J. Ch. 694; 19 L. T. O. S. 173, L. J.J.**

*Annotations:—Mentd. A.-G. v. Clapham* (1853), 10 Hare, 540; *A.-G. v. Anderson* (1888), 57 L. J. Ch. 543.

**318. Grounds for granting or refusing—Action on foreign judgment—Appeal pending in foreign court.]—Where an action was brought in this country on a foreign judgment, & pltf. obtained a verdict & judgment, the ct. refused to prevent pltf. charging deft. in execution upon the latter judgment, though it was sworn that an appeal was still pending in the foreign ct. upon the original judgment, it not appearing that the appeal had been proceeded with.—*ALIVON v. FURNIVAL* (1834), 1 Cr. M. & R. 277; 3 Dowl. 202; 4 Tyr. 751; 3 L. J. Ex. 241; 149 E. R. 1084.**

*Annotations:—Reid. Re Henderson, Nouvion v. Freeman* (1887), 35 Ch. D. 704. *Mentd. R. v. Douglas* (1845), 1 Car. & Kir. 870; *Boyle v. Wiseman* (1855), 10 Exch. 647; *In the Goods of Holl* (1858), 1 Sw. & Tr. 136; *Ingate v. Austrian Lloyd's Co.* (1858), 6 W. R. 659; *Didlsheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

**319. — Appeal nugatory if successful.]—Where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the ct. in ordinary cases to make such order for staying proceedings under the judgment appealed from, as will prevent the appeal, if successful, from being nugatory. But the ct. will not interfere if the appeal appears not to be *bonâ fide*, or there are other sufficient exceptional circumstances. When the ct. makes an order to stay proceedings pending an appeal, it will put applts. on terms to speed the appeal, & it will not interfere with the execution of the order of the ct. below respecting costs, except to put the solr. who is to receive the costs upon an undertaking to refund them if required to do so.—*WILSON v. CHURCH* (No. 2) (1879), 12 Ch. D. 454; 41 L. T. 296; 28 W. R. 284, C. A.**

*Annotations:—Reid. Bradford v. Young, Re Falconar's Trusts* (1884), 28 Ch. D. 18; *The Ratata*, [1897] P. 118.

**320. —.]—The Ct. of Appeal will not grant a stay of execution pending appeal, unless**

**PART II. SECT. 15, SUB-SECT. 4.—**  
**B. (a) i.**

**315i. General rule—Special circumstances must be shown.]—Pltf. signed judgment & received gold dust out of ct. & distributed same. Then deft. served notice of appeal. Application**

**for return of value of gold dust refused. Proceedings on execution stayed in special circumstances.—*OLSEN v. DESJARLAIS* (1909), 12 W. L. R. 467.—CAN.**

**315ii. —.]—Upon appeal to**

**the Ct. of Appeal, unless special circumstances are shown, a stay of execution upon the judgment below will not be granted.—*WILLIAMSON v. GRIGOR* (1912), 22 W. L. R. 29; 4 D. L. R. 53; 2 W. W. R. 898.—CAN.**

it can be shown that irreparable mischief may be done by refusing a stay.—*CHESTER v. POWELL* (1885), 1 T. L. R. 390, C. A.

**321. — Payment into court—Whether granted as of course.]**—Where a decree has been made for the payment of money, it is the general rule to stay proceedings pending an appeal, when the party against whom the decree is made pays the money into ct., & the appeal is not frivolous.

A decree was made for payment to two pltfs. of the sum of £2,000. One of pltfs. was abroad. Defts. appealed from the decree, & stated that counsel had advised that the appeal would succeed :—*Held* : it was a matter of course to stay proceedings upon defts. paying the money into ct.—*TOUCHE v. METROPOLITAN RAILWAY WAREHOUSE Co.* (1871), 40 L. J. Ch. 496.

**322. — — — — —.]**—*BARKER v. LAVERY*, No. 331, *post*.

**323. — — — — — Or to party entitled—Subject to security for repayment.]**—(1) Proceedings on an order to pay money & costs stayed pending an appeal, on payment of the money by deft. to pltf., pltf. giving security for repayment, or if pltf. preferred it on payment into ct., the costs to be paid to pltf.'s solr. on his undertaking to repay them if directed.

(2) Applt., in such a case, must pay the costs of the application.—*MERRY v. NICKALLS* (1873), 8 Ch. App. 205 ; 42 L. J. Ch. 479 ; 28 L. T. 296 ; 21 W. R. 305, L. C. & L. JJ.

*Annotations* :—*As to* (2) *Folld.* *Cooper v. Cooper* (1876), 2 Ch. D. 492 ; *Morgan v. Elford* (1876), 4 Ch. D. 352. *Refd.* *Adair v. Young* (1879), 11 Ch. D. 136.

**324. — Undertaking to refund.]**—A party to whom costs have been ordered to be paid, will not be restrained from enforcing the order pending an appeal to the House of Lords, if his solrs. undertake to refund if the order should be reversed.—*MORGAN v. ELFORD* (1876), 4 Ch. D. 352 ; 25 W. R. 136, C. A.

*Annotations* :—*Appld.* *Grant v. Banque Franco-Egyptienne* (1878), 3 C. P. D. 202. *Mentd.* *Platt v. Rowe* (Trading as Chapman & Rowe) & *Mitchell* (1909), 26 T. L. R. 49.

**325. — — — — —.]**—The recovery of costs payable under an order will not be stayed pending an appeal to the House of Lords, if the solrs. to whom they are payable give their personal undertaking to refund in case of the order being reversed.

Payment of costs will not be stayed on the ground that another proceeding in the same action is pending under which costs may become payable to appct.—*GRANT v. BANQUE FRANCO-EGYPTIENNE* (1878), 3 C. P. D. 202 ; 47 L. J. Ch. 455 ; 38 L. T. 622 ; 26 W. R. 669, C. A.

**326. — — — — —.]**—*SANTA CLARA (OWNERS) v. LONDON & NORTH-WESTERN RY. Co.* (1886), 2 T. L. R. 312, C. A.

**327. — — — — —.]**—Pltf., a foreigner residing

**321 i. Grounds for granting or refusing—Payment into court—Whether granted as of course.]**—A party appealing against a decree, which directs him to pay money, may obtain stay of execution of the decree, so far as it directs payment, on his lodging the amount in ct., unless the other party gives security for the repayment of the money in the event of the decree being reversed. If such security be given by the successful party, then stay of execution should not be granted.—*DHUNJIBHOY COWASJI UMRIGAR v. LISBOA* (1858), 1 L. R. 13 Bom. 241.—*IND.*

*Security for costs*  
*Whether granted as of course—Possibility of injustice to respondent by stay.]*—*pon an appeal to the Ct. of Appeal*, J.—VOL. XXI.

upon security for costs being allowed in general the proceedings ought to be stayed ; but if it is made to appear in any case that resp. may suffer injustice by his execution being stayed, then the stay may be removed, upon terms which may be just to both parties.—*WINTERMUTE v. BROTHERHOOD OF RAILWAY TRAINMEN* (1899), 19 P. R. 6.—*CAN.*

s. — *Perfecting of security for appeal—Whether granted as of course.]*—A pltf. is justified under Queen's Bench Act, 1895, r. 683, in issuing executions & certificates of judgment immediately on judgment being entered notwithstanding deft. has given notice of appeal to the Supreme Ct., & although, upon the perfecting of the

abroad, on instituting his action deposited £350 by way of security. On judgment being given for defts., £308 13s. 10d. of this sum was paid over to defts. by way of costs & the balance returned to pltf., who, on his appeal being successful, claimed the return of the costs :—*Held* : in the circumstances, a stay would be granted unless pltf.'s solrs. gave an undertaking to refund any costs in the event of defts.' appeal to the House of Lords being successful.

The authorities cited do not affect the question, as it is a pure matter of discretion depending on the particular circumstances of each case (*ESHER, M.R.*).—*THE RATATA*, [1897] P. 118 ; 66 L. J. P. 39 ; 76 L. T. 224 ; 8 Asp. M. L. C. 236, C. A. ; *on appeal, sub nom. PRESTON CORPN. v. BIORNSTAD, THE RATATA*, [1898] A. C. 513, H. L.

*Annotations* :—*Mentd.* *Lohne, etc. (Owners of Barque Ydun) & Skibs Assee. Forening Protector v. Preston Corpn., The Ydun* (1899), 81 L. T. 10 ; *The Maréchal Suchet*, [1911] P. 1 ; *The West Cock*, [1911] P. 208.

**328. — Protection of fund in court.]**—A decree was made in three suits for the administration of the personal estate of an intestate, directing the usual inquiry as to her next of kin. A certificate was made finding five persons of the names of F., who were resident abroad, to be the next of kin, & an order was made for distribution of the fund in ct. among them. S., who had not been a party to the proceedings, applied by motion to stay the distribution of the fund, alleging herself to be next of kin. The Vice-Chancellor suspended the giving out of the order, & directed his chief clerk to inquire whether S. had made out a *prima facie* case, & the chief clerk finding that she had not, the Vice-Chancellor directed the order to be given out without prejudice to any independent proceeding by S. Four of the five shares were at once transferred to four of the persons found entitled ; the fifth remained in ct. Two of the shares which had been transferred were sold out, & the proceeds received by the vendors. S. then commenced an action, & obtained in it an order granting an injunction to restrain any dealing with the three shares which had not been sold, & directing an inquiry who were the next of kin, & this order was subsequently directed to be taken as made in the three suits as well as in the action. The chief clerk again found the F. family to be the next of kin. The action & a summons to vary the certificate were heard before the Vice-Chancellor, who dismissed the summons & the action, but continued the injunction in the three causes until further order. S. appealed, & the Ct. of Appeal affirmed the decision of the Vice-Chancellor dismissing her bill, but S. being about to appeal to the House of Lords :—*Held* : as, if S. ultimately succeeded in the House of Lords, her success would be useless unless the fund was protected in the meantime, the injunction ought to

security for the appeal, an order has been made setting aside the executions, pltf. is entitled, after dismissal of the appeal, to the costs of the executions & certificates.—*DAY v. RUTLEDGE* (1899), 12 Man. L. R. 451.—*CAN.*

**324 i. — Undertaking to refund.]**—On an application for a stay of proceedings on a verdict pending an appeal, the stay was refused except on terms of payment of the amount of the verdict to the successful party & the taxed costs to his solr., the former giving security for repayment in case of the appeal being successful, or consenting that the amount be paid into ct., & the latter giving an undertaking to repay the costs if so ordered by the Appeal Ct.—*PORTER v. O'CONNELL* (1915), 43 N. B. R. 611.—*CAN.*



*Sect. 15.—Stay of execution: Sub-sect. 4, B. (a) i. & ii.]*

be continued pending the appeal.—*POLINI v. GRAY, STURIA v. FRECCIA* (1879), 12 Ch. D. 438; 41 L. T. 173; 28 W. R. 360, C. A.

**329.** ———.]—An order was made by the Ct. of Appeal directing a sum of Consols in ct. to be sold & the proceeds paid to B. Y. appealed to the House of Lords & after sale but before payment out applied to stay proceedings pending the appeal, asking to have the proceeds of the sale of the funds re-invested, & retained in ct.:—*Held*: as a condition of obtaining the order, Y. must undertake that in case his appeal was unsuccessful, he would make good the difference between the income actually produced by the fund & interest at £4 per cent. *per annum*, & would also pay the costs of the sale & reinvestment.—*BREWER v. YORKE, YORKE v. BREWER* (1882), 20 Ch. D. 669; 31 W. R. 109, C. A.

*Annotation*:—*Refd. Bradford v. Young* (1884), 51 L. T. 550.

**330.** ———.]—In the absence of special circumstances it is not the practice of the ct. to retain in ct. pending an appeal a fund which has been ordered to be paid out, because there is an appeal from the order.

An order directing the payment of a fund out of ct. to pltf. having been made just before the commencement of the Long Vacation, & an appeal having been presented, a suspension of the payment out was granted over the Long Vacation, in order to enable applt. to apply to the Ct. of Appeal.

On appeal, it being shown that pltf. had been abroad for two years, & that appct. could not discover his address:—*Held*: payment out ought to be stayed if appct. would give security to pay to pltf. interest at £4 per cent. on the present value of the funds in ct., & to make good to pltf., if the appeal was unsuccessful, the difference between the highest market price of the investments at any time before the hearing of the appeal & their market price on the day of the hearing of the appeal.—*BRADFORD v. YOUNG, Re FALCONAR'S*

**331 i.** ———.]—*Inability to repay amount levied.*—The only ground for a stay of execution pending appeal, is an affidavit showing that, if the damages & costs are paid, there is no reasonable probability of getting them back, even if the appeal succeeds.—*ATKINSON v. CANADIAN PACIFIC RY. CO.* (1915), 32 W. L. R. 246; 11 W. W. R. 100, 600; 25 D. L. R. 48, 769; 8 Sask. L. R. 179.—*CAN.*

**331 ii.** ———.]—A stay of execution pending appeal is not granted as a matter of course, but only on special grounds. There should be affidavit evidence from one who knows the facts deposed to or based on information from one who knows. *Semble*: it should be shown that the other party would be unable to repay the amount levied by execution if the appeal were unsuccessful.—*CLARKE v. CANADIAN NATIONAL RY. CO.*, [1922] 2 W. W. R. 1023.—*CAN.*

**t.** ———.]—*Where parties understand case will be appealed—Whether formal leave necessary.*—The ct. refused to rescind the stay of proceedings on the execution, although no notice of the grounds of appeal had been served or formal leave to appeal asked, all parties having understood that the case would be appealed.—*GRANT v. GREAT WESTERN RY. CO.* (1859), 8 C. P. 348.—*CAN.*

**a.** ———.]—*Necessity for affidavits by appellant.*—Dcft. applied to the trial judge for a stay of execution pending an appeal to the Ct. of Appeal from

the judgment at the trial in favour of pltf.; but, it appearing that the execution had been satisfied by payment to the sheriff, the application was refused. If the execution could be stayed, dcft. should come into ct. with all necessary affidavits to establish his position; an adjournment would not be granted to enable him to procure affidavits.—*BARNUM v. BECKWITH* (1912), 22 W. L. R. 761; 17 B. C. R. 496; 7 D. L. R. 931; 3 W. W. R. 441.—*CAN.*

**b.** ———.]—*Further litigation arising from execution.*—As many complications, probably resulting in further litigation, were likely to arise if the decree-holder were allowed to proceed with the execution sale, & no practical injury to any one would be caused by restraining her from so doing until the decision of the appeal, a temporary injunction should be granted subject to security being given by applt.—*KIRPA DAYAL v. RANI KISHORI* (1887), 1 L. R. 10 All. 80.—*IND.*

**c.** ———.]—*Mere possibility of success of appeal—Whether sufficient.*—A. brought a suit & obtained a decree against B. on a mtge. bond in the ct. of a subordinate judge, which decree was confirmed by the High Ct. on appeal. A. then applied for execution. In the execution proceedings the sons of B. intervened claiming a portion of the properties attached; this claim was dismissed, & the sons of B. brought a regular suit before the same subordinate judge to have their

TRUSTS (1884), 28 Ch. D. 18; 54 L. J. Ch. 368; 51 L. T. 550; 33 W. R. 159, C. A.

*See, further, PRACTICE.*

**331.** ———.]—*Inability to repay amount levied.*—The ct. will not stay execution for costs, pending an appeal to the House of Lords, upon payment into ct. of the amount, without the inability of resp. to repay the amount or other special circumstances being shown.—*BARKER v. LAVERY* (1885), 14 Q. B. D. 769; 54 L. J. Q. B. 241; 33 W. R. 770, C. A.

*Annotations*:—*Apld. The Annot Lyle* (1886), 11 P. D. 114. *Follid. Atkins v. G. W. Ry.* (1886), 2 T. L. R. 400.

**332.** ———.]—Where an application was made to stay execution of a judgment pending an appeal to the House of Lords on the ground that if certain moneys were paid to a party to the action under the terms of the judgment, & the appeal were successful, it was probable that the money would not be repaid:—*Held*: the grounds were not sufficient to induce the ct. to grant the application.—*Re BOWER (DECEASED), AIREY v. BOWER* (1886), 2 T. L. R. 291, C. A.

**333.** ———.]—*Appeal contemplated only—Application with view to gaining time.*—An application to stay execution will not be granted by the Ct. of Appeal in order to give a party who is dissatisfied with the amount of damages assessed by a jury, an opportunity to decide whether he will appeal or not to the House of Lords.

Defts. have neither presented nor decided to present an appeal to the House of Lords, & we are asked to grant a stay of execution, in order to give them an opportunity to decide whether they will do so or not. I have never heard of such an application except where an appeal has been presented, or where the House of Lords is not sitting, & then appct. always undertakes to present it. This is an entirely new application, & I say emphatically it is one which ought not to be granted (*JESSEL, M.R.*).—*WEBBER v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1881), 51 L. J. Q. B. 154, C. A.

**334.** ———.]—*Allegation of prejudice at trial.*—In support of an application for a stay of execution

rights to the property declared, & obtained an interim injunction restraining A. from executing his decree pending the decision of their suit. This suit was dismissed, & the sons of B. appealed to the High Ct. A. again applied for execution of his mtge. decree, whereupon the sons of B. applied for a further injunction restraining A. from executing his decree pending their appeal to the High Ct.; this application was granted:—*Held*: the subordinate judge had no right to restrain the decree-holder from executing his decree merely on the possibility of the Appellate Ct. reversing his decision.—*GOSSAIN MONEY PUREE v. GURU PERSHAD SINGH* (1884), 1 L. R. 11 Calc. 146.—*IND.*

**d.** ———.]—*Substantial loss resulting from execution.*—In order to obtain a stay of execution of a decree directing the payment of money, appct. must satisfy the ct. on affidavit that substantial loss may result to him unless execution is stayed.—*GAIKWAR SIKAR v. GHANDI* (1899), 1 L. R. 25 Bom. 243.—*IND.*

**e.** ———.]—*Danger of property being wrongfully sold.*—In execution of a simple money decree against M., the decree-holder, R. attached certain property as belonging to his judgment-debtor. To this attachment C. objected, & her objection was sustained. The decree-holder thereupon brought a suit, as provided by Code of Civil Procedure, s. 283, against the judgment-

pending appeal, it was alleged that a great deal of prejudice had been imported into the case at the trial, & that there were the strongest grounds for the appeal:—*Held*: the grounds were not sufficient to grant the application.—*ATKINS v. GREAT WESTERN RY. CO.* (1886), 2 T. L. R. 400, C. A.

**335. — Ball given in Admiralty action.]—***THE ANNOT LYLE*, No. 315, *ante*.

**336. — Non-compliance with order of court—Security for costs of appeal.]—***Re CORPN. OF BRITISH INVESTORS, LTD.* (1897), 41 Sol. Jo. 384, C. A.

**When terms will be imposed.]—***See* Sub-sect. 5, *post*.

## ii. Other Proceedings.

**337. Sufficiency of proceedings as grounds for stay—Trial of opponent's witnesses for perjury in the action.]—**The ct. refused to stay execution after verdict & judgment, which was affirmed on error, until the trial of an indictment for perjury against two of pltf.'s witnesses in the action, & the rule *nisi* having been obtained upon deft.'s own affidavit alone, they discharged it with costs.—*WARWICK v. BRUCE* (1815), 4 M. & S. 140; 105 E. R. 787.

*Annotations:—Mentd.* *Thurtell v. Beaumont* (1823), 1 Bing. 339; *Maclean v. Maclean* (1829), 2 Hag. Ecc. 601; *Kenrick v. Kenrick* (1831), 4 Hag. Ecc. 114.

**338. — New trial—Stay as to costs recovered in different action between same parties.]—**Costs recovered in one action, cannot be set off against costs of the other party in another action, on which he has a verdict, but on which a new trial is pending. *Semble*: execution for the costs actually recovered, may be suspended for a short time, till the rule in the other action is determined.—*MASTERMAN v. MALIN* (1831), 7 Bing. 435; 5 Moo. & P. 325; 9 L. J. O. S. C. P. 171; 131 E. R. 168.

*Annotation:—Mentd.* *Alliance Bank v. Holford* (1864), 16 C. B. N. S. 460.

**339. — Administration action.]—**To an action by a creditor to recover a debt due upon bond against the heir-at-law of an intestate, deft. pleaded that he had no lands by descent other than those mentioned in his plea, to which pltf. replied, that deft. had other lands, whereupon issue was joined. Three weeks previously to the time fixed for the trial of the action, a decree in a creditor's suit for the administration of the intestate's estate was obtained, & on the same day, notice of the decree was served upon pltf.'s solr., who refused to stay the proceedings in the action. A few days before the trial took place, deft. moved, upon notice, for an injunction to stay the trial, which motion was refused. Upon appeal:—*Held*: the injunction ought to have been granted. In the meantime, the trial having been had, & a verdict given for pltf., injunction granted to stay execution,

debtor & C., & in this suit obtained a decree from the ct. of first instance. C. appealed to the High Ct. & pending the appeal, applied for an injunction against R. under sect. 492 of the Code:—*Held*: such an injunction could not under the circumstances be granted, inasmuch as it was impossible to say that the attached property was in danger of being "wrongfully" sold in execution of a decree within the meaning of sect. 492.—*Re CHANDO BIBI* (1904), 1 L. R. 26 All. 311.—*IND.*

## PART II. SECT. 15, SUB-SECT. 4.—B. (a) ii.

**1. Sufficiency of proceedings as grounds for stay—New trial.]—**Pltfs.

having been ordered by the Judicial Committee to pay the costs of defts.' appeal to that tribunal:—*Held*: they were not entitled to a stay of execution for such costs in the ct. below, the High Ct., with a view to a set-off of other costs or of damages to be recovered upon a new trial ordered by the Judicial Committee.—*METALLIC ROOFING CO. v. JOSE, C. R.* [1909] A. C. 1; 12 O. W. R. 670; 17 O. L. R. 237.—*CAN.*

**g. — — —.] —***FAWCETT v. CANADIAN PACIFIC RY. CO.* (1914), 26 O. W. R. 562; 6 O. W. N. 634; 17 Can. Ry. Cas. 313.—*CAN.*

**h. — Trial of counterclaim.]—**In an action for rent pltf. obtained summary judgment for \$800, but deft.,

upon payment of pltf.'s costs up to the time when he had notice of the decree.—*ROUSE v. JONES* (1844), 1 Ph. 462; 4 L. T. O. S. 129A; 41 E. R. 708; *sub nom.* *ROOSE v. JONES*, 14 L. J. Ch. 4; 8 Jur. 1035, L. C.

**340. — Motion for new trial.]—**The Ct. of Appeal, following the former practice of the Div. Ct., will not grant a stay of execution pending an application for a new trial except under special circumstances; & the mere allegation either that there has been a misdirection, or that there was no evidence to go to the jury, is not to be considered as a special circumstance.—*MONK v. BARTRAM*, [1891] 1 Q. B. 346; 60 L. J. Q. B. 267; 64 L. T. 45; 39 W. R. 310; 7 T. L. R. 227, C. A.

**341. — Mere cross demand.]—**The ct. will not restrain proceedings in an action at law to recover damages for breach of a contract, until an account of the mercantile dealings & transactions had between the parties shall have been taken in a suit in equity, instituted by defts. at law, & the result of such account shall have been ascertained.

The mere existence of a cross demand, on the part of pltfs. against deft., is not a sufficient ground to restrain deft. in equity from taking out execution on a judgment recovered by him in an action for damages against pltfs. in equity, until after an account shall have been taken in equity between the parties.

Pltfs. in equity, in such a case, must, for the purpose of the injunction sought by them, establish from admissions contained in the answer of deft., or from documents produced by him, the case made by their bill.—*RAWSON v. SAMUEL* (1841), Cr. & Ph. 161; 10 L. J. Ch. 214; 41 E. R. 451, L. C.

*Annotations:—Consd.* *Fisher v. Baldwin* (1853), 11 Hare, 352. *Refd.* *Best v. Hill* (1872), L. R. 8 C. P. 10; *White v. Witt* (1876), 24 W. R. 727. *Mentd.* *Dodd v. Lydall*, *Lydall v. Dodd* (1842), 1 Hare, 333; *Gordon v. Pym* (1843), 3 Hare, 223; *Bury v. Allen* (1845), 1 Coll. 589; *S. E. Ry. v. Brogden* (1850), 3 Mac. & G. 8; *Harvey v. Palmer* (1851), 4 De G. & Sm. 425; *Gibson v. Goldsmid* (1854), 3 Eq. Rep. 106; *Stimson v. Hall* (1857), 1 H. & N. 831; *Agra & Masterman's Bank v. Hoffmann* (1864), 5 New Rep. 214; *Watson v. Mid Wales Ry.* (1867), L. R. 2 C. P. 593; *Middleton v. Pollock, Ex p. Nugee* (1875), L. R. 20 Eq. 29; *Johnson v. Lyttle's Iron Agency* (1877), 5 Ch. D. 687; *Re Milan Tramways, Ex p. Theys* (1884), 25 Ch. D. 587.

**342. — Rule nisi to reduce damages.]—**Where a rule *nisi* for reducing the damages is granted, execution should be stayed only in respect of the amount mentioned in the rule.—*BATE v. PANE* (1849), as reported in 13 Jur. 609.

**343. — Intention to move against verdict.]—**Where there appears to be a *bona fide* intention to dispute a verdict at the assizes, & to move to set it aside, the judge will stay the execution on bringing the debt or damages into ct.—*BUCKMASTER v. MEIKLEJOHN* (1853), 20 L. T. O. S. 316; *subsequent proceedings*, 8 Exch. 634.

**344. — — —.] —**The question of the

asserting a counterclaim for \$2,000 for damages for injury to goods on the demised premises caused by non-repair, asked to have execution upon the judgment stayed pending the trial of the counterclaim:—*Held*: the stay should in the circumstances of the case, be granted. The counterclaim was so far plausible that it was not unreasonably possible for it to succeed if brought to trial.—*WELLS v. KNOTT* (1910), 15 W. L. R. 285.—*CAN.*

**k. — Suit pending between same parties—Stay as to costs in former suit.]—**Pltf. instituted a suit against deft. for recovery of money & other reliefs, which was ultimately dismissed in appeal by the High Ct., & he was ordered to pay deft. £1,000 as costs of



**Sect. 15.—Stay of execution: Sub-sect. 4, B. (a) ii**

sufficiency of an apology being eminently one for the jury, execution will not be stayed, in the event of a verdict for debt. upon an application showing that pltf. intends to move to set aside the verdict as against the weight of evidence.—**RISK ALLAH (BEY) v. JOHNSTONE** (1868), 18 L. T. 620.

**345. — As to costs—Other proceeding in same action.]—GRANT v. BANQUE FRANCO-EGYPTIENNE**, No. 325, *ante*.

**Terms on which granted.]—See Sub-sect. 4, C., post.**

**(b) Matters arising after Judgment.**

**Facts arising too late to be pleaded.]—See, now, R. S. C., Ord. 42, r. 27.**

**346. Arrangement between parties.]—The ct. will stay proceedings if execution be taken out contrary to agreement.—VEAL v. WARNER** (1669), as reported in 1 Mod. Rep. 20; 86 E. R. 699.

**347. — Rendering execution inequitable.]—ANON.** (1875), 1 Char. Cham. Cas. 6; Bitt. Prac. 36.

**(c) Death, Bankruptcy, Winding-up.**

**Death of party—Whether ground for stay against executor or administrator.]—See EXECUTORS.**

**Bankruptcy or insolvency of party.]—See BANKRUPTCY**, Vol. IV., pp. 43, 44, Nos. 373, 374; p. 360, No. 3358. Vol. V., pp. 815 *et seq.*, Nos. 6934 *et seq.*; p. 1007, No. 8211; p. 1008, No. 8218; p. 1012, No. 8258; p. 1013, No. 8267; p. 1015, Nos. 8282, 8283; p. 1093, Nos. 8930, 8931, 8935, 8936; p. 1094, Nos. 8937–8940; p. 1116, Nos. 9092–9094; p. 1118, No. 9102; p. 1133, No. 9203.

**Compulsory winding-up proceedings.]—See COMPANIES**, Vol. X., p. 862, No. 5815; p. 864, No. 5829; p. 959, No. 6572; p. 960, Nos. 6578–6580; pp. 963–967, Nos. 6607–6641.

**Voluntary winding-up proceedings.]—See COMPANIES**, Vol. X., pp. 1013, 1014, Nos. 7031–7039.

**Winding-up proceedings under supervision of court.]—See COMPANIES**, Vol. X., pp. 1052, 1053, Nos. 7361, 7362.

**Winding-up proceedings against unregistered company.]—See COMPANIES**, Vol. X., p. 1097, No. 7687.

**(d) Other Cases.**

**348. Seizure of goods of third party.]—ANON.** (1728), 1 Barn. K. B. 43; 94 E. R. 30.

**349. Agreement to refer to arbitration—Action brought before award made.]—Pltf. & debt. mutually entered into bonds to submit to arbitration a certain claim of pltf. on a charter-party, for the hire of a ship. The umpire chosen by the arbitrators evincing partiality towards debt., pltf., before the award was made, revoked his authority, &**

the litigation. Pltf. then brought this suit against debt. in the ct. of the subordinate judge of F., &, while it was pending, debt. applied to the ct. to execute his decree for costs. Pltf. then applied for stay of the execution, & his application was refused by the first ct. but granted by the district ct. On appeal by debt. to the High Ct.:—**Held**: the judge's order was correct.—**KASSA MAL v. GORI** (1888), 1 L. R. 10 All. 389.—**IND.**

**PART II. SECT. 15, SUB-SECT. 4.—B. (d).**

**1. Oral agreement not to enforce execution—Against goods.]—MCPHERSON v. SUTHERLAND** (1827), Tay. 422.—**CAN.**

**m. Execution against administrator**

**of intestate—Estate insolvent.]—The ct. will stay an execution on a judgment duly obtained against an administrator for the full amount of a debt due by his intestate, upon affidavits showing the estate to be insolvent, & that pltf. will, if such execution issues, obtain an undue share of the assets of the estate.—CUNLIFFE v. MOREHOUSE** (1843), 2 Kerr, 347.—**CAN.**

**n. Delay in issuing execution.]—Where pltf. had obtained judgment ten years before, & two or three years afterwards had fled from the province charged with a criminal offence, & a writ of execution was issued on the judgment without any leave of the ct., or notice to debt., the ct. stayed the proceedings.—HOBSON v. SHAND** (1846), 3 U. C. R. 74.—**CAN.**

afterwards brought an action on the charter-party, & recovered a verdict for £1,500 & sued out execution thereon. The umpire, notwithstanding the revocation, made an award in favour of debt., who afterwards commenced an action against pltf. on the arbitration bond, but, by reason of pltf.'s being resident in Scotland, was unable to serve him with process. The ct. on motion, refused to order the execution issued at the suit of pltf. in the action upon the charter-party to be stayed.—**STEWART v. WILLIAMSON** (1829), 5 Bing. 415; 2 Moo. & P. 765; 7 L. J. O. S. C. P. 156; 130 E. R. 1121.

**350. Action for breach of covenant in building lease—Covenant by lessee to cultivate.]—A lease for years was executed for certain building purposes, but it contained, besides a covenant to pay rent, a covenant by the lessee to cultivate the part not required for the buildings in a good & husband-like manner. There having been a breach of the covenants to cultivate & to pay rent, an action of ejectment was brought & judgment was recovered against lessee. On a bill filed by him to restrain execution:—**Held**: the ct. would not restrain execution, & therefore, the injunction which had been granted must be dissolved.—HILLS v. ROWLAND (1853), 4 De G. M. & G. 430; 22 L. J. Ch. 964; 22 L. T. O. S. 139; 1 W. R. 422; 43 E. R. 575, L. JJ.**

**351. Payment of amount into court pending special case—Claim for amount due under special case—Stay as to amount in excess of balance.]—To a declaration containing (a) a count on a policy of insurance, & (b) a count for money had & received, debt., as to the first count, pleaded various pleas in bar; &, as to the second, paid into ct. the amount of the premiums which had been paid on the policy. The matters in dispute under the first count were embodied in a special case, which terminated in pltf.'s favour, & an average stater eventually found that £2,038 was due to pltf. for an average loss. Whilst the argument of the case was pending, a nominal judgment for £4,000 had been entered by consent. Pltf. having claimed the whole amount found by the average stater the ct., in the exercise of the power inherent in them to prevent an abuse of their own process, restrained him from signing judgment or issuing execution for any larger amount than the balance of the average loss ascertained by the average stater, after deducting the amount of the premiums paid into ct.—CARR v. ROYAL EXCHANGE ASSURANCE CORPN. (1864), 5 B. & S. 941; 122 E. R. 1080; *sub nom.* CARR v. ROYAL EXCHANGE ASSURANCE CO., CARR v. MONTEFIORE, 5 New Rep. 216; 34 L. J. Q. B. 21; 11 L. T. 595; 11 Jur. N. S. 265; 13 W. R. 204; 2 Mar. L. C. 160.**

**352. Pending transfer of action to another division—R. S. C., Ord. 49, r. 5.]—Re LOW, BLAND v.**

**o. Action settled before judgment—Execution of subsequent judgment stayed.]—Pltf. recovered a verdict on a policy of insurance for \$2,000, subject to the opinion of the ct. After the argument of a rule nisi & before judgment pronounced on the rule the parties entered into negotiations for a settlement, the result of which was that pltf. about a fortnight before the delivery of judgment accepted \$1,000 in full of his claim & delivered up his policy to the co. Judgment was afterwards given in his favour for the full amount of the claim, & a rule nisi was taken by debts. to compel pltf. to file a discontinuance, or in the alternative that all proceedings under the judgment should be stayed. The ct. refused to interfere with pltf.'s common law right**

Low (1893), 37 Sol. Jo. 683; *subsequent proceedings*, [1894] 1 Ch. 147, C. A.

**353. Absence abroad of party entitled—No one within jurisdiction authorised to receive payment.]**—I am clear that if deft. showed that neither pltf. nor any one authorised by him to receive the amount of the judgment, was available in England, he would get a stay of execution on bringing the money into ct. (FARWELL, L.J.).—*Re A DEBTOR*, [1912] 1 K. B. 53; 81 L. J. K. B. 107; 105 L. T. 610; 19 Mans. 12, C. A.

**Execution against lands held on trust by local authority.]**—See CORPORATIONS, Vol. XIII., p. 428, No. 1513.

**Actions on negotiable instruments.]**—See BILLS OF EXCHANGE, Vol. VI., pp. 489, 490, Nos. 3111–3116.

**Outbreak of war—Party becoming enemy alien.]**—See ALIENS, Vol. II., pp. 157, 158, 159, Nos. 277, 292, 299.

#### SUB-SECT. 5.—TERMS ON WHICH GRANTED.

**354. Payment of amount into court.]**—FISHER v. BALDWIN, No. 288, *ante*.

**355. ——— Proof of—Intention to dispute verdict complained of.]**—BUCKMASTER v. MEIKLEJOHN, No. 343, *ante*.

**356. ———.]**—Where a default having been made in payment of interest, a mtgee. recovered judgment for the amount of the principal & interest, & a bill was filed to restrain execution on the ground that the mtge. deed was not in accordance with the terms of a previous agreement, which provided that the principal should not be called in for a term still unexpired. An injunction was refused, except on the terms of the amount recovered being paid into ct., since if a clause in accordance with that provision in the agreement had been inserted in the deed, it would, as a matter of course, have made the not calling in of the principal conditional on the punctual payment of interest.—SEATON v. TWYFORD (1870), L. R. 11 Eq. 591; 23 L. T. 648; 19 W. R. 200.

to enter judgment, but stayed execution for thirty days, that defts. might take such steps as they might be advised.—PEPPIT v. NORTH BRITISH INSURANCE CO. (1880), 13 N. S. R. (1 R. & G.) 486.—CAN.

**p. Taxation of costs—Setting off costs in court below.]**—*Held*: the costs which had been previously allowed to applt. in the Supreme Ct. of Canada should be set off against whatever costs might be taxed & allowed to resp. in the ct. below, & should be satisfaction *pro tanto* of the last mentioned costs, when so set off, & that all proceedings upon the execution should, in the meantime be stayed.—NORTH ONTARIO ELECTION CASE, WHEELER v. GIBBS (1881), Cout. 19.—CAN.

#### PART II. SECT. 15, SUB-SECT. 5.

**354 i. Payment of amount into court.]**—Amount of judgment with interest & costs directed to be paid into ct., otherwise the execution of the process not to be interfered with.—STEVENSON v. SEXSMITH (1874), 21 Gr. 355.—CAN.

**354 ii. ———.]**—Appeal allowed & execution stayed on deft. paying into ct. the amount thereof within a time fixed.—ROGERS v. BURNHAM (1892), 24 N. S. R. 535.—CAN.

**354 iii. ———.]**—In an action to recover an amount claimed for work & labour, where deft. admitted the greater portion of the amount claimed,

but pleaded a set-off for passage money paid & other expenditures made on behalf of pltf., pltf. moved at chambers to set aside the plea of set-off as false, fraudulent, & vexatious, & the judge, treating the set-off as a counterclaim, ordered final judgment for pltf. for the amount claimed, & stayed execution on payment into ct. within a fixed time of the amount of the claim less the amount of the set-off:—*Held*: this was error; the proper form of order would have been for judgment for pltf. for the amount of his claim, less the amount of the set-off, with a provision for stay of execution on payment of the amount into ct.—FISHER v. GRAND RIVER LUMBER CO. (1905), 38 N. S. R. 180.—CAN.

**362 i. Payment of costs—Discretion of court as to refund of costs if appeal successful.]**—Execution upon a judgment of the Supreme Ct. of Canada, made an order of this ct., will be stayed pending an appeal to the Privy Council, upon terms. The terms imposed were to pay the costs of the appeal to the Supreme Ct. of Canada, with an undertaking to refund, if the judgment be reversed; to give security for the amount of the judgment appealed from; money in ct. to stand for such security *pro tanto*.—DAVIES v. McMILLAN (1893), 3 B. C. R. 35.—CAN.

**g. Security given for payment of costs.]**—The bond for \$400, given under R. S. O., 1877, c. 38, s. 26, is a

**357. ———.]**—KEVERS v. MICHELL, [1876] W. N. 53; Bitt. Prac. Cas. 118; 2 Char. Cham. Cas. 4.

**358. ——— Pending trial of counterclaim.]**—In an action for goods sold & delivered deft. admitted pltf.'s claim & set-off, & counter-claimed for damages suffered & expenses incurred in respect of other goods which he alleged pltf. had agreed to supply of a certain quality for exportation, but which, on arrival abroad after payment of the purchase money, were found to be not of the quality contracted for & were rejected by deft.:—*Held*: on motion for judgment on admissions in the pleadings under R. S. C., Ord. 40, r. 11, judgment must be entered for pltf. on their claim on the terms that execution should not issue till after the trial of the counter-claim, if deft. paid the amount into ct. within fourteen days.—SHOWELL & CO. v. BOURON (1883), 52 L. J. Q. B. 284; 48 L. T. 613; 31 W. R. 550, D. C.

*Annotation*:—*Reid*. Mersey S.S. Co. v. Shuttleworth (1883), 11 Q. B. D. 531.

**359. ——— No one within jurisdiction authorised to receive payment.]**—*Re A DEBTOR*, No. 353, *ante*.

**360. Prosecution of appeal without delay.]**—WILSON v. CHURCH (No. 2), No. 319, *ante*.

**361. ———.]**—SMITH v. SOUTH-EASTERN RY. CO. (1895), as reported in 12 T. L. R. 67, C. A. *Annotation*:—*Mentd*. Mercer v. S. E. & C. Rys.' Managing Committee, [1922] 1 K. B. 549.

**362. Payment of costs—Discretion of court as to refund of costs if appeal successful.]**—WILSON v. CHURCH (No. 2), No. 319, *ante*.

**363. ——— Special circumstances.]**—SMITH v. SOUTH-EASTERN RY. CO. (1895), as reported in 12 T. L. R. 67, C. A.

*Annotation*:—*Mentd*. Mercer v. S. E. & C. Rys.' Managing Committee, [1922] 2 K. B. 549.

**364. ———.]**—SCHWEPPE, LTD. v. GIBBENS, SCHWEPPE v. BISCOMBE (W.) & SONS, [1904] W. N. 208, C. A.

*See, also*, Sub-sect. 4, B. (a) ii., *ante*.

**365. Discretion of court of appeal to set aside terms.]**—HANSARD v. LETHBRIDGE (1891), 8 T. L. R. 179, C. A.

**366. Undertaking to repay if appeal successful—**

security for the costs of appeal only; in order to stay execution for the costs of the ct. below, further security must be given.—HEWARD v. HEWARD (1867), 2 Ch. Ch. 245.—CAN.

**r. ———.]**—Where judgment is for deft., & pltf., appealing to the Supreme Ct. of Canada, wishes to stay execution for deft.'s costs, he must give security for \$750 or \$250, in addition to the \$500 prescribed by Supreme & Exchequer Courts Act.—KINNEY (ASSIGNEE) v. DUDMAN (1877), 11 N. S. R. (2 R. & C.) 376.—CAN.

**s. ———.]**—POWELL v. PECK (1879), 8 P. R. 85.—CAN.

**t. Security for payment of amount.]**—Where there is an appeal from a judgment, execution will not be stayed until satisfactory security has been given that applt. will pay the amount thereby directed to be paid.—INSINGER v. CUNNINGHAM, [1923] 3 W. W. R. 1328; 4 D. L. R. 1199.—CAN.

**u. ——— Must not be excessive.]**—UDEYADETA DEV v. GREGGSON (1886), 1 L. R. 12 Calc. 624.—IND.

**a. Till equity done.]**—Where pltf. recovered a verdict in an action of ejectment, execution was stayed until he had paid the amount of an equitable mtge. on the land, the value of improvements made by the purchaser from the equitable mtgee., & confirmed a lease of the premises.—MCKENNEY v. SPENCE (1875), Temp. Wood. 11.—CAN.

**b. Payment of amount to party—**



**Sect. 15.—Stay of execution: Sub-sects. 5 & 6. Sect. 16: Sub-sects. 1 & 2. Sect. 17: Sub-sects. 1 & 2.]**

**Enforcement in summary manner—Notwithstanding second stay pending further appeal.]**—The Ct. of Appeal, upon the application of deft., granted a stay of execution pending an appeal to Div. Ct. from the judgment of an official referee, upon the terms that deft. should pay into the ct. the amount for which judgment had been given against him, & also pay the costs, as soon as taxed, to pltf.'s solr. upon his personal undertaking to repay the same if the appeal should be successful. Deft. complied with these terms. The appeal succeeded, but execution was stayed pending an appeal by pltf. to the Ct. of Appeal. Deft. applied to the Ct. of Appeal for an order that pltf.'s solr. should pay the costs:—**Held**: the ct. had power to enforce the undertaking given by the solr., & to order him to repay the costs, & the stay of execution granted by Div. Ct. did not affect that undertaking.—**SWYNY v. HARLAND**, [1894] 1 Q. B. 707; 63 L. J. Q. B. 415; 70 L. T. 227; 42 W. R. 297; 10 T. L. R. 276; 38 Sol. Jo. 256; 9 R. 210, C. A.

#### SUB-SECT. 6.—EFFECT OF STAY.

**367. Interest during time execution delayed—Power of court.]**—At the trial of a cause pltf. had a verdict with leave to defts. to move to enter a verdict. A rule in pursuance of leave reserved was subsequently obtained & discharged, whereupon defts. appealed, & pltf. delayed to sign judgment until after the decision of the ct. below had been affirmed. A judge's order was then obtained by pltf. to the master to compute interest. A rule was obtained by deft. to rescind the order:—**Held**: the Ct. of Appeal were empowered under the circumstances to make an order for the allowance of interest for such time as execution was delayed by the proceedings upon appeal.—**TYNE IMPROVEMENT COMRS. v. GENERAL STEAM NAVIGATION CO.** (1867), 16 L. T. 452; 15 W. R. 875, Ex. Ch.

**368. Second stay after successful appeal pending further appeal—Effect on undertaking given to repay costs paid when first stay granted.]**—**SWYNY v. HARLAND**, No. 366, *ante*.

#### SECT. 16.—RETURN OF THE WRIT.

##### SUB-SECT. 1.—IN GENERAL.

*See R. S. C., Ord. 52, r. 11.*

**369. Whether necessary—To validity of process.]**—A. had judgment to recover a certain sum of money against B., & assigned it to the Queen with proviso to be void on the revocation of the Barons of the Exchequer or any two of them. Judgment against B. was affirmed on error brought, & on

*On security for repayment if appeal successful—Or payment into court.]*—On an application for a stay of proceedings on a verdict pending an appeal, the stay was refused except on terms of payment of the amount of the verdict to the successful party & the taxed costs to his solr., the former giving security for repayment in case of the appeal being successful, or consenting that the amount be paid into ct., & the latter giving an undertaking to repay the costs if so ordered by the appeal ct.—**PORTER v. O'CONNELL** (1915), 43 N. B. R. 611.—**CAN.**

*a. Undertaking not to realise*

*judgment on moneys in court.]*—Where a master's order setting aside a garnishee summons was sustained on appeal & the action would soon be on for trial the ct. granted a stay for an appeal on condition that pltf. undertook that should he recover judgment against deft. he would not attempt to realise thereon by resorting to the moneys in ct. unless the decision against the validity of the garnishee proceedings was reversed.—**ADAMS v. ADAMS**, [1921] 3 W. W. R. 540.—**CAN.**

#### PART II. SECT. 15, SUB-SECT. 6.

*d. Effect of delay.]*—Order of ct.

process out of the Exchequer the lands of B. were extended, & his goods of the value of the debt assigned were seised by the sheriff, but the writ was not returned. After the death of A. three of the Barons revoked the assignment, & on the exor. of A. suing a *sc. fa.* to have execution of the sum of money, etc.:—**Held**: (1) the execution for the Queen was good as to the goods, although the writ was not returned; (2) so on *fi. fa.* in the case of a common person the execution is good without a return of the writ; (3) in *cap. ad sat.* the execution is good although the writ be not returned, but *cap.* in process must be returned; (4) in *elegit*, the writ must be returned, for there the extent is to be made by inquest; (5) after the execution had by the Queen the revocation came too late; (6) goods sold by the sheriff on a *cap. utlagatum* shall be restored to the party on reversal of the outlawry, but a sale of goods on a *fi. fa.* shall not be avoided by a subsequent reversal of the judgment; (7) the power for the Barons or any two of them to revoke, if no execution had been, would have been well performed by the three. **Secus**: if the clause of the revocation had been by them jointly or severally.—**HOE'S CASE** (1600), 5 Co. Rep. 89 b; 77 E. R. 191.

*Annotations:—As to (2) Refd.* **Freeman v. Blewitt** (1700), 1 Salk. 409. *As to (3) Apld.* **Rowland v. Veale** (1774), 1 Cowp. 18. *As to (4) Refd.* **Re Hobson** (1886), 55 L. J. Ch. 754. *Generally, Mentd.* **Gage v. Acton** (1700), Carth. 511.

—**Before issue of subsequent writ.]**—*See* Sect. 12, sub-sect. 1, *ante*.

**370. Right to call for return—Conduct disentitling party.]**—There are many cases in which a pltf. is not entitled to call for the return of a writ, as where he has so conducted himself as to show that he is contented. Thus when he has acted as his own bailiff, or when, after an arrest, he has met deft. & accepted a sum in discharge of all claims, can he call for a return of the writ? Put the case of the bkpcy. of deft., & pltf. becoming his assignee, could he sue the sheriff & obtain separate compensation? The merits are the same here (**TINDAL, C.J.**).—**HEPWORTH v. SANDERSON** (1831), 8 Bing. 19; 1 Moo. & S. 64; 1 L. J. C. P. 15; 131 E. R. 307.

*Annotation:—Refd.* **Jackson v. Taylor** (1836), 2 Har. & W. 135.

*See, further, Part III., Sect. 1, sub-sect. 10; Sect. 3, sub-sect. 4; Sect. 6, sub-sect. 5, post.*

**371. — When writ void.]**—**JONES v. WILLIAMS**, No. 488, *post*.

**372. Time for return—Returnable immediately—Meaning of.]**—Where a writ is made returnable "immediately" the meaning is, that it should be returned immediately after the execution of the writ, allowing a reasonable time for such execution. Therefore, where a writ of attachment issued on Jun. 22, & the suit became abated on the 24th, & was not revived till the following Nov.:—**Held**: the return of the writ in Jan. was sufficient.—**SNOWBALL v. DIXON** (1841), 4 Y. & C. Ex. 511; 10 L. J. Ex. Eq. 56.

upon a party who was alleged to have suffered a considerable time to elapse without taking the prosecution of an appeal to show cause why execution should not issue upon judgment given against him.—**EVANS v. CONGDON** (1823), Wakeham's Nfld. 426.—**NFLD.**

*e. Judgment entered—Not traction of certificate.]*—Notwithstanding the stay, judgment may be signed & entered, but a certificate thereof may not be registered, nor an execution placed in the sheriff's hands.—**JOHNSON v. HENRY** (1911), 17 W. L. R. 327.—**CAN.**

**373. — Premature return—Jurisdiction of court to order.]**—If he be not arrested the writ does not become returnable, & the fact of its being returned cannot help whether it be done by a judge's order or not, for, strictly speaking, no writ can be returned before it is returnable, although a judge may order the sheriff to return what he has done upon it, & so in some sense to return the writ (LORD DENMAN, C.J.).—LEWIS v. HOLMES (1847), 10 Q. B. 896; 16 L. J. Q. B. 430; 10 L. T. O. S. 246; 12 J. P. 135; 11 Jur. 945; 116 E. R. 339.

*Annotation* :—**Mentd.** Levy v. Hamer (1850), 5 Exch. 518.

**374. — Right to call for immediate return—On what dependent.]**—ANGELL v. BADDELEY, No. 1042, *post*.

*See, further*, Part III., Sect. 1, sub-sect. 10, Sect. 3, sub-sect. 4, Sect. 6, sub-sect. 5, *post*.

.]—*See* Sub-sect. 2, *post*.

**375. Filing return—Act of sheriff—Not of the party.]**—JONES v. WILLIAMS, No. 488, *post*.

**376. — During vacation.]**—If a rule on the sheriff to return the writ in this ct. expires in vacation the sheriff must nevertheless file his return in vacation within one day after the rule expires.—R. v. MIDDLESEX SHERIFF (1814), 5 Taunt. 647; 1 Marsh. 270; 128 E. R. 845.

*See, generally*, PRACTICE.

**Form & sufficiency of return.]**—*See* Part III., Sect. 1, sub-sect. 10; Sect. 3, sub-sect. 4; Sect. 6, sub-sect. 5, *post*.

**Action for false return.]**—*See* Part III., Sect. 1, sub-sect. 10; Sect. 3, sub-sect. 4; Sect. 6, sub-sect. 5, *post*; & *generally*, SHERIFFS AND BAILIFFS.

#### SUB-SECT. 2.—AFTER EXPIRATION OF SHERIFF'S TERM OF OFFICE.

*See* R. S. C., Ord. 52, r. 11, & Sheriffs Act, 1887 (c. 55), s. 28.

**377. Return by outgoing sheriff—Enforcement within six months—How time calculated.]**—A sheriff is not liable to be called upon to return process unless within six lunar months after the expiration of his office, & the day on which he goes out of office is to be reckoned as part of the six months.—R. v. ADDERLEY (1780), 2 Doug. K. B. 463; 99 E. R. 295.

*Annotations* :—**Refd.** Yorath v. Hopkins (1835), 5 Tyr. 794. **Mentd.** Castle v. Burditt (1790), 3 Term Rep. 623; *Glasington v. Rawlins* (1803), 3 East, 407; *Lester v. Garland* (1808), 15 Ves. 248; *Webb v. Fairmauer* (1838), 6 Dowl. 549; *Re Whitby, Ex p. Whitby* (1839), 8 L. J. Bey. 55; *Young v. Higgon* (1840), 6 M. & W. 49; *Re North, Ex p. Hasluck*, [1895] 2 Q. B. 264.

**378. — Rule of court necessary.]**—A sheriff is not liable to attachment for not returning a writ if not called upon by a rule of ct. within six months after the expiration of his office, notwithstanding he was requested by the party to return it before the six months were expired.—R. v. JONES (1787), 2 Term Rep. 1; 100 E. R. 1.

**379. — ]**—A writ of *fi. fa.* was delivered to a sheriff, to be executed, on Dec. 20, 1833, returnable on the 30th of the same month. The sheriff went out of office in the Feb. following. On June 14 a rule to return the writ was served

upon the new sheriff, & the writ not having been returned, another rule to return the writ was served upon the under-sheriff of the late sheriff on Nov. 12, which, however, was more than six months after the late sheriff had gone out of office :—**Held** : an attachment against the late sheriff for not making a return could not be supported, he not having been duly ruled to return the writ.—YRATH v. HOPKINS (1835), 2 Cr. M. & R. 250; 150 E. R. 109; *sub nom.* YUROTH v. HOPKINS, 1 Gale, 141; 4 L. J. Ex. 196; *sub nom.* YORATH v. HOPKINS, 5 Tyr. 794; *sub nom.* YAROTH v. HOPKINS, 3 Dowl. 711.

**380. — Rule obtained after six months.]**—A sheriff having been ruled to return a writ more than six months after the expiration of his office, the London agent of his under-sheriff obtained an order for a week's further time to return the writ :—**Held** : obtaining the rule after six months was merely an irregularity, & such irregularity was waived by obtaining the order for further time to return the writ.—WALKER v. DAVIS (1858), 3 H. & N. 374; 27 L. J. Ex. 387; 157 E. R. 515.

— **Liability for non-return.]**—*See* SHERIFFS & BAILIFFS.

**381. Return by succeeding sheriff—Where former special return made.]**—**Seemle** : when one sheriff has made a special return to a writ of *capias*, the ct. will not compel his successor to make another, the circumstances remaining unaltered.—PASMORE v. WILKINSON (1835), 3 Dowl. 635.

**382. — When writ not transferred by predecessor.]**—A sheriff is not liable to an attachment for not returning a writ which has not been transferred to him by his predecessor in office.—THOMAS v. NEWNAM (1842), 2 Dowl. N. S. 33.

**383. — ]**—Where a writ has not been transferred to a sheriff by his predecessor, such sheriff is not liable to an attachment for not returning the writ.—HOLMES v. ELNITTS (1842), 6 Jur. 994.

*See, further*, SHERIFFS & BAILIFFS.

#### SECT. 17.—EFFECT OF SUPERVENING BANKRUPTCY OR INSOLVENCY.

##### SUB-SECT. 1.—ON POSITION OF EXECUTION CREDITOR IN RELATION TO OTHER CREDITORS.

**Whether a "secured" creditor.]**—*See* BANKRUPTCY, Vol. IV., pp. 356–358, Nos. 3334–3348; pp. 359, 360, Nos. 3356–3359; Vol. V., p. 815, No. 6933.

##### SUB-SECT. 2.—ON RIGHTS OF EXECUTION CREDITOR.

**Institution of bankruptcy proceedings—To defeat execution.]**—*See* BANKRUPTCY, Vol. IV., p. 184, Nos. 1696–1698.

**Extent to which restricted—Against trustee in bankruptcy.]**—*See* BANKRUPTCY, Vol. IV., pp. 43,

successor had not been appointed till after the return of the writ, which was made in the interval. The deputy, who remained in the office to wind up the old business, made his return to the writ. In an action against the sheriff for a false return :—**Held** : the sheriff must be considered in office at the return of the writ, & liable upon the return made.—ROES v. McMARTIN (1850), 7 U. C. R. 179.—CAN.

#### PART II. SECT. 16, SUB-SECT. 2.

**f. Return by outgoing sheriff—Attachment after six months.]**—The ct. will not attach a sheriff more than six months out of office before the rule issued against him, for not giving an account of sales made & moneys received from a debt. on writs against his lands, although the rule directing the sheriff to render such account had before been granted.—LADD v. BUR-

WELL (1840), (1823–1900), 3 Ont. Dig. 6429.—CAN.

**g. — Made by deputy after sheriff's resignation—Before appointment of successor.]**—A *fi. fa.* was delivered to a sheriff on Nov. 21, 1847, returnable in H. T., 1848. On Dec. 9, 1847, the sheriff tendered to the govt. his resignation. On Dec. 14 he was notified of its acceptance, but his



**Sect. 17.—Effect of supervening bankruptcy or insolvency: Sub-sects. 2, 3 & 4. Sect. 18: Sub-sects. 1, 2 & 3. Sects. 19 & 20: Sub-sect. 1, A. (a) & (b).]**

44, Nos. 373, 374; p. 46, No. 391; Vol. V., pp. 808 *et seq.*, Nos. 6902 *et seq.*

— **Against trustees of composition or scheme of arrangement.]—See** BANKRUPTCY, Vol. V., pp. 1092–1096, Nos. 8928–8949; pp. 1171–1174, Nos. 9476–9494; pp. 1067, 1118, 1147, 1151, Nos. 8731, 8732, 9102, 9301, 9333.

— **By notice of act of bankruptcy.]—See** BANKRUPTCY, Vol. V., pp. 919 *et seq.*, Nos. 7513, 7518–7521, 7524–7526, 7529, 7532, 7534–7536, 7547, 7560–7563, 7577, 7582.

— **Where goods in reputed ownership of bankrupt.]—See** BANKRUPTCY, Vol. V., pp. 762, 768, 796, Nos. 6552, 6603–6608, 6807, 6808.

**How far operative—In restraint of execution.]—See** BANKRUPTCY, Vol. IV., pp. 43, 44, Nos. 373, 374; p. 360, No. 3358; Vol. V., pp. 815 *et seq.*, Nos. 6934 *et seq.*; p. 1007, No. 8211; p. 1008, No. 8218; p. 1012, No. 8258; p. 1013, No. 8267; p. 1015, Nos. 8282, 8283; p. 1093, Nos. 8930, 8931, 8935, 8936; p. 1094, Nos. 8937–8940; p. 1116, Nos. 9092–9094; p. 1118, No. 9102; p. 1133, No. 9203.

#### SUB-SECT. 3.—ON DUTIES AND LIABILITIES OF SHERIFF.

**See** BANKRUPTCY, Vol. V., pp. 816 *et seq.*, Nos. 6936 *et seq.*; pp. 1183, 1184, Nos. 9558, 9559, 9562, 9563.

#### SUB-SECT. 4.—ON RIGHTS OF EXECUTION DEBTOR.

**Rights against sheriff in respect of wrongful or irregular execution.]—See** BANKRUPTCY, Vol. V., p. 1183, Nos. 9558, 9559.

**Right to be discharged from arrest.]—See** BANKRUPTCY, Vol. V., p. 1184, Nos. 9562–9565.

### SECT. 18.—EFFECT OF EXECUTION.

#### SUB-SECT. 1.—IN GENERAL.

**As discharge.]—See** Part III., Sect. 1, sub-sect 4, E. (g) iii., & Sect. 2, sub-sect. 9, F., *post*.

— **Levy not satisfying whole debt.]—See** Sect. 12, sub-sect. 2, *ante*.

#### SUB-SECT. 2.—AS ACT OF BANKRUPTCY.

**See** BANKRUPTCY, Vol. IV., pp. 84, 85, Nos. 758–767.

#### SUB-SECT. 3.—AS PROTECTED TRANSACTION IN BANKRUPTCY.

**See** BANKRUPTCY, Vol. V., pp. 826, 827, Nos. 7013–7019; p. 914, Nos. 7478, 7479.

### SECT. 19.—SETTING ASIDE EXECUTION.

**See** Sect. 20, sub-sects. 1, B., & 2, B., *post*.

**After supervening bankruptcy.]—See** BANKRUPTCY, Vol. V., pp. 827, 828, Nos. 7020–7027.

### SECT. 20.—WRONGFUL AND IRREGULAR EXECUTION.

#### SUB-SECT. 1.—WRONGFUL EXECUTION.

##### A. Process Wrongly Issued.

##### (a) In General.

**384. Issue of second process when first executed.]—**WATERER v. FREEMAN (1619), Hob. 205, 266; Noy, 23; 80 E. R. 352, 412; *sub nom.* WARTER v. FREEMAN, 1 Brownl. 12.

**Annotations:—**Refd. De Medina v. Grove (1847), 10 Q. B. 172; Gilding v. Eyre (1861), 10 C. B. N. S. 592; Clissold v. Cratchley, [1910] 1 K. B. 374. **Mentd.** Turner v. Sterling (1671), Freem. K. B. 15; Traverse v. Daws (1673), Freem. K. B. 324; Saville v. Roberts (1697), 5 Mod. Rep. 394; Jones v. Givin (1713), Glb. 185; Parker v. Langley (1713), Glb. 163; Reynolds v. Kennedy (1748), 1 Wils. 232; Wren v. Weild (1869), L. R. 4 Q. B. 730.

**385. —.]—**In a case against a judgment-creditor for maliciously suing out an alias *fi. fa.* after a sufficient execution levied upon pltf.'s goods under the first *fi. fa.*:—**Held:** the sheriff's returns endorsed upon the two writs, which writs had been produced in evidence by pltf. as part of his case, wherein the sheriff stated that he had forborne to sell under the first, & had sold under the second writ, by the request & with the consent of the now pltf., were *prima facie* evidence of the facts so returned, credence being due to the official acts of the sheriff between third persons.—GYFFORD v. WOODGATE (1809), 11 East, 297; 2 Camp 117; 103 E. R. 1018.

**Annotations:—**Consd. Avril v. Warwick, Sheriff (1834), 3 Nev. & M. K. B. 871. **Refd.** Cator v. Stokes (1813), 1 M. & S. 599; Jackson v. Hill (1839), 2 Per. & Dav. 455.

**386. Process issued contrary to agreement.]—**VEAL v. WARNER, No. 346, *ante*.

**387. —.]—**A *cognovit* was given, with a condition that if the ultimate decision of certain Chancery suits between the parties should be for pltf., deft. should pay him £500 within one month after such decision, or else execution should issue. The V.-C. made his decree in those suits, for pltf., who at the end of a month, issued execution, the £500 being unpaid. The decree had not been passed by the registrar, though the minutes had been settled, & deft. had lodged a *caveat*, intending as he stated, to appeal:—**Held:** the Chancery suits had not been ultimately decided within the meaning of the condition, & the execution, consequently, was irregular.—DUMMER v. PITCHER (1832), 3 B. & Ad. 347; 110 E. R. 130.

**388. —.]—**JENNENS v. HANDFORD (1844), 2 L. T. O. S. 476.

**389. —.]—**Signing judgment against an order of *nisi prius* made by consent, is an irregularity, although it was also a breach of faith.

#### PART II. SECT. 20, SUB-SECT. 1.—A (a).

**386 i. Process issued contrary to agreement.]—**Upon an appeal from an order setting aside an execution:—**Held:** the execution was issued contrary to good faith & in violation of an agreement, & the appeal must be dismissed.—ASHDOWN v. DEDERICK (1885), 2 Man. L. R. 212.—CAN.

**h. Issue of writ not warranted by judgment.]—**An execution requiring the sheriff to take deft., to satisfy the sum, which pltf. had recovered against

him for his debt, which he had sustained as well on the occasion of the non-performance of certain promises & undertakings lately made by deft. to pltf., as for his costs & charges, etc., is not warranted by a judgment in debt on a bond & warrant of attorney, & will be set aside.—WILLARD v. LODGE (1851), 2 All. 160.—CAN.

**k. Writ issued by officer at his own house—Before office hours.]—**The ct. refused a rule to set aside a *fi. fa.* because issued by the officer at his own house before office hours.—

ROLKER v. FULLER (1853), 10 U. C. R. 477.—CAN.

**1. Judgment debt paid by one of two defendants—Process issued by defendant against co-defendant—For moiety of judgment debt.]—**Judgment having been recovered against two defts. the verdict & costs were paid by one deft., who thereupon, without applying to the pltf. or tendering him any indemnity, issued an execution in pltf.'s name against the other deft. for one-half of the debt & costs:—**Held:** clearly not warranted by 26 Vict. c. 45,

The judge's note is conclusive evidence of an arrangement at *nisi prius*.

In an action of ejectment, a verdict having passed for pltf., the judge stayed proceedings until the fifth day of the ensuing term. During the first four days of term a cross-action of trespass came on to be tried; deft. therein, finding himself not in a position to produce the judgment in ejectment as an estoppel obtained an adjournment, on the condition that the action of ejectment should abide the result of the action of trespass, & it turned out that not either of the parties, but C., was entitled to the premises. Thereupon, by consent, an arrangement was entered into, & made an order of *nisi prius*, to the effect that the actions should be abandoned, & the premises given up to C. Pltf. in ejectment applied, with C., to be put in possession, & possession being refused, signed judgment & issued execution. The ct. set aside these proceedings as irregular.—*DOE d. BEESTON v. BIKKER* (1860), 5 H. & N. 253; 157 E. R. 1178; *sub nom. BIKKER v. BEESTON*, 29 L. J. Ex. 121.

### 390. Process issued for larger sum than agreed.]

—By a *cognovit*, A. confessed the action, & that B. had sustained damage to the amount of £3,000, & that in case A. should make default in payment of £259 on May 7, B. should be at liberty to enter up judgment for £3,000, & sue out execution for £259 & costs, which would have left a principal sum of £1,650 due to B. A. not having paid the £259 on May 7, B. entered up judgment, & sued out execution for £3,011, indorsed with a direction to the sheriff, requiring him to levy £1,967, & A. was arrested, & detained in prison for that sum:—*Held*: A. might maintain an action against B. for having caused him to be arrested & imprisoned for a larger sum than he ought.—*WENTWORTH v. BULLEN* (1829), 9 B. & C. 840; 9 L. J. O. S. K. B. 33; 109 E. R. 313.

*Annotations*:—*Refd.* *Saxon v. Castle* (1837), 6 Ad. & El. 652; *De Medina v. Grove* (1847), 10 Q. B. 172; *Churchill v. Siggers* (1854), 3 E. & B. 929; *Hookpayton v. Bussell* (1854), 10 Exch. 24; *Lievesley v. Gilmore* (1866), L. R. 1 C. P. 570; *Conolan v. Leyland* (1884), 27 Ch. D. 632. *Mentd.* *Porter v. Cooper* (1834), 4 Tyr. 456; *Re Ingham, Ex p. Trustee* (1884), 52 L. T. 299.

& the execution was set aside.—

— *Partnership accounts unsettled.*—A judgment recovered against the two defts., who were partners, was paid by deft. G., who thereupon issued execution against his co-deft., S., on the judgment, for half the amount. It appeared that the partnership accounts were unsettled, & that an award had been made in favour of S., the validity of which was disputed by G.:—*Held*: under 26 Vict. c. 45, s. 4, the execution was improperly issued; & it was set aside.—*SCRIPTURE v. GORDON* (1877), 7 P. R. 164.—*CAN.*

n. *Issue of process on judgment by confession—Future advances—Writ restricted to amount advanced.*—A., being indebted to B. in the sum of \$395, gave him a confession of judgment for \$1,000. B. afterwards made some further advances, amounting in the whole to \$996, & signed judgment for \$1,000, & issued execution for that amount. On application to set aside the execution, alleging in his affidavit that the confession was only intended as a security for his then indebtedness to B. This was granted.—*Held*: the judgment stood for the amount advanced.—*MUIRHEAD v. LOBAN* (1885), 24 N. B. R. 360.—*CAN.*

o. *Seizure of effects declared exempt by law.*—Debtor whose effects,

declared exempt from seizure by the law have been seized by a creditor, has a claim for damages against this latter.—*LEMOINE v. GIROUX* (1886), 9 L. N. 147.—*CAN.*

p. *Process issued prematurely.*—Where an execution was issued in face of an order that it should not issue for a certain time which had not elapsed:—*Held*: this was not merely an irregularity, & that another execution creditor might move against it.—*WHITLA v. SPENCE* (1889), 5 Man. L. R. 392.—*CAN.*

### PART II. SECT. 20, SUB-SECT. 1.— A. (b).

q. *Payment by sheriff.*—The sheriff held an execution against A., B., & C., upon a note on which O. was the last indorser, & the others therefore liable over to him. Goods belonging to A. having been seized C. paid the bailiff £100, part of the debt, & the sheriff accepted & paid a draft by pltf.'s attorney for the whole. On the same day that this draft was accepted, the bailiff took an assignment of the judgment, & afterwards sold the goods under a *ven. ex.*, when they were bought by C., & out of the purchase money the bailiff paid the balance due to the sheriff:—*Held*: the payment made by the sheriff had satisfied the judgment, & the sale was illegal.—*MCLEOD v. FORTUNE* (1859), 19 U. C. R. 100.—*CAN.*

r. *Proof of payment.*—On an

391. *Issue of second writ to indemnify sheriff.*—A sheriff's officer, having permitted a voluntary escape upon a writ of *ca. sa.*, & the sheriff paid pltf. the amount for which the arrest was made, & pltf. thereupon permitted the sheriff to use his name in suing out a second writ. On motion to set aside this writ:—*Held*: the writ was improperly issued, & the rule to set it aside being a matter of right, the ct. could not impose terms upon deft.—*GILLOTT v. ASTON* (1842), 2 Dowl. N. S. 413; 12 L. J. Q. B. 5; 7 Jur. 235.

### (b) *Issue of Process after Judgment Fully Satisfied.*

392. *Whether actual malice must be proved—Action on the case.*—In an action for maliciously holding to bail, it is not sufficient to prove that the writ was sued out after payment of the debt, if the circumstances afford no inference of malice, but in such case evidence of actual malice must be given.—*GIBSON v. CHATERS* (1800), 2 Bos. & P. 129; 126 E. R. 1196.

*Annotations*:—*Consd.* *Lewis v. Morris* (1834), 4 Tyr. 907. *Expld.* *Clissold v. Cratchley*, [1910] 2 K. B. 244. *Refd.* *Nicholson v. Coghill* (1825), 6 Dow. & Ry. K. B. 12; *Saxon v. Castle* (1837), 6 Ad. & El. 652.

393. — *Action for trespass.*—A solr., who had an office in London with a branch office in the country, sued out in London a writ of *fi. fa.* upon an order for costs made in favour of his client against pltf. in the High Ct., & endorsed the writ, in accordance with R. S. C. Ord. 42, r. 16, with a direction to the sheriff to levy the amount of the debt. The debt had in fact been paid at the solr.'s country office, to a clerk having authority to receive it, on the same day as, & about three hours before, the writ of *fi. fa.* was sued out. Neither the solr. nor his client knew of the payment of the debt. Execution having been levied on pltf.'s goods, the solr. was then informed that the debt had been paid, & he withdrew the execution. In an action against the solr. & his client on the case to recover damages for improperly levying execution, & in the alternative for trespass, it was found that neither the client nor the solr. who sued out the writ acted maliciously:—*Held*: defts. were liable in trespass, though in the absence

application to set aside a *fi. fa.* lands on the ground that the judgment had been paid before issuing it, the judge directed an issue as to the fact of payment.—*REYNOLDS v. STREETER* (1864), 3 P. R. 315.—*CAN.*

s. *Issue of alias writ after judgment satisfied.*—Under pltf.'s judgment & execution the sheriff seized & sold certain horses of defts. S. & M., claiming to be mtgees. of the horses, attended the sale & notified intending purchasers. The horses having been sold, the mtgees. brought trespass & trover against the sheriff & recovered against him the amount for which he had sold the horses. Pltf. had indemnified the sheriff against damage by reason of the seizure & sale, & also by reason of payment to him of the purchase money & the sheriff having paid over the money to pltf., pltf. paid the mtgees. the amount of their verdict against the sheriff. Pltf. then issued an *alias fi. fa.* taking no notice of the return of the sheriff to the previous writ of "money made & paid to pltf.'s attorney":—*Held*: the new *fi. fa.* should be set aside; satisfaction be entered up on the judgment roll, & a summons to amend the sheriff's return should be dismissed.—*HANNA v. MCKENZIE* (1889), 6 Man. L. R. 250.—*CAN.*

t. *Payment out of court—Statement in receipt—Burden of proof.*—Where money was paid in satisfaction of a decree, not through the ct., & a



*Sect. 20.—Wrongful and irregular execution: Subsect. 1, A. (b)*

of malice they were not liable in an action on the case.—*CLISSOLD v. CRATCHLEY*, [1910] 2 K. B. 244; 79 L. J. K. B. 635; 102 L. T. 520; 26 T. L. R. 409; 54 Sol. Jo. 442, C. A.

*Annotation:—Apld.* *Cubitt v. Gamble* (1919), 35 T. L. R. 223.

**394. Liability of execution creditor & his solicitor.]—**A. employed B., an attorney, to enforce payment of a debt. B. directed his agent to sue out a *justicies* in the county ct. Before the return of the *justicies* the debtor paid debt & costs to B. His agent, not knowing of such payment, afterwards entered up judgment in the county ct., although debt. had not appeared, & sued out execution under which the goods of the debtor were seized:—*Held*: A. & B. were liable as trespassers.—*BATES v. PILLING* (1826), 6 B. & C. 38; 9 Dow. & Ry. K. B. 44; 5 L. J. O. S. K. B. 40; 108 E. R. 367.

*Annotations:—Refd.* *Codrington v. Lloyd* (1838), 8 Ad. & El. 449; *Jarmain v. Hooper* (1843), 6 Man. & G. 827; *Collett v. Foster* (1857), 26 L. J. Ex. 412; *Clissold v. Cratchley* (1909), 79 L. J. K. B. 274.

**395. Valid tender of sum due.]—**The principle that a person who issues execution for a debt after payment is liable for trespass applies also in a case where instead of payment there has been an effective & valid tender of the amount due. Although a creditor has a legal right to demand notes or cash he waives that right if he expressly asks for payment by cheque.—*CUBITT v. GAMBLE* (1919), 35 T. L. R. 223; 63 Sol. Jo. 287.

(c) *Issue of Process for More than Amount due.*

*See, generally, MALICIOUS PROSECUTION.*

**396. Execution for more than judgment—Liability of plaintiff for costs.]—**A pltf. arresting for a larger sum than is legally due, though without malice, is liable to pay debt.'s costs under 43 Geo. 3, c. 46, s. 3.—*DONLAN v. BRETT* (1829), 10 B. & C. 117; 5 Man. & Ry. K. B. 29; 109 E. R. 395; *sub nom.* *DOULAN v. BRETT*, 8 L. J. O. S. K. B. 94.

*Annotations:—Apld.* *Ashton v. Naull* (1833), 3 Moo. & S. 184. *Refd.* *Forster v. Weston* (1830), 4 Moo. & P. 276; *Gompertz v. Denton* (1832), 1 Cr. & M. 207; *Erle v. Wynne* (1833), 3 Tyr. 586; *Reynolds v. Flower* (1833), 3 Moo. & S. 801; *Roper v. Sheasby* (1833), 3 Tyr. 486; *Willding v. Temperley* (1848), 11 Q. B. 987.

**397. —.]—***MELLIN v. PEDLEY* (1879), 68 L. T. Jo. 134.

**398. Judgment for more than sum due—Subsequently set aside.]—**Defts. having issued a writ of summons against pltf. specially endorsed for

£34 under Common Law Procedure Act, 1852 (c. 76), s. 25, signed judgment, under s. 27, in default of appearance for the full amount & costs, & issued a *ca. sa.* indorsed for that amount, under which pltf. was arrested & paid the sum demanded. Pltf. then applied at chambers to set aside the judgment on the ground that £16 only was due to defts., & the master set aside the judgment on payment of costs by pltf. Pltf. then brought an action against defts. for false imprisonment:—*Held*: as the judgment was regular, & as it must be taken that it was set aside as a favour to pltf., & not for irregularity or any bad faith on defts.' part, the action could not be maintained.—*SMITH v. SYDNEY* (1870), L. R. 5 Q. B. 203; 39 L. J. Q. B. 144; 22 L. T. 16; 18 W. R. 628.

**399. Part payment before judgment—Judgment for full amount.]—**A. having issued a writ of summons against B. specially endorsed for £28, B., without appearing to the writ, paid £10 to A., on account of the debt. A. afterwards, under Common Law Procedure Act, 1852 (c. 76), s. 27, signed judgment for default of appearance, for the full amount of £28 & costs, and issued a *ca. sa.*, endorsed for that amount, under which B. was arrested, & paid the sum demanded. B. having brought an action against A. for maliciously & without probable cause signing judgment & issuing execution:—*Held*: whilst the judgment stood for the full amount, it estopped pltf. from denying the correctness of the judgment or of the execution.—*HUFFER v. ALLEN* (1866), L. R. 2 Exch. 15; 4 H. & C. 634; 36 L. J. Ex. 17; 15 L. T. 225; 12 Jur. N. S. 930; 15 W. R. 281.

*Annotation:—Refd.* *Turley v. Daw* (1906), 94 L. T. 216.

**400. Part payment after judgment—Effect of order quashing writ.]—**To a plea of justification in trespass, under a *ca. sa.* issued at the suit of the now debt. against the now pltf., by virtue of which the latter was arrested & detained till payment of £1,267 if pltf. reply that the writ was irregularly issued for so much, whereas it ought only to have been for £300, & that the ct. afterwards, on motion, ordered it to be quashed, which fact was found for pltf. the ct. will intend, on pltf.'s own showing, that the writ was only quashed for the excess, & will therefore arrest the judgment.—*KING v. HARRISON* (1812), 15 East, 612; 104 E. R. 974.

**401. — Writ issued for full amount—Malice & want of probable cause must be alleged & proved.]—**(1) No action lies against an execution creditor or his attorney for issuing a *fi. fa.* endorsed to levy the whole sum recovered by a judgment

receipt was taken, but execution was afterwards enforced in a suit for refund of the money so paid:—*Held*: the statement contained in the receipt to the effect that the decree had been satisfied was sufficient to shift the burden of proof to debt. to show that it was an incorrect statement.—*DAVLATA v. GANESH SHASTRI* (1880), 1. L. R. 4 Bom. 295.—*IND.*

**a. Remedy of judgment debtor.]—**In 1878 a decree-holder, having received certain grain from the judgment-debtor in satisfaction of the decree, failed to certify satisfaction of the decree to the ct. in accordance with Civil Procedure Code, 1877, s. 258, & executed the decree nevertheless. In a suit for damages against the decree-holder:—*Held*: the judgment-debtor's remedy for the wrong suffered was not taken away by sects. 244 & 258 of the Code.—*VIKARAGHAYA v. SUBBAKKA* (1882), 1. L. R. 5 Mad. 397.—*IND.*

**b. —.]—***POROMANAND KHASNABISH v. KHEPOO PARAMANIOK* (1884), 1. L. R. 10 Calc. 354.—*IND.*

**c. —.]—**In execution of a decree passed against a judgment-debtor, his property was sold by auction. Prior to the execution-sale he effected a private sale to another person, & out of the proceeds he paid off the judgment-creditor, who duly certified that the decree was satisfied:—*Held*: the judgment-debtor could apply under Civil Procedure Code, 1882, s. 310A, to set aside the execution-sale.—*MAGANLAL MULJI v. DOSHI MULJI* (1901), 1. L. R. 25 Bom. 631.—*IND.*

**d. Validity of order for sale & sale thereunder.]—**An order for sale & a sale under such order are *ultra vires* and nullities if the decree which is ordered to be executed has been satisfied by payment into ct. of the decretal money before the order is made.—*CHUNNI v. LALA RAM* (1893), 1. L. R. 10 All. 5.—*IND.*

**e. Validity of sale to bona fide purchaser.]—**Where a person, a stranger to the proceedings, purchases property *bona fide* at an auction-sale held in

execution of a decree, the sale to him cannot be set aside on the ground that the decree had already been satisfied out of the ct. at the time the sale was held.—*YELLAPPA v. RAMCHANDRA* (1896), 1. L. R. 21 Bom. 463.—*IND.*

**f. Adjustment of decree not certified—Whether action to set aside sale available.]—**No separate suit would lie to set aside a sale held in execution of a decree on the ground that the decree had been adjusted out of ct. when, in fact, no such adjustment of the decree had been certified in the manner provided by Civil Procedure Code, s. 258.—*JAIKARAN BHARTI v. RAGHUNATH SINGH* (1898), 1. L. R. 20 All. 254.—*IND.*

**PART II. SECT. 20, SUB-SECT. 1.—**  
**A. (c).**

**401 i. Part payment after judgment—Writ issued for full amount—Malice & want of probable cause must be alleged & proved.]—**The declaration, after setting out a judgment recovered against pltf. in an action in which debt. was the then

which, to the knowledge of both, has been partly satisfied by payments, unless malice & want of probable cause be alleged in the declaration, & proved.

(2) Money levied by a regular execution under a judgment valid on the face of it, cannot be recovered back in an action for money had & received on the ground that judgment was signed or execution issued fraudulently, for the whole sum named in the judgment when part had been already paid. The remedy in case of such fraud is by motion to the ct. in which the action was brought to set aside the judgment or the execution.—*DE MEDINA v. GROVE* (1847), 10 Q. B. 172; 17 L. J. Q. B. 321; 11 Jur. 145; 116 E. R. 67, Ex. Ch.

*Annotations* :—As to (1) *Consd.* *Churchill v. Siggers* (1854), 3 E. & B. 929. *Refd.* *Moore v. Gardner* (1847), 16 M. & W. 595; *Horsley v. Style* (1893), 69 L. T. 222. As to (2) *Apld.* *Holdway v. Ray* (1863), 1 New Rep. 273.

**402.** ————.]—Where it appears by the declaration that deft. has recovered a judgment for debt & costs, against pltf., and has issued a *ca. sa.* endorsed to satisfy the whole of such debt & costs, & afterwards the debt itself has been satisfied, as where the judgment is recovered by the holder of a bill of exchange against the acceptor, & the drawer, for whose accommodation the bill had been accepted, pays to the holder the amount due on the bill, so as to reduce the sum remaining due on the judgment to a sum below £20, & that afterwards deft. has delivered to the sheriff's bailiff a warrant endorsed to satisfy the whole debt & costs, and has procured pltf. to be arrested to satisfy the whole, & there is an allegation of malice & want of probable cause, & of special damage, by means of the premises, in pltf. being prevented from attending to his business, being injured in his credit, & incurring expense in procuring his liberation by a judge's order, such facts show a good cause of action.—*CHURCHILL v. SIGGERS* (1854), 3 E. & B. 929; 2 C. L. R. 1509; 23 L. J. Q. B. 308; 23 L. T. O. S. 220; 18 Jur. 773; 2 W. R. 551; 118 E. R. 1389.

*Annotations* :—*Apld.* *Jenings v. Florence* (1857), 2 C. B. N. S. 467. *Consd.* *Gilding v. Eyre* (1861), 10 C. B. N. S. 592. *Refd.* *The Walter D. Waller*, [1893] P. 202.

**403.** ———— **Proof of special damage.**—In an action for maliciously & without reasonable or probable cause causing pltf. to be arrested under a *ca. sa.* issued upon a judgment obtained by deft. against him, & upon which deft. maliciously & without reasonable or probable cause indorsed a direction to levy the whole amount recovered by the judgment, whereas a portion of that amount had been previously satisfied—the declaration alleged, as damage caused by the arrest for the greater amount, that pltf. was, after he was taken, during his detention, & before his

pltf.'s attorney, alleged that pltf. paid the same except a small sum, yet that deft. well knowing, but contriving, etc., issued a *fl. fa.*, & wrongfully & unjustly caused the same to be indorsed for the full amount of damages & costs, well knowing that only a small portion thereof remained unpaid, & caused the sheriff to seize pltf.'s goods :—*Held* : no cause of action was shown, for it was not stated that deft. acted maliciously & without reasonable or probable cause, & these averments were not dispensed with by the allegation of his knowledge that the debt was nearly paid.—*YOUNG v. DANIELL* (1862), 21 U. C. R. 413.—**CAN.**

**g.** ———— *To one of several joint decree holders—Must be certified for benefit of all.*—The ct. ought not to recognise payments made out of ct., unless made & certified for the benefit

of all the joint decree-holders of any portion of the decree in excess of that to which the decree-holder so paid is undisputedly entitled.—*TARUCK CHUNDER BHUTTACHARJEE v. DIVENDRO NATH SANYAL* (1883), 1 L. R. 9 Calc. 831; 12 C. L. R. 566.—**IND.**

**h.** ———— *Judgment debtor entitled to credit.*—A judgment-debtor is entitled to credit for any sum paid *bond fide* to one of several joint decree-holders, & duly certified to the ct. by the latter & the other joint decree-holders cannot execute the decree for more than their own share.—*TARUCK CHUNDER BHUTTACHARJEE v. DIVENDRO NATH SANYAL* (1883), 1 L. R. 9 Calc. 831; 12 C. L. R. 566.—**IND.**

**k.** *Compromise—Payment not certified—Subsequent execution of decree—Action for recovery of sum paid by way of compromise.*—A., a judgment-

debtor, able & willing & offered to pay, & always afterwards during his detention was willing to pay, & was finally discharged from imprisonment upon paying the smaller sum; & that pltf., by reason of the premises, was necessarily put to & incurred divers costs & expenses in & about obtaining his discharge :—*Held* : the declaration sufficiently showed special damage resulting to pltf. from the arrest—inasmuch as to entitle him to a verdict, pltf. must show not merely that he was arrested & kept in custody for a greater amount than was due, however improperly endorsed, but also that, by reason of the arrest & detention for the larger sum, his imprisonment was prolonged, or the expense of obtaining his discharge increased.—*JENINGS v. FLORENCE* (1857), 2 C. B. N. S. 467; 26 L. J. C. P. 277; 30 L. T. O. S. 54; 3 Jur. N. S. 774; 140 E. R. 500.

*Annotations* :—*Consd.* *Gilding v. Eyre* (1861), 10 C. B. N. S. 592. *Refd.* *Allen v. Flood*, [1898] A. C. 1.

**404.** ————.]—The declaration stated that defts., the one, A., acting as attorney for B., the other, recovered a judgment against pltf. for £30 7s. 4d., that pltf. paid & satisfied to B. the debt recovered by such judgment except the sum of 15s. 8d. & that defts. sued out a *ca. sa.* upon the judgment, & wrongfully & maliciously, & without any reasonable or probable cause, endorsed the writ with directions to levy £5 14s. 8d., & interest, & £1 7s. for the costs of execution; that pltf. tendered & offered to pay to defts. £3 8s., which was sufficient to pay & discharge all that was recoverable against pltf. upon the judgment & writ, together with the costs of the writ of execution & all other legal & incidental expenses; & that defts. wrongfully & maliciously, & without any reasonable or probable cause, procured the sheriff to arrest pltf., & detain him until he paid £7 6s. 9d., whereas £3 8s. & no more was due & owing from & recoverable against pltf. upon the judgment :—*Held* : the declaration disclosed a good cause of action, & that it was not necessary for pltf. to allege that he had obtained his discharge by order of the ct. or a judge, so as to show that the proceedings had terminated in his favour.—*GILDING v. EYRE* (1861), 10 C. B. N. S. 592; 31 L. J. C. P. 174; 5 L. T. 136; 7 Jur. N. S. 1105; 142 E. R. 584; *sub nom.* *GELDING v. EYRE*, 9 W. R. 946.

*Annotations* :—*Refd.* *Parton v. Hill* (1864), 4 New Rep. 103; *Basébo v. Matthews* (1867), L. R. 2 C. P. 684; *Woolley v. Morgan, Cobbold & Woolley v. Morgan* (1887), 4 T. L. R. 211. *Mentd.* *Turley v. Daw* (1906), 94 L. T. 216.

**405.** **Payment after issue of writ—Neglect to countermand execution—Malice & want of probable cause must be alleged & proved.**—An action on the case will not lie against a party suing out a writ if he neglect to countermand it after payment of the debt, at least unless malice

debtor, paid to B., the decree-holder, a sum of money by way of compromise, in full satisfaction of the decree. B. failed to certify this payment to the ct., & afterwards executed her decree for the full amount. In a suit by A. against B. for recovery of the amount previously paid out of ct. in satisfaction of the decree :—*Held* : notwithstanding Act, XXIII. of 1861, s. 11, the suit was maintainable.—*GUNAMANI DAS v. PRAN KISHORI DAS* (1870), 5 B. L. R. 223; 13 W. R. (F. B.) 69.—**IND.**

**l.** ————.]—*ISHAN CHUNDER BANDOPADHYA v. INDRO NARAIN GOSSAMI* (1883), 1 L. R. 9 Calc. 788; 12 C. L. R. 391.—**IND.**

**m.** *Payment of claim before judgment—Judgment for claim & costs.*—In an action of damages pursuer averred that defenders had raised a



*Sect. 20.—Wrongful and irregular execution:—Sub-sect. 1, A. (c), B. & C.; sub-sect. 2, A.]*

be averred. Reasonable time is a question of law.—*SCHEIBEL v. FAIRBAIN* (1799), 1 Bos. & P. 388; 126 E. R. 968.

*Annotations:—Apld. Page v. Wiple* (1803), 3 East, 314. *Distd. Bates v. Pilling* (1826), 11 B. & C. 38. *Consd. De Medina v. Grove* (1846), 10 Q. B. 152; *Phillips v. General Omnibus Co.* (1880), 50 L. J. Q. B. 112; *Clissold v. Cratchley*, [1910] 1 K. B. 374. *Refd. Lewis v. Morris* (1834), 2 Cr. & M. 712; *Saxon v. Castle* (1837), 11 Ad. & El. 652.

406. ————.]—No action will lie for not preventing but permitting & suffering pltf. to be arrested after payment of debt & costs owing to deft. upon a writ sued out before such payment. Malice is the gist of all actions for injuries of that nature.—*PAGE v. WIPLE* (1803), 3 East, 314; 102 E. R. 618.

*Annotations:—Distd. Bates v. Pilling* (1826), 6 B. & C. 38. *Consd. De Medina v. Grove* (1846), 10 Q. B. 152; *Phillips v. General Omnibus Co.* (1880), 50 L. J. Q. B. 112. *Refd. Lewis v. Morris* (1834), 2 Cr. & M. 712; *Churchill v. Siggers* (1854), 18 Jur. 773.

407. **Compromise after issue of writ—Duty of plaintiff to countermand execution—Malice & want of probable cause must be alleged & proved.]**—In the absence of malice, no action will lie against a judgment creditor for not withdrawing the sheriff from possession after the judgment creditor has become bound by a composition of the debt. According to the statement of claim, A., having recovered a judgment against B., issued a writ of *fi. fa.* under which the sheriff entered into possession of B.'s goods. B. filed a petition of insolvency, & A. proved for the amount of his judgment against B.'s estate. Resolutions for a composition were passed & registered. The sheriff refused to withdraw from possession without A.'s instructions, & which were not given by A. No malice was alleged as against A.:—*Held*: in the absence of malice A.'s failure to instruct the sheriff to retire gave B. no right of action against A.—*PHILLIPS v. GENERAL OMNIBUS CO.* (1880), 50 L. J. Q. B. 112.

**Malicious execution.]—See Sub-sect. 3, post.**

*B. Process Wrongly Executed.*

**Execution against wrong person.]—See Sect. 6, ante.**

**Execution of writ.]—See Sect. 13, ante.**

**Wrongful & irregular seizure under writ of *fi. fa.*]—See Part III., Sect. 1, sub-sect. 12, post.**

debt against him for payment of £5, that thereafter he had sent them a cheque for that amount, that they had retained the cheque, & some days after receiving it had, without communicating with pursuer maliciously taken decree in absence against him for £5 & expenses:—*Held*: pursuer's averments were irrelevant, as the only tender which would have disentitled defenders to take decree would have been a tender of money in payment of the debt & expenses.—*POLLOCK v. GOODWIN'S TRUSTEES* (1898), 25 R. (Ct. of Sess.) 1051; 35 Sc. L. R. 821; 6 S. L. T. 72.—*SCOT*.

**PART II. SECT. 20, SUB-SECT. 1.—C.**

**n. Execution issued before judgment.]—**An execution placed in the sheriff's hands before judgment will be treated as fraudulent, & will be set aside at the instance of a judgment creditor of deft.—*DE VEBER v. COLLING* (1880), 11 N. B. Dig. 370.—

**o. Execution for damages not claimed nor awarded.]—**A writ of execu-

tion for damages & costs was set aside, damages being neither claimed on the record nor awarded in the judgment.—*DAVIS v. M'NAB* (1842), 6 O. S. 157.—*CAN*.

**p. When no object served by setting aside writ.]—**A deft. arrested on a *ca. sa.* was discharged from custody with costs, he undertaking to bring no action; & in the order leave was reserved to him to move the ct. to set aside the writ & arrest. The ct. discharged a rule for this purpose; for deft. being released, & precluded from an action, there could be no object served by setting aside the process.—*BROWN v. BROWN* (1853), 10 U. C. R. 393.—*CAN*.

**q. When sum demanded not due—Or payable when action commenced.]—**When any person shall have any title or interest in any real estate, goods or credits attached, as a subsequent attachor or otherwise, he may be allowed to dispute the validity & effect of the attachment, on the ground that the sum demanded was not justly due, or that it was not payable when the

*C. Setting Aside Writ.*

408. **Terms will not be imposed.]—***GILLOTT v. ASTON*, No. 391, *ante*.

*See, also, Sub-sect. 1, A. (b), (c), ante.*

**SUB-SECT. 2.—IRREGULAR EXECUTION.**

*A. What Constitutes Irregular Execution.*

409. **Blank filled up after sealing.]—***WEBSTER v. VAUGHAN* (1727), 1 Barn. K. B. 19; 94 E. R. 13.

410. **Successive writs for portions of debt.]—***FISHER v. CARRUTHERS* (1736), Barnes, 202; 94 E. R. 876.

411. **Whether execution after bankruptcy.]—***CALCRAFT v. SWANN* (1741), Barnes, 204; 94 E. R. 877.

412. ————.]—A bkpt. obtained his certificate on Nov. 13. The same day a *fi. fa.* was executed on his goods. The ct. refused relief on motion.—*HANSON v. BLAKEY* (1828), 4 Bing. 493; 1 Moo. & P. 261; 6 L. J. O. S. C. P. 70; 130 E. R. 858.

*Annotations:—Distd. Davis v. Shapley* (1830), 1 B. & Ad. 54. *Refd. Barrow v. Poile* (1830), 9 L. J. O. S. K. B. 95.

413. ————.]—6 Geo. 4, c. 16, s. 121, enacts, that a bkpt. shall be discharged from all debts due by him when he became bkpt., & from all claims & demands thereby made proveable under the commission, in case he shall obtain his certificate:—*Held*: the goods, as well as the person, are protected by this sect.; & the goods of a certificated bkpt., acquired after the bkpcy., being seized under a *fi. fa.* issued upon a judgment in respect of a debt due before the bkpcy., the ct. on motion set aside the *fi. fa.*—*DAVIS v. SHAPLEY* (1830), 1 B. & Ad. 54; 8 L. J. O. S. K. B. 357; 109 E. R. 707.

*Annotations:—Consd. Clark v. Smith* (1847), 3 C. B. 982. *Refd. Sharpe v. D'Almaine* (1840), 4 Jur. 989; *Rossi v. Bailey* (1868), L. R. 3 Q. B. 621.

414. ————.]—*TURNER v. PULMAN* (1848), 2 Exch. 513; 154 E. R. 594.

415. ————.]—An order having been made in bkptcy. protecting deft. from process until a certain day, on which day pltf. levied under writs of *fi. fa.* issued after the order, the money levied was ordered to be paid to the assignees.—*BELLHOUSE v. MELLOR*, *PROUDMAN v. MELLOR* (1859), 4 H. & N. 116; 32 L. T. O. S. 317; *sub nom. BACKHOUSE v. MELLOR*, *PROUDHON v. MELLOR*, 28 L. J. Ex. 141; 5 Jur. N. S. 175.

*Annotations:—Folld. Williams v. Dray* (1860), 29 L. J. Q. B. 86. *Mentd. Tomline v. Cadman* (1859), 6 C. B. N. S. 733; *Isaacs v. Royal Insce. Co.* (1870), L. R. 5 Exch. 296.

action commenced. When T., a subsequent attachor, in his affidavit in support of a motion to set aside process of preceding attachor, stated that pltf. was secured, in part, by a mtge. & that security had been given for the whole amount:—*Held*: T. had shown a right to interfere. The ct. directed a jury to inquire whether pltf. had any & what good & sufficient security.—*NASH v. MCCARTNEY* (1857), 2 Thom. 167.—*CAN*.

**r. Judgment fraudulent against creditors.]—***DOUGLASS v. WARD* (1864), 11 Gr. 39.—*CAN*.

**s. Execution against executors—Proceedings to be taken in original action.]—**Proceedings to set aside an execution against exors. of an estate on the ground that it was improperly issued should be taken in the original action & it cannot be set aside in an action brought to remove it as a cloud on the title by transferees of land from the exors.—*RUTTLE v. ROWE* (1919), 3 W. W. R. 1120; 50 D. L. R. 346; 13 Sask. L. R. 79.—*CAN*.

**416.** —.]—An execution on a trader's goods after a protection order has been granted on his petition under Bkpt. Act, 1849 (c. 106), s. 211, is void & the execution creditor is not entitled to the proceeds whatever is the result of the proceedings in bkpcy.—*WILLIAMS v. DRAY* (1860), 29 L. J. Q. B. 86; 1 L. T. 513; 6 Jur. N. S. 532; 8 W. R. 259.

**417.** —.]—If the property of a debtor be taken in execution after a deed of composition has been executed by the debtor, the ct. will not, except under special circumstances, set aside the execution, but will order the sheriff to withdraw.—*ALLEN v. CUCKSEY* (1867), 16 L. T. 385; 15 W. R. 865.

**418. Not irregularity in return.**—The validity of an execution under a *fi. fa.* cannot be impeached at *nisi prius* on the ground that the judgment ought to have been revived by *sc. fa.* or that there was an irregularity in the return of the writ.—*HABBERTON v. WAKEFIELD* (1814), 4 Camp. 58, N. P.

**419. Issue after death of debtor.**—Pltf. obtained a verdict at the Spring Assizes. Deft. died on Apr. 18. The costs were taxed on the 21st, final judgment signed on the 22nd, & a *fi. fa.* issued on the same day, tested on the first day of the term. The ct. refused to set aside the *fi. fa.* for the irregularity in issuing it after the death of deft. without a *sci. fa.*, the writ being warranted by the judgment, which the motion did not impeach.—*WATSON v. MASKELL* (1834), 4 Moo. & S. 461.

**420.** —.]—Where deft. died between eleven & twelve o'clock in the morning & a writ of *fi. fa.*

was sued out against his goods between two & three the afternoon of the same day, the ct. set aside the writ as irregular.

Where it is necessary to show which of two events first took place the ct. may enter into the question of the fractions of the day.—*CHICK v. SMITH* (1840), 8 Dowl. 337; *sub nom. CLINCH v. SMITH*, 4 Jur. 86.

*Annotations:*—*Reid. Edwards & Collins v. R.* (1854), 23 L. J. Ex. 165; *Wright v. Mills* (1859), 4 H. & N. 488; *Campbell v. Strangeways* (1877), 3 C. P. D. 105.

**421. Variance between sum indorsed & judgment.**—In an action of debt, pltf. signed judgment for want of a plea, & the *incipitur* was entered up for the whole debt claimed in the declaration, which was the aggregate of the sums named in the several counts, & exceeded the real debt. Pltf. sued out a *fi. fa.*, which, in the mandatory part as well as the endorsement, was for the real debt only, & taxed costs, & which recited a judgment as for such lesser sum only. A summons being taken out to set aside the proceedings, for irregularity, on account of the variance between the *fi. fa.* & the entry of the *incipitur*, pltf., before the summons was heard, completed the judgment roll, with a *remittitur* of all above the real debt & costs, & an award of judgment for such debt & costs only. The execution having been set aside at chambers for irregularity, the judge's order was rescinded on motion in banc, the complete judgment roll agreeing with the *fi. fa.*, & the ct., on such motion, not looking to the *incipitur*. The ct. afterwards refused to set aside the judgment & subsequent proceedings on the ground of variance between the *incipitur* & the judgment itself.—*KING v.*

## PART II. SECT. 20, SUB-SECT. 2.—A.

**421 i. Variance between sum indorsed & judgment.**—*Semble:* an execution issued by a justice of the peace for more than the amount of the judgment is irregular only, & the mere arrest of deft. under it is not necessarily a wrong.—*RYAN v. JAMES* (1872), 14 N. B. R. (1 Pug.) 122.—CAN.

**t. Proceeding after return day.**—Where a *fi. fa.* is in itself regular, the ct. will not set it aside because the sheriff did not take any proceedings under it during its currency, but advertised lands after the return day thereof.—*MORRISON v. REES* (1851), 1 P. R. 25.—CAN.

**a. Issue from wrong office.**—It is irregular to issue execution out of the office of a deputy clerk of the Crown, in which there have been no previous proceedings in the cause, or in which there is no judgment entered.—*DALRYMPLE v. MULLEN* (1852), 1 P. R. 327, n.—CAN.

**b. Misnomer in writ—Variance in copies served.**—One of several debts was arrested on a *capias* in which he was misnamed, & on the copy served there was no direction to take bail. He was taken to the sheriff's office, & about an hour afterwards was served there with another copy, on which was indorsed, "take bail for £319 11s. 3d.," not saying that this was the sum sworn to, nor was this stated on the original either. The next day he was served in gaol with a third copy, on which was indorsed the same direction, with "by affidavit" added:—*Held:* arrest bad on both grounds.—*PEGG v. CAMPBELL* (1853), 1 P. R. 328.—CAN.

**c.** —.]—Where a party by his own conduct & admissions has justified the calling him by a wrong name, he cannot object to the use of such name as a misnomer.—*BROWN v. SMITH* (1855), 1 P. R. 347.—CAN.

**d.** — *Transposition of names of parties.*—In a writ of *fi. fa.*, & the indorsements thereon, pltf. were styled

defts. & *vice versa*, the words being transposed throughout, & the Christian names of deft. were also transposed:—*Held:* the writ & indorsements were irregular.—*DAVIDSON v. GRANGE* (1870), 5 P. R. 258.—CAN.

**e. After date fixed for return of writ.**—A *fi. fa.* lands had been renewed on Aug. 25, 1862, & nothing done under it till the last day of its currency Aug. 24, 1863. On this day a list of deft.'s lands was given by pltf.'s attorney to the sheriff, & the latter on the same day sent the usual advertisement thereof to the *Canada Gazette* & a local paper. On Sept. 2 following, it appeared in a local paper, & in the *Gazette* on a subsequent day:—*Held:* the writ was spent, & the lands could not be legally sold under it.—*REYNOLDS v. STREETER* (1864), 3 P. R. 315.—CAN.

**f.** — *Alias writs not in sheriff's hands for one year.*—A *fi. fa.* lands issued Sept. 6, 1866, & was returned for \$1, & no lands for the residue; but nothing had been done & no lands advertised under it. On the same day a *ven. ex.* & a *fi. fa.* residue was delivered to the sheriff, who advertised as if under the original writ, & sold the lands in question on May 2, 1868:—*Held:* the sale could not be supported, for the original writ had expired with nothing done under it, & the *ven. ex.* & *fi. fa.* residue had not been a year in the sheriff's hands before the sale; & moreover he had assumed to act under the original *fi. fa.* & *ven. ex.* & not the *fi. fa.* residue.—*LEE v. HOWES* (1870), 30 U. C. R. 292.—CAN.

**g. Description of parties—Following judgment roll—Error of court officer in judgment book.**—A writ of execution was set aside on the ground that although it purported to be issued in the proper action, according to the papers & the judgment roll, it did not follow the title of the cause as entered by mistake by the officer of the ct. in his book of judgments:—*Held:* the solr., in issuing the execution, correctly followed the judgment roll, & not the

error made by the officer of the ct. in his entry in the judgment book.—*ARMSTRONG v. DUNLAP* (1892), 24 N. S. R. 334.—CAN.

**h. Execution for costs—Non-service of order dismissing action & notice of taxation.**—Deft. obtained an order dismissing the action with costs for non-prosecution, upon notice to pltf., who did not appear upon the motion. Deft. did not serve pltf. with a copy of the order, & went on & taxed his costs, without notice to pltf., & issued execution for the amount taxed:—*Held:* not grounds for setting aside the execution.—*CRANSTON v. BLAIR* (1893), 15 P. R. 167.—CAN.

**k. Variation between writ & transcript—Recital in writ of wrong date for judgment.**—*STAUNTON v. MCLEAN*, 21 C. L. T. 587.—CAN.

**l. Absence of Gazette advertisement.**—The absence of an advertisement in the *Gazette* is a mere irregularity.—*STAUNTON v. MCLEAN*, 21 C. L. T. 587.—CAN.

**m. No return to writ.**—The fact that there is no return to the *fi. fa.* goods does not invalidate the sale but is a mere irregularity.—*STAUNTON v. MCLEAN*, 21 C. L. T. 587.—CAN.

**n. Technical irregularity.**—In execution proceedings the cts. will look at the substance of the transaction, & will not be disposed to set aside an execution upon mere technical grounds, when they find it is substantially right.—*SHEO PERSHAD SINGH v. SAHEB LAL* (1892), 1 L. R. 20 Calc. 453.—IND.

**o. Sale—Deposit of part of purchase-money.**—The fact that an auction-purchaser at a sale held in execution of a decree not pay the 25 per cent. of the purchase-money required by Civil Procedure Code, s. 306, at the time of the sale is a mere irregularity, which will not affect the validity of the sale, unless it can be shown that substantial injury is thereby caused to the judgment-debtor.—



*Sect. 20.—Wrongful and irregular execution: Subsect. 2, A. & B. (a) i. & ii., (b) & (c).]*

BIRCH (1842), 3 Q. B. 425; 2 Gal. & Dav. 513; 11 L. J. Q. B. 183; 114 E. R. 569.

*Annotations:—*Reid. Phillips v. Birch (1842), 4 Man. & G. 403; Peirce v. Derry (1843), 4 Q. B. 635; Deacon v. Allison (1848), 6 C. B. 434.

**422. Issue before proper date.]—**BIRKENHEAD, ETC. JUNCTION RY. CO. v. DIMMACK, No. 430, *post*.

### *B. Setting Aside Writ.*

#### *(a) The Application.*

##### *i. Who can Apply.*

**423. Any party having interest—Bankrupt execution debtor.]—**Upon an application to set aside the execution upon a judgment under a warrant of attorney, if it appear that the party applying has some interest, the ct. will not look to the amount of it:—*Held*: the application might be made by deft. against whom a fiat in bkptcy. had afterwards issued, & which was in the course of operation, as he had an interest to increase the divisible fund to be distributed under the fiat.—PINCHES v. HARVEY (1841), 1 Q. B. 868; 1 Gal. & Dav. 236; 10 L. J. Q. B. 316; 6 Jur. 389; 113 E. R. 1364.

##### *ii. How Made.*

**424. Application not made ex parte.]—**ROLFE v. BROWN, No. 287, *ante*.

**425. Application must be made without delay.]—**A party must come to the ct. to set aside irregular proceedings within a reasonable time. Where, therefore, execution was levied on an irregular judgment in vacation, & the motion to set it aside was not made until the fifteenth day of the next term:—*Held*: too late.—AUSTIN v. DAVEY (1844), 1 New Pract. Cas. 50; 4 L. T. O. S. 160; 8 Jur. 1138.

**426. —.]—**When a party seeks to set aside proceedings on the ground that he has not been served with process, he should apply promptly.

The goods of deft. were seized under a *fi. fa.* on Dec. 23. On Jan. 18, he moved for a rule to set aside the proceedings on the ground that he had never been served with process, & knew nothing of the action until the day of the execution:—*Held*: the application was made too late.—JONES v. DAVIS (1847), 1 Saund. & C. 290; 8 L. T. O. S. 347.

**427. —.]—**Where a party seeks to set aside proceedings for irregularity, he must come promptly to the ct. Where, therefore, execution was levied on Nov. 7, & the affidavit of the party sworn on Nov. 18, & the motion to set the execution aside made on Nov. 20:—*Held*: too late.—COOKE v. PEACE (1844), 4 L. T. O. S. 141; 9 Jur. 227.

**428. —.]—**Alehouse Licensing Act, 1828 (c. 61), is repealed by Summary Jurisdiction Act, 1847 (c. 43), s. 27, as to the mode in which costs may be ordered to be paid by applt. upon confirmation of a conviction by the sessions.

If an order of sessions bad upon the face of it is removed into this ct. under Quarter Sessions Act, 1849 (c. 45), s. 18, & a writ of *fi. fa.* issued thereon & the party against whom the writ is issued is not guilty of laches, the ct. will, upon his application, set aside the proceedings in this ct. subsequent to the removal & order the money levied to be returned, although appct. could not have removed the order of sessions by *certiorari* for the purpose of quashing it.—R. v. HELLIER (1851), 17 Q. B. 229; 4 New Sess. Cas. 725; 21 L. J. M. C. 3; 17 L. T. O. S. 152; 15 J. P. 674; 15 Jur. 901; 117 E. R. 1267.

*Annotations:—*Mentd. R. v. Binney (1853), 22 L. J. M. C. 127; R. v. Huntley (1854), 3 E. & B. 172; Mid. Ry. v. Edmonton Union (1893), 70 L. T. 355; R. v. London JJ., [1895] 1 Q. B. 616.

**429. —.]—**Where a writ of summons is specially endorsed under Common Law Procedure Act, 1852 (c. 76), s. 25, & judgment is signed for default of appearance, pursuant to sect. 27, after payments made by deft. on account, pltf. is not entitled to sign judgment for the sum endorsed upon the writ, but only for the balance remaining due after giving credit for the moneys paid. By a special endorsement under above statute, pltf. claimed £34 11s. 7d. Deft., after the issuing of the writ, & before judgment paid £25 on account, & judgment was signed & execution issued for the full amount, but with a direction to the officer to take the balance only & costs. Deft. having been arrested & detained under this writ, a judge at chambers made an order to reduce the amount for which the judgment was signed to the proper sum, & to discharge deft. from custody, in pursuance of Execution Act, 1844 (c. 96), s. 57, the sum recovered not exceeding £20 exclusive of costs. The ct. refused to rescind the order. The arrest took place on Aug. 14, & the application for deft.'s discharge was not made until Dec. 11:—*Held*: not too late.—HODGES v. CALLAGHAN (1857), 2 C. B. N. S. 306; 26 L. J. C. P. 171; 29 L. T. O. S. 79; 3 Jur. N. S. 369; 5 W. R. 531; 140 E. R. 434.

*Annotations:—*Mentd. West v. Farlar (1858), 1 E. & E. 179; Huffer v. Allen (1866), L. R. 2 Exch. 15; Hughes v. Justin, [1894] 1 Q. B. 667; Muir v. Jenks, [1913] 2 K. B. 412.

**430. Form of application.]—**Judgment by default on a writ of summons specially endorsed, & a writ of execution issued on the seventh day after the last day for appearance instead of the eighth:—*Held*: an irregularity only, & the rule nisi to set aside the execution should have pointed out that it was for irregularity.—BIRKENHEAD, ETC. JUNCTION RY. CO. v. DIMMACK (1858), 31 L. T. O. S. 213.

AHMAD BAKSHI v. LAITA PRASAD & AZMAT ALI (1905), 1 L. R. 28 All. 238.—IND.

### **PART II. SECT. 20, SUB-SECT. 2.—** **B. (a) i.**

**p. Any person having interest—Judgment creditor.]—**STEVENS v. SHELDON (1841), (1823–1900), 2 Ont. Dig. 2609.—CAN.

**q. —.]—**After the death of pltf. & before the order of revive the solr. who had acted for her issued a writ of *habere facias possessionem* upon the judgment, without the leave required by rule 886:—*Held*: the writ was irregular, & it was competent for the party affected by it to apply to set

it aside without first reviving the action.—CHAMBERS v. KITCHEN (1894), 16 P. R. 219.—CAN.

**r. Not subsequent execution creditor.]—**An irregular execution will not be set aside at the instance of a subsequent execution creditor.—FARR v. ARDERLY (1845), 1 U. C. R. 337.—CAN.

**s. Not judgment debtors sustaining no damage.]—**On application for confirmation of a sale, the judgment debtors applied to have the sale set aside; the judge confirmed the sale finding that, although there were irregularities in the conduct of the sale, the judgment debtors had not sustained any damage.—GAJRAJMATI TEORAIN

v. AKBAR HUSAIN (1906), 1 L. R. All. 196; L. R. 34 Ind. App. 37.—IND.

**t. Not mortgagees sustaining no actual loss.]—**A vessel disabled at sea was repaired at a remote seaport, with the sanction of the owner; & thereafter the party who repaired it arrested the vessel for the price, & ultimately, brought it to a judicial sale, at which he became the purchaser. All the procedure was conducted by him or his agent:—*Held*: mortgagees who had sustained no actual loss had no legal title or interest to challenge the proceedings.—ELIAS v. BLACK (1856), 18 Dunl. (Ct. of Sess.) 1225; 28 Sc. Jur. 622.—SCOT.

(b) *Terms Imposed.*

**431. Discretion of court—No action to be brought.]—**WILSON v. KINGSTON (1816), 2 Chit. 203; 1 Chit. 134, n.

**432. ———.]—**SIMMONS v. JOHNSON (1818), 1 Chit. 134, n.

**433. ———.]—**Deft., against whom in an action for damages, on a tort, a verdict has been taken subject to the award of an arbitrator, was held to be discharged from the debt by his certificate obtained before the entering up of judgment where he had become bkpt. between the verdict & the making of the award, & that execution could not be sued out on the judgment, because pltf. might have proved the damages recovered under the commission by production of the record. Nor can he support such execution for the costs. A *fi. fa.* issued on a judgment entered up under such circumstances & executed, was set aside on the terms of deft. undertaking to bring no action against the sheriff.—BEESTON v. WHITE (1819), 7 Price, 209; 146 E. R. 950.

**434. ——— Judgment set aside for irregularity.]—**On setting aside a judgment & execution for irregularity the ct. will restrain deft. from bringing an action of trespass unless a strong case of damages be shown.—LORIMER v. LULE (1819), 1 Chit. 134.

*Annotation:—*Consd. Abbott v. Greenwood (1839), 7 Dowl. 534.

**435. ———.]—**If a proceeding is irregular, the opposite party has a right to have it set aside; & therefore if the term of bringing no action is not imposed by the ct. at the time of disposing of the rule for setting aside the irregular proceedings the successful party cannot be restrained from bringing an action in respect of the irregularity.—ABBOTT v. GREENWOOD (1839), 7 Dowl. 534; 1 Will. Woll. & H. 565.

**436. ———.]—**Where a judgment & execution are set aside for irregularity, the ct. has no power to impose the term on deft. that he shall bring no action.—ADLAM v. NOBLE (1841), 9 Dowl. 322; 5 Jur. 246.

*Annotation:—*Mentd. Durrant v. Blurton (1841), 5 J. P. 532.

**437. ——— Where costs not asked for.]—**(1) An arrest under a *ca. sa.* by a bailiff, to whom the warrant is not addressed, in the absence of the officer to whom it is addressed, even though such officer has engaged him to assist him in his absence, he himself being at a considerable distance at the time of the arrest, is irregular, & deft. will be discharged out of custody.

(2) A rule to discharge him is properly directed to pltf., & not to the sheriff.

(3) If the rule does not ask for costs, the ct. will not impose it as a condition, that deft. shall bring no action.—RHODES v. HULL (1857), 26 L. J. Ex. 265.

**438. ———.]—**Deft.'s goods having been taken under a *fi. fa.* after the debt & costs had been paid by another party liable upon the same instrument, he applied to a judge to set aside the execution. The judge made the order, but imposed as a term that deft. should bring no action. Having availed himself of the order so as to get the sheriff to withdraw from possession:—*Held*: deft. could not afterwards move to set aside so much of it as restrained him from bringing an action.—WILCOX v. ODDEN (1864), 15 C. B. N. S. 837; 143 E. R. 1014.

**439. ———.]—**The ct. will not interfere with the discretion of a judge at chambers, where upon a summons to set aside an execution for irregularity, with costs, he makes the order as prayed, adding as a condition, that deft. bring no action, even though the order has not been drawn up.—BARTLETT v. STINTON (1866), L. R. 1 C. P. 483; Har. & Ruth. 565; 35 L. J. C. P. 238; 14 L. T. 287; 12 Jur. N. S. 342; 14 W. R. 614.

*Annotation:—*Mentd. Anlaby v. Prætorius (1888), 20 Q. B. D. 764.

**440. ———.]—**IBBOTSON v. WHITWORTH  
Char. Cham. Cas. 33.

**441. Time for making application—At time of order setting aside.]—**SIMMONS v. JOHNSON (1818), 1 Chit. 134, n.

**442. Term that no action be brought—Sheriff proceeding with sale — Liability of execution creditor.]—**B. sued out execution against A. After seizure, & before sale, the execution was set aside by rule of K. B. Div., of which the sheriff received notice from A. before the sale, & by the terms of the rule A. was to bring no action for the seizure. The sheriff having proceeded to a sale, on the ground that he had received no notice of the rule from B.:—*Held*: A. might sue B. in trespass for the sale.—PERKINS v. PLYMPTON (1831), 7 Bing. 676; 5 Moo. & P. 731; 131 E. R. 261; *sub nom.* PARKINS v. PLYMPTON, 9 L. J. O. S. C. P. 223.

(c) *Effect of.*

**443. Plaintiff entitled to issue another writ.]—**The ct. refused to discharge deft. out of custody, on the ground that he had before been irregularly taken, under colour of a pretended criminal charge, on a *capias* sued out on the same judgment, & discharged from that execution on account of the irregularity of the proceeding, the first

PART II. SECT. 20, SUB-SECT. 2.—  
B. (b).

**431 i. Discretion of court—No action to be brought.]—***Assumpsit* against A. & B., two brothers, as maker & indorser of a note. A verdict & judgment having been obtained, & B.'s goods seized, he applied for relief, stating in his affidavit that he had never indorsed the note, & knew nothing of the action until seizure of his goods. Upon the affidavits it was uncontradicted that he had received no notice before action brought, & had been served with no writ or other papers in the cause, an attorney having appeared for both debts, by A.'s instructions; but A. swore positively to B.'s indorsement, & that he had instructed him to have such appearance entered. The service of the writ of summons, & all subsequent proceedings as against B., were set aside without costs, B. undertaking to bring no action for anything done under the

*fi. fa.*—WRIGHT v. HULL (1856), 2 P. R. 26.—CAN.

**431 ii. ———.]—**In suing out a writ of attachment against deft., pltf. had omitted to state in his affidavit whether deft. was a corpn. or not. Deft., being therefore entitled *ex debito justitiæ*, to have the writ set aside:—*Held*: the ct. could not impose the term of bringing no action against pltf. as a condition of setting the writ aside, but costs should be refused unless deft. would consent to such term being imposed.—WILSON v. SMITH (1893), 9 Man. L. R. 318.—CAN.

**431 iii. ———.]—**On an application to set aside a writ of *ca. sa.*, under which deft. was in custody, the ct., notwithstanding that the evidence abundantly proved irregularities, made the release conditional by restraining deft. from bringing any action for the imprisonment.—BEARNS v. PERCHARD (1858), 4 Nfld. L. R. 254.—NFLD.

PART II. SECT. 20, SUB-SECT. 2.—  
B. (c).

**u. Whether issue of effective execution effected.]—**On Oct. 16, 1881, pltf. recovered judgment against deft., & on Oct. 3, 1885; issued an execution for the amount, describing the judgment as of July 18, 1885. Finding his mistake, he directed the sheriff to return the execution as not satisfied, which was done, but not until a levy had been made on deft.'s goods. Pltf. then issued a second execution, correctly, following the judgment, & under the second execution the goods were sold. Deft. applied to set aside the first & second executions & all proceedings of the sheriff thereunder, & an application was made on behalf of pltf. to revive & renew the first execution:—*Held*: the first execution being irregular, & not such an execution as when returned satisfied, would be a bar to any future claim for the amount



**Sect. 20.—Wrongful and irregular execution: Sub-sect. 2, B. (c) & (d) & C.; sub-sects. 3 & 4, A. (a).]**

execution being a nullity.—**MACKIE v. WARREN** (1828), 5 Bing. 176; 2 Moo. & P. 279; 7 L. J. O. S. C. P. 59; 130 E. R. 1028.

**444. —**It is no answer to an action of debt on a judgment that debt. had been taken under a writ of *ca. sa.* issued on the judgment & detained in custody twenty days, if it appears that debt. was by a judge's order let out of custody on certain terms.—**MCCORMICK v. MELTON** (1834), 1 Cr. M. & R. 525; 5 Tyr. 147; 4 L. J. Ex. 24; 149 E. R. 1188; *sub nom.* **MCCORNISH v. MELTON**, 3 Dowl. 215.

**Annotation:—****Folld. Collins v. Beaumont** (1839), 10 Ad. & El. 225.

(d) *Costs of.*

**445. Not set off against costs of judgment.]—**If an execution be set aside with costs, as having been sued out after the allowance of a writ of error, the ct. will not permit the costs of the application to be set off against the costs of the action, but will compel pltf. to pay them forthwith.—**HILL v. TEBB** (1805), 1 Bos. & P. N. R. 311; 127 E. R. 482.

**446. —**Where the lessor of pltf. obtained a verdict in ejectment in 1834, & taxed his costs, & sued out a writ of possession, which was set aside in 1837, for irregularity, with costs:—**Held**: not having revived the judgment by *sci. fa.*, he could not set off his costs on the judgment against debt.'s costs, on setting aside the writ of possession.—**DOE d. STEVENS v. LORD** (1839), 7 Ad. & El. 610; 1 Per. & Dav. 388; 8 L. J. Q. B. 97; 112 E. R. 600.

C. *Waiver of Irregularity.*

**447. By request for time for return by sheriff.]—**Irregularity in signing judgment & issuing execution on a warrant of attorney was cured by debt. obtaining time for the sheriff to return the writ.—**LEWIS v. GOMPERTZ** (1837), Will. Woll. & Dav. 592; 1 Jur. 984.

SUB-SECT. 3.—MALICIOUS EXECUTION.

*See, generally, MALICIOUS PROSECUTION.*

**448. Attachment of goods of third party.]—****SANDERS v. POWELL** (1664), 1 Lev. 129; 83 E. R. 332; *sub nom.* **SAUNDERS v. POWELL**, 1 Sid. 183; 1 Keb. 693.

**Annotations:—****Mentd. R. v. Lawley** (1731), 1 Barn. K. B. 459; **Adamson v. Jarvis** (1827), 4 Bing. 66.

**449. Refusal to accept debt & costs from execution debtor.]—**Pltf. is bound to accept from debt. in custody under a *ca. sa.* the debt & costs when tendered in satisfaction of his debt & to sign an authority to the sheriff to discharge debt. of out

of the judgment, & so protect debt. as well as serve pltf., it could not interfere with the issue of an effective execution, or justify the setting aside of the execution last issued, which answered the purpose of both parties.—**MCDUGALL v. GRIFFIN** (1886), 19 N. S. R. (7 R. & G.) 254; 7 C. L. T. 347.—**CAN.**

a. *Discontinuance of suit.]—*It is contrary to general principles & a senseless addition to all the vexations of delay in the course of proceedings to hold that when, for any reason satisfactory or not, the execution of a final decree in a suit fails or is set aside, & the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, & the further proceedings for the same

purpose are to be considered as taken in a new suit.—**MUNESH NARAIN SINGH (RAJAH) v. KISHANUND MISHI** (1862), 5 W. R. (P. C.) 7; 1 Marsh. 592; 9 Moo. Ind. App. 324.—**IND.**

PART II. SECT. 20, SUB-SECT. 3.

b. *Malice must be specifically alleged.]—*In an action for enforcing a judgment in itself regular, but which has been satisfied, malice must be alleged in the declaration.—**AULT v. —** (1855), 12 U. C. R. 385.—**CAN.**

c. —.]—**Held**: no cause of action was shown, for it was not stated that debt. acted maliciously & without reasonable or probable cause.—**YOUNG —** 21 U. C. R. 443.—

custody. An action on the case will lie against pltf. for having maliciously refused so to do; & the refusal to sign the discharge is sufficient *prima facie* [evidence] of malice in the absence of circumstances to rebut the presumption.—**CROZER v. PILLING** (1825), 4 B. & C. 26; 6 Dow. & Ry. K. B. 129; 3 L. J. O. S. K. B. 131; 107 E. R. 969.

**Annotations:—****Apld. Phillips v. General Omnibus Co.** (1880), 50 L. J. Q. B. 112. **Refd. Lewis v. Morris** (1834), 2 Cr. & M. 712; **Saxon v. Castle** (1837), 6 Ad. & El. 652; **Drury v. Hounsfield** (1840), 11 Ad. & El. 101; **Savory v. Chapman** (1840), 11 Ad. & El. 829; **De Medina v. Grove** (1846), 10 Q. B. 152; **Moore v. Gardner** (1847), 16 M. & W. 595; **Hemming v. Hale** (1859), 7 C. B. N. S. 487; **Lee v. Dangar, Grant & Co.**, [1892] 1 Q. B. 231; **Cubitt v. Gamble** (1919), 35 T. L. R. 223.

**450. Neglect to inform sheriff of payment of debt.]—**(1) Two concurrent writs of *ca. sa.* were issued into the counties of L. & M., by B., the attorney of one D., pltf. in a former action, against F. Both writs were returnable on Nov. 2. F. was arrested on Nov. 1, on the writ issued in the county of M., but the sheriff of that county, on being paid the debt & costs, discharged F. out of custody, without the knowledge or sanction of pltf. in the original action or her attorney, & without any authority of either. After his discharge from that arrest, F. went into the county of L., & was again arrested on the following day, upon the *ca. sa.* issued into the latter county, & was detained in custody for about twelve days. A notice was sent to B.'s office on Nov. 3, that F. had been arrested & paid the debt & costs to the sheriff of M., but B. was then from home. On Nov. 9, B. was again applied to by the under sheriff of L.; but he refused to authorise F.'s discharge unless the debt & costs were paid into his hands. Some days after the amount of debt & costs having been obtained from the sheriff at M., was paid to B., & thereupon he gave an order for the discharge of F. In an action brought by F. against B. & D. for wilfully & maliciously neglecting to inform & give notice to the sheriff of L. that F. had been before arrested in the county of M., & the judgment satisfied:—**Held**: malice was essential to the action, & the existence of malice was a question for the jury, & they having negatived malice & found thereupon for debts., their finding was right.

(2) In this case two concurrent writs of *ca. sa.* were issued. A pltf. has a right to issue two such writs, but he cannot execute both. It was held in **Hodgkinson v. Whalley** [No. 174, ante] that the second writ cannot be made use of, if the first has been acted upon. This would be a good ground for discharging debt. out of custody on the second writ, or in some cases for setting the second writ aside (**PARKE, B.**).—**LEWIS v. MORRIS** (1834), 2 Cr. & M. 713; 4 Tyr. 907; 4 L. J. Ex. 264; 149 E. R. 947.

d. —.]—**VENTRIS v. BROWN** (1872), 22 C. P. 345.—**CAN.**

e. *Presumption of malice.]—***Held**: the jury might with propriety infer malice from the fact of debt. having recovered a sum less than attached for, unless satisfactorily accounted for.—**PALK v. KENNEY** (1853), 11 U. C. R. 350.—**CAN.**

f. —.]—**DENISS & GLASS** (1867), 17 L. C. R. 473.—**CAN.**

g. *What evidence of malice admissible.]—***Held**: pltf. was not entitled to give evidence in support of a claim for damages for maliciously issuing the writ of *fi. fa.* matters on which the judgment was founded in respect of which the *fi. fa.* issued, without first setting aside the judgment. The

**451. Misrepresentation to taxing master—Necessity to allege malice.]**—Pltf. gave deft. a warrant of attorney to enter up judgment if certain costs should be unpaid within four days after the master should have taxed the same. Defts. procured a taxation *ex p.* & by an incorrect representation to the master obtained from him an allocatur for more costs than they were entitled to. By order of a judge on summons a new taxation was directed, pending which deft. arrested pltf. Afterwards the new taxation was had & the costs were reduced. Pltf. declared in case for a wrongful arrest & deft. pleaded that the costs had been taxed & a sum found due for which he arrested:—*Held*: (1) pltf. might properly sue in case for a malicious arrest & was not bound to declare for a deceitful representation to the master; (2) the plea was not supported, there having been in effect no taxation when deft. arrested & pltf. was not bound to reply the facts which rendered the first taxation invalid; (3) judgment must be arrested because the declaration, which set out the facts of the case, alleged only that deft. had “wrongfully & injuriously” delivered the writ to the sheriff, not adding “maliciously.”—*SAXON v. CASTLE* (1837), 6 Ad. & El. 652; 1 Nev. & P. K. B. 661; Will. Woll. & Dav. 305; 6 L. J. K. B. 177; 112 E. R. 251.

*Annotations*:—As to (3) *Appld.* *De Medina v. Grove* (1846), 10 Q. B. 152. *Refd.* *Churchill v. Siggers* (1854), 3 E. & B. 929.

**452. ———.]**—*WOOLLEY v. MORGAN*, *COBOLD & WOOLLEY v. MORGAN* (1888), 4 T. L. R. 211.

**453. Issue of process against person of same name as debtor.]**—Case is not maintainable against an attorney, who, being retained to sue for a debt a person of the same name with pltf., by mistake & without malice, takes all the proceedings to judgment & execution against pltf., or, having obtained judgment against the right person, by mistake & without malice issues execution against pltf. In the latter case, pltf. has a remedy in trespass.—*DAVIES v. JENKINS* (1843), 11 M. & W. 745; 1 Dow. & L. 321; 12 L. J. Ex. 386; 1 L. T. O. S. 290; 7 Jur. 801; 152 E. R. 1005.

*Annotations*:—*Mentd.* *Hadley v. Baxendale* (1854), 2 W. R. 302; *The Kate* (1864), *Brown. & Lush.* 218.

**454. Execution issued in bad faith—Liability of solicitor for costs of issue & execution.]**—Where under an order for the payment of costs in Chancery, a writ of *fi. fa.* has been issued & executed by the sheriff, the ct. refused to set aside the writs; but, believing they had been issued in bad faith, ordered the solr. who had taken them out to pay all charges attending their issue & execution, & also the costs of a motion for the purpose.—*Re COMMONWEALTH LAND, BUILDING, ESTATE & AUCTION CO., LTD., Ex p. HOLLINGTON* (1873), 43 L. J. Ch. 99; 29 L. T. 502; 22 W. R. 106.

**Issue of writ for sum larger than due.]**—See Sub-sect. 1, A., *ante*.

## SUB-SECT. 4.—ACTION FOR.

## A. Justification under Judgment.

## (a) Existing Judgment.

**455. Whether necessary for sheriff or his officers to justify.]**—*COTES v. MICHILL*, No. 470, *post*.

**456. ———.]**—*BRITTON v. COLE*, No. 601, *post*.

**457. ———.]**—(1) It is the well-known distinction between the cases of the party & of the sheriff or his officer that the former to justify his taking body or goods under process must show the judgment in pleading as well as the writ, but for the latter it is enough to show the writ only (*DENMAN, L.J.*).

(2) Where an officer for whom the writ or warrant alone would have been a justification joins in pleading with the party for whom it would not & who can only defend himself on the validity of the judgment or proceeding he foregoes the benefit of the warrant (*DENMAN, C.J.*).—*ANDREWS v. MARRIS* (1841), 1 Q. B. 3; 1 Gal. & Dav. 268; 10 L. J. Q. B. 225; 6 Jur. 58; 113 E. R. 1030.

*Annotations*:—As to (2) *Consd.* *Dews v. Riley* (1851), 11 C. B. 434; *Aspey v. Jones* (1884), 48 J. P. 613. *Generally, Refd.* *Carratt v. Morley* (1841), 1 Q. B. 18; *London Corp. v. Cox* (1867), L. R. 2 H. L. 239; *Speers v. Daggors* (1885), *Cab. & El.* 503. *Mentd.* *Mill v. Hawker* (1875), L. R. 10 Exch. 92; *Hill v. Metropolitan Asylum Managers* (1879), 4 Q. B. D. 433.

**458. ——— In action by execution debtor.]**—In trespass against the sheriff for seizing goods in execution brought by the person against whom the execution issued, the sheriff need not prove that there was a judgment. In trespass by any other person he must.—*LAKE v. BILLERS* (1698), 1 Ld. Raym. 733; 91 E. R. 1389.

*Annotations*:—*Appld.* *Martin v. Podger* (1770), 2 Wm. Bl. 701; *Doe d. Batten v. Murless* (1817), 6 M. & S. 110. *Refd.* *Savage v. Smith* (1776), 2 Wm. Bl. 1102; *White v. Morris* (1852), 11 C. B. 1015.

**459. ——— In action by third party.]**—*LAKE v. BILLERS*, No. 458, *ante*.

**460. ———.]**—*BESSEY v. WINDHAM*, No. 731, *post*.

.]—*WHITE v. MORRIS*, No.

*post*.

**462. ———.]**—If defts. justify under a *fi. fa.*, they must produce & prove a copy of the judgment.—*MARTYN v. PODGER* (1770), 5 Burr. 2631; 2 Wm. Bl. 701; 98 E. R. 384.

*Annotations*:—*Appld.* *Doe d. Batten v. Murless* (1817), 6 M. & S. 110. *Refd.* *White v. Morris* (1852), 11 C. B. 1015; *Haylock v. Sparke* (1853), 1 E. & B. 471. *Mentd.* *Martindale v. Booth* (1832), 3 B. & Ad. 498.

**463. ———.]**—As long as a judgment exists, it protects those who seize property, under an execution founded on it, & if the judgment & execution are set aside, no action lies against the sheriff for anything he did under it, while it remained in existence.—*IVES v. LUCAS* (1823), 1 C. & P. 7.

**464. By party suing out writ.]**—*COTES v. MICHILL*, No. 470, *post*.

**465. ———.]**—*BRITTON v. COLE*, No. 601, *post*.

execution would have been perfectly lawful if it were not for the Courts (Emergency Powers) Act, & accordingly the case must be treated simply as an action of trespass *ab initio* in which evidence of malice might be given but not evidence of that which was no malice at all.—*McMULLAN v. BRADSHAW* (1916), 50 I. L. T. 205.—*IR.*

**h. Judicial process — Proof of malice—Writ must first be set aside.]**—*Held*: (1) as the execution took place under the formal sanction of judicial powers, & as there was no proof of malice on B.'s part, A. was not entitled to succeed in the action for damages, whatever right he might have to set aside the writ; (2) if the

writ was improperly issued, A. could not succeed in an action for malicious execution without first having the writ set aside.—*HART v. COHEN* (1899), 16 S. C. 363.—*S. AF.*

## PART II. SECT. 20, SUB-SECT. 4.—A. (a).

**455i. Whether necessary for sheriff or his officers to justify.]**—An execution under which a sheriff justifies must be proved by him.—*McGILVRAY v. GIBBONS* (1853), *James*, 152.—*CAN.*

**j. ——— What is justification.]**—An execution issued on a summary judgment is a justification to the sheriff, or a person clothed with his authority, for any act done under it,

without proof of the filing of the bill of costs.—*PATTISON v. TINGLEY* (1863), 5 All. 553.—*CAN.*

**464 i. By party suing out writ.]**—To a count in trespass for entering the close of the partners, one of defts. pleaded the same judgment or execution & alleging that the other deft. in pursuance of the writ of *fi. fa.* entered on the premises to execute the same, & there seized the goods of one of the partners. Replication setting up negligence in the sale:—*Held*: bad, as negligence in the sale cannot make the entry unlawful.—*LANE v. TAYLOR* (1866), 5 N. S. W. S. C. R. (L.) 84.—*AUS.*

**464 ii. ———.]**—Dft. obtained a regular judgment, which was in force



*Sect. 20.—Wrongful and irregular execution: Subsect. 4, A. (a) & (b), B. (a) & (b).]*

466. —.]—ANDREWS v. MARRIS, No. 457, ante.

467. —.]—HUFFER v. ALLEN, No. 399, ante.

(b) *Judgment Set Aside.*

468. *Judgment signed against good faith.*—In trespass for assault & false imprisonment, deft. justified under a judgment & writ of *ca. sa.* issued at his suit against pltf. Replication, that the judgment was not a judgment signed in any action, but under colour of a document purporting to be a warrant of attorney; that, after the issuing of the *ca. sa.*, a judge ordered the judgment & writ to be set aside; that the order was afterwards, to wit, on etc., made a rule of ct.; & that the judgment & writ were so set aside on the ground that the warrant of attorney was never delivered as a complete authority to do the acts therein specified, but as an escrow, to take effect in a certain event, which never happened, & was to be kept by pltf. in his own possession till such event should happen; & that deft., by an improper & fraudulent contrivance, obtained & kept possession of it against pltf.'s will; that the judgment was signed under colour of the document, & the *ca. sa.* issued thereon, without pltf.'s consent:—*Held*: the replication was good. It was not necessary it should show that the judgment was set aside for irregularity, inasmuch as it sufficiently showed that it was set aside as having been signed against good faith. It was not necessary to state that the judge's order was made a rule of ct. before the commencement of this suit, inasmuch as a judge at chambers had authority to set aside the judgment & writ.—BROWN v. JONES (1846), 15 M. & W. 191; 15 L. J. Ex. 210; 153 E. R. 817.

*B. Justification under Process.*

(a) *Existing Process.*

469. *By sheriff or his officers.*—A sheriff & his officers ought not to examine the judicial act of the ct. but execute the writ.—RUTLAND'S (COUNTESS) CASE (1605), 6 Co. Rep. 52 b; Moore, K. B. 765; 77 E. R. 332.

*Annotations*:—*Refd.* Mackallay's Case (1611), 9 Co. Rep. 61 b; Hodges v. Marks (1618), Cro. Jac. 485; Benyon v. Evelyn (1664), O. Bridg. 324; Harland v. Cocke (1673), Freem. K. B. 315; Parsons v. Loyd (1772), 3 Wils. 341; Gosset v. Howard (1847), 10 Q. B. 411; Hooper v. Lane (1817), 10 Q. B. 546; Hooper v. Lane (1857), 6 H. L. Cas. 443. *Mentd.* Strata Mercella's Case (1591), 9 Co. Rep. 24 a; Nevill's Case (1605), 7 Co. Rep. 33 a; Postnati Case (1608), 2 State Tr. 559; Calvin's Case (1609), 7 Co. Rep. 1 a; R. v. Hampden (1637), 3 State Tr. 826;

at the time of the issuing of the writ & the delivery of it over to the bailiff. He took the proper steps before obtaining the writ of *fi. fa.* In the absence of notice & want of reasonable & probable cause, no action would lie against him for what he had done.—DUCY v. STEVENS (1885), 6 N. S. W. L. R. 100.—AUS.

464 iii. —.]—Pltf. replied that before judgment or execution he had paid the debt & costs & that deft., with full knowledge that the debt had been satisfied, wrongfully authorised the execution:—*Held*: the replication was bad, as the judgment had not been set aside.—OSBORNE v. ROBISON (1886), 7 N. S. W. L. R. 193; 2 N. S. W. W. N. 90.—AUS.

k. —.]—Evidence of fraud on part of plaintiff.—Pltf. & deft. had both obtained judgments against A., & issued executions thereon, but pltf.'s execution was first in the sheriff's hands. The sheriff sold under both, &

pltf. purchased under deft.'s protest at the sale on his execution, & deft. purchased the same property under the sale on his execution:—*Held*: deft. had a right, in an action of trover brought against him by pltf. to show fraud by pltf. in obtaining his judgment against A.—MCKAY v. CROCKER (1861), 5 All. 20.—CAN.

l. —.]—Although the writ be irregular, yet unless it be set aside, the party at whose suit it issued, or his attorney, may justify under it.—KINGLEY v. SMITH (1874), Cong. Dig. 561.—CAN.

PART II. SECT. 20, SUB-SECT. 4.—A. (b).

m. *Judgment signed against good faith—Waiver of irregularity—No costs allowed.*—Where deft.'s proceedings were irregular, & pltf., after a waiver of the irregularity, signed judgment & issued execution, the judgment & execution were set aside, but without

Gwinne v. Poole (1692), 2 Lut. 1560; R. v. Knowles (1694), 12 Mod. Rep. 55; R. v. Cooke (1824), 2 B. & C. 871; Cowley v. Cowley (1900), 83 L. T. 218; Demer v. Cook (1903), 88 L. T. 629; Rhondda's Claim, [1922] 2 A. C. 339.

470. —.]—Whether judgment must be pleaded.]—Officer may justify by the writ without the judgment but pltf. cannot.—COTES v. MICHILL (1681), 3 Lev. 20; 83 E. R. 555.

*Annotations*:—*Refd.* Moravia v. Sloper (1737), Wilses, 30; Andrews v. Marris (1841), 1 Q. B. 3; Jarmain v. Hooper (1843), 7 Scott, N. R. 663; Gosset v. Howard (1847), 10 Q. B. 411; Aspey v. Jones (1884), 48 J. P. 613.

471. —.]—BRITTON v. COLE, No. 601, post.

472. —.]—ANDREWS v. MARRIS, No. 457, ante.

473. —.]—Joinder of defence with party to whom writ no justification.]—Where a judgment is vacated for irregularity, pltf. is not justified, as he is where it is reversed for error. Where the officer joins in defence with one for whom the warrant is no justification, he forfeits the benefit of it.—PHILIPS v. BIRON (1722), 1 Stra. 509; 93 E. R. 667; sub nom. BYRON v. PHILLIPS, 11 Mod. Rep. 378.

*Annotations*:—*Refd.* Smith v. Boucher (1734), Ridg. temp. H. 136; Perkin v. Proctor & Green (1768), 2 Wils. 382; Parsons v. Lloyd (1772), 2 Wm. Bl. 845; Barker v. Braham & Norwood (1773), 3 Wils. 368; Codrington v. Lloyd (1838), 8 Ad. & El. 449; Andrews v. Marris (1841), 1 Q. B. 3.

474. —.]—Justification under process of University of Oxford held ill, & where those who might justify join those who have not a good justification it is bad as to all.—SMITH v. BOUCHIER (1734), 2 Stra. 993; Cunn. 89, 127; 2 Barn. K. B. 331; Kel. W. 144; 7 Mod. Rep. 173; Ridg. temp. H. 4, 136; Lee temp. Hard. 62, 69; 93 E. R. 989.

*Annotations*:—*Refd.* Shergold v. Holloway (1734), Sess. Cas. K. B. 154; Perkin v. Proctor & Green (1768), 2 Wils. 382; Parsons v. Lloyd (1772), 2 Wm. Bl. 845; Perrin v. West (1835), 3 Ad. & El. 405; Andrews v. Marris (1841), 1 Q. B. 3. *Mentd.* Miller v. Seare (1777), 2 Wm. Bl. 1141.

475. —.]—SAMUEL v. DUKE, No. 998, post.

476. —.]—ANDREWS v. MARRIS, No. 457, ante.

477. —.]—Trespass for breaking & entering pltf.'s dwelling-house, & seizing his goods. Plea, that T. recovered a judgment against H. & thereupon issued a writ of *fi. fa.* directed to the sheriff, who made & delivered his warrant to deft., a bailiff, to be executed, by virtue of which writ & warrant deft., as bailiff, seized the goods of H. in pltf.'s dwelling-house. Replication, that, although T. recovered judgment, & sued out such writ, & the sheriff made & delivered to deft. such

costs.—DEVER v. WILEY (1877), 17 N. B. R. (1 P. & B.) 507.—CAN.

n. —.]—Issue of attachment—Rescission of judge's order.]—Where attachment was issued during the progress of a cause, on the order of a judge:—*Held*: the judge's order must be rescinded before the attachment could be set aside.—MCLELLAN v. MILMORE (1877), 17 N. B. R. (1 P. & B.) 291.—CAN.

PART II. SECT. 20, SUB-SECT. 4.—B. (a).

o. *Action against public officer—Position of—Where execution defective.*—A comr. of highways, who, in the discharge of his duty, procures the conviction of a person for neglecting to perform statute labour, does not make himself a trespasser by delivering an execution, issued by the justice, to a constable, & telling him that if deft. was arrested he thought he would pay, deft. being afterwards arrested

warrant as in the plea mentioned, nevertheless *de injuria absque residuo causæ*. Issue thereon:—*Held*: on these pleadings, the judgment, writ, & warrant being admitted, there was, in the absence of proof to the contrary, evidence that deft. entered under the warrant.—*HEWITT v. MACQUIRE* (1851), 7 Exch. 80; 21 L. J. Ex. 30; 155 E. R. 864.

**478. — Valid or invalid writs in possession of sheriff—Arrest on invalid writ.**—The sheriff had, in his office, two writs issued at different times against B., one at the suit of A., which, for certain reasons of form, was invalid, the other, at the suit of L., which was a valid writ. Warrants were granted on both writs. B. was arrested on A.'s writ. B. applied for his discharge, & on the hearing before a judge, the sheriff claimed to detain B. on L.'s writ. The judge ordered his discharge. In an action for negligence brought by L. against the sheriff, the direction given to the jury was, that there had been no arrest at L.'s suit; that the judge's order discharging B. from custody was no justification to the sheriff; that whether the sheriff had acted negligently in arresting B. on A.'s invalid writ was a question of fact, & also that the jury must say whether the sheriff knew, or without negligence might have known, that A.'s writ was a void writ:—*Held*: this direction was right.—*HOOPER v. LANE* (1857), 6 H. L. Cas. 443; 27 L. J. Q. B. 75; 30 L. T. O. S. 33; 3 Jur. N. S. 1026; 6 W. R. 146; 10 E. R. 1368, H. L.

*Annotations*:—*Consd.* Ockford v. Freston, Chapman v. Same (1861), 6 H. & N. 466. *Refd.* Bateman v. Freston (1861), 3 E. & L. 578; *Exp.* Freston (1861), 3 De G. F. & J. 612. *Mentd.* Tyne Improvement Comrs. v. General Steam Navigation Co. (1866), 8 B. & S. 66; *Re* London Celluloid Co. (1888), 39 Ch. D. 190.

**479. By party suing out writ—Must prove judgment.**—*COTES v. MICHILL*, No. 470, *ante*.

**480. — — — — —**—*BRITTON v. COLE*, No. 601, *post*.

**481. — — — — —**—*ANDREWS v. MARRIS*, No. 457, *ante*.

**482. Where writ returnable—Return must be shown.**—Serjeant at mace justifies under precept, on a plaint in *replevin* out of the sheriff's ct.:—*Held*: bad for want of showing it was returned. Where a principal officer justifies under a returnable writ, he must show it was returned.—*FREEMAN v. BLEWITT* (1701), 1 Salk. 409; 1 Ld. Raym. 632; 12 Mod. Rep. 394; Holt, K. B. 409; 91 E. R. 355.

*Annotations*:—*Consd.* Rowland v. Voale (1774), 1 Cowp. 18; *Moore v. Taylor* (1813), 5 Taunt. 69. *Refd.* Barker v. Braham & Norwood (1773), 3 Wils. 368; *Lucas v. Nockells* (1833), 10 Bing. 157; *Gossett v. Howard* (1847), 16 L. J. Q. B. 345; *Cobbett v. Hudson* (1849), 18 L. J. Q. B. 233.

**483. Writ properly issued—Defendant entitled to discharge.**—Where a party against whom a judgment has been obtained is discharged therefrom by the Irish Insolvent Act, 1840 (c. 107), but is subsequently arrested by his creditor on a writ of *ca. sa.* issued on such judgment:—*Held*: an action for trespass would not lie against the creditor but that the remedy, if any, is by action on the case for knowingly & maliciously suing

out the writ of *ca. sa.* & arresting pltf. thereon notwithstanding his discharge from such judgment.—*YOUAT v. JONES* (1845), 6 L. T. O. S. 156; 10 J. P. 92.

(b) *Void or Irregular Process.*

**484. No justification if writ void.**—One was arrested by a *capias ad respondendum*, tested in Trinity & returnable in Hilary term following. The writ was set aside as void. Trespass for false imprisonment lies against pltf. in that writ, & he cannot justify under a void or irregular writ.—*PARSONS v. LOYD* (1772), 3 Wils. 341; 2 Wm. Bl. 845; 95 E. R. 1089.

*Annotations*:—*Consd.* Cameron v. Lightfoot (1778), 2 Wm. Bl. 1190. *Distd.* Wilson v. Tumman (1843), 8 Man. & G. 236; *Youat v. Jones* (1845), 10 J. P. 92. *Consd.* Ewart v. Jones (1845), 14 M. & W. 774. *Refd.* Barker v. Braham & Norwood (1773), 3 Wils. 368; *Riddell v. Pakeman* (1835), 2 Cr. M. & R. 30; *Jarmain v. Hooper* (1843), 1 Dow. & L. 769; *Gosset v. Howard* (1847), 10 Q. B. 411; *Smith v. Keal* (1882), 9 Q. B. D. 340; *Clissold v. Cratchley* (1910), 102 L. T. 520.

**485. — — — — —**—Action of false imprisonment lies against pltf.'s attorney, who sues out an illegal & void *ca. sa.* against deft., & delivers it himself to the officer, who by his order arrests defts. thereon.—*BARKER v. BRAHAM & NORWOOD* (1773), 3 Wils. 368; 2 Wm. Bl. 866; 95 E. R. 1104.

*Annotations*:—*Consd.* Cameron v. Lightfoot (1778), 2 Wm. Bl. 1190. *Distd.* Carrett v. Smallpage (1808), 9 East, 330. *Apld.* Bates v. Pilling (1826), 6 B. & C. 38. *Consd.* Codrington v. Lloyd (1839), 8 Ad. & El. 449; *Ewart v. Jones* (1845), 14 M. & W. 774. *Distd.* Youat v. Jones (1845), 10 J. P. 92. *Apld.* Collett v. Foster (1857), 2 H. & N. 356. *Refd.* Green v. Elgie (1843), 5 Q. B. 99; *Rundle v. Little* (1844), 6 Q. B. 174; *Gosset v. Howard* (1847), 10 Q. B. 411; *Egginton v. Litchfield Corp'n.* (1855), 5 E. & B. 100; *Smith v. Keal* (1882), 9 Q. B. D. 340; *Serjeant v. Nash, Field* (1903), 72 L. J. K. B. 630; *Clissold v. Cratchley* (1910), 102 L. T. 520. *Mentd.* Morland & Hammersley v. Lashley, Same v. Lashley (1794), 2 Hy. Bl. 441, n.

**486. — — — — —**—Action of false imprisonment does not lie for a person arrested by legal process, but at a time when privileged *redeundo* from attending the ct.

For all arrests made without lawful authority, trespass & false imprisonment will lie—as if there be no writ or a void writ (*DE GREY, C.J.*).—*CAMERON v. LIGHTFOOT* (1778), 2 Wm. Bl. 1190; 96 E. R. 701.

*Annotations*:—*Consd.* Magnay v. Burt (1843), 5 Q. B. 381. *Refd.* Tarlton v. Fisher (1781), 2 Doug. K. B. 671; *Re* Helsby (1832), 1 L. J. Bey. 5; *Aga Kurboolie Mahomed v. R.* (1843), 4 Moo. P. C. C. 239; *Cronmire v. MacColla* (1893), 9 T. L. R. 549. *Mentd.* Crook v. Dowling (1782), 3 Doug. K. B. 75; *Nixon v. Burt* (1817), 1 Moore, C. P. 413; *Hennell v. Lyon* (1877), 1 B. & Ald. 182.

**487. — — — — —**—Where a writ of *capias ad respondendum* has been set aside for irregularity, the attorney who sued it out is liable in trespass.—*CODRINGTON v. LLOYD* (1838), 8 Ad. & El. 449; 3 Nev. & P. K. B. 442; 7 L. J. Q. B. 196; 2 Jur. 593; 112 E. R. 909; *sub nom.* *CODRINGTON v. LLOYD*, 1 Will. Woll. & H. 358.

*Annotations*:—*Consd.* Collett v. Foster (1857), 26 L. J. Ex. 412. *Refd.* Green v. Elgie (1843), 5 Q. B. 99; *Rundle v. Little* (1844), 6 Q. B. 174. *Mentd.* Gregory v. Brunswick (1843), 13 L. J. C. P. 34; *Gregory v. Brunswick* (1846), 3 C. B. 481.

under the execution, which was defective.—*CRAIG v. GIBERSON* (1851), 2 All. 207.—*CAN.*

**p. — Liability of debtor — Necessity for proof.**—Where deft. as sheriff, seized, under a writ of attachment, goods in the possession of pltf., to whom they had been transferred by the alleged absconding debtor, & the transfer was, in a suit by pltf. against the sheriff for the alleged conversion, attacked as fraudulent:—*Held*: the justification of the seizure under the

writ was not complete without proof of an indebtedness from the alleged absconding debtor to the party attaching, & the production of the affidavit on which the attachment issued was not sufficient for that purpose.—*MILLS v. McLEAN* (1876), 10 N. S. R. (1 R. & C.) 379.—*CAN.*

**q. — Seizure — Presumption of validity — Whether rebuttable.**—The sheriff made a seizure of deft.'s land under pltf.'s execution. It did not

appear, upon an interpleader summons obtained by the sheriff, a claim of exemption having been made by deft., that the execution had been registered in the land titles office:—*Held*: the seizure must be presumed to have been regularly made until the contrary was shown, & if deft. desired to impeach the validity of the seizure, regular on its face, he must produce the evidence to establish the invalidity.—*IMPERIAL ELEVATOR CO. v. SHERE* (1910), 14 W. L. R. 32; 3 Sask. L. R. 197.—*CAN.*



*Sect. 20.—Wrongful and irregular execution: Subsect. 4, B. (b). Sects. 21 & 22.]*

**488. Writ set aside for irregularity—Effect of execution debtor ruling sheriff to return writ.]—**Trespass for breaking & entering pltf.'s house & seizing his goods. Plea, that deft. brought an action against pltf., which was referred to arbitration by an agreement afterwards made a rule of ct.; that the arbitrator awarded a certain sum to be due to deft., & ordered pltf. to pay it on a certain day which he refusing to do, deft. issued a writ of *fi. fa.* & levied on pltf.'s goods. Replication, that by a rule of ct. it was ordered that the said writ should be set aside for irregularity. Rejoinder, by way of estoppel, that, after the making of that rule of ct., pltf. ruled the sheriff to return the writ of *fi. fa.*:—*Held*: (1) the replication was good, & it was unnecessary to aver that the rule of ct. was acted on; (2) pltf., by ruling the sheriff to return the writ, was not estopped from showing that it was not a good writ, for although it might be bad as against the party suing it out it might still be good as respected the sheriff; & the filing of record did not affirm the existence of a void writ; & therefore the rejoinder was bad.

It is argued that a writ cannot at the same time be both good and bad. . . . But I am of opinion that a writ may be at once a good writ for some purposes, though a bad writ for others. . . . What then does the act of pltf., in ruling the sheriff to return the writ amount to? It amounts simply to this, that though the writ may be void for some purposes, yet pltf. may, if he desire it, make use of it for others. He may wish to question the propriety of the sheriff's charges for executing it & may have ruled him to return it in order to ground an application to the ct. . . . It is enough to say that he may make some use of a void writ (PARKE, B.).

The filing of record is not the act of the party, but it is the mode in which the sheriff makes his return. He returns the writ into the proper office where it is filed of record as a matter of course. The filing of record does not affirm the existence of a void writ (PARKE, B.).

(3) Judgments Act, 1838 (c. 110), does not authorise a party to issue execution for money awarded by an arbitrator.

(4) The words in Judgments Act, 1838 (c. 110), s. 18, "Moneys or costs, charges or expenses," mean money decreed or ordered to be paid, together with the costs, etc., to be ascertained on taxation by the officer of the ct. & no order to pay costs is requisite after taxation.—JONES v. WILLIAMS (1841), 8 M. & W. 349; 9 Dowl. 702; 10 L. J. Ex. 253; 5 Jur. 895; 151 E. R. 1073.

*Annotations:—As to (4) Refd. Widgery v. Tepper, Hall v. Tepper (1877), 6 Ch. D. 364; Taylor v. Roe, [1894] 1 Ch. 413. Generally, Mentd. Nash v. Swinburne (1842), 3 Man. & G. 853; Doe d. Harrison v. Hampson (1847), 4 C. B. 745; Re Lilley & Harvey (1849), 14 Q. B. 403.*

**489. — Irregularity must be pleaded.]—**Trespass for assault & false imprisonment. Plea of justification under a writ of *ca. sa.* Replication, that the writ was after the issuing thereof, & before the commencement of the suit, ordered to be set aside & was set aside by order of a judge:—*Held*: the replication was bad for not averring that the writ was set aside for irregularity.

For aught that appears upon the face of pltf.'s pleading the writ might have been set aside on account of some defeat, that would make it erroneous, & defts. in that case would not be liable, & an error in the award of execution has

been suggested, namely, the issuing of the writ more than a year after the date of the judgment. This objection must prevail, pltf. should have guarded himself against it by stating that the writ was set aside for irregularity (LORD DENMAN, C.J.).—PRENTICE v. HARRISON (1843), 4 Q. B. 852; Dav. & Mer. 50; 12 L. J. Q. B. 315; 1 L. T. O. S. 254; 7 Jur. 580; 114 E. R. 1118.

*Annotations:—Distd. Rankin v. De Medina (1845), 1 C. B. 183. Consd. Brown v. Jones (1846), 15 M. & W. 191; Collett v. Foster (1857), 2 H. & N. 356. Refd. Brooks v. Hodgkinson (1859), 33 L. T. O. S. 227; McStephens v. Hartley (1869), 20 L. T. 225; Pidgeon v. Mellor (1912), 28 T. L. R. 261.*

**490. —.]—**A writ of execution issued on a judgment more than a year old without a *sci. fa.* is not absolutely void, but voidable only, & if not actually avoided, such writ is a justification to parties sued in trespass for causing it to be executed.—BLANCHENAY v. BURT (1843), 4 Q. B. 707; 3 Gal. & Dav. 613; 12 L. J. Q. B. 291; 1 L. T. O. S. 169; 7 Jur. 575; 114 E. R. 1064.

*Annotations:—Refd. Prentice v. Harrison (1843), 4 Q. B. 852; Brooks v. Hodgkinson (1859), 33 L. T. O. S. 227.*

**491. —.]—**To a plea in trespass *quare domum fregit* by A. against B., B. justifies under a writ of *fi. fa.* upon a judgment obtained by B. against A. A. replies that the writ was irregularly sued out & prosecuted, & that, by a judge's order, subsequently made a rule of ct., it was ordered that the writ, & the proceedings thereon, should be set aside. The replication was good as sufficiently showing that the writ was set aside for irregularity.—RANKIN v. DE MEDINA (1845), 1 C. B. 183; 14 L. J. C. P. 89; 4 L. T. O. S. 316; 9 Jur. 89; 135 E. R. 507.

*Annotation:—Refd. Williams v. Smith (1863), 14 C. B. N. S. 596.*

**492. — Liability of judgment creditor for acts of attorney.]—**It was proved at the trial that judgment having been entered up against pltf., on a warrant of attorney, for £60 given to deft. to secure the payment of a debt by instalments of which less than £20 were due, deft.'s attorney caused pltf. to be arrested under a *ca. sa.*, endorsed to levy £21 10s. Deft. having been informed that pltf. had been arrested by a person who had joined in the warrant of attorney, wrote a letter in answer not denying that such arrest had taken place by her authority. The writ was afterwards set aside by order of a judge:—*Held*: (1) the replication was proved; (2) deft. was liable in trespass for the act of her attorney in improperly causing the pltf. to be arrested.—COLLETT v. FOSTER (1857), 2 H. & N. 356; 26 L. J. Ex. 412; 29 L. T. O. S. 229; 5 W. R. 790; 157 E. R. 147.

*Annotation:—As to (2) Consd. Smith v. Keal (1882), 11 Q. B. D. 340.*

**493. Attachment by order of court—Order reversed on appeal.]—**A. having changed her attorney, an order was made, in the Rolls Ct., on pltf., her first attorney to deliver to B., her second attorney, all papers, etc. Pltf. complied with the order, except as to some papers detained by counsel, & a law stationer, who claimed a lien on them. B. made an affidavit to the effect that the papers had not been delivered up according to the exigency of the order, whereupon an attachment was issued against pltf. It was subsequently set aside:—*Held*: A. & B. were not liable in an action, they having acted under the authority of the ct.—WILLIAMS v. SMITH (1863), 14 C. B. N. S. 596; 2 New Rep. 280; 143 E. R. 579.

*Annotations:—Apld. Smith v. Sydney (1870), L. R. 5 Q. B. 203. Mentd. Johnson v. Emerson (1871), L. R. 11 Exch. 329.*

## SECT. 21.—RESTITUTION.

**494. When ordered — Possession colourably obtained.]**—The ct. may award restitution where possession is colourably obtained.—**WILKINSON'S CASE** (1596), Cro. Eliz. 465 ; 78 E. R. 703.

**495. — Judgment reversed before sale.]**—**CORBET (SIR MILES) v. ROOKWOOD** (1597), cited Cro. Eliz. 597 ; 78 E. R. 840.

*Annotations* :—**Refd.** *Meriton v. Stevens* (1741), Willes, 271 ; *Giles v. Grover* (1832), 9 Bing. 128.

**496. — —.]**—A *venditioni exponas* shall go for the sale of goods levied before a *supersedeas*.—**CHARTER v. PEETER** (1598), Cro. Eliz. 597 ; 78 E. R. 840.

*Annotations* :—**Apld.** *Hughes v. Rees* (1838), 8 L. J. Ex. 46. **Refd.** *Meriton v. Stevens* (1741), Willes, 271 ; *Giles v. Grover* (1832), 9 Bing. 128.

**497. — Judgment set aside.]**—Where the money recovered in a judgment appears by record to be paid, restitution shall be without a *sci. fa.* ; otherwise where levied only.

But where judgment is set aside after execution for irregularity there needs no *sci. fa.* for restitution but an attachment shall be granted upon the rule for contempt if there be not a restitution (**HOLT, C.J.**).—**ANON.** (1705), 2 Salk. 588 ; 91 E. R. 493.

**498. — —.]**—**BEVAN v. JONES** (1850), 14 L. T. O. S. 355.

**499. — Property forcibly resumed by defendant in ejectment.]**—When deft. in ejectment having been put out of possession by the sheriff & possession given to the lessor of pltf. afterwards on the same day forcibly resumed possession of the premises the ct. ordered a writ of restitution to issue within a week deft. paying the costs of the application for the writ.—**DOE d. PITCHER v. ROE** (1841), 9 Dowl. 971.

*Annotation* :—**Refd.** *Doe d. Stratford v. Shail* (1844), 8 Jur. 538.

**500. — Party improperly made plaintiff.]**—*Semble* : where money has been recovered under an execution from a person improperly made pltf. in respect of costs ordered to be paid by him without his knowledge, the ct. will order it to be repaid.—**FRICKER v. VAN GRUTTEN**, [1896] 2 Ch. 649 ; 65 L. J. Ch. 823 ; 75 L. T. 117 ; 45 W. R. 53 ; 40 Sol. Jo. 701, C. A.

*Annotations* :—**Refd.** *Geilinger v. Gibbs*, [1897] 1 Ch. 479. **Mentd.** *Yonge v. Toynbee*, [1910] 1 K. B. 215.

**501. Where judgment reversed—Inquiry as to profits recovered—From date of judgment.]**—If judgment be reversed on error, a writ of restitution shall be awarded to inquire what profits the party hath taken *colore judicii predicti*. The inquiry shall be from the time the erroneous judgment was obtained.—**SYMPSON v. JUXON** (1625), Cro. Jac. 699 ; 79 E. R. 607.

**502. What can be recovered—Only money properly paid.]**—When an irregular execution is set aside & the sums levied & paid by deft. are ordered to be repaid, pltf. is only bound to repay the money which has been properly paid by deft.—**WHALLEY v. BARNETT** (1833), 2 Dowl. 33.

**503. — Interest.]**—In June, 1867, resps. recovered from appls. in an action of trover in

the Supreme Ct. at Hong Kong, a large sum of money, as principal, interest & costs, & execution was had & the money was paid. Upon appeal in Feb. 1869, this judgment was reversed. In June, 1869, the Supreme Ct. directed resps. to repay to appls. the money, but declined to direct interest to be paid during the time the money remained in resps.' possession :—*Held* : (1) it is the duty of all cts. to take care that the act of the ct. does no injury to the suitor, & that by the act of the ct. is meant not merely the primary ct., but the act of the ct. as a whole, from the lowest ct. to the highest, which finally disposes of the case ; (2) it was in the power of the ct. at Hong Kong to make every order, which was fairly & properly consequential upon the reversal of the original judgment, & appls. were entitled to the current rate of interest, whilst the money remained in possession of resps., on both the principal & interest, but not on the costs.—**RODGER v. COMPTOIR D'ESCOMPTE DE PARIS** (1871), L. R. 3 P. C. 465 ; 7 Moo. P. C. C. N. S. 314 ; 40 L. J. P. C. 1 ; 24 L. T. 111 ; 19 W. R. 449 ; 17 E. R. 120, P. C.

*Annotations* :—**Apld.** *Merchant Banking Co. of London v. Maud* (1874), 43 L. J. Ch. 861 ; *Cox v. Hakes* (1890), 15 App. Cas. 506. **Mentd.** *Spartali v. Constantinidi* (1872), 20 W. R. 823 ; *Nitrate Producers S.S. Co. v. Short* (1922), 91 L. J. K. B. 871.

**504. — —.]**—Where money has been paid under a decree which is afterwards reversed it must be repaid with interest.—**IMPERIAL MERCANTILE CREDIT ASSOCN. v. COLEMAN** (1871), 6 Ch. App. 558 ; 40 L. J. Ch. 262 ; 24 L. T. 290 ; 19 W. R. 481, L. C. ; *on appeal, sub nom. IMPERIAL MERCANTILE CREDIT ASSOCN. (LIQUIDATORS) v. COLEMAN* (1873), L. R. 6 H. L. 189, H. L.

*Annotations* :—**Refd.** *Silkstone & Haigh Moor Coal Co. v. Edey* (1899), 69 L. J. Ch. 73. **Mentd.** *Dunne v. English* (1874), L. R. 18 Eq. 521 ; *Re Coal Economising Gas Co., Gover's Case* (1875), 1 Ch. D. 182 ; *Panama & South Pacific Telegraph Co. v. Indiarubber, Gutta Percha & Telegraph Works Co.* (1875), 10 Ch. App. 520, n. ; *Bagnall v. Carlton* (1877), 6 Ch. D. 371 ; *Chesterfield & Boythorpe Colliery Co. v. Black* (1877), 26 W. R. 207 ; *New Sombbrero Phosphate Co. v. Erlanger* (1877), 5 Ch. D. 73 ; *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918 ; *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888), 59 L. T. 345 ; *Turnbull v. West Riding Athletic Club, Leeds* (1894), 70 L. T. 92 ; *Costa Rica Ry. v. Forwood*, [1901] 1 Ch. 746 ; *Cackett v. Keswick*, [1902] 2 Ch. 456 ; *Transvaal Lands Co. v. New Belgium Transvaal Land & Developing Co.*, [1914] 2 Ch. 488.

**505. How application made—By rule nisi.]**—When in ejectment a writ of *habere facias possessionem* has been executed in respect of the premises in question & possession has been given to the lessor of pltf. but the tenant subsequently comes & forcibly dispossess him the ct. will grant a new writ but the rule for such writ is only *nisi* in the first instance.—**DOE d. LLOYD v. ROE** (1842), 2 Dowl. N. S. 407 ; 7 Jur. 352.

**Writ of restitution as auxiliary to writ of possession.]**—*See* Part III., Sect. 5, sub-sect. 3, *post*.

## SECT. 22.—REMEDIES FOR INTERFERENCE WITH SHERIFF.

*See* SHERIFFS & BAILIFFS ; Sheriffs Act, 1887 (c. 55), s. 8 (2).

## PART II. SECT. 21.

**r. When judgment reversed—Measure of restitution.]**—Where goods were sold under an execution upon a decree reversed on appeal for error :—*Held* : restitution should be of the amount of the sale & not of the real value of the goods.—**ROBERTSON v. MILLER** (1904), 3 N. B. Eq. Rep. 78 ; 25 C. L. T. 76.—**CAN.**

**s. Money received by public officers—How divisible.]**—Where a debtor,

who absconded from this Province, before his departure gave his *cognovit* for £700 to a person to whom he was not indebted, on which judgment was entered, execution issued, & some money made by the sheriff, & some paid to pltf.'s attorney, the ct., on the affidavits & application of several *bond fide* creditors of the absconding debtor, ordered the attorney to pay to the sheriff the money he had received, & the sheriff to divide all the money between the creditors who had execu-

tions in his hands, ratably, according to their several claims.—**BERGIN v. PINDAR** (1834), 3 O. S. 574.—**CAN.**

**t. Ejectment—For non-payment of rent—When court will order restitution.]**—Where in ejectment for non-payment of rent, & judgment against the casual ejector, the *habere* was executed before the affidavit ascertaining the rent was filed, the ct. awarded restitution.—**TOWNSHEND v. CASUAL EJECTOR** (1832), Alc. & N. 228.—**IR.**



## Part III.—Particular Forms of Execution.

### SECT. 1.—WRIT OF FIERI FACIAS.

#### SUB-SECT. 1.—WHEN APPLICABLE.

See R. S. C., Ord. 42, r. 17, Ord. 43, r. 1.

**506. In respect of what judgment or order—Judgment on default of defence—Heir liable for debt of ancestor.]**—If judgment be obtained against an heir by *nihil dicit*, execution of *ca. sa.* or *fi. fa.* shall go against his body or goods, like, as for his own proper debt.—*BARKER v. BOURN* (1599), Cro. Eliz. 692; *Moore*, K. B. 522; 78 E. R. 928.

*Annotation*:—*Refd. Smith v. Angell* (1702), 2 Ld. Raym. 783.

**507. — Order for payment of sum to be ascertained—Ascertainment by master—Taxed costs.]**—(1) If an order directing the joint costs of certain persons named, in certain proceedings, to be taxed as against a solr., & further direct the costs of the persons, naming all but one, when “so taxed as aforesaid,” to be set off against the sum due to the solr., & the master reports that he has taxed the costs of all the persons, & has set off the costs of all against the sum due to the solr., the balance being against the latter, & a writ of *fi. fa.* is issued in accordance with the report, under which the sheriff levies the balance under protest of the solr., the writ is not irregular.

(2) The writ of *fi. fa.* is not irregular because the order does not mention a sum certain.

(3) A mere clerical error in the order will not make any difference when it plainly appears to be such.

The costs of petitioners were the joint costs of the six; there is no pretence of there being separate costs of any one of them; there is no distinction of the cases. The costs of the six were to be taxed, & the master was to ascertain the balance, after setting off the costs of the persons last named so taxed as aforesaid. It would be an extraordinary proposition to maintain that only the costs of five of the six were to be set off. It is of great importance that the orders of this Ct. be drawn up with as much accuracy as possible; they are, however, as to their construction, subject to the ordinary rules of the English language (LORD LANGDALE, M.R.).—*POTTS v. DUTTON* (1845), 6 L. T. O. S. 363; *previous proceedings*, 8 Beav. 493.

**508. — Effect of clerical error in order.]**—*POTTS v. DUTTON*, No. 507, *ante*.

**509. — Not order for payment of money into court.]**—(1) An order for the payment of money into the Bank to an account is not an order to pay money to any person which can be enforced by writ of *fi. fa.* under the 6th rule of the 20th Consolidated Order.

(2) Where in the course of winding up an order has been made on a contributory for payment of money into the Bank to the account of the official liquidator, & it is desired to enforce that order by issuing a writ of *fi. fa.*, the course prescribed by the 38th order of Nov. 11, 1862, must be followed, & an order obtained for payment of the sum in question to the official liquidator himself.—*Re LEEDS BANKING CO.* (1866), 1 Ch. App. 150; 35 L. J. Ch. 311; 12 Jur. N. S. 304; 14 W. R. 269, L. C.

**510. — Service of order—Service on party's**

**solicitor—Sufficient.]**—*Re* — (A SOLICITOR), No. 14, *ante*.

See, further, Part II., Sect. 1, *ante*.

**511. Summons for examination of judgment debtor issued—Writ of *fi. fa.* subsequently executed—Summons dismissed.]**—Where, subsequently to the issuing of a judgment debtor summons, under Bkpcy. Act, 1861 (c. 134), s. 76, the sheriff has levied, under a writ of *fi. fa.*, goods of deft. sufficient to satisfy pltf.'s claim, the Ct. will dismiss the summons, but without costs; it will not adjourn the summons pending proceedings by way of interpleader summons.—*HALL v. DRAKE* (1864), 13 W. R. 104.

**512. Judgment in admiralty action—Interest & costs on recovered damages.]**—In an action *in rem* in respect of damage by collision defts. gave bail in the sum of £100,000 as representing the full value of their vessel & the limit of their liability according to French law. In the Admlty. Ct. both pltf.'s & defts.' vessels were held to blame, but the Ct. of Appeal held defts.' vessel alone to blame & this decision was upheld by the House of Lords. The £100,000 being insufficient to satisfy pltf.'s judgment, pltf., who admitted that *qua* damages they could not recover more than the £100,000, threatened to arrest defts.' vessel in respect of interest & costs; &, under protest, defts. provided bail in a further sum to avoid arrest:—*Held*: (1) interest on sums due in respect of collision damage was awarded by way of damages, &, accordingly, pltf. were not entitled to interest except for the period between the judgment of the Ct. of Appeal & the judgment of the House of Lords, 309 days, in respect of which defts. were liable for interest on the £100,000 at 4 per cent.; (2) pltf. were entitled to costs & interest on costs at 4 per cent.; (3) having received bail in the full value of defts.' vessel, pltf. could not arrest her *in rem*, but could proceed *in personam* & were entitled to a declaration that the amounts due in respect of interest & costs were enforceable by seizure & sale of the vessel by a sheriff under a writ of *fi. fa.*—*THE JOANNIS VATIS* (No. 2), [1922] P. 213; 91 L. J. P. 196; 127 L. T. 494; 38 T. L. R. 566; 16 Asp. M. L. C. 13.

—*See* ADMIRALTY, Vol. I., pp. 224, 225, Nos. 1499, 1500, 1510.

#### SUB-SECT. 2.—ISSUE AND DELIVERY OF THE WRIT.

See, generally, Part II., Sects. 2–12, *ante*.

**Issue after expiry of particular period.]**—*See* R. S. C., Ord. 42, r. 17.

**Stay of execution.]**—*See* R. S. C., Ord. 42, r. 17; Part II., Sect. 15, *ante*.

**Delivery with instructions to delay execution.]**—*See* Nos. 541–543, *post*.

**For what sums execution may issue.]**—*See* Part II., Sect. 7, *ante*.

**Endorsement to defendant.]**—*See* Nos. 1236, 1237, 1250–1252, *post*.

**Indorsement on writ—As to seizure of goods.]**—*See* Nos. 1231, 1232, 1235, *post*.

**As to residence of debtor.]**—*See* Nos. 1236, 1237, 1250–1253, *post*.

### PART III. SECT. 1, SUB-SECT. 2.

*writ.*—The issuing of the writ of execution may be entered on the roll at any time.—*SOULES v.* 15 C. P. 101, *ante*.

## SUB-SECT. 3.—PRIORITIES OF CREDITORS WHERE SEVERAL WRITS.

See Sub-sect. 4, B. (b), *post*.

## SUB-SECT. 4.—EXECUTION OF THE WRIT.

## A. In General.

**Effect of delivery to sheriff.]—**See Nos. 989-999, *post*.

**513. Execution & levying—Synonymous terms—Signifying seizure in execution.]—**CHESTON *v.* GIBBS, No. 1202, *post*.

**514. Duty of sheriff—To inquire as to bona fides of creditor.]—**(1) A., in Mar., fraudulently, & for the mere purpose of protecting the goods, sued out a *fi. fa.* against B., under which C., the then sheriff, seized. In Sept., D., a new sheriff, came into office, to whom a *fi. fa.*, sued out by E. against B., was delivered. D. did not seize, but suffered C. to sell under the first *fi. fa.* & returned *nulla bona* to the second :—*Held* : D. was liable to E. for a false return.

(2) The sheriff must see, at his own peril, that the party who sets him in motion is acting *bonâ fide*; though where he exercises all reasonable caution, & himself acts fairly & *bonâ fide*, he is entitled to apply to the ct. for an indemnity from one of two conflicting claimants. Generally speaking, the sheriff is liable; & it is highly just & proper that he should be so. If it were otherwise, a wide door would be opened for fraud, & the officers of the sheriff, & the debtors against whose goods process issued would be colluding together, for the purpose of making one process the means of defeating another (LORD TENTERDEN, C.J.).

(3) A creditor who sues out execution against the goods of his debtor, is bound to be both prompt & honest in the steps he takes to enforce it. Delay always raises a suspicion that the execution was set on foot merely to protect the goods from other creditors; & where that suspicion is confirmed to the satisfaction of a jury, another creditor, who comes in with a subsequent execution, is entitled to priority (BAYLEY, J.).—LOVICK *v.* CROWDER (1828), 8 B. & C. 132; 2 Man. & Ry. K. B. 84; 6 L. J. O. S. K. B. 263; 108 E. R. 992.

*Annotation* :—As to (1) *Refd.* Imray *v.* Magnay (1843), 11 M. & W. 267.

**515. — To levy—Void prior writs.]—**In an action against the sheriff for a false return of *nulla bona* to pltf.'s writ of *fi. fa.* for £125, it appeared that deft. had not levied at all. There were goods of the execution debtor of the value of £50 upon which he might have levied. There were two writs of *fi. fa.* against the execution debtor for more than £50 lodged with the sheriff prior to pltf.'s writ; but these prior writs were proved to be fraudulent as against creditors; the sheriff had, however, no information as to this :—*Held* : (1) pltf. was entitled to recover the £50; (2) it was the sheriff's duty to have levied, & pltf. might then have disputed the validity of the prior writs, & so obtained the proceeds of the levy.

(3) If the sheriff has various writs of *fi. fa.* in his hands against the same debtor, he is bound to execute them all, giving priority to each in the order in which they came into his hands; & any one who places one of such writs in the hands of the sheriff is entitled to have it executed, so far as

it is possible in his interest & on his behalf; & the sheriff commits a wrong if, instead of executing, he holds his hand altogether (COCKBURN, C.J.).—DENNIS *v.* WHETHAM (1874), 1 L. R. 9 Q. B. 345; 43 L. J. Q. B. 129; 30 L. T. 514; 22 W. R. 571, D. C.

**516. — To regard interests of creditor.]—**(1) A sheriff, in executing a writ of *fi. fa.* should have regard to the interests & instructions of the execution creditor so far as reasonable.

(2) There is no duty imposed upon a sheriff to hold the goods seized under a *fi. fa.* for a period of five days before sale, as is the case with a county ct. bailiff.—*Re CROOK, Exp. SOUTHAMPTON, SHERIFF* (1894), 63 L. J. Q. B. 756; 71 L. T. 236; 42 W. R. 650; 10 T. L. R. 596; 38 Sol. Jo. 633; 1 Mans. 410; 10 R. 394, D. C.

**517. Duty of creditor—To act honestly & promptly.]—**LOVICK *v.* CROWDER, No. 514, *ante*.

**518. Payment to sheriff—Defence to action by subsequent sheriff.]—**Deft. pleaded that a *fi. fa.* issued out of the Exch. to levy the damages, & upon it he had paid the money to the sheriff who was discharged of his office before the return of the writ, but the new sheriff returned that he received such a writ so endorsed :—*Held* : deft. having once paid the money it is not reason he should be compelled to pay it again & pltf. is put to his remedy against the ancient sheriff, if he will.—ROOK *v.* WILMOT (1590), Cro. Eliz. 209; 78 E. R. 465.

*Annotations* :—*Consd.* Giles *v.* Grover (1832), 9 Bing. 128. *Refd.* Mountney *v.* Andrews (1591), Cro. Eliz. 237; Hoe's Case (1600), 5 Co. Rep. 89 b; Langdon *v.* Wallis (1698), 1 Lut. 582; Clerk *v.* Withers (1704), 2 Ld. Raym. 1072; Morland *v.* Pellatt (1829), 7 L. J. O. S. K. B. 54.

**519. Payment of part of debt—No release of whole debt.]—**To an action of debt on a judgment, a plea that a *fi. fa.* had issued on the judgment, indorsed to levy part of the sum recovered, & that that writ had been executed, & the money received under it paid over to pltf., is bad on general demurrer.

You are trying to make this mere indorsement on the *fi. fa.* as effective as a release under seal (MAULE, J.).—HUTTON *v.* THOMPSON (1846), 7 L. T. O. S. 209.

Release of debt generally, see CONTRACT, Vol. XII., p. 497.

**520. Right of sheriff to indemnity—On conflicting claim.]—**LOVICK *v.* CROWDER, No. 514, *ante*.

**521. Completion of execution—When full amount recovered.]—**R. *v.* ESSEX, SHERIFF, No. 23, *ante*.

**522. — — Successive levies.]—**JORDAN *v.* BINCKES, No. 24, *ante*.

— **Renewal of writ.]—**See Part II., Sect. 4, *ante*.

**523. Execution pending appointment of receiver—Not contempt by sheriff.]—**After the institution of a suit seeking the dissolution of a partnership & appointment of a receiver, an action was brought against the partnership firm & a judgment recovered. Before the receiver was actually appointed, but after he had been nominated, a writ of *fi. fa.* was issued upon the judgment, under which the sheriff took possession of certain partnership property, & refused to give up possession thereof after the appointment of the receiver. Upon motion to commit the sheriff for contempt of ct. :—*Held* : there was no contempt.—DEFRIES *v.* CREED (1865), 6 New Rep. 17; 34

## PART III. SECT. 1, SUB-SECT. 4.—A.

*Duty of sheriff to execute writ.]—*ROSS *v.* GRANGE (1866), 25 U. C. R. 396.—CAN,



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, A. & B. (a) & (b).]*

L. J. Ch. 607; 12 L. T. 262; 11 Jur. N. S. 360; 13 W. R. 632.

*Annotation:—Mentd.* Edwards v. Edwards (1876), 45 L. J. Ch. 391.

*B. Where Several Writs.*

*(a) In General.*

**524. General rule—All writs to be executed.]—**DENNIS v. WHETHAM, No. 515, *ante*.

**525. Violation of priorities—Execution valid—Liability of sheriff.]—**The first *fi. fa.* delivered to the sheriff should be first executed; but if he execute the last first, the execution is good; & the party must have his remedy against the sheriff.—SMALCOMB v. BUCKINGHAM (1697), Carth. 419; 1 Com. 35; Holt, K. B. 302; 5 Mod. Rep. 376; 12 Mod. Rep. 146; 1 Salk. 320; 3 Salk. 159; 88 E. R. 1225; *sub nom.* SMALLCOMB v. CROSS & BUCKINGHAM, 1 Ld. Raym. 251; *sub nom.* SMALLCORN v. LONDON, SHERIFF, Comb. 428.

*Annotations:—Consd.* Payne v. Drewe (1804), 4 East, 523; Giles v. Grover (1832), 9 Bing. 128; Lucas v. Nockells (1833), 10 Bing. 157; Hunt v. Hooper (1844), 1 Dow. & L. 626. *Refd.* Bradley v. Wyndham (1743), 1 Wils. 44; R. v. Giles (1820), 8 Price, 293; Balme v. Hutton (1833), 9 Bing. 471; Drewe v. Lainson (1840), 11 Ad. & El. 529.

**526. Effect of partiality of sheriff—Between creditors.]—**WARMOLL v. YOUNG, No. 1075, *post*.

**527. Judgment obtained by fraud—Seizure thereunder—Evidence of grant—Retention of goods by debtor for long time.]—**If a creditor by *fi. fa.* seizes the goods of the debtor, & suffers them to remain long in the debtor's hands, & another creditor obtains a subsequent judgment & execution, it has been determined often, that it is evidence of fraud in the first creditor, & the goods in the hands of the debtor remain liable (LORD HARDWICKE, C.).—WEST v. SKIP (1749), 1 Ves. Sen. 239; 27 E. R. 1006, L. C.

*Annotations:—Refd.* Inray v. Magnay (1843), 11 M. & W. 267; *Re* Rawbone's Trust (1857), 3 K. & J. 476. *Mentd.* Smith v. De Silva (1776), 2 Cowp. 469; Taylor v. Fields (1799), 4 Ves. 396; *Ex p.* Ruffin (1801), 6 Ves. 119; Ekins v. Brown (1854), 1 Ecc. & Ad. 400; Bartlett v. Bartlett (1857), 1 De G. & J. 127.

**528. ——— Second writ founded on bonâ fide debt—Duty & liability of sheriff.]—**(1) Where goods seized under a writ, founded upon a judgment fraudulent against creditors, remain in the hands of the sheriff, or are capable of being seized by him, he is compellable, under 13 Eliz., c. 5, to seize & sell such goods under a writ afterwards received by him, & founded on a *bonâ fide* debt; & if he neglect to do so, having notice of the fraud, & return *nulla bona* to the latter writ, he is liable to an action for a false return.

(2) Therefore, evidence of the fraud in the previous judgment & execution is admissible in such action, in answer to a defence founded on the outstanding writ, & the conduct of the debtor in reference to the execution of the previous judgment is admissible in evidence, as a part of the fraud.—IMRAY v. MAGNAY (1843), 11 M. & W. 267; 2 Dowl. N. S. 531; 12 L. J. Ex. 188; 7 Jur. 240; 102 E. R. 803.

*Annotations:—As to (1) Consd.* Christopherson v. Burton

(1848), 3 Exch. 160; Remmett v. Lawrence (1850), 15 Q. B. 1004. *Refd.* Shattock v. Carden (1851), 6 Exch. 725.

**529. ——— ——— ——— ———.]—**Where goods seized under a former writ, founded on a judgment fraudulent against creditors, are capable of being seized by the sheriff, he is compellable under 13 Eliz., c. 5, to seize & sell such goods under a writ received by him subsequently, & founded on a *bonâ fide* debt; & if after notice of such fraud he neglects to sell, & returns *nulla bona* to the latter writ, he is liable to an action for a false return. Nor does the fact that the sheriff has assigned the goods upon the prior execution to a supposed *bonâ fide* purchaser, but who is in truth a party to the fraud, innocently, & in ignorance of the fraud, excuse the sheriff from such liability.—CHRISTOPHERSON v. BURTON (1848), 3 Exch. 160; 18 L. J. Ex. 60; 12 L. T. O. S. 272; 13 J. P. 219; 154 E. R. 798.

*Annotations:—Refd.* Shattock v. Carden (1851), 6 Exch. 725; *Re* Pearce, *Ex p.* Crossthwaite (1885), 14 Q. B. D. *Mentd.* Fletcher v. Hinder (1858), 3 H. & N. 757.

**530. Entry for one cause—Justification for another.]—**In trespass for breaking & entering pltf.'s close, & taking his goods, deft. may justify under sufficient legal process, if he had it in fact at the time, although he declared then that he entered for another cause.—CROWTHER v. RAMSBOTTOM (1798), 7 Term Rep. 654; 101 E. R. 1182.

*Annotations:—Consd.* Lucas v. Nockells (1833), 10 Bing. 157. *Refd.* Deane v. Clayton (1817), 1 Moore, C. P. 203; Baillie v. Kell (1838), 4 Bing. N. C. 638; Lamont v. Southall (1839), 3 J. P. 355; Hooper v. Lane (1847), 17 L. J. Q. B. 189. *Mentd.* Trent v. Hunt (1853), 9 Exch. 14.

———. *Sec. also,* DISTRESS, Vol. XVIII., p. 338, Nos. 725-730.

**531. Withdrawal under first writ—Execution under latter writ—Notice by sheriff to first creditor.]—**

(1) A sheriff cannot be held liable for the non-return of a writ of *fi. fa.* until he has been called upon & has neglected to make a return, & such neglect as will give a cause of action must be specifically alleged in the statement of claim.

(2) Where the sheriff has entered & then withdrawn his writ in consequence of an arrangement having been come to between the execution creditor & the execution debtor, the sheriff cannot re-enter again without fresh instructions from the execution creditor.

(3) If a second execution creditor levies a writ at a date subsequent to the first execution creditor's levy, & anticipates the first execution creditor in consequence of such arrangement as aforesaid, there is no duty cast upon the sheriff to report the fact of such second writ to the first execution creditor.—SHAW v. KIRBY (1888), 52 J. P. 182; 4 T. L. R. 314.

**Effect of seizure—Where several writs.]—***See* Sub-sect. 4, E. (g), (i), *post*.

*(b) Priority of Creditors.*

**532. General rule—Execution in order of delivery of writ.]—**SMALCOMB v. BUCKINGHAM, No. 525, *ante*.

**533. ——— ——— ——— ———.]—**Where two writs of *fi. fa.* against the same deft. are delivered to a sheriff

**PART III. SECT. 1, SUB-SECT. 4.—**  
**B. (b).**

**532 i. General rule—Execution in order of delivery of writ.]—**The right to the goods seized is to be determined by the priority of the time of delivery of the writ to the sheriff or bailiff respectively, & not by the priority of seizure.—McDOUGALL v. WADDELL (1877), 28 C. P. 191.—CAN.

**532 ii. ——— ——— ——— ———.]—**Pltfs. placed a writ of execution against deft. in the

hands of the sheriff of Ontario, on Dec. 6, 1884. The sheriff seized deft.'s goods on Dec. 8. Deft. made a mtge. of his goods to D. on Dec. 9. B. placed a second execution against deft. in the hands of the sheriff on Dec. 22. On Dec. 31, the mtgee., D., paid to the sheriff the whole amount of the first execution, \$115, specially appropriating the payment to that execution.—*Held:* the money paid to the sheriff was not levied by him within Creditors' Relief Act, & the first execution

creditor was entitled to the whole of it.—DAVIES BREWING & MALTING CO. v. SMITH (1885), 10 P. R. 627.—CAN.

**532 iii. ——— ——— ——— ———.]—**Executions against goods in the hands of a sheriff subsequent to the making of a chattel mtge. by the execution debtor, on the goods seized, attach only on the equity of redemption, & are not entitled, under Creditors' Relief Act, to share with executions prior to the giving of the mtge.—ROACH v. McLACHLAN (1892), 19 A. R. 496.—CAN.

on different days, & no sale is actually made of deft.'s goods, the first execution must have the priority, even though the seizure were first made under the subsequent execution; & if the person, claiming under the second execution, pay the sheriff the amount of the debt under the first execution for his security, the ct. will not compel the sheriff to refund that money on motion.

The general principle of law is, that the person whose writ is first delivered to the sheriff is entitled to a priority (ASHHURST, J.).—HUTCHINSON v. JOHNSTON (1787), 1 Term Rep. 729; 99 E. R. 1346.

*Annotations*:—**Expld. & Distd.** Payne v. Drewe (1804), 4 East, 523. **Expld. & Apld.** Jones v. Atherton (1816), 7 Taunt. 56. **Consd.** Sawle v. Paynter (1822), 1 Dow. & Ry. K. B. 307; Giles v. Grover (1832), 9 Bing. 128; Lucas v. Nockells (1833), 10 Bing. 157. **Refd.** Gibbins v. Phillips (1828), 2 Man. & Ry. K. B. 238.

**534.** ———.]—The duty of the sheriff, when he has several writs of execution, is clear. He is to execute them according to their priority; which, as to writs of *fi. fa.*, is according to the time of their delivery to him. By "executing" is meant, that he is to apply the proceeds of goods seized in that manner. It is not material whether he seizes the goods under the first or the last writ: as soon as they are seized, they are, in point of law, in his custody under all the writs which he then has; & when he sells them, he sells, in point of law, under all the writs. This is obviously so: for, if the proceeds are more than sufficient to satisfy the first, he must apply the surplus to the second, & so to the third & others (*per CUR.*).—DREWE v. LAINSON (1840), 11 Ad. & El. 529; 3 Per. & Dav. 245; 9 L. J. Q. B. 69; 113 E. R. 516.

*Annotations*:—**Consd.** Shattock v. Carden (1851), 6 Exch. 725. **Refd.** Heenan v. Evans (1841), 3 Man. & G. 398. **Mentd.** Giles v. Giles (1846), 9 Q. B. 164.

**535.** ———.]—Where a writ of *fi. fa.* is delivered to the sheriff with directions to suspend the execution, & in the meantime another writ is delivered by another creditor, the sheriff is bound to levy under the latter writ in preference to the former although the former writ was not delivered with any fraudulent intent to protect the goods of the debtor.

There is no doubt that the sheriff as between him & the different execution creditors is bound to execute that writ which is first delivered to him to be executed, & is responsible to the first creditor who so delivered his writ, if he does not (PARKE, B.).—HUNT v. HOOPER (1844), 12 M. & W. 664; 1 Dow. & L. 626; 13 L. J. Ex. 183; 2 L. T. O. S. 425; 8 Jur. 203; 152 E. R. 1365.

*Annotations*:—**Refd.** Withers v. Parker (1859), 4 H. & N. 524. **Mentd.** Shaw v. Kirby (1888), 4 T. L. R. 314.

**536.** ———.]—DENNIS v. WHETHAM, No. 515, *ante*.

### 537. Exception to rule—Earlier execution

**532 iv.** ———.]—Deft. sheriff, after having levied upon goods under pltf.'s execution, sold the goods under two executions placed in his hands subsequently, & paid over the proceeds to the creditors, at whose instance such subsequent executions were issued:—**Held**: he was liable to pltf. in damages for so doing.—CROWE v. BUCHANAN (1903), 36 N. S. R. 1.—**CAN.**

**c.** ———.]—*Between execution & attaching creditor.*—Where a party serves process on the debtor personally before attachments issue, & obtains judgment before the attaching creditor, his execution has priority.—BANK OF BRITISH NORTH AMERICA v. JARVIS (SHERIFF) (1844), 1 U. C. R. 182.—**CAN.**

**d.** ———.]—Where goods have been attached, a creditor obtaining a confession of judgment from the debtor without service of process, &

execution upon it before the attaching creditors, does not obtain priority:—**Held**: on the affidavits filed no case was made out for setting aside the judgment so obtained for fraud or collusion.—BYRD v. FOLGER (1859), 17 U. C. R. 536.—**CAN.**

**e.** ———.]—D., a sheriff, between May 7 & Aug. 4, received several *fi. fas.* against the goods of deft. On Aug. 16 he received one upon which this action was founded. Between Aug. 4 & 18, two attachments were placed in his hands, & after the 16th several more. The sheriff treated pltf.'s *fi. fa.* as subsequent to the attachments, & returned it *nulla bona*, upon which this action was brought for a false return:—**Held**: the writ of Aug. 16 having come into deft.'s hands while the goods of pltf. were *in custodia legis*, it attached prior to the attach-

**fraudulent.**—Where a first *fi. fa.* is executed fraudulently, a second *fi. fa.* at the suit of another executed afterwards shall stand & be preferred, & the matter was properly left to a jury.—BRADLEY v. WYNDHAM (1743), 1 Wils. 44; 95 E. R. 483.

*Annotations*:—**Mentd.** Docker v. Hasler (1825), 10 Moore, C. P. 210; Hunt v. Hooper (1844), 1 Dow. & L. 626.

**538.** ———.]—LOVICK v. CROWDER, No. 514, *ante*.

**539.** ———.]—IMRAY v. MAGNAY, No. 528, *ante*.

**540.** ———.]—If the sheriff return, to a *fi. fa.* in an action by R. against W., that he has seized goods of W. under a *fi. fa.* upon a prior judgment recovered by L. against W., & R. then brings an action for a false return, & for not seizing the goods under R.'s writ, & the sheriff pleads not guilty, & other pleas in denial of the seizure of W.'s goods under R.'s writ, & of there having been goods of W. which might have been seized under R.'s writ, the sheriff is not estopped from showing, under such pleas, that the goods seized did not in fact belong to W.

Where a declaration by an execution creditor against the sheriff complains that goods of the execution debtor have been seized under pltf.'s *fi. fa.* & a false return made, & deft. denies such seizure, deft. supports his issue by proof that, at the time of the seizure, he had in his hands a *fi. fa.* under a prior judgment obtained by another party against the same debtor. For, although the sheriff is, in strictness, considered to seize goods under all the writs in his hands at the time, he does not do so in the sense of such a declaration & traverse, which point to a seizure available under pltf.'s writ. If a sheriff has seized goods at a time when he holds two writs of *fi. fa.* upon judgments at the suit of two different parties, & pltf. obtaining the second judgment brings an action against the sheriff for a false return:—**Qu.**: whether such plt. may, on proof that the first party's judgment was fraudulent, insist that the seizure was under his writ only.—REMMETT v. LAWRENCE (1850), 15 Q. B. 1004; 20 L. J. Q. B. 25; 16 L. T. O. S. 169; 14 Jur. 1067; 117 E. R. 738.

*Annotations*:—**Apld.** Levy v. Hale (1859), 29 L. J. C. P. 127.

**Consd.** Stimson v. Farnham (1871), L. R. 7 Q. B. 175.

**541.** ———.]—**Instructions to delay execution of first writ.**—If a *fi. fa.* be delivered to the sheriff, & he is directed not to levy thereon till a future day, & in the meantime another writ is delivered, he is to levy on the second writ as if no other had been delivered to him.—KEMPLAND v. MACAULEY (1791), Peake, 95, N. P.; *subsequent proceedings*, 4 Term Rep. 436.

*Annotations*:—**Apprvd. & Folld.** Pringle v. Isaac (1822), 11 Price, 445. **Refd.** Docker v. Hasler (1825), 3 L. J. O. S. C. P. 109; Hunt v. Hooper (1844), 1 Dow. & L. 626. **Mentd.** Imray v. Magnay (1843), 11 M. & W. 267; Sage v. Robinson (1848), 3 Exch. 142.

ments, & ought to have been paid first.—CARROLL v. POTTER (1860), 19 U. C. R. 346.—**CAN.**

**f.** ———.]—To entitle an execution creditor to priority over an attachment, he must not only obtain execution before the attaching creditor, but this action must have been commenced by process served before the attachment issued. Therefore, where the execution issued upon a confession given before the debtor absconded, without process served:—**Held**: the attachment must prevail.—BANK OF UPPER CANADA v. GLASS (1861), 21 U. C. R. 39.—**CAN.**

**g.** ———.]—The sheriff's bailiff went to & entered upon the land of debtor, on which his family resided, & finding there no goods, did not leave any one in possession; he said that he had no instructions



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, B. (b),*

**542.** ———.] —Where the attorney of a judgment creditor delivered to the sheriff a writ of *fi. fa.* returnable on a day certain, with directions by letter, not to execute it till the return, unless another execution should come in, in the meantime, & afterwards sent in an alias, accompanied with the same directions; & the sheriff, upon another execution coming in, issued warrants on, & executed both writs on the same day, giving precedence to the last execution, & satisfying that wholly, first, out of the money levied, & then paid over the remainder, in part satisfaction of the execution first delivered, & returned that payment & *nulla bona* as to the residue:—*Held*: pltf. could not maintain an action against the sheriff for a false return, & a nonsuit on that ground had been properly directed.—*PRINGLE v. ISAAC* (1822), Price, 445; 117 E. R. 527.

*Annotation*:—*Consd.* *Hunt v. Hooper* (1844), 1 Dow. & L. 626.

**543.** ———.]—*HUNT v. HOOPER*, No. 535, *ante*.

**544.** ——— **Fraudulent collusion.**] —If writs of execution are lodged with the sheriff, they are entitled to priority over writs subsequently placed in his hands, unless there has been fraudulent collusion to keep them unexecuted.—*THEOBALD v. COTTERELL* (1853), 20 L. T. O. S. 212, N. P.

**545.** ——— **Laches in enforcing earlier writs.**]—*LOVICK v. CROWDER*, No. 514, *ante*.

**546.** **Execution under later writ—Liability of sheriff to earlier creditors.**]—*SMALCOMB v. BUCKINGHAM*, No. 525, *ante*.

**547.** ———.]—Action against the sheriff for a false return to a *fi. fa.* Pltf. delivered a writ of execution to the sheriff under which his officer levied the debt. Then the sheriff discovered a former execution in the office & returned *nulla bona*:—*Held*: the sheriff having once sold under pltf.'s execution was answerable to him for the debt.—*RYBOT v. PECKHAM* (1778), 1 Term Rep. 731, n.; 99 E. R. 1347.

*Annotations*:—*Expld. & Distd.* *Hutchinson v. Johnston* (1787), 1 Term Rep. 729. *Refd.* *Giles v. Grover* (1832), 9 Bing. 128; *Lucas v. Nockells* (1833), 10 Bing. 157; *Graham v. Witherby* (1845), 7 Q. B. 491.

**548.** ——— **If creditor not guilty of laches.**]—Allowing that the award of a writ of sequestration out of Chancery, which is the process of that ct. to compel appearance & the performance of decrees, has the same obligatory effect to bind the goods as a writ of *fi. fa.* at common law; yet if the party at whose prayer such sequestration is issued take no measure to compel the execution of it in due time, & the sequestrators do not in fact possess themselves of the goods, it is no excuse to a sheriff, to whom at a distance of 18 months a writ of *fi. fa.* is directed against the goods of the party deft. in the suit in Chancery, for not executing such writ & selling the goods; pltf. in the sequestration having at all events lost his priority by such laches; & therefore, the sheriff, who had seized under the *fi. fa.*, having on notice of such supposed obstacle returned *nulla bona*, was holden liable to pltf. in

beyond the warrant to seize the land; he told debtor's wife at the time that the land would be sold, but he did no other act of seizure:—*Held*: there was no seizure, & writs of *fi. fa.* lands placed in the sheriff's hands subsequent to the writ of attachment, were entitled

10 P. R. 127.—*CAN.*

*Intervening creditors.*]

—Where lands were sold under the judgment in a mtge. action, & there was a surplus after paying the claim of pltf., the first mtgee., sufficient to pay in full the amounts of three executions against deft., the registered owner, & the amount of a second mtge., registered after the three executions were lodged, but not sufficient to pay in full as well the amounts of several executions lodged after the second

an action for a false return. Though a writ of *fi. fa.* bind the goods as against deft., yet the property is not divested out of him till execution executed: & therefore, an execution & sale under a subsequent writ delivered to the sheriff will bind the goods; but pltf. in the first execution has his remedy against the sheriff, if the non-execution of the writ did not proceed from his own laches.

The sense in which, & extent to which, goods are in either case said to be bound is, that it binds the property as against the party himself & all claiming by assignment from, or representation through or under him; but it does not so vest the property in the goods absolutely as to defeat the effect of a sale thereof made by the sheriff under an execution (*LORD ELLENBOROUGH, C.J.*).—*PAYNE v. DREWE* (1804), 4 East, 523; 102 E. R. 931; *sub nom.* *PAINE v. DREW*, 1 Smith, K. B. 170.

*Annotations*:—*Consd.* *Giles v. Grover* (1832), 9 Bing. 128. *Refd.* *Doker v. Hasler* (1825), 3 L. J. O. S. C. P. 109; *Lucas v. Nockells* (1833), 10 Bing. 157; *Samuel v. Duke* (1838), 6 Dowl. 537. *Mentd.* *Russell v. East Anglian Ry.* (1850), 3 Mac. & G. 104.

**549.** ———.]—Sheriff seized on *fi. fa.* goods of considerable value, but returned that he had seized only to the value of 30s. before the delivery of the writ. Others had been delivered against the same debtor, & returned that he had seized & satisfied them:—*Held*: the sheriff was justified in appropriating the goods seized in discharge of his liabilities under the former writs.—*ASHBY v. GIBBS* (1843), 1 L. T. O. S. 255.

**550.** ———.]—*HUNT v. HOOPER*, No. 535, *ante*.

**551.** **Priority of Crown.**]—*BUTLER v. BUTLER*, No. 251, *ante*.

**552.** **Who determines priority—Writs delivered in a bundle—At suit of several creditors.**]—There being one attorney employed by six several ptfs., in various actions against one deft., in each of which judgment was obtained, & a writ of execution issued, the whole of the writs were delivered to the sheriff for execution at one time, & in one bundle. The ct. refused, upon application by the sheriff, to compel ptfs., or their attorney, to direct in what priority the writs should be executed.

*Semble*: a return to the effect that he had received the writs at the same time, & had levied under all, would be a good return.—*ASHWORTH v. UXBRIDGE (EARL)* (1842), 2 Dowl. N. S. 377; 12 L. J. Q. B. 39; 7 Jur. 237.

**553.** **Effect of change of sheriff—During issue of several writs.**]—*LOVICK v. CROWDER*, No. 514, *ante*.

**554.** ——— **Full execution of earlier writs.**]—In the year 1837 two writs of *fi. fa.*, one at the suit of S. for £1,034, the other at the suit of C. for £530, were issued against the West Cork Mining Co., & lodged with the sheriff of Surrey, who seized goods of the co. to a large amount. Proceedings in Chancery were then instituted by the co., & injunctions granted to restrain the sheriff from selling the goods, but he nevertheless sold them & they realised £1,370, which he paid into his banker's hands to the account of the sheriff. On June 6, 1839, the proceedings in Chancery being still

*mtge.*:—*Held*: the three intervening execution creditors were entitled to be paid in full, instead of *pari passu* with the subsequent execution creditors.—*EDMONTON MORTGAGE CO. v. GROSS* (1911), 18 W. L. R. 385; 3 Alta. L. R. 500.—*CAN.*

**k.** **Execution under later writ.**]—A subsequent execution creditor has not any equity to compel the first

pending, pltf. issued a *fi. fa.* against the co., directed to deft., the sheriff for that year, & gave him notice of the former levy. On Aug. 8, the proceedings in Chancery terminated; the result of which was, that the debt of S. & E. were reduced to £545, which reduced amount was paid over to them by the sheriff, & the residue £825, paid over to the co., & the sheriff returned *nulla bona* to pltf.'s execution. The same person acted as under sheriff in the years 1837, 1838 & 1839. In an action for a false return:—*Held*: (1) the present deft. was not liable, inasmuch as the former writ was wholly executed by the seizure & sale of the goods by the sheriff in 1837, & therefore ought not to be transferred to the present deft. under Fines Act, 1833, c. 99, s. 7, as writs "not wholly executed," & he was not rendered liable by having employed the same under sheriff; (2) the balance of the proceeds of the goods after satisfying the two former executions, constituted a debt from the sheriff who levied in 1837 to the co., & as such could not be taken in execution under Judgments Act, 1838 (c. 110), s. 12.—*HARRISON v. PAYNTER* (1840), 6 M. & W. 387; 8 Dowl. 349; 9 L. J. Ex. 169; 4 Jur. 488; 151 E. R. 462.

*Annotation*:—As to (2) *Refd.* *Hawkins v. Gathercole* (1855), 11 De G. M. & G. 1.

**555. Consent order as to execution—Consent given by agent of creditor—Estoppel.**—P. having recovered judgment against F., the sheriff, on Apr. 15, seized F.'s goods in Hampshire under a *fi. fa.* in that action, & left a man in possession. On the same day F. executed a bill of sale to W., & a writ of *fi. fa.* in an action by W. against F. was lodged with the sheriff for execution. On May 1, F. was taken in Middlesex under a writ of *ca. sa.* issued on P.'s judgment, & thereupon P.'s attorney at Southampton, immediately wrote to request the sheriff to withdraw from possession under the *fi. fa.* The officer received the letter, but his man continued in possession of the goods & did not in fact withdraw. The officer, however, told W. that he would hold for him under the writ. A summons was taken out to set aside the *ca. sa.* for irregularity, when F. was discharged out of custody, & an order was made by consent, "that on payment of the judgment debt on a certain day no *ca. sa.* should be issued, but in the meantime pltf. should be at liberty to proceed on the *fi. fa.* already issued, & under which the sheriff of Hants is now in possession." The consent to the order was given by the London agent of W., who was the attorney for F. in the action against him by P. W. knew nothing of the terms of the order at the time it was made, & when he heard of it, took no steps to set it aside:—*Held*: W. was bound by the consent of his London agent to the order, & thereby precluded from contesting that the sheriff was in possession under P.'s writ.—

creditor to recover payment of his claim out of property held by him in security, so as to leave the goods of the debtor to satisfy the subsequent executions.—*TOPPING v. JOSEPH* (1859), 1 E. & A. 292.—CAN.

**l. No priority among creditors—Under statute.**—*THOMPSON v. BERGLAND* (1910), 16 W. L. R. 154; 3 Sask. L. R. 470.—CAN.

**m. Partnership property—Effect of appointment of receiver.**—Where executions against the property of a partnership were in the sheriff's hands prior to the date of the appointment of a receiver of the partnership assets:—*Held*: they were not entitled to be satisfied in full in priority to executions which did not reach the sheriff until after that date.—*Re NATURAL GAS LIGHT & APPLIANCE CO.*, [1918] 1

W. W. R. 769; 13 Alta. L. R. 358.—CAN.

#### PART III. SECT. 1, SUB-SECT. 4.—D.

**n. Delay of execution—Powers of sheriff.**—Where at the time of placing an execution against goods in the sheriff's hands there is a claim for unpaid rent, the sheriff cannot delay the seizure until the execution creditor first pays the rent. He must seize, but he need not sell the goods until the rent is paid, & if the execution creditor will not pay it he may withdraw from possession.—*LOCKE v. MCCONKEY* (1876), 26 C. P. 475.—CAN.

**o. Presumption of immediate intention to execute.**—Where a *fi. fa.* issues, & there is no evidence of intention beyond the mere delivery of the writ to the sheriff, it may be inferred

*WITHERS v. PARKER* (1860), 5 H. & N. 725; 29 L. J. Ex. 320; 2 L. T. 602; 6 Jur. N. S. 1033; 8 W. R. 550; 157 E. R. 1370, Ex. Ch.  
*Annotation*:—*Consd.* *Re Newen, Carruthers v. Newen*, [1903] 1 Ch. 812.

#### C. By Whom Executed.

See Part II., Sect. 13, sub-sect. 2, *ante*.

#### D. Time for Execution.

See R. S. C., Ord. 42, r. 20.

**556. At any hour.**—Landlord cannot distrain at all hours, whereas a sheriff is under no such restriction (*LORD CAMPBELL, C.J.*).—*BROWN v. GLENN* (1851), 16 Q. B. 254; 20 L. J. Q. B. 205; 16 L. T. O. S. 341; 15 Jur. 189; 117 E. R. 876.  
*Annotations*:—*Refd.* *American Concentrated Meat Co. v. Hendry*, [1893] W. N. 67. *Mentd.* *Hodder v. Williams*, [1895] 2 Q. B. 663.

**557.** —.]—The effect of the maxim "a man's house is his castle" is to extend the immunity to the outer door, not only of all dwelling-houses, but of all buildings whatever, & to the outer gates of all enclosures, as regards both distress & execution (*BOWEN, L.J.*).—*AMERICAN CONCENTRATED MEAT CORPN. v. HENDRY* (1893), 62 L. J. Q. B. 388; 68 L. T. 742; 57 J. P. 521, 788; 9 T. L. R. 340, 445; 37 Sol. Jo. 341, 475; 5 R. 331.

*Annotations*:—*Refd.* *Long v. Clarke*, [1894] 1 Q. B. 119; *Hodder v. Williams*, [1895] 2 Q. B. 663.

**558. Delay of execution—Effect on priority of execution.**—*LOVICK v. CROWDER*, No. 514, *ante*.

**559.** — For benefit of judgment debtor—Not permissible—Liability of sheriff to attachment.]

—The sheriff is not justified in delaying the execution of writs whether of *ca. sa.* or *fi. fa.*, for the purpose of enabling the judgment debtor to carry on his business, even though the sheriff *bonâ fide* believes that by so doing he may the better enable the debtor to raise the money, & his doing so renders him liable to attachment.—*Re ESSEX, SHERIFF, TERRELL v. FISHER* (1862), 10 W. R. 796.

**Time for issue of execution.**—See Part II., Sect. 3, *ante*.

#### E. Seizure.

##### (a) How Made.

**560. Production of warrant necessary.**—A seizure by sheriff's officers is imperfect where neither the warrant is produced nor the seizure in any way made public.—*Re WILLIAMS, Ex p. JONES* (1880), 42 L. T. 157.

**561. Seizure must be public.**—*Re WILLIAMS, Ex p. JONES*, No. 560, *ante*.

**Liability for wrongful seizure.**—See Sub-sect. 12, *post*.

##### (b) What Amounts to.

**562. Seizure of part—In name of whole.**—The seizure in execution of a part of the goods in a house in the name of all is a seizure of all.—*COLE*

that it was intended for immediate execution, but circumstances may be shown which will negative this presumption.—*JOHNSON v. CROCKER* (1858), 4 All. 94.—CAN.

#### PART III. SECT. 1, SUB-SECT. 4.—E. (a).

**p. Indorsement of mode of execution.**—It is not necessary that there should be an indorsement on the writ of execution of the mode in which it is to be executed.—*SUTHERLAND v. WHIDDEN* (1858), 2 Thom. 410.—CAN.

#### PART III. SECT. 1, SUB-SECT. 4.—E. (b).

**q. Whether entry necessary.**—P. brought ejectment for land in B.'s possession. B. thereupon attorned to P., & continued in possession. The



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (b) & (c) i.]*

*v. DAVIES* (1698), 1 Ld. Raym. 724; 91 E. R. 1383.

*Annotations:—Consd. Gladstone v. Padwick* (1871), L. R. Exch. 203. *Mentd. Brassey v. Dawson* (1734), 2 Stra. 978; *Ryall v. Rolle* (1749), 1 Atk. 165; *Cooper v. Chitty* (1756), 1 Burr. 20; *Balme v. Hutton* (1833), 9 Bing. 471; *Garland v. Carlisle* (1837), 11 Bli. 421; *Isitt v. Beeston* (1869), 39 L. J. Ex. 89.

**563. Actual seizure not necessary—Person in charge informed of execution.]—**A writ of *fi. fa.* having been sued out against the goods of A., the sheriff assigned them to B., the execution creditor, by a bill of sale, which included a specific chattel in the possession of C., who had a lien upon it. A demand was made, with a tender, on behalf of the execution creditor, which was refused. On Apr. 6, after the date of the bill of sale, the sheriff's officer went upon the premises of C., & told him that he must consider the chattel in the possession of the sheriff, & that, if he removed it, it would be at his peril; the sheriff's officer showed his warrant, & then went away. On Apr. 16, he went again with the assignee under the bill of sale, for the purpose of delivering the chattel, which remained upon the premises of C., in the same position as on the 6th, & he said to the assignee, "I give the carriage to you under the bill of sale":—*Held*: (1) the Act done by the sheriff's officer on the 6th would have been sufficient to constitute a seizure, if the chattel had been on the premises of the execution debtor; (2) there was neither a sufficient seizure as against the party having a lien, nor a sufficient resumption of possession, & the bill of sale, did not pass any interest to the execution creditor.

(3) The sheriff must continue either absolutely or constructively in possession even if the goods seized are in the possession of a third party whose right to hold them is questionable.—*BALLS v. PINK* (1845), 4 L. T. O. S. 356; *sub nom. BALLS v. THICK*, 9 Jur. 304.

**564. ———.]—**An execution debtor was possessed of a mansion house & grounds, & also of a farm, which, with the exception of two out-

lying fields, adjoined the grounds & formed part of one block with them. The farm was in debtor's occupation, although the accounts were kept distinct. The farmhouse was a mile distant from the mansion house in a direct line. On May 19, a writ of *fi. fa.* was executed at the mansion house, by the under-sheriff, who informed persons in charge there, including the steward of the estate, that all the goods on the estate were seized; & a man was left in possession. No act of seizure was done at the farmhouse or upon the farm on that day, the under-sheriff intending what he had done to be a seizure of the whole; but on the following day a man was put in possession at the farmhouse. The goods on the farm were claimed by assignees under a bill of sale, made for an antecedent debt, & for the purpose of giving it a preference over the execution, & which was executed on the evening of May 19 after the seizure at the mansion house was completed. At the time of the execution of the bill of sale, it was known to the solr. of the assignees that the judgment creditor had threatened to seize, & that a writ of *fi. fa.* on the same judgment had been executed in another county; & it was expected by him, but not known, that a writ had been delivered to the sheriff of the county in which the goods lay:—*Held*: (1) what was done on May 19 amounted to an "actual seizure" of the goods on the farm & at the farmhouse, within the meaning of Mercantile Law Amendment Act, 1856 (c. 97), s. 1; (2) (*BRAMWELL, B.*) there was no notice to the assignees of the bill of sale that the writ in question had been delivered to the sheriff to be executed within the proviso in the same sect.

*Qu.*: whether notice of the writ issued in another county was notice within the meaning of the proviso.—*GLADSTONE v. PADWICK* (1871), L. R. 6 Exch. 203; 40 L. J. Ex. 154; 25 L. T. 96; 19 W. R. 1064.

*Annotations:—As to* (1) *Refd. Johnson v. Pickering*, [1907] 2 K. B. 437. *Generally, Mentd. Webster v. Ashton-under-Lyne Overseers, Hadfield's Case* (1873), L. R. 8 C. P. 306.

**565. ——— Constructive seizure—Money concealed from sheriff—While in possession.]—**After the death of a judgment debtor against whose

*Held*: this, in effect, was actual seizure.—*MULTAN CHAND KANYALAL v. BANK OF MADRAS* (1904), L. L. R. 27 Mad. 346.—*IND.*

**d. ——— Giving list of property as seized.]—**A debt, against whose goods a sheriff had an execution, afterwards set aside for irregularity, drove to the sheriff's office & gave his deputy a list of his property as seized, but without any actual seizure:—*Held*: not sufficient to support trespass against the then pltf.—*HERVEY v. ALEXANDER* (1839), (1823-1900) 3 Ont. Dig. 6905.—*CAN.*

**e. ——— Notice of seizure.]—**The posting of one of the notices of seizure on debtor's premises is sufficient to constitute a seizure.—*MANITOBA OIL PRODUCTS, LTD. v. VILLAGE OF LANGENBURG*, [1923] 3 W. W. R. 308; 4 D. L. R. 260.—*CAN.*

**f. Property left in debtor's custody.]—**The fact of leaving the goods seized in the possession of the execution debtor for a reasonable time under an arrangement whereby they were to be held for the sheriff does not in itself constitute an abandonment.—*YOUNG v. DENCHER, BANK OF TORONTO v. ADAMES*, [1923] 1 W. W. R. 136; [1923] 1 D. L. R. 432; 18 Alta. L. R. 496.—*CAN.*

**g. Acknowledgment of levy—By debtor.]—**Deft., a bailiff of a division ct., having an execution against L., went to him & seized a yoke of oxen, which he allowed him to retain on

—Where a *fi. fa.* was delivered to the sheriff for the purpose of binding the debtor's lands, & not for the purpose of a sale, & the sheriff informed the debtor that he had the execution & indorsed upon it that he had levied on the lands, but did no other act for more than five years, when he advertised the land for sale; the ct., doubting whether this amounted to a levy on the land, set it aside on the application of the debtor & a mtgee. of his land.—*HAMILTON v. BRYSON* (1869), 1 Han. 618.—*CAN.*

**a. ———.]—**By delivering a certified copy of the writ of *fi. fa.* to the registrar, the sheriff "seizes" all the lands of the judgment debtor.—*FREDERICKS v. NORTH-WEST THRESHER CO.* (1910), 15 W. L. R. 66; 3 Sask. L. R. 280.—*CAN.*

**b. ———.]—**In the case of the sale of lands under execution no corporal seizure is necessary, but in this case there was what was equivalent to a seizure, three months before the sale, when the advertisements were posted & published.—*Re SHERK* (1911), 16 W. L. R. 277; 4 Sask. L. R. 51.—*CAN.*

**c. ———.]—**A judgment creditor obtained a warrant of attachment, which was executed by affixing it to the outer door of a warehouse, in which goods belonging to his judgment debtors were stored. The door was not broken open nor was physical possession taken of the goods inside:—

**r. ———.]—**A seizure of goods under an execution & a notice that goods 20 miles away in the same bailiwick belonging to the same execution debtor are under seizure do not operate as a seizure of the latter goods.

*Semble*: goods cannot be seized by telephone.—*DICKINSON v. ROBERTSON* (1905), 11 B. C. R. 155.—*CAN.*

**s. ———.]—**Deft. in an execution being the registered proprietor of shares in a ship a writ of *fi. fa.* was delivered to the sheriff & the solr. for the creditor by the direction of the sheriff procured a certificate of registry from the ship & delivered it to the sheriff who retained it. The sheriff was registered at the custom house under Merchant Shipping Act as the owner of the shares which were afterwards sold by him & transferred to the purchaser by a bill of sale which was also registered:—*Held*: the seizure was effectual although the sheriff did not go on board the ship.—*HARLEY v. HARLEY* (1860), 11 L. Ch. R. 451.—*IR.*

**t. Whether actual seizure necessary.]**

effects a writ of *fi. fa.* had been sued out, the sheriff has power under Judgments Act, 1838 (c. 110), s. 12, to seize by virtue of the writ money which belonged to the judgment debtor in his lifetime.

The goods of a judgment debtor at his house were seized under a *fi. fa.* While the sheriff was in possession at the house, the judgment debtor, without the knowledge of the sheriff, placed a sum of money which he had received in a drawer in his bedroom there. Some days afterwards he died, & his widow, having found the money, removed it & deposited it with her solrs., the sheriff remaining in ignorance of its existence. Subsequently an order was made under Bkpcy. Act, 1883 (c. 52), s. 125, for the administration of the judgment debtor's estate in bkpcy. The sheriff, having learned of the existence of the above-mentioned sum of money, claimed it from the solrs., & interpleader proceedings having been taken, an order was made for the trial of an issue whether the trustee under the administration order was entitled to the money as against the execution creditor:—*Held*: there was no seizure by the sheriff before the death of the judgment debtor; & after his death the sheriff could not seize the money; & consequently it belonged to the trustee as against the execution creditor.

All previous enactments were swept away by Sale of Goods Act, 1893 (c. 71), s. 26, which provides that the time of the delivery of the writ to the sheriff shall be the time from which the goods are bound (FLETCHER MOULTON, L.J.).—JOHNSON v. PICKERING, [1908] 1 K. B. 1; 77 L. J. K. B. 13; 98 L. T. 68; 24 T. L. R. 1; 51 Sol. Jo. 810; 14 Mans. 263, C. A.

**566. Where goods on premises of third party—Having lien on the goods.]**—BALLS v. PINK, No. 563, *ante*.

(c) *Where Made.*

i. *In General.*

**567. Premises of stranger—Goods of testator or intestate.]**—A sheriff may enter the house of a stranger, if the doors are open, to execute a *fi. fa. de bona testatoris*, if his goods are there.—BISCOP v. WHITE (1600), Cro. Eliz. 759; 78 E. R. 991.

*Annotation*:—*Refd.* Cooke v. Birt (1814), 1 Marsh. 333.

**568. ——— House of husband of administratrix.]**—(1) Under a writ of *fi. fa.* against the goods of an intestate, in the hands of his administratrix, or of the husband of the administratrix & her, in her right, since her marriage, the sheriff may justify entering the house of the husband to search for goods of the intestate, though none be found therein, because that is the most natural custody for them.

(2) After a demurrer seriously argued, the ct. would not permit pltf. in an action against the sheriff to amend. In trespass for entering pltf.'s house & continuing there a long time, deft., as to

part of the time, justified entering under a *fi. fa.*, & staying a reasonable time, to wit, two days, to search for goods. Pltf. replied, that two days was too great & unreasonable a time, & newly assigned that deft. stayed much longer than two days:—*Held*: the traverse of the reasonableness of two days was immaterial, & it ought to have been a traverse of the reasonableness of the time the sheriff stayed there.—COOKE v. BIRT (1814), 5 Taunt. 765; 1 Marsh. 333; 128 E. R. 893.

*Annotations*:—*As to* (1) *Refd.* Johnson v. Leigh (1815), 0 Taunt. 246. *Generally, Mentd.* R. v. Watts (1830), 8 L. J. O. S. K. B. 381.

**569. ——— Goods taken thither—To escape process of law.]**—(1) In all cases where the King is party, the sheriff may break the house, either to arrest or do other execution of the King's process, if he cannot otherwise enter. But he ought first to signify the cause of his coming, & make request to open the doors.

(2) Where the door is open the sheriff may enter, & do execution at the suit of a subject, & so also in such case may the lord, & distrain for his rent or service.

(3) It is not lawful for the sheriff, on request made & denial, at the suit of a common person, to break deft.'s house, *scilicet*, to execute any process at the suit of a subject.

(4) The house of any one is only a privilege for himself, & does not extend to protect any person who flies to his house, or the goods of any other which are brought there, to prevent a lawful execution & to escape the process of the law; in such cases after request & denial, the sheriff may break the house.

(5) If the sheriff might break open the door to execute civil process, yet it must be after request made.—SEMayNE'S CASE (1604), 5 Co. Rep. 91 a; 77 E. R. 194; *sub nom.* SEYMAN v. GRESHAM, Cro. Eliz. 908; *sub nom.* SEMAYNE v. GRESHAM, Moore, K. B. 668; Yelv. 29.

*Annotations*:—*As to* (1) *Refd.* Mackalley's Case (1611), 9 Co. Rep. 65 b; Oath before Justices Case (1612), 12 Co. Rep. 130; Cooke's Case (1639), W. Jo. 429; Burdett v. Abbot (1812), 4 Taunt. 401; Harvey v. Harvey (1884), 26 Ch. D. 644. *As to* (2) *Refd.* Aga Kurboolic Mahomed v. R. (1843), 4 Moo. P. C. C. 239. *As to* (3) *Consd.* Lee v. Gansel (1774), 1 Cowp. 1. *Refd.* Bowles's Case (1615), 11 Co. Rep. 77 b; Penton v. Brown (1664), 1 Keb. 698; East India Co. v. Kynaston (1821), 3 Bli. 153; Ryan v. Shilcock (1851), 7 Exch. 72; Percival v. Stamp (1853), 9 Exch. 167; Hooper v. Lane (1857), 6 H. L. Cas. 443; Attack v. Bramwell (1863), 3 B. & S. 520; Edmondson v. Nuttall (1864), 17 C. B. N. S. 280; American Concentrated Must Corp'n. v. Hendry (1893), 62 L. J. Q. B. 388; Long v. Clarke (1893), 63 L. J. Q. B. 108; Hodder v. Williams, [1895] 2 Q. B. 663; Grunnell v. Welch (1905), 74 L. J. K. B. 925. *As to* (4) *Refd.* Hollier v. Laurie (1846), 3 C. B. 334. *As to* (5) *Refd.* Ratcliffe v. Burton (1802), 3 Bos. & P. 223. *Generally, Mentd.* Foster v. Hill (1611), 1 Bulst. 146; Kerbey v. Denby (1836), 1 M. & W. 336; Bridges v. Hawkesworth (1851), 15 Jur. 1079.

**Right to break in.]**—*See* Sub-sect. 4, E. (c) (ii.), *post*.

*See, also*, DISTRESS, Vol. XVIII., pp. 314, 315, Nos. 496-509.

receiving an acknowledgment of the levy indorsed on the writ. L. absconded, leaving the oxen with pltf. Deft. took them away, whereupon she brought trespass, alleging that she had received them from L. on the day of his departure in payment of a debt:—*Held*: by the acknowledgment given, debtor had put it out of his power to transfer the goods seized.—LOSSING v. JENNINGS (1852), 11 U. C. R. 406.—CAN.

**h. ———.]**—P., sheriff of Queen's county, went to B.'s residence to execute a writ. B. gave him a description of the property on the place, & P. made a memorandum of it in B.'s presence & told B. that he, P., had

levied upon the property, & B. then promised that if the sheriff would leave the property in the place, it should be forthcoming when it was required to be sold:—*Held*: B. was estopped by his conduct from saying there was no levy, as the sheriff would certainly be estopped as against B. from saying there was no seizure.—BROOKS v. PALMER (1878), 17 N. B. R. (1 P. & B.) 615.—CAN.

**k. ———.]**—Goods seized by the sheriff under an execution at the suit of B. v. R., were claimed by E. R., the wife of R., as her property. After a formal levy it was arranged between the sheriff & E. R. that she should hold the goods for the sheriff until they

were required for sale under the execution. After the seizure & before sale, a suit was commenced by E. R. against the sheriff, & a declaration was filed containing two counts, 1st, for seizing, taking away, & converting the pltf.'s goods; 2nd for detention. Part of the goods seized were sold, & part released:—*Held*: as far as the sheriff was concerned, the levy was effectual & complete.—RIDEOUT v. TIBBITS (1903), 36 N. B. R. 281.—CAN.

**l. Intimation of intention to seize.]**—Entry by proper officer upon premises on which goods are situated, together with an intimation of an intention to seize the goods, con-



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (c) ii. (d).]*

ii. *Forcible Entry.*

**570. In respect of what execution — Execution of the King's process—Request to enter necessary.]**—SEMAYNE'S CASE, No. 569, *ante*.

**571. — Execution at suit of subject—Request to enter necessary—Effect of refusal of request.]**—SEMAYNE'S CASE, No. 569, *ante*.

**572. Right to break outer doors — House of stranger—Goods brought thither—To escape process of law.]**—SEMAYNE'S CASE, No. 569, *ante*.

**573. — Not private dwelling house.]**—If a *fi. fa.* be directed & delivered to the sheriff, he may not break the outer door of the house & enter, & do execution; but if the outer door be open, then he may enter by that, & then he may & ought to break the door of an entry or chamber which is locked, & break open any chest which is locked, & take the goods in that in execution (*per CUR.*) — ANON. (1602), 1 Brownl. 50; 123 E. R. 658.

**574. — —.]**—PENTON *v.* BROWN (1664), 1 Keb. 698; 1 Sid. 186; 83 E. R. 1193.

*Annotations:—*Consd. Brown *v.* Glenn (1851), 16 Q. B. 254; American Concentrated Must Corpn. *v.* Hendry (1893), 62 L. J. Q. B. 388. *Apld.* Hodder *v.* Williams, [1895] 2 Q. B. 663. The law as laid down in that case has been established by so long a course of practice that it would be impossible now to overrule it (KAY, L.J.). *Refd.* Ryan *v.* Shilcock & Purday (1851), 16 J. P. 213.

**575. — —.]**—In trespass for breaking & entering pltf.'s house, & seizing & taking away his goods, the evidence was that deft. went to the house to take, under the process of a county ct., certain goods supposed to be there; that, being refused admittance, he broke open the outer door with an axe, after a warning not to do so, entered the house, & took away certain goods of pltf.:—*Held:* this was a case in which the judge had power, under 3 & 4 Vict., c. 24, s. 2, to certify that the trespass was "wilful & malicious," so as to give pltf. his full costs, the damages found by the jury being under 40s.—SHERWIN *v.* SWINDALL (1844), 12 M. & W. 783; 1 Car. & Kir. 402; 1 Dow. & L. 999; 13 L. J. Ex. 237; 3 L. T. O. S. 106; 8 Jur. 580; 152 E. R. 1416.

*Annotation:—*Mentd. Bowyer *v.* Cook (1847), 4 C. B. 236.

**576. — —.]**—S., a county ct. bailiff, went to levy a judgment debt on W., & calling at W.'s door, upon W. opening it, B. put his foot inside & tried to get in against the wish of W., who assaulted S. W. being summoned for assaulting S.:—*Held:* as B. was not in the execution of his duty in forcing a debtor's door, the justices had properly dismissed the summons.—BROUGHTON *v.* WILKERSON (1880), 44 J. P. 781.

*Annotation:—*Consd. Rossiter *v.* Conway (1893), 58 J. P. 350.

**577. — —.]**—The sheriff may, for the purpose of executing a writ of *fi. fa.*, break open the outer door of a workshop or other building of the judgment debtor, not being his dwelling-house or connected therewith.—HODDER *v.* WILLIAMS, [1895] 2 Q. B. 663; 65 L. J. Q. B. 70; 73 L. T. 394; 44 W. R. 98; 12 T. L. R. 24; 40 Sol. Jo. 32; 14 R. 757; 59 J. P. Jo. 724, C. A.

**578. — Building not part of dwelling house — Barn.]**—It is not material in case of a barn whether the doors be open or shut, there being no

particular place where the sheriff may make demand but *contra* if the barn was parcel of a mansion-house.—PENTON *v.* BROWN (1664), 1 Keb. 698; 1 Sid. 186; 83 E. R. 1193.

*Annotations:—*Consd. American Concentrated Must Corpn. *v.* Hendry (1893), 62 L. J. Q. B. 388; Hodder *v.* Williams, [1895] 2 Q. B. 663. *Refd.* Brown *v.* Glenn (1851), 16 Q. B. 254; Ryan *v.* Shilcock & Purday (1851), 16 J. P. 213.

**579. — —.]**—AMERICAN CONCENTRATED MUST CORPN. *v.* HENDRY, No. 557, *ante*.

**580. — — Workshop.]**—HODDER *v.* WILLIAMS, No. 577, *ante*.

**581. — Lodger's apartments — Not being outer door.]**—A bailiff on execution of mesne process may break open the door of a lodger's apartment, having first gained peaceable entrance at the outer door of the house.—LEE *v.* GANSEL (1774), 1 Cowp. 1; Lofft, 374; 98 E. R. 935.

*Annotations:—*Consd. Ratcliffe *v.* Burton (1802), 3 Bos. & P. 223. *Apld.* Lloyd *v.* Sandilands (1818), 2 Moore, C. P. 207. *Consd.* Hodder *v.* Williams, [1895] 2 Q. B. 663. *Refd.* Hodgson *v.* Towning (1837), Will. Woll. & Dav. 53; Brunswick *v.* Slowman (1849), 8 C. B. 317; American Concentrated Must Corpn. *v.* Hendry (1893), 62 L. J. Q. B. 388. *Mentd.* Wilson *v.* Roberts (1861), 11 C. B. N. S. 50; Thompson *v.* Ward, Ellis *v.* Burch (1871), L. R. 6 C. P. 327.

*Compare* DISTRESS, Vol. XVIII., p. 334, Nos. 682–688.

**582. Right to break inner doors.]**—ANON. (1602), No. 573, *ante*.

**583. — —.]**—If bailiffs who have entered a house, the doors being open, to execute a *fi. fa.*, are disturbed & locked up in the rooms, it is justifiable to break open the doors in order to release them; & on trespass brought, if the fact be admitted, pltf. shall be bound to his good behaviour.—WHITE *v.* WILTSHIRE (1619), Cro. Jac. 555; Palm. 52; 2 Roll. Rep. 137; 79 E. R. 476.

*Annotations:—*Consd. Pugh *v.* Griffith (1838), 7 Ad. & Ml. 827. *Refd.* Aga Kurboolie Mahomed *v.* R. (1843), 3 Moo. Ind. App. 164. *Mentd.* Carlton *v.* Mortagh (1704), 1 Salk. 268.

**584. — —.]**—(1) On a *fi. fa.* the sheriff may sell the goods, & if he pay the money to the party it is good, & the ct. will allow of such return, because pltf. is thereby satisfied, although the writ run, *ita quod habeat coram nobis*, etc., or else he may return that he has them in his hands for want of buyers, & then a *venditioni exponas* goes, commanding him to sell them at the best rate he can; & he must not appraise them too high, for if he value them so high that none will take them at that rate, he must himself; yet if before sale deft., or any other person for him, do tender him the money, etc., he cannot sell them (*per CUR.*).

(2) On a *fi. fa.* when the officers are once in the house, they may break open any chamber doors, or trunks, for doing their execution (*per CUR.*).—R. *v.* BIRD (1679), 2 Show. 87; 89 E. R. 811.

*Annotation:—*As to (1) *Refd.* Giles *v.* Grover (1832), 9 Bing. 128.

**585. — —.]**—LEE *v.* GANSEL, No. 581, *ante*.

**586. — Necessity for previous demand for admittance.]**—*Semble:* a sheriff's officer acting under civil process may justify breaking the inner doors of deft.'s house, though he be not therein at the time, but, in such case, the officer must first demand admittance.—RATCLIFFE *v.* BURTON (1802), 3 Bos. & P. 223; 127 E. R. 123.

*Annotations:—*Expld. Hutchison *v.* Birch (1812), 4 Taunt. 619. *Refd.* Johnson *v.* Leigh (1815), 1 Marsh. 565.

stitutes a valid seizure.—LITTLE *v.* MAGLE (1914), 29 W. L. R. 596; 7 W. W. R. 224.—CAN.

PART III. SECT. 1, SUB-SECT. 4.—  
E. (c) ii.

m. Right to break open doors —

*Judicial authority necessary.]*—If the debtor be absent, or if there be no one to open the doors of the house, the seizing officer must obtain judicial authority to use all necessary force, but only in the presence of two witnesses.—KAUFMAN *v.* CAMPEAU (1901), Q. R. 19 S. C. 479.—CAN.

n. — Of dwelling house.]—A nazir or sheriff cannot, under a writ of attachment, break open a deft.'s dwelling-house to execute civil process against his person or goods if the outer door is closed & locked, even when he finds that the deft. has absconded to evade such execution.—

**587.** ———.]—(1) A sheriff having entered at the open doors of an house need not demand to have the inner doors opened to him before he breaks them in order to take, under a writ of *fi. fa.*, goods which are within them.

(2) A sheriff may enter a house to search for the body of a debtor, under a writ of *ca. sa.*

After the sheriff has entered the house in which the person or the goods of deft. are contained, omitting the question of breaking down for the purpose of search, I take it to be clear that he may break open any door within the house without any further demand (GIBBS, J.).—HUTCHISON v. BIRCH (1812), 4 Taunt. 619; 128 E. R. 473.

*Annotation* :—As to (2) *Refd.* Johnson v. Leigh (1815), 1 Marsh. 565.

—— **Lodger's apartment.**]—See No. 581, *ante*.

*Compare* DISTRESS, Vol. XVIII., p. 334, Nos. 689–693.

**588. Right to break open trunks.**]—ANON. (1602), No. 573, *ante*.

**589.** ———.]—R. v. BIRD, No. 584, *ante*.

**590. Right to break out—On being locked in.**]—Where a sheriff was lawfully in a room, occupied by an under-tenant of pltf., in his dwelling-house, & had entered the residue of the dwelling through an open door communicating between the two tenements, in order to seize pltf.'s goods under a *fi. fa.*; & having seized the goods was unable to carry them away without himself opening the outer door, which was locked, neither pltf. nor any one on his behalf being present whom the sheriff could request to open the door :—*Held* : he was justified in breaking the outer door & the lock thereof, in order to carry away all the goods.—PUGH v. GRIFFITH (1838), 7 Ad. & El. 827; 3 Nev. & P. K. B. 187; 7 L. J. Q. B. 169; 2 Jur. 614; 112 E. R. 681.

*Annotation* :—*Refd.* Aga Kurboolie Mahomed v. R. (1843), 4 Moo. P. C. C. 239.

**591. Persons breaking in trespassers ab initio.**]

Trespass for breaking & entering pltf.'s dwelling-house, & assaulting & imprisoning him, etc. Pleas, first, not guilty; secondly, as to all the trespasses alleged, except the breaking of the house, a justification under a writ of *ca. sa.* & warrant thereon, by virtue of which defts. entered the house, the outer door being open, & arrested pltf. Replication, admitting the writ & warrant, *de injuria absque residue causâ*. It was proved that defts., who were bailiffs, in execution of the warrant broke open the outer door of pltf.'s house, & so gained an entrance, & arrested him :—*Held* : (1) the averment in the plea, that the outer door was open, was a material averment, for the door's being open was a condition precedent to deft.'s right to enter & arrest pltf. in his house, & therefore, the plea was sufficiently traversed by the general replication, & it was not necessary to reply the breaking of the outer door; (2) defts. having become trespassers *ab initio* by the breaking of the door, the jury were rightly directed that they might, even on the plea of not guilty, give damages in respect of all the injuries complained of in the declaration.—KERBEY v. DENBY (1836), 1 M. & W. 336; Tyr. & Gr. 688; 2 Gale, 31; 150 E. R. 463; *sub nom.* KIRBY v. DENBY, 5 L. J. Ex. 162.

*Annotations* :—As to (1) *Refd.* Ryan v. Shilcock (1851), 21 L. J. Ex. 55; Percival v. Stamp (1853), 22 L. T. O. S.

BAI KÚVAR v. VENDIDÁS GANGARÁM 3 Bom. 89.—IND. (1871), 8 Bom. A. C. 127.—IND.

**o.** — *Of shops.*]—A bailiff or nazir has authority to break open the door of a shop in order to execute a writ of attachment.—DAMODAR PAR-SOTAM v. ISHVAR JETHÁ (1878), I. L. R.

**p.** *Right to remove locks of inner doors.*]—A person executing a process directing a general attachment of moveable property, having gained access to a house, has a right to

90; Hooper v. Lane (1857), 6 H. L. Cas. 443; American Concentrated Must Corpn. v. Hendry (1893), 62 L. J. Q. B. 388. As to (2) *Refd.* Brunswick v. Slowman (1849), 18 L. J. C. P. 299.

**592. Whether seizure invalidated—When entry unjustified.**]—A declaration stated, that deft., on Sunday, Mar. 6, broke & entered pltf.'s dwelling-house, & continued therein for a long time, to wit, eight days; & also unlawfully seized divers goods & chattels of pltf., to wit, etc.; & also for that deft. converted to his own use similar goods of pltf. Deft. pleaded (*inter alia*), as to seizing & converting the goods, a justification as bailiff under a warrant & writ of *fi. fa.*; & as to continuing on the premises after the evening of the Tuesday following the Sunday in the declaration mentioned, not guilty; upon which pleas issues were joined. At the trial it appeared, that a warrant having been directed to deft. on a writ of *fi. fa.* against pltf.'s goods, on Sunday, Mar. 6, some assistants, employed by deft., broke into pltf.'s house, & seized his goods. They continued in possession until the following Tuesday night, when they withdrew. They returned on the following Thursday, & proceeded to lot the goods for sale, & remained in possession until the following Saturday, when deft., for the first time, came on the premises & sold the goods under the writ & warrant :—*Held* : (1) the sale was not vitiated by the previous illegal seizure of the goods, since the principle which governed an arrest of the person did not apply to an execution against goods. *Semle* : even where a sheriff broke into a house the execution against the goods would be valid, though the sheriff would be liable to an action for the breaking; (2) the declaration in substance laid a trespass with a *continuando*, & therefore, pltf. was entitled to give evidence of the trespasses committed on the premises by deft. after he had left on the Tuesday.—PERCIVAL v. STAMP (1853), 9 Exch. 167; 2 C. L. R. 282; 23 L. J. Ex. 25; 22 L. T. O. S. 90; 18 J. P. 105; 2 W. R. 14; 156 E. R. 71.

*Annotation* :—*Consd.* Hooper v. Lane (1857), 6 H. L. Cas. 443.

*Compare* DISTRESS, Vol. XVIII., pp. 333–335, Nos. 676–704.

#### (d) What Amount to be Seized.

**593. Reasonable amount.**]—HARGRAVE v. WARD (1697), 2 Lut. 1452; 125 E. R. 801.

*Annotations* :—*Mentd.* Courtney v. Satchwell (1726), 2 Stra. 694; Moir v. Munday (1755), Say. 181.

**594. Only sufficient to satisfy execution.**]—It is the duty of the sheriff, in executing a *fi. fa.*, to possess himself of all the goods of the debtor within his bailiwick, or of sufficient to satisfy the execution; & therefore, where to an action on the case by the execution creditor against the sheriff for a false return that the goods remained in his hands for want of buyers the sheriff pleaded that he seized certain goods, specifying them, & other goods of the debtor in his bailiwick, & that, while he was in possession of the goods, he was directed by the execution creditor to withdraw from the possession of all the goods but those specified, & that he was unable to find buyers of the specified goods, which consequently remained in his hands for want of buyers :—*Held* : ill.—PITCHER v. KING (1844), 5 Q. B. 758; Dav. & Mer.

remove the lock from the door of a room in which he has reasonable ground for believing moveable property to be lodged.—KONDASAWMY PILLAY v. KRISTNASAWMY PILLAY (1870), 5 Mad. 189.—IND.



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (d)*

585; 13 L. J. Q. B. 162; 2 L. T. O. S. 419; 8 Jur. 401; 114 E. R. 1436.

595. ———.]—GAWLER v. CHAPLIN, No. 966, *post*.

**Effect of excessive seizure—Liability of sheriff.]—**  
See Sub-sect. 12, A. (c), *post*.

(c) *What Property may be Seized.*

i. *Rule at Common Law.*

See, now, Judgments Act, 1838 (c. 110), s. 12.

596. **Only what can be sold—Not bank notes.]—**Nothing that cannot be sold can be taken in execution; as deeds, writings, etc. Bank notes cannot be taken in execution.—FRANCIS v. NASH (1734), Lee temp. Hard. 53; Cunn. 51; 95 E. R. 32.

597. ———.]—ANON. (1734), No. 621, *post*.

598. ——— **Not property held on lien.]—**(1) Property held by a party in right of a lien cannot be taken in execution.

(2) The general rule of law is, that the sheriff can seize only such things as he can sell (PARKE, B.).—LEGG v. EVANS (1840), 6 M. & W. 36; 8 Dowl. 177; 9 L. J. Ex. 102; 4 J. P. 123; 4 Jur. 197.

*Annotations:—As to (1) Apld. Rogers v. Kennay (1846), 9 Q. B. 592. Refd. Lancashire Waggon Co. v. Fitzhugh (1861), 6 H. & N. 502. As to (2) Refd. Belcher v. Patten (1848), 18 L. J. C. P. 69. Generally, Mentd. Bank of Bengal v. Fagan (1849), 5 Moo. Ind. App. 27; Donald v. Suckling (1866), L. R. 1 Q. B. 585.*

599. ——— **Not money.]—**Where the sheriff has seized goods under a *fi. fa.*, & holds a balance of money, the proceeds of the sale, such money is not liable to seizure under a *fi. fa.* against the execution creditor, under Judgments Act, 1838 (c. 110), s. 12, as money belonging to such creditor, unless the sheriff has appropriated & set apart specific money for the balance to be paid under the first *fi. fa.*—WOOD v. WOOD (1843), 4 Q. B. 397; 3 Gal. & Dav. 532; 12 L. J. Q. B. 141; 7 Jur. 325; 114 E. R. 948.

*Annotation:—Refd. Watts v. Jefferyes (1851), 3 Mac. & G. 422.*

, also, DISTRESS, Vol. XVIII., pp. 288–308, Nos. 247–439.

ii. *Animals.*

600. **Cattle—Of stranger—Cannot be taken.]—**The sheriff may not take beasts of a stranger in the land of him that hath lost issues to the Queen (GAWLEY & FENNER, JJ.).—STAFFORD v. DATHEMAN (1601), Gouldsb. 140; Cro. Eliz. 431; 2 Roll. Abr. 159; 75 E. R. 1050.

*Annotation:—Refd. Britton v. Cole (1697), 1 Com. 51.*

601. ——— **Levant & couchant.]—**(1) A

*levari facias* issues only where the party's land is debtor. Any cattle levant & couchant thereon are issues of such land, & may be seized & sold under such writ.

(2) Upon a *levari facias* against the issues of an outlaw's lands, the sheriff, his officers, or any one acting in his or their aid, may justify under the writ alone. No other person can.

(3) In a justification under a writ & warrant, it is not necessary to show the delivery of the writ to the sheriff, or of the warrant to the bailiff.

(4) Under a warrant to A. & B., B. & C. cannot act.

(5) If a plea sets out a warrant to A. & B. & that by virtue thereof, through mistake, B. & C. did the act directed by the warrant, the ct. will not after a demurrer & argument permit an amendment.

(6) If pltf. in the action persuades & encourages the sheriff, etc., to execute a judicial writ; if trespass be brought against him, if he does not plead the judgment, he shall be a trespasser (HOLT, C.J.).—BRITTON v. COLE (1698), 1 Ld. Raym. 305; Comb. 469; 12 Mod. Rep. 175; 1 Salk. 408; Carth. 441; Skin. 617; 1 Com. 51; 91 E. R. 1099; *sub nom.* BRETON v. COLE, Holt, K. B. 421.

*Annotations:—As to (2) Refd. Watkins v. West (1727), 2 Ld. Raym. 1530; Moravia v. Sloper (1737), Willes, 30; Morso v. James (1738), Willes, 122. As to (6) Refd. Parsons v. Lloyd (1772), 2 Wm. Bl. 845; Barker v. Braham (1773), 3 Wils. 368; Generally, Mentd. Thornby v. Fleetwood (1780), 1 Stra. 318; R. v. Cooke (1825), M'Cle. & Yo. 196; Gosset v. Howard (1847), 10 Q. B. 411.*

602. ——— **Liability of owner for keep—Prior to sale.]—**CLARKE v. LOCKEY (1696), 1 Lut. 1439; 125 E. R. 794.

603. **Deer.]—Qu.:** whether deer & wild cattle are liable to be taken in execution under a writ of *fi. fa.*, issued against a tenant for life.—DAVIS v. TANKERVILLE (LORD) (1843), 2 L. T. O. S. 125; 7 J. P. 726.

604. **Wild cattle.]—**DAVIS v. TANKERVILLE (LORD), No. 603, *ante*.

*Compare* DISTRESS, Vol. XVIII., pp. 298–300, 442, 443, Nos. 348–378, 1793–1802.

iii. *Chattels Real.*

605. **Rentcharge—Annuity granted by Crown.]—**The sheriff under a writ of *fi. fa.* may sell an annuity granted by the Crown, & payable by the receiver in the Ct. of Wards; for it is in the nature of a rentcharge.—YORK v. TWINE (1605), Cro. Jac. 78; 79 E. R. 67.

*Annotation:—Mentd. Hornbee, Williamson, Smith & Stone's Petition (1691), Freem. K. B. 331.*

PART III. SECT. 1, SUB-SECT. 4.—  
E. (e) ii.

q. *Horse.]—*A horse ordinarily used in the debtor's occupation, not exceeding in value \$60 is not liable to seizure for debt.—DAVIDSON v. REYNOLDS (1865), 16 C. P. 140.—CAN.

r. ———.]—NELSON v. GURNEY (1877), Temp. Wood, 173.—CAN.

s. ———.]—A horse, the only exigible personalty of debt., was taken in execution. It was appraised at \$1,000. Debt. claimed that he was entitled to select the horse to the extent of \$500, & to be paid that amount by the sheriff out of the proceeds of its sale.—*Held:* debtor was so entitled.—VYE v. (1893), 3 B. C. R. 24.—CAN.

t. ———.]—Pltf. placed a mare in the custody of B. for sale with permission to make use of her pending the finding of a purchaser. While the mare was in the possession of B. she

was levied upon under an execution issued on a judgment recovered by debt. against B., & was delivered to debt. in settlement of the debt & costs.—*Held:* pltf. was entitled to recover against debt. the value of the mare & damages for her detention.—GARDEN v. NEILY (1898), 31 N. S. R. 89.—CAN.

a. ———.]—A stallion which is kept for breeding purposes & which is the chief source of revenue & means of livelihood of its owner is exempt from seizure under execution.—WILLIAMS v. M. RUMELY CO., [1917] 3 W. W. R. 301.—CAN.

b. ——— *Progeny.]—*The progeny of mares said to have been sold to debt. by the same execution debtor, long before the progeny were conceived, & upon the sale of the dams there having been no bill of sale or change of possession, the sale of the dams was absolutely void as against

pltf., & no property in their increase ever became vested in debt. as against pltf., debt. never having had any possession of the mares or their foals as distinguished from the possession of his brothers. The brood of all tame & domestic animals belongs to the owner of the dam.—GRAF v. LINGERELL (1914), 27 W. L. R. 707; 16 D. L. R. 417; 7 Alta. L. R. 340.—CAN.

PART III. SECT. 1, SUB-SECT. 4.—  
E. (e) iii.

c. *Rentcharge.]—*A rentcharge issuing out of, & chargeable upon, a freehold estate, & granted to a person for his life, cannot be seized under a *fi. fa.* goods.—SMITH v. TURNBULL (1849), 5 U. C. R. 586.—CAN.

d. *Interest in mining claim.]—*Under a writ of *fi. fa.* against the "goods & chattels, lands & tenements" of a judgment debtor, his undivided

**606. Estate pur autre vie.]—**JOHNSON v. STREETE (1694), Comb. 290; 90 E. R. 484.

iv. *Choses in Action.*

**607. General rule—Choses in action cannot be taken.]—**Choses in action, viz. stock, debts, etc., are not liable to creditors; they cannot be taken on a *levari facias*, & cannot be touched in equity.—DUNDAS v. DUTENS (1790), 1 Ves. 196; 2 Cox, Eq. Cas. 235; 30 E. R. 298.

*Annotations:—*Reid. British Mutoscope & Biograph Co. v. Homer, [1901] 1 Ch. 671. *Mentd.* Shaw v. Jakeman (1803), 4 East, 201; Randall v. Morgan (1805), 12 Ves. 67; Rider v. Kidder (1805), 10 Ves. 360; Sims v. Thomas (1840), 12 Ad. & El. 536; Lassence v. Tierney (1849), 1 Mac. & G. 551; Bligh v. Tredgett (1851), 5 De G. & Sm. 74; Surcoure v. Pinniger (1853), 17 Jur. 196; Norton v. Cooper, *Re Manby & Hawksford, Ex p. Bittleston* (1856), 3 Sm. & G. 375; Warden v. Jones (1857), 6 W. R. 180; Goldie v. Townsend (1860), 28 Beav. 445; Trowell v. Shenton (1878), 8 Ch. D. 318; Nurse v. Durnford (1879), 13 Ch. D. 764; Williams v. Preston (1882), 51 L. J. Ch. 927; Colonial Bank v. Whinney (1886), 11 App. Cas. 426; *Re Holland, Cregg v. Holland*, [1902] 3 Ch. 360.

**608. Debt due to judgment debtor.]—**DUNDAS v. DUTENS, No. 607, *ante*.

**609. —.]—**HARRISON v. PAYNTER, No. 554, *ante*.

**Money in hands of sheriff.]—**See Nos. 650–657, *post*.

**610. Copyright.]—**B. was the sole registered proprietor of certain newspapers published by him on premises of which he was the rated occupier, & he was the owner of the type & plant used in the publication. He mortgaged the newspapers, type, & plant to F., who took no steps to alter the registration of proprietorship. The sheriff entered under an execution issued by a creditor of B., & though possession was demanded by F. remained in possession till B. had become bkpt., which took place after two days:—*Held*: (1) the right of publishing a newspaper was goods & chattels within Bkpcy. Law Consolidation Act, 1849 (c. 106), as to reputed ownership; (2) the type & plant were not within the order & disposition of bkpt., at the time of his bkpcy., with the consent of the true owner, but the right of

interest in a mining claim is liable to seizure & sale.—CLARKSON & FORGIE v. WISHART & MYERS, [1913] A. C. 828.—CAN.

**e. —.]—**CAMPION v. TURTON (1884), 3 N. Z. L. R. 337.—N.Z.

PART III. SECT. 1, SUB-SECT. 4.—  
E. (e) iv.

**608i. Debt due to judgment debtor.]—**Book debts are not within the exemption of Homestead Act, C. S. B. C., 1888, s. 10, as not being within the description of personal property capable of seizure.—HUDSON'S BAY CO. v. HAZLETT (1896), 4 B. C. R. 450.—CAN.

**608 ii. —.]—**Book debts are excluded & not liable to seizure under executions.—JOBIN-MARRIN CO. v. BERRS (1905), 1 W. L. R. 369.—CAN.

**f. Copyright—Patent.]—**We are unable to draw any sound distinction between a copyright & a patent; both are personal, & both are privileges given to some person as compensation or reward for advantages the public are supposed to derive from his work or services; the statutes relating to copyrights & patents, permit an assignment subject to certain conditions, but without such an enabling clause it would not be assignable, nor could either be levied on in satisfaction of an execution (*per* CUR.).—BROWN v. COOPER (1870), 1 V. R. (Law) 210.—AUS.

J.—VOL. XXI.

publication of the newspapers was not capable of seizure by the sheriff, & as bkpt. continued the sole registered proprietor, & nothing had been done to make it apparent that he was not the sole owner, the doctrine of reputed ownership applied to the newspapers.

With regard, however, to the property not tangible, that which has been called the copyright of the newspapers, & was a right to publish newspapers, bearing particular names . . . this property, this right, was not nor could have been seized by the sheriff (KNIGHT BRUCE, L.J.).—*Re BALDWIN, Ex p. FOSS* (1858), 2 De G. & J. 230; 27 L. J. Bcy. 17; 31 L. T. O. S. 30; 4 Jur. N. S. 522; 6 W. R. 417; 44 E. R. 977, L. JJ.

*Annotations:—*As to (2) *Reid*. Platt v. Walter (1867), 17 L. T. 157; Kelly v. Hutton (1868), 3 Ch. App. 703. *Generally, Mentd.* *Re Rouse, Ex p. The Assignees* (1865), 13 L. T. 327; *Re Cuthbertson, Ex p. Edey* (1875), L. R. 19 Eq. 264.

**Salaries, pensions, allowances, etc.]—**See BANKRUPTCY, Vol. V., pp. 927–930, Nos. 7594–7615; CHOSSES IN ACTION, Vol. VIII., pp. 436–441, 484, Nos. 135–176, 524–527.

v. *Crops.*

See Sale of Farming Stock Act, 1816 (c. 50), ss. 1–11.

**611. General rule—Only fructus industriales seizable.]—**Corn & other articles, which are raised by the industry of man, are emblements which go to the exor., & may be taken in execution; but things which give no annual profit, or which proceed without the labour of man, are not emblements—they go to the heir, & cannot be seized under a *fi. fa.* (HULLOCK, B.).—SCORELL v. BOXALL (1827), 1 Y. & J. 396; 148 E. R. 724.

**612. What crops may be taken—Growing crops—Corn in blade.]—**Sheriff taking corn in the blade under a *fi. fa.* & selling it before rent due is not liable to account to the landlord of debt., under 8 Ann., c. 14, for rent accruing subsequently to the levy & sale, although he is given notice & though the corn be not removed from the premises until long afterwards, when a considerable proportion of rent has become due. The landlord's

**g. Dividends.]—**Right to receive dividends in insolvent estate is an "equitable interest" bound by writ of *fi. fa.* & not a mere chose in action.—EVANS v. STEPHEN (1882), 3 N. S. W. L. R. 154.—AUS.

**h. Policy moneys.]—***Re* NEW YORK LIFE INSURANCE CO. & FULLERTON (1919), 45 O. L. R. 606.—CAN.

**j. Policy of insurance.]—**A policy of insurance was not such a "security for money" as could be seized by the sheriff.—ALLEYNE v. DARCY (1855), 5 L. Ch. R. 56.—IR.

**k. —.]—**A policy of insurance, effected by debtor on his own life, & on which annual premiums are payable, is not a security for money which the sheriff is empowered to seize & sell under a *fi. fa.*—*Re* SARGENTS' TRUSTS (1879), 7 L. R. Ir. 66.—IR.

**l. Right to sue for mesne profits.]—**The right to sue for mesne profits is a "right to sue for damages," & therefore cannot be sold in execution of decree.—SHYAM CHAND KOONDOL V. LAND MORTGAGE BANK OF INDIA (1883), 1 L. R. 9 Calc. 695; 12 C. L. R. 440.—IND.

PART III. SECT. 1, SUB-SECT. 4.—  
E. (e) v.

**611i. General rule—Only fructus industriales seizable.]—**Growing crops sown by the person in possession &

intended to be reaped at maturity, being *fructus industriales*, are chattels seizable under execution, & the ownership of them is not an interest in land within Stat. Frauds, s. 4. They are bound by the delivery to the sheriff of an execution against the owner, & they must equally be bound by the act of the owner.—CAMERON v. GIBSON (1889), 17 O. R. 233.—CAN.

**611ii. —.]—**ELVES v. PRATT, [1917] 1 W. W. R. 1384; 11 Alta. L. R. 134.—CAN.

**m. What crops may be taken—Growing crops—Where debtor tenant by curtesy.]—**When a husband & wife reside on land of which the wife has the fee, the husband is tenant by the curtesy, & the crops raised by his labour & the labour of his servants & children, are his & liable to seizure for his debts, & the sheriff may enter to make a levy.—POURRIER v. RAYMOND (1869), 1 Han. 512.—CAN.

**n. —.]—**Growing crops are seizable under a division ct. execution.—MCDUGALL v. WADDELL (1877), 28 C. P. 191.—CAN.

**o. —.]—***After harvest.]—*The writs of *fi. fa.* bound all the goods & chattels of debt. from the day when they were placed in the sheriff's hands, & the crops grown on the land subsequent thereto, being the property of debt., were bound by the execution as they came into existence, although they could not be sold by the sheriff



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (e) v. vi. & vii.]*

remedy in such case is by distress.—*GWILLIAM v. BARKER* (1815), 1 Price, 274; 145 E. R. 1401.

*Annotations:—*Refd. *Peacock v. Purvis* (1820), 2 Brod. & Bing. 362; *Wright v. Dewes* (1834), 1 Ad. & El. 641.

**613. ———.]**—The growing crops of a tenant having been seized under a *fi. fa.*, a writ of *hab. fac. poss.* was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord, founded on a demise made long before the issuing of the *fi. fa.*:—*Held*: (1) the sheriff was not bound to sell the growing crops under the *fi. fa.*, as they could not, in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration; (2) the sheriff had no right to allow the landlord a year's rent under 8 Ann., c. 14, that Act contemplating an existing tenancy, which, in this case, must be taken to have ceased on the day of the demise in the ejectment.—*HODGSON v. GASCOIGNE* (1821), 5 B. & Ald. 88; 106 E. R. 1126.

*Annotations:—*As to (1) Refd. *Re Medley, Ex p. Barnes* (1838), 3 Doac. 223; *Kelly v. Webber* (1860), 3 L. T. 124. As to (2) Refd. *Cox v. Leigh* (1874), 43 L. J. Q. B. 123. Generally, *Mentd.* *Mills v. Oddy* (1835), 5 Tyr. 571; *Newport v. Harley* (1845), 14 L. J. Q. B. 242.

**614. ——— Potatoes.]**—A contract for the sale of a growing crop of potatoes, to be dug up by the seller, is not a contract for the sale of an interest in land, so as to require a note in writing to satisfy Stat. Frauds.

It seems that such a growing crop might be taken in execution as goods & chattels, under a writ of *fi. fa.*—*EVANS v. ROBERTS* (1826), 5 B. & C. 829; 8 Dow. & Ry. K. B. 611; 4 L. J. O. S. K. B. 313; 108 E. R. 309.

*Annotations:—*Consd. *Scorell v. Boxall* (1827), 1 Y. & J. 396. Refd. *Shelton v. Livius* (1832), 2 Tyr. 420; *Graves v. Weld* (1833), 2 Nev. & M. K. B. 725; *Hallen v. Runder* (1834), 1 Cr. M. & R. 266; *Sainsbury v. Matthews* (1838), 4 M. & W. 343; *Jones v. Flint* (1839), 10 Ad. & El. 753; *I. R. Comrs. v. Smyth*, [1914] 3 K. B. 406; *Stephenson v. Thompson*, [1924] 2 K. B. 240. *Mentd.* *Watts v. Friend* (1830), 8 L. J. O. S. K. B. 181; *Washbourn v. Burrows* (1847), 1 Exch. 107.

**615. ——— Not fruit.]**—Growing fruit cannot be levied in execution under a writ of *fi. fa.* by the sheriff (LORD ABINGER, C.B.).—*RODWELL v. PHILLIPS* (1842), 9 M. & W. 501; 11 L. J. Ex. 217; 152 E. R. 212.

*Annotation:—**Mentd.* *Washbourn v. Burrows* (1847), 1 Exch. 107.

**616. ——— Crops not above the earth.]**—A sheriff seized the crops of a tenant sown in the earth, but not sprung up, for an execution creditor; the landlord gave notice of rack rent due, & also a further sum by way of a penal rent due under an agreement for breaking up & ploughing pasture ground; the sheriff called upon the execution creditor & landlord to interplead, but the ct. re-

fused to compel them to interplead:—*Qu.*: can a sheriff seize & sell crops of seed sown in the earth before they are sprung up.—*BAGSHAW v. FARNSWORTH* (1860), 2 L. T. 390.

**617. Sale—Subject to existing covenants or agreements—In debtor's tenancy—Crown not bound.]**—Sale of Farming Stock Act, 1816 (c. 50), although passed for the purpose of general good & public benefit in promoting good husbandry, does not extend to bind the Crown; sales of goods seized under prerogative process are not within it, & the sheriff must sell unconditionally. Nor can he sell crops as subject to tithe; he must sell without any qualification.—*R. v. OSBOURNE* (1818), 6 Price, 94; 146 E. R. 752.

**618. ——— Sale of Farming Stock Act, 1816 (c. 50), s. 11.]**—Above sect. prohibited any purchaser of farming stock, such as hay, straw, etc., from purchasing & carrying it off the farm contrary to the restraining clauses of the tenant's lease:—*Held*: that sect. was not confined to sales of farming stock by the sheriff under an execution but it applied to all sales of farming stock, etc., on a farm, contrary to the restraining clauses of the tenant's lease.

*Semble*: by above sect. the purchaser from the tenant purchases subject to the restraining clauses of the tenant's lease.—*WILMOT v. ROSE* (1854), 3 E. & B. 563; 2 C. L. R. 677; 23 L. T. O. S. 76; 18 J. P. 600; 18 Jur. 518; 2 W. R. 378; 118 E. R. 1253; *sub nom.* *WILMOT v. ROSE*, 23 L. J. Q. B. 281.

*Annotations:—*Consd. *Hawkins v. Walrond* (1876), 1 C. P. D. 280. Refd. *Lybbe v. Hart* (1885), 29 Ch. D. 8.

**619. ——— Title of debtor defective.]**—*HODGSON v. GASCOIGNE*, No. 613, *ante*.

—.]—*See, generally*, Sub-sect. 4, II., *post*.

**620. Expenses in removing crops—Cutting, carrying, threshing, etc.—Not costs of execution.]**—Expenses incurred by a sheriff for the cost of cutting, carrying, threshing, & dressing corn which has been taken in execution, are not "costs of the execution" within Bkpcy. Act, 1883 (c. 52), s. 46 (1), & therefore if before sale notice of a receiving order against the execution debtor is served on the sheriff, & the goods are delivered to the official receiver or trustee, such expenses are not a charge on the goods, & must be disallowed on taxation of the sheriff's costs.—*Re WOODHAM, Ex p. CONDER* (1887), 20 Q. B. D. 40; 57 L. J. Q. B. 46; 58 L. T. 116; 36 W. R. 526.

*Compare* DISTRESS, Vol. XVIII., pp. 300, 301, Nos. 379–392.

#### vi. Deeds and Documents.

**621. Cannot be taken.]**—(1) It had never been determined that bank notes could be taken in execution (*per* CUR.).

(2) Deeds & writings could not be taken in

until they were harvested.—*KIDD & CLEMENTS v. DOCHERTY* (1914), 27 W. L. R. 636; 16 D. L. R. 625; 7 Sask. L. R. 137.—CAN.

**p. ——— Severed crop—Where debtor agent for his wife.]**—Land was conveyed to a married woman, for life, for her separate use; it was managed under her directions, & the labour paid for by the produce of the land, the husband not interfering except as her agent:—*Held*: the crop, when severed, did not become the property of the husband, & was not liable to seizure under an execution against him.—*Dow v. DIBBLEE* (1867), 1 Han. 55.—CAN.

**q. ——— Growing grass.]**—Grass still growing & not yet cut does not come under the description of goods

& chattels & cannot be seized & sold under execution.—*LATE v. McLEAN* (1870), 8 N. S. R. 69.—CAN.

**r. ——— Standing crops.]**—A writ of execution binds standing crops of the execution debtor.—*BELAIR v. BANQUE D'HOCHELAGA*, [1923] 2 W. W. R. 771.—CAN.

**s. ———.]**—Standing crops are immovable property & cannot be attached.—*CHEDA LAL v. MULCHAND* (1891), 1 L. R. 14 All. 30.—IND.

**t. ——— Duties of sheriff—Right to compensation.]**—The law does not impose upon a sheriff the duty of harvesting or threshing crops which he has seized &, if he does so without the express or implied sanction of the execution creditor, he is not entitled to reimburse himself for the expense

so incurred out of the moneys realised.—*STURGEON v. HENDERSON*, [1917] 3 W. W. R. 56; 37 D. L. R. 54.—CAN.

#### PART III. SECT. 1, SUB-SECT. 4.—E. (e) vi.

**a. Land warrant.]**—A S. A. land warrant or scrip issued under Volunteer Bounty Act, 1908 (c. 67) (D), entitling the holder to select a certain amount of land, is in the nature of a document of title to land, &, like a deed, is not seizable under execution or attachment.—*INTER-OCEAN REAL ESTATE Co. v. WHITE* (1910), 15 W. L. R. 351; 20 Man. L. R. 67.—CAN.

**b. Liquor licence.]**—A licence under Liquor Licence Act cannot be seized

execution (*per* CUR.).—ANON. (1734), 2 Barn. K. B. 461; 94 E. R. 619.

622. —.]—FRANCIS *v.* NASH, No. 596, *ante*.

vii. *Equitable Interests.*

623. **Whether seizable.**—An equitable interest cannot be taken in execution.—METCALF *v.* SCHOLEY (1807), 2 Bos. & P. N. R. 461; 127 E. R. 709.

624. — **Term of years.**—A mere equitable interest in a term of years cannot be taken in execution by the sheriff under a writ of *fi. fa.* at the suit of a judgment creditor.—SCOTT *v.* SCHOLEY (1807), 8 East, 467; 103 E. R. 423.

*Annotations*:—**Folld.** Metcalf *v.* Scholey (1807), 2 Bos. & P. N. R. 461. **Distd.** Doe *d.* Phillips *v.* Evans (1833), 1 Cr. & M. 450. **Consd. & Expld.** Gore *v.* Bowser (1855), 3 Eq. Rep. 319. **Refd.** Spears *v.* Lord Advocate (1839), 6 Cl. & Fin. 180.

625. —.]—A creditor having sued out execution on a judgment at law, & finding the interest of his debtor in a term of years to be an equitable interest, has a lien upon it in equity, without the aid of Judgments Act, 1838 (c. 110); & where, after such execution, the leasehold estate of debtor had been sold:—**Held**: the execution creditor had a lien on the proceeds of the sale.—GORE *v.* BOWSER (1855), 3 Sm. & G. 1; 3 Eq. Rep. 319; 24 L. J. Ch. 316; 25 L. T. O. S. 243; 1 Jur. N. S. 392; 3 W. R. 157; 65 E. R. 537; *affd.*, 3 Eq. Rep. 561; 24 L. J. Ch. 440; 3 W. R. 430, L. J.J.

626. —.]—A judgment creditor having taken out a writ of *fi. fa.* against his debtor, who had an equitable life interest in a leasehold house, the sheriff, took possession under the writ & sold a portion of the effects of debtor. The creditor now presented a petition under Judgments Act, 1864 (c. 112), s. 4, for an order for the sale of the interest in the house:—**Held**: as the creditor had no charge on the house under Judgments Act, 1838 (c. 110), s. 13, & as an equitable leasehold interest could not be "actually delivered in execution," no order could be made on the petition.—*Re* NEWCASTLE (DUKE) (1869), L. R. 8 Eq. 700; 34 J. P. 164; *sub nom.* *Re* NEWCASTLE (DUKE), *Ex p.* PADWICK, 39 L. J. Ch. 68; 21 L. T. 343; 16 W. R. 8.

627. —.]—SCARLETT *v.* HANSON, No. 632, *post*.

628. —.]—Goods which had been taken in execution under a county ct. judgment were claimed by a bill of sale holder. Notice of the claim was given by the bailiff to the execution creditor. The claim not having been admitted, claimant deposited with the bailiff under County Courts Act, 1888 (c. 43), s. 156, the amount of the judgment debt & costs as being the value of the goods. The money was paid into ct. by the bailiff who then withdrew from possession & applied for an interpleader summons. On the same day that the summons was issued the execution creditor gave notice of his intention to apply for an order for the sale of the goods under C. C. R., 1903,

Ord. 27, r. 13. On the hearing of the application the execution creditor, who had been given no opportunity of being heard as to the value of the goods before pltf. withdrew, admitted claimant's title but alleged & was prepared with evidence to prove, that the value of the goods was sufficient to satisfy the amount due on the bill of sale & the judgment debt & costs. The county ct. judge without hearing the evidence held that, the bailiff having withdrawn from possession he had no power to order a sale:—**Held**: if the amount deposited with the bailiff was not the value of the goods his withdrawal from possession was wrongful & the county ct. judge had power in that case to order him to retake possession; & the case must go back to the county ct. judge for him to determine after hearing the evidence whether the circumstances were such that an order for sale ought to be made.

Notwithstanding that procedure it was held in *Scarlett v. Hanson*, No. 632, *post*, that no action will lie against the bailiff for withdrawing & returning *nulla bona*, one reason being that the bailiff is not entitled to seize equities (KENNEDY, J.).—MILLER & Co. *v.* SOLOMON, [1906] 2 K. B. 91; 75 L. J. K. B. 671, D. C.

*Annotation*:—**Refd.** Nowsum *v.* James, [1909] 2 K. B. 384.

629. — **Whole beneficial interest vested in debtor.**—Though as a general rule a judgment creditor may not be entitled under a writ of *fi. fa.* to seize goods which are only at the equitable disposition of the judgment debtor, yet where the whole of the beneficial interest in the chattels is vested in the judgment debtor, the trust is no defence to an execution at the instance of the judgment creditor.—STEVENS *v.* HINCE (1914), 110 L. T. 935; 30 T. L. R. 419; 58 Sol. Jo. 434.

630. **Equity of redemption.**—A judgment creditor, before he is entitled to redeem a mtge. of a leasehold estate & bond creditor, must take out execution.—SHIRLEY *v.* WATTS (1744), 3 Atk. 200; 26 E. R. 917.

*Annotations*:—**Refd.** Leith *v.* Pope (1780), 2 Dick. 575; Scott *v.* Scholey (1807), 8 East, 467.

631. —.]—Equity of redemption of a term cannot be taken in execution.—LYSTER *v.* DOLLAND (1792), 3 Bro. C. C. 478; 1 Ves. 431; 30 E. R. 422, L. C.

*Annotation*:—**Refd.** Scott *v.* Scholey (1807), 8 East, 467.

632. **Goods assigned under bill of sale.**—Where a sheriff, having seized goods under a writ of *fi. fa.*, withdrew without interpleading, & returned *nulla bona* on finding that they were assigned under a bill of sale to another person, & where in the event the goods proved to be worth more than the sum for which they were so assigned:—**Held**: the execution creditor could not maintain an action against the sheriff, for C. L. P. Act, 1860 (c. 126), s. 13, does not give the sheriff power to seize such an equitable interest of the execution debtor as alone existed in this case.—SCARLETT *v.* HANSON (1883), 12 Q. B. D. 213; 53 L. J. Q. B. 62; 50 L. T. 75; 32 W. R. 310, C. A.

*Annotation*:—**Refd.** Miller *v.* Solomon, [1906] 2 K. B. 91.

by a sheriff under a writ of *fi. fa.*—WALSH *v.* WALPER (1901), 1 O. L. R. 158; 22 C. L. T. 49.—CAN.

c. —.]—The licence did not pass under the sheriff's assignment.—*Re* GILMER (1885), 17 L. R. Ir. 1.—IR.

d. **Account books.**—Books of account cannot be attached in execution.—*Re* PESTANJI CURSETJI SHROFF (1866), 3 Bom. O. C. 42.—IND.

PART III. SECT. 1, SUB-SECT. 4.—E. (e) vii.

e. **Whether seizable—Equitable lien**

—**Of vendor.**—The equitable lien of a vendor for the purchase price remaining unpaid under an agreement for the sale of land of which he is still the registered owner cannot be sold under an execution against him.—TRAUNWEISER *v.* JOHNSON (1918), 11 Alta. L. R. 224.—CAN.

f. **Equity of redemption—In goods.**—Under O. 40, r. 31, the sheriff is authorised to seize & sell the interest or equity of redemption of the mtgor. or personal chattels.—GATES *v.* BENT (1899), 31 N. S. R. 544.—CAN.

g. — **Unassigned right of dower**

in.]—A right of dower in an equity of redemption before assignment is not exigible under a writ of *fi. fa.* nor is the share of one of several tenants in common of an equity of redemption.—BANK OF COMMERCE *v.* ROLSTON (1902), 4 O. L. R. 106; 22 C. L. T. 232; 1 O. W. R. 351.—CAN.

h. — **Share of one of several tenants in common.**—BANK OF COMMERCE *v.* ROLSTON (1902), 4 O. L. R. 106; 1 O. W. R. 351; 22 C. L. T. 232.—CAN.

k. — **Urban homestead.**—Where the owner of an urban homestead



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (e) vii.*

**633. Right to suit in equity.]—**A. conveyed, or assigned his interest in, lands to B. in consideration that B. should make or give a lease back again to A. of the half or portion of the lands, & in consideration also of a loan of £200 by B. to A. B. covenanted to execute the lease accordingly, subject to the repayment of the £200 for which B. had a judgment. No lease actually made, but A. remained in possession of his portion upon his equitable title. B. lent further sums of money to A. & obtained judgments for these sums, & then conveyed the lands, & assigned the judgments to C. C. issued writs of *fi. fa.* on the judgments, & in 1781, procured a sale by the sheriff of A.'s equitable interest; & on ejectment brought on the demises of the purchaser, & of C., A. was turned out of possession.

A. in 1782 filed his bill in chancery for relief, & execution of a lease to him according to the agreement, but from embarrassment in his circumstances, did not further prosecute the suit till 1801. No steps taken between 1782 & 1801 to dismiss the bill. In 1808 the bill dismissed below:—*Held*: the decree of dismissal should be reversed, for the right to a suit in equity was not a proper subject of sale by the sheriff under a *fi. fa.* & the sale was a nullity.—*MOORE v. BLAKE* (1816), 4 Dow, 230; 3 E. R. 1147.

#### viii. Fixtures.

**634. What may not be taken—Fixtures attached to freehold—Dyer's vat.]—**A. dyer's vat fastened to the wall of a house is parcel of the freehold, & cannot be taken in execution under a *fi. fa.*—*DAY v. BISBITCH* (1595), Cro. Eliz. 374; 78 E. R. 622.

**635. ——— Freehold in possession of debtor.]—**A. sheriff has no right under a *fi. fa.* to seize fixtures where the house in which they are situated is the freehold of the person against whom the execution issues.—*WINN v. INGILBY* (1822), 5 B. & Ald. 625; 106 E. R. 1319.

*Annotations:—**Reid*. *Evans v. Roberts* (1826), 5 B. & C. 829; *Re Ogden & Walmsley, Ex p. Loyd* (1834), 3 Deac. & Ch. 765; *Re Butterworth, Ex p. Wilson* (1835), 2 Mont. & A. 61; *Re Gye & Hughes, Ex p. Reynal* (1841), 2 Mont. D. & De G. 443; *Mather v. Fraser* (1856), 2 K. & J. 536; *Walmsley v. Milne* (1859), 7 C. B. N. S. 115.

mtges. it, his interest in the property is confined to his equity of redemption; it is that only which is available to judgment creditors & the exemption rights of the owner are likewise confined to that equity of redemption.—*Re BELL*, [1922] 1 W. W. R. 1015; 2 C. B. R. 271; 67 D. L. R. 66; 32 Man. L. R. 9.—*CAN.*

1. ——— *Subject to contract for sale.]—**Semble*: an equity of redemption subject to a valid contract for sale is notseizable.—*MCMAWAY v. CLELAND* (1870), 1 C. A. 343.—*N.Z.*

#### PART III. SECT. 1, SUB-SECT. 4.—E. (e) viii.

m. *What may not be taken—Fixtures attached to freehold—Engine & boiler.]—**HUGHES v. TOWERS* (1866), 16 C. P. 287.—*CAN.*

n. ——— *Machinery of mill.]—*An engine & boiler had been in a saw-mill which was burnt down, & remained there, set in brick, & bolted to timbers let into the ground. The sheriff offered them for sale while in this state, but there were no buyers. On the return day of the writ the execution debtor sold them to plffs., who detached them from the mill, & removed them to another place where the sheriff followed & sold under a

*ven. ex.:—Held*: the first attempt at sale was clearly illegal as the goods were then fixed to the freehold, & could not be taken as chattels.—*WALTON v. JARVIS* (1856), 13 U. C. R. 616; (1857), 14 U. C. R. 640.—*CAN.*

o. ——— *Disconnected for repairs.]—*The machinery of the mill had been disconnected, & taken down to be altered & repaired, with the intention of replacing it again:—*Held*: while thus lying in the mill, & on the premises, it could not be treated as chattels.—*GRANT v. WILSON* (1859), 17 U. C. R. 144.—*CAN.*

p. ——— *—.]—*C. owning land on which the building for a steam saw-mill had been in part erected, mortgaged it to D., having previously mortgaged it to M. Afterwards the machinery was put in, D. assigned his mtge. to H., & the mill having been destroyed by fire, the machinery, engine, boiler, etc., were removed by C., with the assent of H., to another county, to place in a new mill, & while still detached they were seized there under an execution against the goods of C., mtgor.:—*Held*: the machinery, etc., were fixtures before the fire, & after it continued to be the property of the mtgee. & though there was a

**636. ———.]—**(1) Under a *fi. fa.* the sheriff cannot take fixtures in a house, whereof the freehold is in the debtor.

(2) Fixtures which the tenant has a right to remove may be treated as chattels in a proceeding against the tenant; but as against the owner of the estate they are part of the freehold (*BAYLEY, J.*).—*PLACE v. FAGG* (1829), 4 Man. & Ry. K. B. 277; 7 L. J. O. S. K. B. 195; *subsequent proceedings, sub nom. PLACE v. ASHBY* (1831), 1 L. J. O. S. K. B. 174.

*Annotations:—**As to* (1) *Reid*. *Re Ogden & Walmsley, Ex p. Loyd* (1834), 3 Deac. & Ch. 765; *Mather v. Fraser* (1856), 2 K. & J. 536. *As to* (2) *Reid*. *Re Maberly, Ex p. Belcher* (1835), 4 Deac. & Ch. 703; *Walmsley v. Milne* (1859), 7 C. B. N. S. 115; *Longbottom v. Berry* (1869), 10 B. & S. 852. *Generally, Mentd.* *Hare v. Horton* (1833), 5 B. & Ad. 715; *Southport & West Lancashire Banking Co. v. Thompson* (1887), 58 L. T. 143; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97.

**637. ——— Fixtures wrongfully removed by tenant.]—**Where certain mill-machinery, together with a mill, had been demised for a term to a tenant, & he, without permission of his landlord, severed the machinery from the mill, & it was afterwards seized under a *fi. fa.* by the sheriff, & sold by him:—*Held*: no property passed to the vendee, & the landlord was entitled to bring trover for the machinery, even during the continuance of the term.—*FARRANT v. THOMPSON* (1822), 5 B. & Ald. 826; 2 Dow. & Ry. K. B. 1; 106 E. R. 1392.

*Annotations:—**Consd.* *Bland v. Lynam* (1827), 5 L. J. O. S. C. P. 87. *Reid*. *Garland v. Carlisle* (1837), 11 Bli. N. S. 421; *Wiltshire v. Cottrell* (1853), 1 E. & B. 674. *Mentd.* *Petre v. Ferrers* (1891), 61 L. J. Ch. 426.

**638. ——— Fixtures to paper mills.]—**Fixtures demised with a paper mill, & used by the tenant in the manufacture of paper, are not liable to be seized under an extent for duties upon paper, owing by the tenant to the Crown, as utensils for the making of paper, in the custody of the tenant, under 34 Geo. 3, c. 20, s. 27.—*A.-G. v. GIBBS* (1829), 3 Y. & J. 333; 148 E. R. 1207.

**639. ——— By agreement between landlord & tenant.]—**By an agreement for a lease, it was provided that the tenant should at all times during the term keep sufficient & suitable fixtures & effects on the premises for the purposes desired, & that none of the movable furniture & effects should be removed therefrom, except for the purposes of repair or of being replaced by others; &

prior mtge. the execution creditor showed no right as against H.—*HARRIS v. MALLOCH* (1861), 21 U. C. R. 82.—*CAN.*

q. ——— *—.]—*I. being the tenant of premises under plff. consisting of a mill, etc., upon the same being burned down, refitted the machinery, putting in some of the old & some new portions. The sheriff under an execution against the tenant, seized some part of the gearing:—*Held*: *prima facie* the landlord was entitled to the goods seized.—*DONKIN v. CROMBIE* (1862), 11 C. P. 601.—*CAN.*

r. ——— *—.]—*The opposant was mtgee. of a property on which was a carding mill. Plff., by virtue of a writ of execution *de bonis*, seized the machinery of the mill. The mtgee. opposed the seizure on the ground that his mtgo. attached not only to the land, but to all the buildings & improvements thereon, & that the fixtures formed part of the mill & were immovable by destination, & therefore could not be seized as goods & chattels under writ:—*Held*: on the seizure was an absolute nullity.—*PHILION v. BISSEY & GRAHAM* (1878), 2 L. N. 38; 23 L. C. J. 32.—*CAN.*

s. ——— *—.]—**Held*: a

also, that in case the term should be determined by effluxion of time, but in no other case, it should be lawful for the tenant, within 21 days after the expiration of the term, but not during any other period, to remove such fixtures, if any, as he might have affixed to the premises, unless the landlord should elect to purchase the same, which it should be lawful for him to do at a price to be settled by arbn. It was further agreed, that in case the tenant became bkpt. or insolvent, "or if any distress or writ of extent or execution shall be lawfully levied or executed by seizure on the said premises," etc., then in any of the said cases the landlord might re-enter & put out the tenant, " & also seize & retain for her own use, & as her own, all fixtures whatsoever, whether tenant's or trade fixtures," etc. After this agreement had been entered into, the tenant put up some fixtures on the premises, which were tenant's fixtures. These fixtures & the tenant's goods were seized by the sheriff, under a *fi. fa.* on a judgment against the tenant, at the suit of a creditor. The landlord, thereupon, put in a claim to the fixtures:—*Held*: by the agreement the tenant had renounced the ordinary tenant's right of removing fixtures during the term, & consequently, the sheriff had no right to take the tenant's fixtures in execution.—*DUMERGUE v. RUMSEY* (1863), 2 H. & C. 777; 33 L. J. Ex. 88; 9 L. T. 775; 10 Jur. N. S. 155; 12 W. R. 205; 159 E. R. 322, Ex. Ch.

*Annotations*:—*Reid*. Lambourn v. McLellan, [1903] 2 Ch. 268; Leschallas v. Woolf, [1908] 1 Ch. 641; *Re* British Red Ash Collieries, [1920] 1 Ch. 326.

**640.** ———.]—On a demurrer, a landlord filed a bill alleging that, under an execution against his tenant, the sheriff was about to sell all the property on the demised premises, & that it appeared by the handbills that it was intended to sell the fixtures on the premises:—*Held*: the demurrer would be overruled.

I am of opinion that if the sheriff takes part of the fixtures belonging to the landlord this ct. will interfere to prevent him (LORD ROMILLY, M.R.).—*RICHARDSON v. ARDLEY* (1869), 38 L. J. Ch. 508.

**641.** ——— **Engine & boiler.**]—A portable engine & boiler was brought to colliery premises to be used in sinking a new shaft, & for the purpose of steadying the machinery was bolted to a wooden framework, which framework was embedded in a layer of wet mortar laid upon a brick foundation:—*Held*: it passed to the mtgees. of the realty as affixed to the freehold, & could not be seized by the judgment creditors of the mtgor.—*CROSS v. BARNES* (1877), 46 L. J. Q. B. 479; 36 L. T. 693.

**642. What may be taken—Fixtures the property of tenant.**]—*PLACE v. FAGG*, No. 636, *ante*.

**643.** ———.]—Fixtures can be taken in execution by the sheriff just as he may cut growing corn, though he may not, like a tenant for life without impeachment for waste, cut down trees

mill built on mud sills laid on piles & spiked to the piles & mill-machinery & plant therein were attached to the freehold & passed to pltf. by mtges. of the land & premises together with all buildings, fixtures & appurtenances, & were not exigible under debts. execution against the goods of the mtgor.—*KILPATRICK v. STONE* (1910), 13 W. L. R. 634; 15 B. C. R. 158.—**CAN.**

**stones.**]—Two mill-stones were seized & sold for taxes. In replevin by the owner of the mill against the purchaser:—*Held*: the sale was clearly illegal, the stones being part of the mill.—*GRIMSHAW v. BURNHAM* (1865), 25 U. C. R. 147.—**CAN.**

**a.** ——— **Frame house.**]—A

frame house rested upon posts sunk in the ground, but not in any way attached thereon:—*Held*: a fixture, & not liable to sale under an execution against the goods of the vendor of the land, by whom it had been put up as a dwelling house.—*BALD v. HAGAR* (1860), 9 C. P. 382.—**CAN.**

**b. What may be taken—Fixtures capable of removal without injury to freehold.**]—A building was converted into a steam grist-mill. Afterwards the mill machinery was taken out, the boiler & engine being left to work various other machines, which were put in for the purpose of making sashes & blinds, such as planing machines, turning lathe, etc. These were fastened to the floors & timbers of the building to steady them while

(*PHILLIMORE, J.*).—*CROSSLEY BROTHERS, LTD. v. LEE*, [1908] 1 K. B. 86; 77 L. J. K. B. 199; 97 L. T. 850; 24 T. L. R. 35; 52 Sol. Jo. 30.

*Annotations*:—*Mentd.* Provincial Bill Posting Co. v. Low Moor Iron Co., [1909] 2 K. B. 344; *Horwich v. Symond* (1914), 110 L. T. 1016.

**644.** ——— **For purposes of trade.**]—Things set up by lessee for years, for the convenience of trade are removable during the term, & seizable on a *fi. fa.*—*POOLE'S CASE* (1703), Holt, K. B. 65; 1 Salk. 368; 90 E. R. 934, N. P.

*Annotations*:—*Distd.* Winn v. Ingilby (1822), 5 B. & Ald. 625. *Reid*. Ryall v. Rolle (1749), 1 Atk. 165; *Elwes v. Maw* (1802), 3 East, 38; *Steward v. Lombe* (1820), 1 Brod. & Bing. 506; *Evans v. Roberts* (1826), 5 B. & C. 829; *A.-G. v. Gibbs* (1829), 3 Y. & J. 333; *Hallen v. Runder* (1834), 1 Cr. M. & R. 266; *Crossley v. Lee*, [1908] 1 K. B. 86. *Mentd.* Lyde v. Russell (1830), 1 B. & Ad. 394; *Birch v. Dawson* (1834), 4 Nev. & M. K. B. 22; *Re Ogden & Walmsley, Ex p. Loyd* (1834), 3 Deac. & Ch. 765; *Minshall v. Lloyd* (1837), 2 M. & W. 450; *Bishop v. Elliott* (1855), 11 Exch. 113; *Pugh v. Arton* (1869), 20 L. T. 865; *Meux v. Jacobs* (1875), L. R. 7 H. L. 481; *Saint v. Pilley* (1875), L. R. 10 Exch. 137; *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100; *Cumberland Union Banking Co. v. Maryport Hematite Iron & Steel Co., Re Maryport Hematite Iron & Steel Co.*, [1892] 1 Ch. 415; *Gough v. Wood* (1894), 63 L. J. Q. B. 564; *Leschallas v. Woolf*, [1908] 1 Ch. 641.

**645.** ———.]—In 1824, A. leased to B. for 21 years, a colliery, with the right of putting up steam-engines, etc., for working it, subject to a proviso for re-entry on non-payment of rent or insolvency. B. erected on the colliery several steam-engines affixed in the ordinary way to the soil, & afterwards, in 1827, assigned the colliery, with the engines, implements, etc., in use upon it, to trustees, in trust to permit B. to enjoy them until default in payment of an annuity granted by him; & on such default to take possession, & sell them & pay the arrears. In June, 1829, A. recovered possession of the premises in ejectment brought in pursuance of the proviso for re-entry. In Nov. 1829, the engines & other articles on the colliery were seized under a *fi. fa.* at the suit of an execution creditor of B.:—*Held*: the trustees could not recover the steam-engines in trover against the sheriff.

The right of a tenant is only to remove during his term the fixtures he may have put up & so to make them cease to be any longer fixtures. That right of the tenant enables the sheriff to take them under a writ, for the benefit of the tenant's creditor. . . . These engines, therefore, were never goods & chattels at all, so as to pass to pltf's. (*PARKE, B.*).—*MINSHALL v. LLOYD* (1837), 2 M. & W. 450; *Murp. & H.* 125; 6 L. J. Ex. 115; 1 Jur. 336; 150 E. R. 834.

*Annotations*:—*Reid*. Mackintosh v. Trotter (1838), 3 M. & W. 184; *Wilde v. Waters* (1855), 16 C. B. 637; *Re Trevey* (1866), 14 L. T. 193. *Mentd.* Weeton v. Woodcock (1840), 7 M. & W. 14; *Elliott v. Bishop* (1854), 10 Exch. 496; *Walmsley v. Milne* (1859), 7 C. B. N. S. 115; *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100; *Gough v. Wood*, [1894] 1 Q. B. 713; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 592.

in motion, each machine being independent, capable of being moved without material injury to the building, or interfering with the engine, & of being worked by any other proper motive power:—*Held*: the machines were chattels, & seizable under a *fi. fa.* goods.—*CARSCALLEN v. MOODIE* (1858), 15 U. C. R. 304.—**CAN.**

**c.** ———.]—A planing machine standing by its own weight on the floor, without fastening, with belts & an engine to work it, is a chattel liable to seizure for taxes.—*HOPE v. CUMMING* (1860), 10 C. P. 118.—**CAN.**

**d.** ———.]—*HAMILTON v. CHISHOLM* (1909), 11 W. L. R. 134.—**CAN.**

**e.** ———.]—Rails laid down by a lessee of the mines under such



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (e) ix.*

646. ————.]—The assignee, for an unexpired term of sixteen years, under an indenture assigning to him absolutely the fixed & movable machinery, plant, fixtures, implements, utensils, & effects, fixed to or placed upon or used in a foundry, demised, by indenture of mtge., as security for payment of a debt, the premises for the residue of his term, except the last two days, & assigned to the mtgee. all the fixed & movable machinery, plant, fixtures, etc., then or thereafter to be fixed or placed on or used in or about the premises, all the articles assigned being trade articles. The mtge. deed was not registered under 17 & 18 Vict., c. 38. The trade fixtures having been seized by the sheriff under a writ of *fi. fa.* issued against the mtgor.:—*Held*: as to the fixtures, the mtge. deed was a bill of sale, & required registration as such, & not having been registered, the fixtures were liable to seizure under the writ of *fi. fa.*—*HAWTRY v. BUTLIN* (1873), L. R. 8 Q. B. 290; 42 L. J. Q. B. 163; 28 L. T. 532; 21 W. R. 633.

*Annotations*:—*Reid*. Southport & West Lancashire Banking Co. v. Thompson (1887), 37 Ch. D. 64. *Mentd.* *Re Wilde*, *Ex p.* Daglish (1873), 8 Ch. App. 1072; *Re Joyce*, *Ex p.* Barclay (1874), 9 Ch. App. 576; *Moux v. Jacob* (1874), 44 L. J. Ch. 481; *Re Trethowan*, *Ex p.* Tweedy (1877), 5 Ch. D. 559.

*See, also*, DISTRESS, Vol. XVIII., pp. 295–297, Nos. 308–321.

#### ix. Goods Subject to Building Contracts.

*See* BUILDING CONTRACTS, Vol. VII., pp. 413, 414, 416, Nos. 323–325, 333.

#### x. Money and Securities.

*See* Judgments Act, 1838 (c. 110), s. 12.

647. **Whether seizable—At common law.**—*ANON.* (1734), No. 621, *ante*.

648. ————.]—*FRANCIS v. NASH*, No. 596, *ante*.

649. ———— Under statute—Judgments Act, 1838 (c. 110), s. 12.]—The effect of above Act is, to place bank-notes & money seized under a *fi. fa.* upon the same footing as goods; & therefore, bank-notes so seized are not to be treated as the property of the execution creditor, so as to be available in the sheriff's hands to satisfy a writ of *fi. fa.* lodged with him against such execution creditor at the suit of a third person.—*COLLINGRIDGE v. PAXTON* (1851), 11 C. B. 683; 2 L. M. & P.

reservation, not permanently attached to the lands, & capable of removal without substantial injury to the rails themselves or the soil, may be taken in execution under a *fi. fa.* against the lessee.—*ANTRIM (EARL) v. DOBBS* (1891), 30 L. R. Ir. 424.—*IR.*

f. ———— Trade fixtures.]—The rule respecting trade fixtures, as between landlord & tenant, is that all such as can be removed without materially injuring the building may be removed, & are liable to sale under an execution against the tenant.—*HUGHES v. TOWERS* (1866), 16 C. P.

g. ————.]—*Re TREVEY* (1866), 14 L. T. 193.—*IR.*

#### PART III. SECT. 1, SUB-SECT. 4.—E. (e) x.

h. **Money—Bank-notes on bank counter—Seized by sheriff before handled by payee.**—A bank teller placed the money on the edge of the teller's wicket, & before payee had touched it, the money was seized by a sheriff's under an execution against

payee:—*Held*: property in the money had passed to the payee as soon as it had been placed upon the ledge, & execution creditor was entitled to it.—*HALL v. HATCH* (1901), 3 O. L. R. 147; 22 C. L. T. 58.—*CAN.*

k. ———— Daily proceeds of business.]—A sheriff seized the daily proceeds of a business under an execution:—*Held*: execution creditor had a lien on such moneys in priority to the claim of the administratrix of the execution debtor.—*Re HUNTER* (1912), 23 O. W. R. 692; 4 O. W. N. 451; 49 C. L. J. N. S. 72; 8 D. L. R. 102.—*CAN.*

l. ———— Deposit to the credit of unfranchised Indian.]—Money deposited in a town branch of a bank to the credit of an unfranchised Indian, living upon an Indian Reserve, is "personal property outside of the reserve," within Indian Act, 1906, s. 99, & is liable to attachment.—*AVERY v. CAYUGA* (1913), 28 O. L. R. 517; 4 O. W. N. 1164.—*CAN.*

m. ———— Not in control of but only payable to debtor—Held by sheriff.

654; 21 L. J. C. P. 39; 18 L. T. O. S. 140; 16 Jur. 18; 138 E. R. 643.

650. **Money—Not in control of but only payable to debtor—Money held by sheriff—Proceeds of execution levied by debtor.**—If a pltf. cannot find sufficient effects of deft. to satisfy his judgment, the ct. will order the sheriff to retain, for the use of pltf., money which he has levied in another action, at the suit of deft.—*ARMISTEAD v. PHILPOT* (1779), 1 Doug. K. B. 231; 99 E. R. 151.

*Annotations*:—*N.F.* Willows v. Ball (1806), 2 Bos. & P. N. R. 376; *Knight v. Criddle* (1807), 9 East, 48; *Padfield v. Brine* (1822), 7 Moore, C. P. 127.

651. ————.]—Money, the surplus of a former execution against deft.'s goods, was refused to be stayed in the late sheriff's hands for the purpose of satisfying another execution at the suit of the same pltf. against the same deft., who had no other effects on which the sheriff in office could levy.—*FIELDHOUSE v. CROFT* (1804), 4 East, 510; 102 E. R. 926.

*Annotation*:—*Reid*. Wood v. Wood (1843), 7 Jur. 325.

652. ————.]—Deft. having recovered a verdict against the sheriff for seizing his goods under a distringas in an action at the suit of J., & having given a *cognovit* to pltf., on which a *fi. fa.* issued, the ct. refused to order the sheriff to pay over the damages recovered by deft. against him to pltf. in satisfaction of the *fi. fa.*—*WILLOWS v. BALL* (1806), 2 Bos. & P. N. R. 376; 127 E. R. 673.

*Annotation*:—*Folld.* Padfield v. Brine (1822), 7 Moore, C. P. 127.

653. ————.]—The ct. will not order the sheriff to retain, in satisfaction of a present writ of *fi. fa.* issued by pltf. against deft., money or bank-notes, which the sheriff had before received for the use of deft., in discharge of an execution levied by deft. against another, & which the sheriff had not paid over.—*KNIGHT v. CRIDDLE* (1807), 9 East, 48; 103 E. R. 491.

*Annotations*:—*Reid*. Wood v. Wood (1843), 4 Q. B. 397; *Colonial Bank v. Whinney* (1885), 30 Ch. D. 261.

654. ————.]—Under an execution by A. against B., the ct. will not order the sheriff to pay over money in his hands, levied on an execution by B. against C.—*PADFIELD v. BRINE* (1822), 3 Brod. & Bing. 294; 7 Moore, C. P. 127; 129 E. R. 1298.

655. ————.]—A party privileged from arrest having been taken on a *ca. sa.*, by the sheriff of G. paid the money to the sheriff, & obtained a judge's order to have it refunded.

Surplus moneys in the sheriff's hands after an execution has been satisfied are not available for seizure under an execution.—*PALMER v. RICHARDS* (1921), 30 B. C. R. 321; 70 D. L. R. 732.—*CAN.*

n. ———— Gift of movable property—Not at debtor's disposal.]—K. was recommended a bonus in consideration of long & good services. This recommendation was sanctioned, but before payment to K., the money was attached in execution:—*Held*: the bestowal of the money was a gift of movable property of date subsequent to July 1, 1882, & was not evidenced by a registered instrument, it could only be effected by actual delivery which did not take place; the money was not at K.'s disposal, & he could not have enforced payment; the money was not liable to attachment in execution.—*JANKI DAS v. EAST INDIAN RY. CO.* (1884), L. L. R. 6 All. 634.—*IND.*

o. **Securities—Bank shares—Bank established in another province.**—A sale in execution in Montreal might be

When the town agent was about to do so, the money was claimed by the sheriff of M. under a *fi. fa.* directed to him:—*Held*: the money could not be taken under the *fi. fa.*—**MASTERS v. STANLEY** (1840), 8 Dowl. 169; 9 L. J. Ex. 145; 4 Jur. 28.

656. ————.]—**WOOD v. WOOD**, No. 599, *ante*.

657. ————.]—**COLLINGRIDGE v. PAXTON**, No. 649, *ante*.

658. ———— **Held by third party as trustee—Proceeds of sale of property.**]—Deft. having contracted for the sale of some property the purchase-money was deposited by the vendee in the hands of a third party for the use of defts.:—*Held*: this money could not be attached under Judgments Act, 1838 (c. 110), s. 14.—**ROBINSON v. PEACE** (1838), 7 Dowl. 93; 2 Jur. 896.

*Annotations*:—**Apld.** *France v. Campbell*, Winter v. Campbell (1841), 9 Dowl. 914. **Consd.** *Brereton v. Edwards* (1888), 21 Q. B. D. 488. **Refd.** *Wood v. Wood* (1843), 4 Q. B. 397; *Watts v. Jefferyes* (1851), 3 Mac. & G. 422.

659. ————.]—After verdict, & before judgment had been entered up, deft. sold his leaseholds by auction:—*Held*: under Judgments Act, 1838 (c. 110), pltf. could not levy execution on the purchase-money.—**BROWN v. PERROTT** (1841), 4 Beav. 585; 49 E. R. 466.

660. ————.]—Money deposited in ct. in one action pursuant to 43 Geo. 3, c. 46, s. 2, & Imprisonment for Debt Act, 1827 (c. 71), s. 2, cannot be paid out to an execution creditor in another action, in satisfaction of his claim, notwithstanding the provisions of Judgments Act, 1838 (c. 110), s. 12, as that sect. does not give power to seize money in execution, while in the hands of a third person as trustee for deft.—**FRANCE v. CAMPBELL**, **WINTER v. CAMPBELL** (1841), 9 Dowl. 914; 6 Jur. 105.

661. ———— **Money deposited in court—To account of debtor.**]—**FRANCE v. CAMPBELL**, **WINTER v. CAMPBELL**, No. 660, *ante*.

662. ———— **Held by debtor's agent—For purpose of paying debt.**]—A *fi. fa.* having been issued to the sheriff to levy £97 10s., deft., not knowing the exact amount, sent a person with a banker's bill for £55 5s. and £40 in country notes to the officer to whom the warrant had been delivered. These two sums were tendered to the officer. Upon his stating the amount he was to levy, the person went away, in order to obtain the difference, leaving the bill & country notes on the table.

made of shares of a bank, whose head office was in Toronto.—*Re* **BANK OF ONTARIO** (1879), 44 U. C. R. 247.—**CAN.**

p. ———— **Bond—For conveyance of land.**]—A money bond for the conveyance of land is seizable on an execution under 13 & 14 Vict. c. 53, & 20 Vict. c. 57.—*R. v. POTTER* (1860), 10 C. P. 39.—**CAN.**

q. ———— **Cheque—Payable to debtor—In hands of sheriff.**]—Cheque issued by sheriff in favour of an execution debtor cannot, under Rule 359, be seized by the sheriff while it remains undelivered in the hands of the sheriff.—**GREGOIRE v. MARKHAM CO.** (1915), 30 W. L. R. 427; 7 W. W. R. 1096.—**CAN.**

r. ———— **Not accepted for purpose for which tendered.**]—Debtor, being entitled to an annuity, found by a report in a minor matter to be charged on the minor's estate, the guardian drew a cheque in his favour, which he retained in his hands, & which had not been accepted in payment of the annuity:—*Held*: the cheque could not be seized by the sheriff under a *fi. fa.* The ct. refused to order the guardian to pay over the money to the sheriff.—*Re* **COTTRELL**, *Ex p.* **SMYTH**

(1852), 2 I. Ch. R. 558.—**IR.**

s. ———— **Fire policy—Where money has become payable—Amount not ascertained.**]—A fire policy, after a loss has taken place, & money has become payable thereon, is such specialty or security for money as is seizable under execution, though the amount payable has not been ascertained.—**BANK OF MONTREAL v. McTAVISH** (1867), 13 Gr. 395.—**CAN.**

t. ———— **Mortgage.**]—S., by arrangement between himself & H., the owner of the equity of redemption under a mtgo. made by G., released the security without any consideration paid therefor by H. or G., & discharged H. from liability:—*Held*: the mtgo. would have been seizable had it not been discharged.—**BANK OF UPPER CANADA v. SHICKLUNA** (1863), 10 Gr. 157.—**CAN.**

u. ———— **Assignment registered after seizure.**]—An execution debtor who was a mtgee. of lands assigned the mtgo., but the assignment was not registered until after registration of a notice of seizure:—*Held*: the mtgo. could not be seized under the provisions of Execution Act, 1897, ss. 23 *et seq.*—**KEENAN v. OSBORNE** (1904), 7 O. L. R. 134; 24 C. L. T.

The officer seized both the bill & the notes under the execution, while the person was so absent upon this errand, & upon his return with the balance, demanded poundage. He subsequently seized some sheep for this, when it was paid under protest. A rule *nisi* having been obtained, calling on the sheriff to refund:—*Held*: the money was not liable to seizure, & the ct. would interfere summarily to compel the sheriff to refund the sum extorted as poundage.—**BELL v. HUTCHISON** (1844), 8 Jur. 895.

663. ———— **Effect of death of debtor.**]—**JOHNSON v. PICKERING**, No. 565, *ante*.

———.]—*See, generally*, Part II., Sect. 8, sub-sect. 1, C. (a), *ante*.

664. **Securities—Cheque payable to debtor—In hands of Accountant-General.**]—A judgment creditor, on ascertaining that a sum of money was about to be paid in a cause to his debtor, applied by petition to the ct. that the sheriff might be at liberty to seize in the Accountant-General's office, a cheque by means of which the sum of money was to be paid out to the debtor:—*Held*: under Judgments Act, 1838 (c. 110), s. 12, the cheque was liable to seizure, & inasmuch as the cheque was in the hands of the Accountant-General, the application to the ct. was proper.—**WATTS v. JEFFERYES** (1851), 3 Mac. & G. 422; 15 Jur. 435; 42 E. R. 324; *sub nom.* *Ex p.* **REECE**, 16 L. T. O. S. 501, L. C.

*Annotations*:—**N.F.** *Courtoy v. Vincent* (1852), 15 Beav. 486. **Refd.** *Harris v. Beauchamp*, [1894] 1 Q. B. 801; *Re Prior, Ex p. Prior*, [1921] 3 K. B. 333.

665. ————.]—A cheque of the Accountant-General in favour of A., but not delivered out, is not A.'s property, so as to be liable to be seized by the sheriff under Judgments Act, 1838 (c. 110), s. 12:—*Held*: leave to seize such a cheque would be refused, but a stop order would be granted.—**COURTOY v. VINCENT** (1852), 15 Beav. 486; 21 L. J. Ch. 291; 19 L. T. O. S. 83; 51 E. R. 626.

*Annotation*:—**Refd.** *Widgery v. Tepper*, *Hall v. Tepper* (1877), 6 Ch. D. 364.

———.]—*See, also*, Part V., Sect. 3, *post*.

666. ———— **Stocks.**]—**DUNDAS v. DUTENS**, No. 607, *ante*.

667. ———— **Government stocks.**]—**CAILLAUD v. ESTWICK**, No. 725, *post*.

668. ———— **Included in fraudulent settlement—In defeat of creditors.**]—Since the passing

132; 3 O. W. R. 143.—**CAN.**

b. ———— **Promissory notes.**]—*Re* **BANK OF NOVA SCOTIA ASSESSMENT** (1877), 12 N. S. R. (3 R. & C.) 32.—**CAN.**

c. ————.]—**SHAW v. DENNISON** (1909), 10 W. L. R. 304.—**CAN.**

d. ———— **Shares.**]—**BROOK v. RUTTAN** (1850), 1 C. P. 218.—**CAN.**

e. ———— **Though no stock certificate issued.**]—Shares may be seized & sold under an execution, though no stock certificates may have been issued.—**EUROPEAN & NORTH AMERICAN RY. CO. v. McLEOD** (1875), 16 N. B. R. (3 Pug.) 3.—**CAN.**

f. ———— **In name of transferee—Acceptance not signed.**]—Stock was transferred & the transfer entered in the stock ledger, so that the shares stood in the name of the transferee, but before any acceptance had been signed the shares were seized under an execution against the transferor:—*Held*: the transfer was complete & the seizure illegal.—**WOODRUFF v. HARRIS** (1854), 11 U. C. R. 490.—**CAN.**

g. ———— **Bona fide assignee.**]—A *bona fide* assignment or pledge for value of shares in the capital stock of



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (e) x., xi., xii. & xiii.]*

of Judgments Act, 1838 (c. 110), an investment of money in the purchase of stock in the names of trustees, upon trust for the children of the settlor, he not having at the time sufficient property besides the money so invested to pay the debts he then owed, is void under 13 Eliz., c. 5; because, by Judgments Act, 1838 (c. 110), money or stock may be taken in execution, & therefore, the effect of such a settlement would now be to delay, hinder, or defraud the creditors of the settlor. For the same reason, any purchaser of property by a settlor so indebted, in the name of a child or other person, would now be void under the statute of Elizabeth.—*BARRACK v. M'CULLOCH* (1856), 3 K. & J. 110; 26 L. J. Ch. 105; 28 L. T. O. S. 218; 3 Jur. N. S. 180; 5 W. R. 38; 69 E. R. 1043.

*Annotations:—***Reid.** *Neale v. Day* (1858), 7 W. R. 45. **Mentd.** *Stephens v. Heathcote* (1860), 1 Drew. & Sm. 138; *R. v. Smith* (1870), L. R. 1 C. C. R. 266; *Lumley v. Timms* (1873), 28 L. T. 608; *Birkett v. Birkett* (1908), 98 L. T. 540; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578; *Montgomery v. Blows*, [1916] 1 K. B. 899.

—*See, also, Part V., Sect. 2, post.*

#### xi. *Railway Stock.*

*See Railway Companies Act, 1867 (c. 127).*

**669. Whether seizable.]—**Railway Companies Act, 1867 (c. 127), s. 4, takes away from the judgment creditor of a railway co. the right of taking in execution the rolling stock & plant of that co., but gives him new rights, which are independent of the fact whether such co. has or has not rolling stock or plant to be taken in execution.—*Re MANCHESTER & MILFORD RY. CO., Ex p. CAMBRIAN RY. CO.* (1880), 14 Ch. D. 645; 49 L. J. Ch. 365; 42 L. T. 714, C. A.

*Annotations:—***Mentd.** *Taylor v. Neate* (1888), 57 L. J. Ch. 1044; *Re Knott End Railway Act, 1898*, [1901] 2 Ch. 8.

**670. — Although railway closed to traffic—Reopening unlikely.]—**The protection from seizure in execution by a judgment creditor, given by Railway Companies Act, 1867 (c. 127), s. 4, to the rolling stock & plant of a railway, after such railway is open for public traffic, continues although the railway is afterwards closed for traffic.—*MIDLAND WAGGON CO. v. POTTERIES RY. CO.* (1880), 6 Q. B. D. 36; 50 L. J. Q. B. 6; 43 L. T. 511; 29 W. R. 78.

**671. — — — Receiver appointed.]—**Even if a receiver were appointed before the railway was open for public traffic, the ct. would probably give a judgment creditor leave to levy execution on chattels of the co., notwithstanding the appointment (*RIGBY, L.J.*).—*Re KNOTT END RAILWAY ACT, 1898*, [1901] 2 Ch. 8; 70 L. J. Ch. 463; 84

L. T. 433; 49 W. R. 469; 17 T. L. R. 353; 45 Sol. Jo. 361, C. A.

**672. — — — Railway ancillary to company's undertaking—Dock company.]—**The protection against seizure in execution afforded by Railway Companies Act, 1867 (c. 127), ss. 3, 4, applies to the railway plant of every co. constituted by a statute for the purpose of constructing or working a railway, even although the railway is merely a subordinate & ancillary part of the undertaking authorised by the statute. By two local statutes a co. was authorised to construct a wet dock, a lock forming an entrance to the dock, & two short railways, each about half a mile long, to connect the dock with other railways. Pltfs. had lent money to the co. upon mtge. debentures. Defts. were creditors of the co., & having obtained judgment seized in execution certain railway plant belonging to it. Pltfs. having brought an action for an injunction to prevent defts. from realising their execution:—**Held:** the dock co. was a "co." within sect. 3 of above Act, & the railway plant belonging to it was protected from seizure by sect. 4.—*GREAT NORTHERN RY. CO. v. TAHOURDIN* (1883), 13 Q. B. D. 320; 53 L. J. Q. B. 69; 50 L. T. 186; 32 W. R. 559, C. A.

*Annotations:—***Apld.** *Re East & West India Dock Co.* (1888), 38 Ch. D. 576. **Mentd.** *London & India Docks Co. v. G. E. Ry. & Mid. Ry.* (1901), 86 L. T. 29.

**673. — — —]**—Sect. 4 [Railway Companies Act, 1867 (c. 127)] in order to prevent public inconvenience deprives a judgment creditor of the right he had to take in execution the rolling stock & plant of a railway co. (*COTTON, L.J.*).—*Re MERSEY RY. CO.* (1888), 37 Ch. D. 610; 57 L. J. Ch. 283; 58 L. T. 745; 36 W. R. 372; 4 T. L. R. 305, C. A.

*Annotation:—***Apld.** *Re East & West India Dock Co.* (1888), 38 Ch. D. 576.

**674. — — —]**—The principal objects of the Act [Railway Companies Act, 1867 (c. 127)] so far as they need be noticed are, first, to afford protection to the rolling stock & plant of the co. used for traffic on their railway against executions (*CHITTY, J.*).—*Re EAST & WEST INDIA DOCK CO.* (1888), 38 Ch. D. 576; 57 L. J. Ch. 1053; 36 W. R. 849; 4 T. L. R. 530; *sub nom. Re EAST & WEST INDIA DOCK CO., CLARK v. EAST & WEST INDIA DOCK CO.*, 59 L. T. 236, C. A.

*Annotations:—***Apld.** *Re Knott End Railway Act, 1898*, [1901] 2 Ch. 8. **Mentd.** *London & India Docks Co. v. G. E. Ry.*, [1902] 1 K. B. 568.

#### xii. *Salaries, Pensions, etc.*

*See CHOSSES IN ACTION, Vol. VIII., pp. 436–441, Nos. 135–176; BANKRUPTCY, Vol. V., pp. 927–930, Nos. 7594–7615.*

a co. incorporated under R. S. O., 1887, c. 157, is valid between the assignor & the assignee, notwithstanding that no entry of the assignment or transfer is made in the books of the company; & as only the debtor's interest in the property seized can be sold under execution, the rights of a *bond fide* assignee cannot be cut out by the seizure & sale of the shares, under execution against the assignor, after the assignment.—*MORTON v. COWAN* (1894), 25 O. R. 529.—**CAN.**

**h. — — — Held by judgment debtor.]—**Provisions of Execution Act relating to the method of execution against shares in a co. held by a judgment debtor must be strictly carried out.—*ROYAL BANK OF CANADA v. CANADA NATIONAL FIRE INSURANCE CO.*, [1920] 3 W. W. R. 517.—**CAN.**

**k. — — — Stock—In building society.]—**Stock in a building society may be taken in execution under 12 Vict. c. 23.—*ROBINSON v. GRANGE* (1859), 18 U. C. R. 260.—**CAN.**

**l. — — — In another province—Whether seizable.]—**Stock was held by a resident of Kingston in the Merchants Bank, which has its chief place of business in Montreal:—*Qu.*: whether the sheriff could seize & sell such stock, which was personal property out of the province, merely because it might, if the directors chose, be made transferable at a branch office.—*NICKLE v. DOUGLAS* (1875), 37 U. C. R. 51.—**CAN.**

#### PART III. SECT. 1, SUB-SECT. 4.— E. (e) xi.

**m. Whether seizable—Under writ**

*of bonis non.]—*The rolling-stock of a railway in Lower Canada is a part of its realty, being immovable by destination, & as such is not liable to seizure under a writ of execution *de bonis*.—*GRAND TRUNK RY. CO. & EASTERN TOWNSHIPS BANK* (1865), 10 L. C. J. 11; 16 L. C. R. 173; 1 L. C. L. J. 53.—**CAN.**

**n. — — — Against mortgagee.]—**The railway of defts. was taken in execution by the bank & the opposants who were large bondholders holding a mtge. on the road, opposed the sale on the ground that the railroad could not, by law, be taken in execution. Pltf. demurred to the opposition:—**Held:** the railway could be taken in execution.—*HOCHELAGA BANK & MONTREAL, PORTLAND & BOSTON RY. CO.* (1881), 4 L. N. 333.—**CAN.**

xiii. *Ships.*

**675. Seizable—Including machinery, fixtures & tools.]**—The owner of goods which are in the custody of the sheriff under a *fi. fa.* may make a valid sale & delivery of possession of them to a purchaser. D., a shipbuilder, being indebted to pltf's. in a large sum, as security made an equitable assignment to them, dated May 21, 1875, of all his right & interest in a steamship built for but not delivered to the Turkish Govt., & retained by D. as having a lien on the vessel for its price. D. also agreed to execute any further assurance of the ship to pltf's. which they might require. This assignment was not registered under Bills of Sale Act, 1854 (c. 36), nor was the ship registered as a British ship under Merchant Shipping Act, 1854 (c. 104), s. 19. By an agreement, dated June 24, 1876, D. agreed to sell to pltf's. certain machinery, fixtures, & loose tools upon his business premises at a valuation, but this agreement was never signed by the parties to it. On July 18, 1876, the sheriff, under an execution issued upon a judgment obtained against D. by a creditor, took possession of the machinery, fixtures, & tools, & also of the steamship. On Aug. 22, pltf's., the sheriff's officer being still in possession, under an authority from D. took formal possession of part of the articles comprised in the agreement of June 24, 1876. Deft., having obtained a judgment against D., a writ of *fi. fa.* was issued, & on Sept. 13, a levy on the machinery, fixtures, tools, etc., was made under the writ. On an interpleader issued to try pltf's.' right to the steamship, & to the machinery, etc., as against deft.:—*Held*: (1) pltf's. had a good title to the ship, & to the machinery, etc., as against deft., because the transfer of the ship by D. to pltf's. being within the exceptions in Bills of Sale Act, 1854 (c. 36), s. 7, was effectual without registration under that Act, & the ship was not a British ship so as to require registration under Merchant Shipping Act, 1854 (c. 104), s. 19; (2) the sale by D. to pltf's. of the machinery, etc., was valid, notwithstanding they were in the custody of the sheriff when pltf's. took possession.—*UNION BANK OF LONDON v. LENANTON* (1878), 3 C. P. D. 243; 47 L. J. Q. B. 409; 38 L. T. 698; 3 Asp. M. L. C. 600, C. A.

*Annotations*:—As to (1) *Consd.* Gapp v. Bond (1887), 19 Q. B. D. 200. *Refd.* The James W. Elwell, [1921] P. 351.

PART III. SECT. 1, SUB-SECT. 4.—  
E. (e) xiii.

**o. Seizable — At common law.]**—The equity of redemption in the shares in a ship cannot be seized by any common law process.—*WILSON BROTHERS v. DONALD* (1899), 7 B. C. R. 33.—CAN.

**p. Debt due by person Other than proprietor.]**—Pltf. having obtained judgment against defts., seized, as belonging to G. L. one of them, a yacht called the Petrol. The opposant filed opposition claiming to be the registered owner of the vessel & produced a registered certificate to that effect dated Dec. 9, 1882. Pltf. contested the opposition alleging fraud & collusion between deft., then insolvent, & the opposant. He set up that the vessel belonging to deft. had only been registered in the name of the opposant for the purpose of putting it out of the reach of deft.'s creditors:—*Held*: the seizure for an ordinary debt due by a person, other than the registered proprietor of a vessel was null, & even proof of fraudulent sale, prior to the registration was not sufficient to give legitimacy to the seizure made on behalf of a creditor of the vendor.—*DARVEAU v. CYPRIEN* (1884), 10 Q. L. R. 348.—CAN.

**q. — Whether personal notification necessary.]**—The seizure by a bailiff, under a writ of execution, of the hull of a steamer lying in the waters of a canal, made from the bank, at a distance of five or six hundred feet, without going on board & notifying those in charge, is null & void.—*BOOKER v. BROOK* (1907), Q. R. 32 S. C. 142.—CAN.

**r. — Under bill of sale.]**—Deft. in an execution, being the registered proprietor of shares in a ship, a writ of *fi. fa.* was delivered to the sheriff & the solr. for the creditor by the direction of the sheriff procured a certificate of registry from the ship & delivered it to the sheriff who retained it. The sheriff was registered at the custom house under Merchant Shipping Act, as the owner of the shares which were afterwards sold by him & transferred to the purchaser by a bill of sale which was also registered:—*Held*: the seizure was effectual although the sheriff did not go on board the ship, & the property in the shares was regularly transferred by the bill of sale.—*HARLEY v. HARLEY* (1860), 11 L. Ch. R. 451.—IR.

**s. — Under mortgage.]**—A ship-owner having mortgaged his ship has still an interest in her seizable in

**676. — As a whole—Though part only saleable by sheriff.]**—A foreign ship was seized under a sheriff's writ of *fi. fa.* in execution of a judgment obtained by the charterers of the ship against the owners of 56/64th shares in the ship. Subsequently the ship was arrested by the Admlty. marshal in an action *in rem* for necessities. Various other writs *in rem* were issued against the ship, including a writ by the master in respect of wages. The sheriff was unable to effect a sale, & the ship was sold by the marshal without prejudice to the rights of the various claimants:—*Held*: (1) the sheriff was entitled to seize the ship as a whole, although he could only have sold the 56/64th shares belonging to the judgment debtors; (2) as the ship, at the time of her seizure by the sheriff, was encumbered with the master's lien for wages, the claim of the master had priority to the claim of the execution creditors.—*THE JAMES W. ELWELL*, [1921] P. 351; 90 L. J. P. 132, 355; 125 L. T. 796; 37 T. L. R. 178, 835; 15 Asp. M. L. C. 418.

**677. — Not if previously mortgaged.]**—(1) If the owner of a ship charge her for repairs done in England by an instrument under seal, stated to be by way of bottomry, upon which she is afterwards seized by Admlty. process, & decreed to be sold to satisfy the demand, & no appeal is made from that sentence, but between the seizure & decree a writ of execution issues against the owner at the suit of another creditor, the sheriff cannot take the vessel under this writ, nor can he maintain trover against the officer in possession by the warrant of the Ct. of Admlty.

(2) If A. lend money on the security of a ship, & take possession before execution, executed at the suit of B., the vessel cannot be seized under B.'s execution.—*LADBROKE v. CRICKETT* (1788), 2 Term Rep. 649; 100 E. R. 349.

*Annotation*:—As to (1) *Consd.* Atlas (1827), 2 Hag. Adm. 48.

**678. — —.]**—A bill of sale of 3/4th parts of a ship then being in the port to which she belongs executed by three of four joint owners, transfers the property to the vendee at the time of its execution, if at that time a memorandum of such transfer be indorsed on the certificate of registry; & signed by the three, & a copy of such indorsement be delivered to the proper officer on the next day, & afterwards within a reasonable

attachment.—*AUJIN AH SEING v. AHMED MAHOMED* (1866), 1 Ind. Jur. N. S. 241.—IND.

**bond fide purchaser of a ship, with a legal title according to the provisions of Merchant Shipping Act, 1854, is not bound by notice of a prior unregistered mtge.; therefore, an injunction was refused, on the application of an unregistered mtgee., to restrain the purchaser of a ship at sheriff's sale, & who, as such purchaser, had become the registered owner, from disposing of the ship until the mtgo. was satisfied, though he purchased with notice of the mtge.**—*DE WOLF v. CARVILL* (1865), 6 All. 299.—CAN.

**a. — —.]**—Where property alleged to be part of the equipment of a ship is in the possession of a receiver appointed in an action *in rem* in the Exchequer Ct. to enforce a mtge. of the ship, such property cannot be seized by a sheriff under a writ of *fi. fa.* issued on a judgment recovered against the registered owner of the ship in the Supreme Ct.; & the Supreme Ct. has no jurisdiction on the application of the sheriff to grant an order directing the trial of an interpleader issue between the mtgees. & the judgment creditors.—*WILLIAMSON*



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (c) xiii. & xiv.]*

time the other owner execute the bill of sale & sign the indorsement & a copy of the indorsement signed by the four, be left with the proper officer; therefore, where upon a writ of *fi. fa.* against one of the three the sheriff seized his share after the execution of the bill of sale & signature of the indorsement by the three, but before the delivery of the copy of such indorsement to the proper officer:—*Held*: the sheriff might abandon the seizure & return *nulla bona*.—*PALMER v. MOXON* (1813), 2 M. & S. 43; 105 E. R. 298.

*Annotations*:—*Consd.* *Boyson v. Gibson* (1847), 1 C. B. 121. *Refd.* *Dixon v. Ewart* (1817), Buck, 94.

**679. ——— Ship & cargo.**—An assignment of a future cargo is good in equity. A., by deed, assigned a ship, then at sea, & engaged in the South Sea Fishery, & “her future cargo,” to L. & Co., by way of mtge. A. & L. & Co. both forwarded to the captain notice of the assignment. On the arrival of the ship in London, the captain, by the direction of M., the managing clerk of A., who was then abroad, delivered up the ship & cargo to L. & Co., who put their agent on board. Two days after, the sheriff seized the ship under a *fi. fa.* On bill by L. & Co.:—*Held*: they, having got an assignment of the future cargo, which would be good in equity against A., & having perfected their legal title by taking possession lawfully, were entitled to hold the same against the judgment creditor.—*LANGTON v. HORTON* (1842), 1 Hare, 549; 11 L. J. Ch. 299; 6 Jur. 910; 66 E. R. 1149.

*Annotations*:—*Consd.* *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191. *Refd.* *Whitworth v. Gaugain* (1844), 3 Hare, 416; *Gale v. Burnell* (1845), 7 Q. B. 850; *Watts v. Porter* (1854), 3 E. & B. 743; *Acraman v. Bates* (1860), 1 L. T. 322. *Mentd.* *The Ariel* (1857), 29 L. T. O. S. 133.

**680. ———.**—Where a ship had been mortgaged for a debt a creditor who has got judgment against the registered owner of the ship cannot take & sell the ship in execution, for to do so would defeat the rights of the mtgee. to make the ship available as a security for his debt, given him by Merchant Shipping Act, 1854 (c. 104).—*KITCHEN v. IRVINE* (1858), 28 L. J. Q. B. 46; 5 Jur. N. S. 118.

*Annotation*:—*Refd.* *The James W. Elwell*, [1921] P. 351.

**681. ——— Subject to pre-existing lien—Master's lien for wages.**—*THE JAMES W. ELWELL*, No. 676, *ante*.

**682. ——— Interest & costs on recovered**

*v. BANK OF MONTREAL* (1899), 6 B. C. R. 486.—*CAN.*

**b. ———.**—Upon an action for insurance upon a vessel under the usual interim receipt:—*Held*: the mtgor. of a non-registered vessel had not such an interest as was saleable under a *fi. fa.*, 8 Vict. c. 5, s. 23, only declaring that the registered owner, although he shall have mtgd. the vessel, shall be considered to be the owner thereof; & that by a purchase under a *fi. fa.* of the mtgor.'s interest in a non-registered vessel, the legal estate did not pass.—*SCATCHERD v. EQUITABLE FIRE INSURANCE CO.* (1859), 8 C. P. 415.—*CAN.*

**c. ——— By Calcutta Court of Small Causes.**—The Calcutta Ct. of Small Causes had power to seize & sell a vessel in execution of a decree of that ct.—*ESAU AHMED v. JASSIM BINSAFF* (1867), 2 Ind. Jur. N. S. 251.—*IND.*

**d. ———.**—*Qu.*: whether a ship can be sold in execution of a decree of the Calcutta Small Cause Ct.—

*Re THE SHAH CALLANDER* (1866), 1 Ind. Jur. N. S. 263.—*IND.*

**e. ———.**—The certificate of registry of a vessel having been produced in an action of reduction for the purpose of satisfying the production, & the agent of the depositors having insisted on the process being returned, in order to borrow upon the certificate of registry, for the purpose of enabling the vessel to sail during the dependence of a discussion whether the arrestment of the vessel had been regularly loosed, the pursuers applied for a suspension of the process-caption, & a suspension & interdict against the clerks lending up the certificate, except for the purposes of the process, on a receipt adapted to the circumstances:—*Held*: this was a competent proceeding.—*CONNON v. BALLINTEN* (1853), 2 Stuart, 376.—*SCOT.*

**f. ———.**—The registered owner was not precluded, by the levy of executions from giving a bill of sale to pltf. & transferring to the latter a possession sufficient to support re-

damages.]—*THE JOANNIS VATIS* (No. 2), No. 512, *ante*.

**683. Sale of ship seized—Property passes by bill of sale.**—Upon a sale of a ship in execution of a judgment the sheriff passes the property by bill of sale (*per Cur.*).—*CHASTEAUNEUF v. CAPEYRON* (1882), 7 App. Cas. 127; 51 L. J. P. C. 37; 46 L. T. 65; 4 Asp. M. L. C. 489, P. C.

*xiv. Term of Years.*

**684. Sheriff's right of seizure.**—*PIT v. HUNT* (1681), 2 Cas. in Ch. 73; 1 Eq. Cas. Abr. 58; 22 E. R. 852; *sub nom.* *PITT v. HUNT*, 1 Vern. 18; *sub nom.* *HUNT v. PIT*, Freem. Ch. 78, L. C.

*Annotations*:—*Mentd.* *Jewson v. Moulson* (1742), 2 Atk. 417; *Incedon v. Northcote* (1746), 3 Atk. 430; *Becket v. Becket* (1760), 1 Dick. 340; *Doe d. Shaw v. Steward* (1834), 1 Ad. & El. 300; *Sturgis v. Champneys* (1839), 9 L. J. Ch. 10; *Hanson v. Keating* (1844), 4 Hare, 1.

**685. ——— Of term only—Not of land.**—The sheriff's assignment of a term is sufficient without an actual seizure of the lease.

That [proof of seizure of lease] is unnecessary; the assignment is sufficient evidence of the seizure. The sheriff, under the *fi. fa.* could not enter on the land; he could only seize the lease, & that need not be seized to give validity to an assignment (*WILLES, J.*).—*COLEMAN v. RAWLINSON* (1858), 1 F. & F. 330, N. P.

**686. From when term bound—When delivered to sheriff—Subsequent assignment by debtor ineffective.**—A leasehold estate is affected by an *elegit* or *fi. fa.* from the time it is lodged in a sheriff's hands; & if the debtor subsequent to this makes an assignment of it, the judgment creditor may proceed at law to sell the term, & the vendee will be entitled to the possession, notwithstanding such assignment.—*BURDON v. KENNEDY* (1757), 3 Atk. 739; 26 E. R. 1224, L. C.

*Annotations*:—*Refd.* *Scott v. Scholey* (1807), 8 East, 467; *Giles v. Grover* (1832), 9 Bing. 128; *Westbrook v. Blythe* (1854), 3 E. & B. 737.

**687. Whether breach of covenant—Operating as forfeiture of lease—As between landlord & tenant.**—A lessee, who had covenanted not “to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture,” etc., with a proviso that the landlord might in such case re-enter, gave a warrant of attorney to confess judgment on which the lease was taken in execution & sold:—*Held*: no forfeiture of the lease.—*DOE d. MITCHINSON v. CARTER* (1798), 8 Term Rep. 57; 101 E. R. 1264.

*Annotations*:—*Apld.* *R. v. Robinson* (1811), Wight. 386; *Doe v. Bevan* (1815), 3 M. & S. 353. *Consd.* *Flight v.*

*plevin.*—*GRANT v. ROBERTSON* (1871), 8 N. S. R. 247.—*CAN.*

**g. ——— Validity of title.**—The title to a British ship is not affected by the delivery of a writ of execution to the sheriff against the owner of the ship.—*CAHOON v. MORROW* (1862), 5 N. S. R. (1 Old.) 148.—*CAN.*

**h. ——— Time to plead.**—When the sale of a vessel belonging to an absent deft., which was held by attachment, under the process of the ct., was ordered to take place immediately for the purpose of preventing the deterioration of the property—time was allowed to appear & plead.—*SIMMS v. HODDERN* (1818), 1 Nfld. L. R. 93.—*NFLD.*

**PART III. SECT. 1, SUB-SECT. 4.—E. (c) xiv.**

**k. Whether saleable.**—A term for years in land cannot be sold under a division ct. execution, but only such things as can be delivered over to the purchaser.—*DUGGAN v. KITSON* (1861), 20 U. C. R. 316.—*CAN.*

Salter (1831), 1 B. & Ad. 673. **Apld.** Croft v. Lumley (1858), 1 H. L. Cas. 672. **Consd.** Jeffries v. Alexander (1860), 8 H. L. Cas. 594; *Re Farrow's Bank*, [1921] 2 Ch. 164. **Refd.** Doe v. Hawke (1802), 2 East, 481; Weatherall v. Geering (1806), 12 Ves. 504; Doe v. Clarke (1807), 8 East, 185; Wilkinson v. Wilkinson (1819), 1 Swan. 515; Davis v. Eyton (1830), 9 L. J. O. S. C. P. 44; Crosbie v. Tooke (1833), 1 My. & K. 431; Saltmarsh v. Hewett (1834), 1 Ad. & El. 812; Avison v. Holmes, Penny v. Avison (1861), 1 John. & H. 530. **Mentd.** Keeves v. Dean, Nunn v. Pellegrini, [1924] 1 K. B. 685.

**688.** ———. ———. ———.]—If a tenant under covenant not to “let, set, assign, transfer, or make over,” etc., the indenture of lease, gives a warrant of attorney to confess judgment to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment; this is in fraud of the covenant, & the landlord under a clause of re-entry in the lease for breach of the condition may recover the premises in ejectment from a purchaser under the sheriff's sale.—**DOE v. CARTER** (1799), 8 Term Rep. 300; 101 E. R. 1400.

**Annotations:**—**Consd.** Sharpe v. Thomas (1830), 6 Bing. 416. **Apld.** Flight v. Salter (1831), 1 B. & Ad. 673. **Consd.** Croft v. Lumley (1858), 1 H. L. Cas. 672; Jeffries v. Alexander (1860), 8 H. L. Cas. 594. **Refd.** Weatherall v. Geering (1806), 12 Ves. 504; Doe v. Clarke (1807), 8 East, 185; R. v. Robinson (1811), Wight. 386; Doe v. Bevan (1815), 3 M. & S. 353; Davis v. Eyton (1830), 9 L. J. O. S. C. P. 44; Gibbons v. Hooper (1831), 2 B. & Ad. 734; Crosbie v. Tooke (1833), 1 My. & K. 431; Saltmarsh v. Hewett (1834), 1 Ad. & El. 812; Billiter v. Young (1856), 6 E. & B. 1; Avison v. Holmes, Penny v. Avison (1861), 1 John. & H. 530. **Mentd.** Benham v. Keane (1861), 1 John. & H. 685.

**689. Sale of term—Right of sheriff to sell—Despite previous agreement by debtor to sell.**—An outgoing tenant having agreed to assign the remainder of his term to the incoming tenant, the sheriff, before an actual assignment made, may, under an execution against the outgoing tenant, sell his interest in such remaining term, & set upon it the same value that the incoming tenant had agreed to give for it.—**SPARROW v. BRISTOL (EARL)** (1813), 1 Marsh. 10.

**690.** ———. ———. **Agreement for lease.**—Where A., having entered into an agreement for a lease, has been let into possession & has paid the stipulated rent, a tenancy from year to year is created, which the sheriff may sell under a *fi. fa.* against A.—**DOE d. WESTMORELAND v. SMITH** (1827), 1 Man. & Ry. K. B. 137; 6 L. J. O. S. K. B. 44.

**Assignment by sheriff.**—*See* Nos. 921–927, *post*.

**691. Assignment by debtor—Subsequent to delivery of writ—Invalid.**—**BURDON v. KENNEDY**, No. 686, *ante*.

**692. Ejection of debtor—By sheriff—Whether permissible.**—If a sheriff on a *fi. fa.* sell a lease or term of an house, he cannot & must not put the person out of possession, & the vendee in; but the vendee must bring his ejectment (*per* CUR.).—**R. v. DEANE, BIRD, ETC.** (1680), 2 Show. 85; 89 E. R. 811.

**Annotations:**—**Refd.** Taylor v. Cole (1789), 3 Term Rep. 292; Playfair v. Musgrove (1845), 3 Dow. & L. 72.

**693.** ———. ———. ———.]—*Qu.*: whether the sheriff, who sells a term in the possession of the debtor under a *fi. fa.*, may not put the vendee in possession.

Under an *elegit* he [the sheriff] certainly could not deliver the land extended (**LORD KENYON, O.J.**).—**TAYLOR v. COLE** (1789), 3 Term Rep. 292; 100 E. R. 582; *affd.* (1791), 1 Hy. Bl. 555, Ex. Ch.

**Annotations:**—**Consd.** Playfair v. Musgrove (1845), 14 M. & W. 239. **Refd.** Scott v. Scholey (1807), 8 East, 467; Cubitt v. Porter (1828), 8 B. & C. 257; Gore v. Bowser (1855), 3 Eq. Rep. 319. **Mentd.** Turner v. Meymott (1823), 7 Moore, C. P. 574; Shorland v. Govett (1826), 5 B. & C. 485; Lucas v. Nockells (1833), 10 Bing. 157; Bush v. Parker (1834), 1 Bing. N. C. 72; Gould v. Lasbury (1834), 1 Cr. M. & R. 254; Baillie v. Kell (1838), 4 Bing. N. C. 638; Weeding v. Aldrich (1839), 8 L. J. Q. B.

119; Newton v. Harland (1840), 1 Man. & G. 644; Perry v. Fitzhowe (1846), 8 Q. B. 757; Harvey v. Bridges (1847), 1 Exch. 261; Curlewis v. Laurie (1848), 11 L. T. O. S. 308; Davison v. Wilson (1848), 11 Q. B. 890; Hemmings v. Stoke Poges Golf Club, [1920] 1 K. B. 720.

**694.** ———. ———. **Liability of sheriff in trespass.**—Trespass against the sheriff for breaking & entering pltf.'s dwelling-house. Plea, that deft. entered under a *fi. fa.* & seized & took in execution a lease of pltf.'s of the said dwelling-house, under which pltf. held & was possessed of the same, & before the return of the writ, sold the term, & continued in possession of the house for the further execution of the writ. Pltf. new assigned that deft. continued in possession an unreasonable time after he had seized & taken in execution & sold the lease. To this new assignment deft. pleaded, that the dwelling-house in the new assignment mentioned was not, at the time of the committing of the trespass newly assigned, the dwelling-house of pltf. At the trial it appeared that the sheriff had sold the lease by auction, but that no assignment had been executed by him to the vendee:—**Held**: the seizure did not vest the term in the sheriff, but it remained in the debtor until the sheriff executed an assignment to the purchaser, & whether the word “sold” imported an actual assignment or not, the sheriff could not justify remaining an unreasonable time in the house.—**PLAYFAIR v. MUSGROVE** (1845), 14 M. & W. 239; 3 Dow. & L. 72; 15 L. J. Ex. 26; 5 L. T. O. S. 177; 10 J. P. 122; 9 Jur. 783; 153 E. R. 465.

**Annotations:**—**Apld.** Ash v. Dawnay (1852), 8 Exch. 237. **Refd.** Lee v. Dangar, Grant, Hollams, Sons, Coward & Hawksley & Nathan (1892), 61 L. J. Q. B. 780. **Mentd.** Gilmour v. Supple (1858), 32 L. T. O. S. 1.

**695.** ———. **By vendee—Proof of title in action of ejectment—Production of fi. fa. without judgment.**—In ejectment by the vendee of a term sold under a *fi. fa.* against deft. in execution, it is sufficient to produce the *fi. fa.* without proving a copy of the judgment, & where it appeared that the term had been granted to deft.'s father, & that on his death, intestate, his son J. entered & took administration, & was possessed till his death, & that on his death, deft., his brother, entered, & that by indenture between deft. & B., concerning other premises, it was recited that deft. was legal personal representative of J.:—**Held**: this was *prima facie* evidence that the term was vested in deft.—**DOE d. BATTEN v. MURLESS** (1817), 6 M. & S. 110; 105 E. R. 1184.

**Annotations:**—**Refd.** Doe d. Morris v. Williams (1826), 6 B. & C. 41; Magdalen Hospital v. Knotts (1878), 8 Ch. D. 709.

**696. Incumbrancer on term—Subsequent to execution—Writ returned without term being sold—Priority.**—A. being possessed of a leasehold house, deposited the lease with B. as a security for a debt. C. afterwards obtained a judgment against A., & sued out a *fi. fa.* The sheriff sold some of A.'s goods, but not the house, & returned the writ: whilst the writ was in the sheriff's hands D., with A.'s consent, paid the debt due to B., & had the lease deposited with him as a security for the amount, & for other sums due to him, from A.:—**Held**: C., having allowed the writ to be returned, without requiring the sheriff to sell the house, had no priority over D.—**WILLIAMS v. CRADDOCK** (1831), 4 Sim. 313; 58 E. R. 117.

**Annotation:**—**Mentd.** Whitworth v. Gaugain (1844), 3 Hare, 416.

**Term acquired by husband—In right of wife.**—*See* Nos. 735, 736, *post*.

**Equitable interests.**—*See* Sub-sect. 4, E. (f) ix., *post*.



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (e) xv. & xvi.]*

*xv. Wearing Apparel, Bedding, Tools.*

*See Small Debts Act, 1845 (c. 127), s. 8; Bkpcy. Act, 1914 (c. 59), s. 38 (2).*

**697. Not to be seized—Wearing apparel.]—**Upon a *fi. fa.* the sheriff may take anything but wearing clothes (HOLT, C.J.).—HARDISTEY v. BARNEY (1696), Comb. 356; 2 Salk. 598; 90 E. R. 525. *Annotation:—Reid. Spitzer v. Chaffers* (1863), 14 C. B. N. S. 686.

**698. ——— In use.]—**Wearing apparel on a man's person . . . cannot be taken under a *fi. fa.* (PARKE, B.).—SUNBOLF v. ALFORD (1838), 3 M. & W. 248; 1 Horn & H. 13; 2 J. P. 136; 2 Jur. 110; 150 E. R. 1135; *sub nom.* TUNBOLF v. ALFORD, 7 L. J. Ex. 60.

*Annotations:—Reid. Spitzer v. Chaffers* (1863), 14 C. B. N. S. 686. *Mentd. Broadwood v. Granara* (1854), 19 J. P. 39.

**699. ——— Insolvent debtor.]—**(1) An action for converting or detaining goods is not maintainable against a sheriff for seizing under a writ of *fi. fa.* the property of an insolvent after notice that it was excepted by him from his schedule under Execution Act, 1844 (c. 96), s. 9.

If such excepted property is exempt from seizure under an execution against the goods of the insolvent, the proper course is to apply to have the execution stayed under 5 & 6 Vict. c. 116, s. 1.

(2) *Semble*: the wearing apparel, bedding, & tools of an insolvent debtor not exceeding the value of £20, which are excepted by him in his petition, & are by Execution Act, 1844 (c. 96), s. 9, excluded from the operation of the Insolvency Acts, are protected from execution by 5 & 6 Vict. c. 116, s. 1.—RIDEAL v. FORT (1856), 11 Exch. 847; 25 L. J. Ex. 204; 26 L. T. O. S. 275; 4 W. R. 302; 156 E. R. 1076.

*Annotation:—As to* (1) *Reid. Wallinger v. Gurney* (1861), 11 C. B. N. S. 182.

**700. ——— To value of £5.]—**A sheriff's bailiff, in the course of executing a writ of *fi. fa.*, seized the whole of the judgment debtor's goods & consequently failed to leave wearing apparel, bed, bedding, etc., belonging to the debtor to the value of £5 as required by Small Debts Act, 1845 (c. 127), s. 8:—*Held*: the sheriff was not liable to the penalty imposed by Sheriffs Act, 1887 (c. 55), s. 29, for the wrongful act of the bailiff.—BAGGE v. WHITEHEAD, [1892] 2 Q. B. 355; 61 L. J. Q. B. 778; 66 L. T. 815; 56 J. P. 548; 40 W. R. 472; 8 T. L. R. 503; 36 Sol. Jo. 425, C. A.

*Annotations:—Consd. Lee v. Dangar, Grant*, [1892] 2 Q. B. 337. *Reid. Moore v. Brompton County Court High Bailiff* (1893), 69 L. T. 140

**701. ——— Of wife—Apparel the property of husband under agreement.]—**A husband is bound to provide his wife with necessary apparel, but is not bound to give it to her. He may make the provision either by giving it to her in accordance with the common practice, or by lending it to her. Therefore, an agreement between husband & wife that all articles of wearing apparel used or worn by the wife were to be purchased by the husband in his own name, & on his credit & were to be his absolute property, & that he was to be entitled to dispose of them as & when & how he pleased, his wife having no right or title to them except to wear them during his pleasure, is valid in law, & effectual as against the execution creditors of the wife.—RONDEAU, LE GRAND & CO. v. MARKS, [1918] 1 K. B. 75; 87 L. J. K. B. 215; 117 L. T. 651; 34 T. L. R. 8; 62 Sol. Jo. 24, C. A.

**702. ——— Bedding.]—**RIDEAL v. FORT, No. 699, *ante*.

**703. ——— To value of £5.]—**BAGGE v. WHITEHEAD, No. 700, *ante*.

**704. ——— Tools of trade.]—**RIDEAL v. FORT, No. 699, *ante*.

**705. ——— To value of £5—Insolvent debtor.]—**A sheriff seized the goods of a judgment debtor under a writ of *fi. fa.* at the suit of a judgment creditor for more than £20, & advertised them for sale, except the debtor's tools of trade, etc., to the value of £5, as provided by Small Debts Act, 1845 (c. 127), s. 8. Before the sale a receiving order was made against the debtor, & thereupon he claimed that, by Bkpcy. Act, 1883 (c. 52), s. 44, his tools of trade, etc., to the value of £20, were excepted from the sale. The official receiver made no request to the sheriff under Bkpcy. Act, 1890 (c. 71), s. 11, & declined to interfere:—*Held*: (1) Small Debts Act, 1845 (c. 127), s. 8, was in no way modified or extended by Bkpcy. Act, 1883 (c. 52), s. 44; (2) the sheriff was bound to sell, & under Bkpcy. Act, 1890 (c. 71), s. 11, to hand over the proceeds of sale, less costs of execution, to the official receiver, although, had there been no sale, the debtor would have been entitled under Bkpcy. Act, 1883 (c. 52), s. 44, to his tools of trade, etc., to the value of £20.—*Re* DAWSON, *Ex p.* DAWSON, [1899] 2 Q. B. 54; 68 L. J. Q. B. 668; 6 Mans. 200; *sub nom.* *Re* DAWSON, *Ex p.* DAWSON v. MIDDLESEX, SHERIFF, 80 L. T. 498; 47 W. R. 524; 43 Sol. Jo. 440.

**Value of exempted articles.]—***See* Nos. 699, 700, 703, 705, *ante*.

*Compare* DISTRESS, Vol. XVIII., pp. 297, 298, Nos. 322–347.

#### PART III. SECT. 1, SUB-SECT. 4.— E. (e) xv.

**1. Wearing apparel—Ball dress.]—**Pltf. seized in the hands of the furnishee a ball dress belonging to deft. Deft. claimed the dress to be exempt as wearing apparel:—*Held*: a ball dress seized in the hands of the dressmaker & worth \$80 could not be considered "ordinary & necessary wearing apparel."—DOUTRE & SHARPLY (1883), 4 L. N. 185; 27 L. C. J. 25; 6 L. N. 37.—CAN.

**m. ——— Necessary neck ornament.]—**The mangalsutra, a neck ornament which is worn by a Hindu married woman during the lifetime of her husband & never removed, is a part of her necessary wearing apparel, & is exempt from execution.—APPANA v. TANGAMMA (1884), 1 L. R. 9 Bom. 106.—IND.

**n. Tools of trade.]—**Tools & implements ordinarily used in the execution debtor's occupation are no longer exempt from seizure when he

changes that occupation to one in which the tools & implements in question are not ordinarily used.—WRIGHT v. HOLLINGSHEAD (1895), 23 A. R. 1.—CAN.

**o. ———.]—**The privilege granted the debtor of selecting & withdrawing from seizure "tools & implements & other chattels ordinarily used in his profession, art or trade, to the value of \$200," only exists while the debtor is carrying on his profession, art or trade.—STEPHENS v. TOBACK (1904), Q. R. 26 S. C. 41.—CAN.

**p. ———.]—**A boiler & some wood were seized by the sheriff under a writ of *fi. fa.*, & were claimed by the execution debtor as exempt from seizure under Yukon Exemptions Ordinance:—*Held*: the wood was liable to seizure, & also the boiler, as the latter was not a chattel or necessary implement used by debtor in the practice of his trade or profession.—MCRAE v. FROOKS, HANNA v. FROOKS (1911), 17 W. L. R. 287.—CAN.

**q. ———.]—**Deft. claimed exemption of certain carpenters' tools on the ground that they were the tools of his trade. The proof was to the effect that deft. was skilled as a carpenter, & was often employed as a carpenter, though not regularly:—*Held*: the tools could not be considered exempt.—NOEL v. LAVERDIÈRE (1881), 7 Q. L. R. 367.—CAN.

**r. Law books.]—**Pltfs. recovered judgment against defts., & under their execution had seized certain law books of deft. These books had been sold by pltf. to deft.:—*Held*: the books specifically paid for were exempt, but the rest were liable to be seized.—CANADA LAW BOOK CO. v. FIELDHOUSE (1909), 12 W. L. R. 396.—CAN.

**s. Automobile used by professional chauffeur.]—**An automobile used by a judgment debtor to make his living as a professional chauffeur is not exempt from seizure under execution.—BURNS v. CHRISTIANSON, [1921] 2 W. W. R. 366; 16 Alta. L. R. 394.—CAN.

xvi. *Other Property.*

**706. Heirlooms—Seizable.]**—F. left plate, etc., to be enjoyed as heirlooms by the persons who should be in possession of his respective houses. A son being born who was tenant in tail (subject to his father's life estate), the chattels so left vested absolutely in him; & he dying, vested in his father as his representative; & were liable to be taken & sold for his (the father's) debt.—**FOLEY v. BURNELL** (1785), 4 Bro. Parl. Cas. 319; 1 Bro. C. C. 274; Rom. 1; 2 E. R. 216, H. L.; *previous proceedings* (1779), 2 Cowp. 436, n.

*Annotations:*—**Mentd.** *Vaughan v. Burslem* (1790), 3 Bro. C. C. 101; *Lincoln v. Newcastle* (1806), 12 Ves. 218; *Carr v. Erroll* (1808), 14 Ves. 478; *Brandon v. Robinson* (1811), 18 Ves. 429; *Brouncker v. Bagot* (1816), 1 Mer. 271; *Conduitt v. Soane* (1844), 1 Coll. 285; *Anon.* (1848), 11 L. T. O. S. 393; *Morgan v. Rowland* (1848), 13 L. T. O. S. 4; *Potts v. Potts* (1848), 1 H. L. Cas. 671;

*Rowland v. Morgan* (1848), 6 Hare, 463; *Rochford v. Hackman* (1852), 9 Hare, 475; *Cox v. Sutton* (1856), 25 L. J. Ch. 845; *Doncaster v. Doncaster* (1856), 3 K. & J. 26; *Scarsdale v. Curzon* (1860), 1 John. & H. 40; *Hogg v. Jones* (1863), 32 Beav. 45; *Moseley v. Cressey's London & Burton Steam Cooperage Co.* (1864), 35 L. J. Ch. 360; *Re Johnson's Trusts* (1866), L. R. 2 Eq. 716; *Shelley v. Shelley* (1868), L. R. 6 Eq. 540; *Ashton v. Blackshaw* (1870), 39 L. J. Ch. 205; *Martelli v. Holloway* (1872), L. R. 5 H. L. 532; *Temple v. Tring* (1887), 56 L. J. Ch. 767; *Re Angerstein, Angerstein v. Angerstein*, [1895] 2 Ch. 883; *Re Fothergill's Estate, Price-Fothergill v. Price*, [1903] 1 Ch. 149; *Re Fitzgerald, Surman v. Fitzgerald* (1904), 73 L. J. Ch. 436; *Re Chesham's Settlement, Valentia v. Chesham*, [1909] 2 Ch. 329; *Re Parker, Parker v. Parkin*, [1910] 1 Ch. 581; *Re Swan, Witham v. Swan*, [1915] 1 Ch. 829; *Re Beresford-Hope, Aldenham v. Beresford-Hope*, [1917] 1 Ch. 287; *Re Fowler, Fowler v. Fowler*, [1917] 2 Ch. 307; *Re Lewis, Busk v. Lewes*, [1918] 2 Ch. 308; *Re Harcourt, Portman v. Portman*, [1921] 2 Ch. 491; *Portman v. Portman*, [1922] 2 A. C. 473.

**707. Settled chattels—Settlement on wife by****PART III. SECT. 1, SUB-SECT. 4.—**  
**E. (e) xvi.**

**t. Intoxicating liquors.]**—Canada Temperance Act does not prohibit judicial sales of intoxicating liquors. Under a warrant of distress upon a conviction for an offence against the second part of the Canada Temperance Act, debt's property must be levied on, though it consists of intoxicating liquors only, & is in a place where the second part of the Act is in force.—*Ex p. Fitzpatrick* (1893), 32 N. B. R. 182.—**CAN.**

**a. Letters in post office—Addressed to debtors.]**—An attachment was placed on letters in the post office addressed to certain judgment debtors. The day before the attachment the senders of the letters had applied to have the letters returned to them:—*Held*: the post office master held the letters in trust for, or on behalf of, the judgment debtors, & they were accordingly liable to attachment on the application of the decree-holder.—**NARASIMHULU v. ADIAPPA** (1890), 1 L. R. 13 Mad. 242.—**IND.**

**b. Home of debtor.]**—49 Vict. c. 17, s. 117 (8), exempts from execution the land upon which debt. or his family resides, or which he cultivates wholly or in part, not exceeding 160 acres.—**HOCKIN v. WHEELER** (1890), 6 Man. L. R. 521.—**CAN.**

**c. — Sale by debtor — Mortgage to secure purchase-money.]**—Deft. was locattee of certain lands under Free Grants & Homesteads Act, R. S. O., 1887, c. 25, & duly obtained patents therefor. Afterwards he & his wife sold & conveyed parts of the land, he taking back mtges. to secure the purchase-money:—*Held*: the mtges. were not interests in the land exempt from levy under execution.—**CANN v. KNOTT** (1890), 19 O. R. 422; 20 O. R. 294.—**CAN.**

**d. —.]**—A building in which is the actual residence & home of a judgment debtor, & not worth more than \$1,500, will be exempt from proceedings to realise the judgment.—**BERTRAND v. MAGNUSSON** (1895), 10 Man. L. R. 490.—**CAN.**

**e. —.]**—F. was the owner of a quarter section of land, which was his homestead, he & his family residing thereon. While it was his homestead, he transferred it to his wife, the pltf. At the time of the transfer, debts. had an execution against the lands of F. on file in the land titles office:—*Held*: pltf. took the property free from any claim of debts. under their execution.—**FREDERICKS v. NORTH-WEST THRESHER CO.** (1910), 15 W. L. R. 66; 3 Sask. L. R. 280.—**CAN.**

**f. —.]**—To render land exempt as a "homestead," under Exemption Ordinance, s. 2 (9), from seizure under the execution, there must be actual occupation of it by debtor & actual

residence by him thereon, & there must be, on the land, a dwelling-house in which debtor lives. It is of no avail that he has always considered the land his house, & that it has always been his intention to make his permanent residence thereon.—**IMPERIAL ELEVATOR CO. v. SHERE** (1910), 14 W. L. R. 32; 3 Sask. L. R. 197.—**CAN.**

**g. — Onus of proof on debtor.]**—Land being seized by the sheriff under execution, execution debtor claimed exemption for it as his homestead:—*Held*: the land was not the homestead of debtor, within the meaning of Exemption Ordinance; his absence therefrom was not of a merely temporary character; the onus was upon him, & he had not satisfied it.—**Re HETHERINGTON** (1910), 14 W. L. R. 529; 3 Sask. L. R. 232.—**CAN.**

**h. —.]**—If debtor is in actual residence upon the land at the time of the seizure, his home & the adjoining 160 acres are *prima facie* exempt; but, if the execution debtor of his family is not in actual residence upon the land at the time it is seized, it is *prima facie* not exempt & the onus is cast upon him to show that it is still under the protection of Ordinance, & therefore not seizable.—**Re DALLIN** (1911), 17 W. L. R. 557; 4 Sask. L. R. 158.—**CAN.**

**k. —.]**—In 1906 H. made homestead entry for 160 acres of land in Saskatchewan, & had ever since resided on the land, with his wife, pltf. Deft. obtained a judgment against H. & issued execution thereon. In 1910, H. obtained a patent for the land, & then transferred it to pltf., who sent in the transfer for registration. When she received her certificate of title, she found that it was subject to debt's execution:—*Held*: the land was exempt from seizure under execution.—**HAMILTON v. McCUAIG** (1911), 18 W. L. R. 84; 4 Sask. L. R. 193.—**CAN.**

**l. —.]**—Under Sask. Statutes (1912-13), c. 16, s. 17, amending Land Titles Act, a homestead, within the meaning of Exemption Act, R. S. C., c. 47, & the surplus proceeds thereof remain exempt from executions after an involuntary or forced sale under process of law.—**NATIONAL TRUST CO. v. STANCUL** (1914), 29 W. L. R. 723; 7 W. W. R. 1389.—**CAN.**

**m. — Execution registered — Mortgage subsequently registered.]**—An execution registered against a homestead does not take priority over a mtge. subsequently registered.—**POLLOCK v. HOLITZKI**, [1918] 3 W. W. R. 41; 11 Sask. L. R. 352; 42 D. L. R. 491.—**CAN.**

**n. —.]**—An execution debtor transferred land to his wife who acquired title subject to the execution. Before seizure under the execution, debtor & his family moved on to the land & continued to live thereon:—*Held*: the property was exempt from

seizure, being the "homestead" & the property of one of debtor's family.—**CANADIAN BANK OF COMMERCE v. HOLISKI** (1920), 1 W. W. R. 677.—**CAN.**

**o. — Residence of representatives of deceased debtor.]**—The exemption of the homestead in favour of the widow & children of a deceased execution debtor is not available unless the homestead is not only necessary for the maintenance & support, but is also in the enjoyment, of the widow or children.—**Re TRIPP'S ESTATE**, [1921] 2 W. W. R. 29.—**CAN.**

**p. —.]**—The expression "materials of houses & other buildings belonging to & occupied by agriculturists" used in Code of Civil Procedure Act, s. 266, is intended to exempt from attachment & sale the house dwelt in by an agriculturist as such & the farm buildings appended to such dwelling. The exemption extends, after the death of an agriculturist debtor, to his representative, who occupies the house in good faith as an agriculturist, & who does not take it up merely with the view of defrauding his creditor.—**RADHAKISAN HAKUMJI v. BALVANT RAMJI** (1883), 1 L. R. 7 Bom. 530.—**IND.**

**q. — Loss of homestead character—Resumption of residence by debtor.]**—Land which had been debt's homestead but had lost its homestead character & thus became liable to seizure under a writ of execution by which it was bound while still a homestead was seized under pltf.'s execution by the sheriff giving notice & advertisement of seizure & intended sale. The sale was adjourned from time to time pending the disposal of proceedings taken by debt. to prevent the sale. Some time after debt. had returned to the land & again taken up his residence thereon the sheriff re-advertised the land for sale on the date to which the sale had been ultimately postponed:—*Held*: the second advertising was given for the purpose of giving publicity to the adjourned sale, & not as an abandonment of the previous seizure or sale proceedings, that the sale really took place under the adjourned sale proceedings, & therefore even though the debt. may have made the land his homestead before the re-advertisement, that fact did not avail to prevent the sale.—**SASKATCHEWAN ELEVATOR CO. v. AREND**, [1923] 3 W. W. R. 1258; 4 D. L. R. 1207.—**CAN.**

**r. Proceeds of sale of steamship.]**—*Held*: the execution debtor was entitled, as an exemption under Homestead Act, to \$500 out of \$1,000 realised by the sheriff on the sale of a steamship, the only exigible personality of the debtor.—**YORKSHIRE GUARANTEE & SECURITIES CORPN. v. COOPER** (1903), 23 C. L. T. 302; 10 B. C. R. 65.—**CAN.**

**s. Goods of partnership.]**—The exemption granted to a "Debtor



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (e) xvi. & (f) i.*

**husband—No evidence of fraud—Bankruptcy of husband.]**—The mere fact that a husband makes a settlement on his wife with a power of revocation is in itself no evidence that the settlement was made with intent to defraud creditors. The wife is entitled to claim possession of goods so settled on her as against the trustee in bkpcy. or an execution creditor of the husband.—*Re TARN, Ex p. TARN* (1893), 57 J. P. 789; 9 T. L. R. 489, C. A.

**708. Goods particularly specified—By solicitor of creditor—Authority of solicitor.]**—*SMITH v. KEAL*, No. 1231, *post*.

**After-acquired chattels.]**—See **BILLS OF SALE**, Vol. VII., p. 55, No. 293.

**709. Not goods held on lien.]**—*LEGG v. EVANS*, No. 598, *ante*.

(f) *Whose Property may be Seized.*

i. *Goods of Execution Debtor.*

**710. General rule.]**—Where a sheriff, under a writ of *fi. fa.* against A., seized & sold the furniture in his house, where he lived with a woman to whom he had been married, & to whom the goods belonged before the marriage:—*Held*: the woman having afterwards discovered that the marriage was void, might maintain trover against the sheriff, & recover the value of the goods, although it exceeded the price for which they were sold.—*GLASSPOOLE v. YOUNG* (1829), 9 B. & C. 696; 4 Man. & Ry. K. B. 533; 7 L. J. O. S. K. B. 305; 109 E. R. 259.

*Annotations*:—*Consd.* *Balme v. Hutton* (1833), 9 Bing. 471; *Garland v. Carlisle* (1837), 11 BH. N. S. 421. *Refd.* *Clark v. Nicholson* (1835), 6 C. & P. 712; *Whitmore v. Black* (1844), 13 M. & W. 507. *Mentd.* *Davis v. Artingstall* (1880), 42 L. T. 507.

his family," by the Exemptions Ordinance (Alta), does not apply to a partnership.—*MACKINNON v. BEALS*, [1917] 1 W. W. R. 1328.—**CAN.**

t. *Stock-in-trade.*—A butcher's safe, cash register, counter, etc., are part of his "stock-in-trade," & not exempt from seizure under a writ of *fi. fa.*—*ENDRIZZI v. PETO & BROCKLEY*, [1917] 1 W. W. R. 1439.—**CAN.**

a. *Household furnishings—Piano.*—A piano comes within the term "household furnishings" used in Exemptions Act, R. S. S., 1920 (c. 51), & may be claimed to be exempt from seizure along with other furniture where the combination value of the piano & such other furniture does not exceed \$500.—*NOTHAM v. BRIGHT*, [1923] 3 W. W. R. 94.—**CAN.**

b. *Exemption—Only debtor can claim.*—Exemption from seizure under execution is a privilege that can be claimed by the debtor only.—*YOUNG v. SHORT* (1885), 3 Man. L. R. 302.—**CAN.**

c. ———.]—The exemption of an urban homestead to the extent of \$1,500 is a right personal to the debtor. He cannot assign or transfer it *qua* exemption.—*Re BELL*, [1922] 1 W. W. R. 1015; 67 D. L. R. 66; 32 Man. L. R. 9; 2 C. B. R. 271.—**CAN.**

d. ——— *Must be claimed within reasonable time.*—The \$500 exemption from execution under Homestead Act Amendment Act, 1890, s. 2, is not an absolute right, but a privilege or option to be effectuated only by claiming it within a reasonable time in regard to the specific goods seizable, or which have been seized, under execution, & does not apply to the proceeds of the goods after sale & conversion into money.—*PILLING v. STEWART* (1895), 4 B. C. R. 94.—**CAN.**

e. ——— *Effect of debtor's election not to claim.*—*Held*: debt.'s

right to exemption was a special privilege which she might insist upon or not, at her option, & her election not to claim the privilege by borrowing the goods was binding upon her.—*Semble*: the right to exemption should be claimed at the time of delivery of possession or within a reasonable time thereafter.—*ROY v. FORTIN* (1915), 32 W. L. R. 790; 9 W. W. R. 407; 25 D. L. R. 18; 22 B. C. R. 282.—**CAN.**

*TRENWITH*, [1922] 3 W. W. R. 1205.—**CAN.**

g. ——— *Where goods withdrawn from.*—Goods generally exempted from seizure under execution but withdrawn from such exemption, when the purchase price of them is the subject of the judgment proceeded upon, are subject to seizure although the judgment has been recovered only upon a bill of exchange for the price accepted by the judgment debtor.—*CANADA LAW BOOK CO. v. —* (1907), 17 Man. L. R. 345; 7 W. L. R. 363.—**CAN.**

h. ——— *Purchaser at sheriff's sale—Acquires no right.*—A purchaser at a sheriff's sale does not acquire any right or interest to or in goods which are exempt from sale under Homestead Act, & which have been claimed as exempt pursuant to the statutory option given to the judgment debtor.—*FLETCHER v. PENDRAY* (1916), 34 W. L. R. 310; 10 W. W. R. 444.—**CAN.**

k. ——— *Property must be necessary for debtor's livelihood.*—Before property of a judgment debtor can be exempted from execution as falling under the head of the property described in Code of Civil Procedure Act, s. 266, it is necessary that the ct. should first express its opinion that such property is necessary to enable execution debtor to earn his livelihood, & the ct. which must decide this point is the ct. which issues the execution.—*BAKHIR MOHAMMED v. DOORGA CHURN SHAHA*

**711. Joint debtors—Discharge of one under Insolvent Debtors Act—Others not discharged—Judgments Act, 1838 (c. 110).]**—A writ of *fi. fa.* having been sued out against four debts jointly, a *ca. sa.* afterwards issued against them on Aug. 1, 1840, under which one of them, J., was taken in execution on Aug. 10. Having thereupon filed his petition under Insolvent Act, he was discharged on bail on Aug. 22, & received his final discharge on Nov. 13. On Oct. 9 a horse belonging to him was taken by the sheriff under a *fi. fa.* of Aug. 11, 1840, issued by plffs. against the four debts:—*Held*: (1) the writ of *fi. fa.* was irregular, under Judgments Act, 1838 (c. 110), s. 91, as having issued against a party who had been discharged under Insolvent Act; (2) the three other debts were not discharged by the discharge of the insolvent, & a new writ of *fi. fa.* might have issued against them, either on a return to the prior writ, or a suggestion on the record that one of them had been discharged from the debt by Insolvent Act.—*RAYNES v. JONES* (1841), 9 M. & W. 104; 1 Dowl. N. S. 373; 11 L. J. Ex. 62; 6 Jur. 133; 152 E. R. 45.

*Annotation*:—*Refd.* *Newton v. Rowe* (1844), 8 Scott, N. R. 26.

**712. Goods comprised in executory contract—Contract not completed.]**—Pltf. let to D. a house & the furniture therein for six months. During that period pltf. & D. entered into a written contract, whereby pltf. agreed to sell the house & furniture to D., the purchase-money to be paid on the completion of a good title by pltf. Before the completion of a good title, the contract was rescinded by consent of both parties:—*Held*: under this contract, the furniture never vested in D. as his property, & therefore, could not be taken

(1883), 1 L. R. 10 Calc. 39; 13 C. L. R. 200.—**IND.**

**PART III. SECT. 1, SUB-SECT. 4.—E. (f) i.**

**710 i. General rule.]**—After an attachment has issued, a rule will be granted against any one in possession of debtor's property, to deliver it up to the sheriff to whom the attachment is directed.—*MULLENS v. ARMSTRONG* (1838), (1823-1900), 1 Ont. Dig. 230.—**CAN.**

**710 ii. ———.]**—An agreement was to pay the purchase-money in kind, in equity the half share became the property of vendor as soon as it came into existence & was therefore never the property of vendee, & it was not subject to an execution against vendee under which the whole yearly crop was seized while in the vendee's possession:—*Held*: an execution creditor can only realise upon such interest as debtor has in the property.—*JOHNSON v. TANNER*, [1923] 2 W. W. R. 397; 2 D. L. R. 869.—**CAN.**

l. ——— *Execution against beneficiary.*—One W. devised his personal estate to three trustees, of whom his widow was one, in trust to call in & convert the securities into money, & when received, to invest same & pay the interest & produce to the widow during her life, for the maintenance of herself & children. The widow, after testator's death, remained on his farm, & in possession of the stock & some personal property, some of which she sold, & the stock had been added to by breeding:—*Semble*: the property was liable, in the widow's hands, to an execution against her, which, for all that appeared, might have been for a debt contracted for the support of herself & family.—*PEERS v. CARRALL* (1860), 19 U. C. R. 229.—**CAN.**

m. ——— *Where transfer effectual.]*—A partnership existing between C. &

under an execution against him.—**LANYON v. TOOGOOD** (1844), 13 M. & W. 27; 13 L. J. Ex. 273; 3 L. T. O. S. 164; 153 E. R. 11.

ii. *Goods of Third Party.*

**713. Goods made over by debtor to third party—By deed of gift—Debtor remaining in possession.]—**A deed of gift made of personal chattels is not good against creditors, if the donor continue in possession; but if, while they are so in his possession, they are taken in execution, & redeemed for, & on account of the donor, they thereby become his absolute property again, & notwithstanding the deed of gift, will pass to a legatee under a bequest of "all his personal estate," etc.—**WINCHELSEA (COUNTESS) v. MAIDSTONE (LADY)** (1691), 4 Mod. Rep. 51; 87 E. R. 257.

**714. — Growing crops—Sale.]—**The vendee of a growing crop of grass, who is in possession of the field, for the purpose of making it into hay, can maintain trespass against the sheriff, if when cut, the close be entered, & part of the grass carried away by a person, who has purchased the grass of a bailiff of the sheriff, who had seized & sold it under a *fi. fa.* against the original vendor, where the person actually entering claims under the sale of the sheriff's bailiff, & carries off the crop by his authority.—**TOMPKINSON v. RUSSELL** (1821), 9 Price, 287; 147 E. R. 95.

**715. — — — Bonâ fide transfer.]—****STEVENSON v. DICKENSON** (1852), 19 L. T. O. S. 123.

**716. — — — Under agreement with non-execution creditor.]—**A creditor having agreed with his debtor to take a growing crop in satisfaction, & debtor giving him a receipt for the amount of the debt, as if for money paid on a sale of the crop, & the creditor having taken possession:—*Held*: the transfer, though not regis-

tered, was good as against an execution creditor.—**NEWMAN v. CARDINAL** (1862), 2 F. & F. 840.  
*Annotation*:—**Refd. Brantom v. Griffiths** (1876), 45 L. J. Q. 588.

**717. — — — With intent to defeat execution.]—**A tradesman expecting the execution of a writ of *fi. fa.* issued by the Ct. of Ch. for payment of costs in a suit, effected a sale of the whole of his furniture & stock-in-trade. The only document passing upon the occasion was a receipt for the money paid upon the purchase. A few days after the purchaser had taken possession the writ was issued, & the sheriff subsequently filed a bill of interpleader, upon which the question arose whether the sale was fraudulent & void:—*Held*: it was not a ground for vitiating a sale that it was made with a view to defeat an expectant execution; under the particular circumstances of this case there was no ground for saying that the purchase was not *bonâ fide*, & consequently the sale could not be set aside; but there being facts of a highly suspicious character attending the transfer of the property, the purchaser was ordered to pay his own costs.—**HALE v. SALOON OMNIBUS CO.** (1859), 4 Drew. 492; 28 L. J. Ch. 777; 7 W. R. 316; 62 E. R. 189.

*Annotations*:—**Mentd. Thomson v. Barrett** (1860), 1 L. T. 268; *Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313; **North Central Wagon Co. v. M. S. & L. Ry.** (1887), 36 Ch. D. 191.

**718. — — —.]—****TOWER FINANCE & FURNISHING CO. v. BROWN** (1890), 6 T. L. R. 192.

—*See, further*, FRAUDULENT & VOIDABLE CONVEYANCES.

**Rights of third parties—For improper seizure.]—***See* Sub-sect. 12, F., *post*.

*See, also*, DISTRESS, Vol. XVIII., pp. 301–303, Nos. 393–404.

S. was dissolved, C. taking all the assets & assuming all the liabilities of the firm:—*Held*: in the absence of fraud, the goods of the firm were effectually transferred to C., & were subject to an execution placed in the hands of debt. sheriff with instructions to levy upon & sell the goods of C.—**CROWE v. BUCHANAN** (1903), 36 N. S. R. 1.—**CAN.**

PART III. SECT. 1, SUB-SECT. 4.—  
E. (f) ii.

**717 i. Goods made over by debtor to third party—With intent to defeat execution.]—**In trespass for taking hay, which pltf. claimed to have been delivered to him by debt. in payment of a debt:—*Held*: evidence was admissible on the part of debt., to show that the hay was delivered to pltf. in order to prevent its being seized on execution against debt., & that no property was intended to pass to pltf.—**KNOWLES v. ADAMS** (1863), 5 All. 445.—**CAN.**

**n. — Without delivery.]—**The sale of goods by parol in this case, without any actual delivery & change of possession:—*Held*: void as against subsequent creditors.—**WILLIAMS v. RAPELJE** (1859), 8 C. P. 186.—**CAN.**

**o. — — —.]—**Pltf. purchased & paid for a carriage from one F., but did not remove it from the shop. At the time of the sale, debt., as sheriff, held an execution against the goods of F., of which F. had notice, & another one was placed in his hands subsequently to the sale to pltf. F. carried on business as usual, notwithstanding these executions, & an actual seizure did not take place till later:—*Held*: pltf., having left the carriage in the vendor's hands more than a reasonable time for the removal thereof, & there being no delivery, followed by an actual & continued change of possession, nor any bill of sale filed, the property remained in F.'s hands liable to seizure.—**CARRUTHERS v. REYNOLDS**

(1862), 12 C. P. 596.—**CAN.**

**p. — Third party in statutory possession.]—***Held*: the taking possession by the B. & L. H. Railway Co., under statute, of the property previously owned by the B. B. & G. R. Co., operated to transfer the same to the former, so as to prevent its being seized under a *fi. fa.*—**BUFFALO & LAKE HURON RY. CO. v. CORBETT** (1859), 8 C. P. 536.—**CAN.**

**q. — — —.]—**Defts., warehousemen, holding certain grain for one M., gave him a warehouse receipt which he indorsed to pltf., who had purchased the grain either from or through him. The sheriff received a *fi. fa.* against M., under which he seized. M. made a voluntary assignment in insolvency. The sheriff gave an order for the grain to the assignee. Pltf. brought detinue & trover against defts., who had shipped a portion of the grain to him:—*Held*: he was entitled to recover, the grain passed to pltf. by the sale; & there was a sufficient change of possession, in the fact that upon & after the sale defts. held the grain for pltf., instead of for M., who was not himself in actual possession when he sold.—**RICHARDSON v. GRAY** (1869), 29 U. C. R. 360.—**CAN.**

**r. — — —.]—**Pltf. & P. entered into an agreement whereby pltf. agreed to purchase, & P. agreed to sell, all the deals that P. should cut & manufacture during 1897. The deals were hauled out & piled alongside the railway siding ready to be loaded on board the cars. A large quantity was placed upon the cars by pltf. with the assent of P., & was sent for shipment. The balance of deals remaining at the station having been levied upon by debt. sheriff, under an execution, & absent or absconding debtor process against P.:—*Held*: there was an irrevocable appropriation of the deals under which pltf. became possessed of the right to receive & to have them

under the contract.—**JOHNSON v. LOGAN** (1899), 32 N. S. R. 28.—**CAN.**

**s. Goods sold to debtor—Found in possession of third party.]—**There is no presumption that goods sold in one year continue the property of the vendee when afterwards found in the possession of a third party as owner, & the sheriff may show that they belonged to such third party.—**KISSOCK v. JARVIS** (1859), 9 C. P. 156.—**CAN.**

**t. — Debtor declining to receive goods in course of delivery.]—**A. & Co. purchased goods in England from B., which were shipped to them, to be delivered at L. While the goods were being transported, A. & Co. becoming insolvent, determined not to receive them, & so advised B., who immediately assented, & sent out a power of attorney to two persons to act for him. In the meantime, & while the goods were in charge of the railway co., defts. in these suits placed executions against the goods of A. & Co. in the hands of the sheriff, & seized the goods some distance from the place of delivery:—*Held*: the declining to receive the goods by A. & Co. in the course of delivery, communicated to B., & B.'s assent to & acting upon it as soon as advised, vested the goods in B., who was, as against the executions, entitled.—**DON v. LAW, DON v. OGILVIE** (1862), 12 C. P. 460.—**CAN.**

**u. Goods in hands of agent for sale.]—**Pltf. placed a mare in the custody of B. for sale with permission to make use of her pending the finding of a purchaser. While the mare was in the possession of B. she was levied upon under an execution issued on a judgment recovered by debt. against B. & was delivered to debt. in settlement of the debt & costs:—*Held*: pltf. was entitled to recover against debt. the value of the mare & damages for her detention.—**GARDEN v. NEILY** (1898), 31 N. S. R. 89.—**CAN.**



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (f) iii., iv., v., vi., vii., viii., ix. & x.]*

*iii. Goods of Debtor Jointly with Third Party.*

**719. Not seizable.]**—The declaration stated that pltf. was possessed as of his own property of certain cattle, to wit, four horses, which deft. converted & disposed of to his own use. Pleas, that they were not the property of pltf.; that a judgment was recovered against J., & that deft., a sheriff's officer, seized them under an execution against J., same being the goods & chattels of J., & liable to be seized & taken as aforesaid, & not being the property of pltf. To which the pltf. replied, that they were the cattle & property of pltf. *modo et forma*. At the trial it was found by the jury that they were the property of pltf. & J. jointly:—*Held*: the issue raised by deft. was, whether the cattle were the sole property of J., & the jury having found that they were the joint property of pltf. & J., pltf. was entitled to recover.—*FARRAR v. BESWICK* (1836), 1 M. & W. 682; 2 Gale, 153; Tyr. & Gr. 1053; 5 L. J. Ex. 225; 150 E. R. 608.

*Annotations:—Refd. Higgins v. Thomas* (1846), 8 Q. B. 908. *Mentd. Mayhew v. Herrick* (1849), 7 C. B. 229.

*iv. Goods of Bankrupt.*

*See* BANKRUPTCY, Vol. IV., p. 175, No. 1624; Vol. V., pp. 673, 732, 733, 735, 768, 769, 808–837, 982, 1092–1095, 1181–1183, Nos. 5957, 6342, 6350, 6362, 6603–6608, 6902–7077, 8034, 8928–8947, 9547, 9549, 9551, 9558, 9559.

*v. Goods Subject to Bill of Sale.*

*See, generally, BILLS OF SALE, Vol. VII., pp. 1 et seq.*

**720. Whether seizable—Not if bill executed bonâ fide.]**—A farmer gave a bill of sale of all his farming stock to secure a debt, the agent of the vendee took possession, & resided on the farm while he converted the stock, but the vendor also continued to reside on the farm, & exercised acts of ownership over parts of the stock:—*Held*: the debt being *bonâ fide*, & the bill of sale taken with a view to recover that debt, the jury were warranted in finding the bill of sale good against a judgment creditor taking the stock in execution.—*BENTON v. THORNHILL* (1816), 7 Taunt. 149; 2 Marsh. 427; 129 E. R. 60.

*Annotation:—Refd. Martindale v. Booth* (1832), 3 B. & Ad. 498.

**721. — Bill of sale executed after seizure—Without notice of seizure—What amounts to notice.]**—*GLADSTONE v. PADWICK*, No. 564, *ante*.

**722. — Subject to rights of holder.]**—On an interpleader summons:—*Held*: after acquired property passed under a bill of sale, & the sheriff seized subject to the equities.—*ANON.* (1876), 2 Char. Cham. Cas. 12; Bitt. Prac. Cas. 128.

**Ship.]**—*See* Sub-sect. 4, E. (e), xii., *ante*.

**Goods in apparent possession of grantor.]**—*See*

*BILLS OF SALE, Vol. VII., pp. 110–118, Nos. 649–685.*

**Goods of which grantor not true owner.]**—*See* *BILLS OF SALE, Vol. VII., pp. 55, 56, 118–126, Nos. 293–298, 686–717.*

**Rights of parties—Grantee against execution creditor.]**—*See* *BILLS OF SALE, Vol. VII., pp. 144, 145, Nos. 793, 794, 798, 799.*

**Grantee against wrong-doer.]**—*See* *BILLS OF SALE, Vol. VII., pp. 151, 152, Nos. 821–823.*

**After satisfaction of grantee.]**—*See* *BILLS OF SALE, Vol. VII., p. 157, No. 843.*

**Where transfer occurred.]**—*See* *BILLS OF SALE, Vol. VII., pp. 156, 157, Nos. 837–839, 841.*

**Goods seized in execution before registration of bill.]**—*See* *BILLS OF SALE, Vol. VII., pp. 13, 31, 84, 105, 106, 108, Nos. 53, 155, 486, 628–634, 645–648.*

**Interpleader by or against execution creditor.]**—*See* *BILLS OF SALE, Vol. VII., p. 128, Nos. 724–730.*

*vi. Goods of Clergyman.*

*See* ECCLESIASTICAL LAW, Vol. XIX., pp. 417 *et seq.*

*vii. Goods of Companies.*

*See* COMPANIES, Vol. X., pp. 739, 755, 761, 762, 764, 1185, 1187, 1189, Nos. 4621, 4716, 4763–4767, 4783, 8104, 8414–8420, 8434, 8437–8439.

**Railway company—Exemption of rolling stock.]**—*See* Nos. 669–674, *ante*.

*viii. Goods Distrained.*

**723. Whether seizable—Goods taken over by debtor's trustee in bankruptcy.]**—Goods seized & sold by the landlord under a distress for rent without any collusion, & purchased by a trustee of the tenant's estate under an assignment by such tenant, for the benefit of the creditors, out of the trust funds, are not liable to be taken in execution by an annuity & judgment creditor, although they are permitted by the trustees to remain in the possession of the tenant.—*GUTHRIE v. WOOD* (1816), 1 Stark. 367, N. P.

**724. —.]**—Where a sheriff seized goods under a *fi. fa.*, which were in the possession of another person under a distress for rent:—*Held*: the sheriff was not entitled to relief under Interpleader Act, 1831 (c. 58).—*HAYTHORN v. BUSH* (1834), 2 Cr. & M. 689; 2 Dowl. 641; 3 L. J. Ex. 210; 149 E. R. 938.

*—.]—See* No. 781, *post*.

*—.]—See, also, DISTRESS, Vol. XVIII., p. 342, Nos. 779–781.*

*See, further, Sub-sect. 5, A., post.*

*ix. Goods Held in Fiduciary Capacity.*

**725. General rule—Property in hands of trustee not seizable.]**—A. executed a deed, by which he conveyed chattels to B. in trust as to one moiety for certain scheduled creditors, as to the other for

**PART III. SECT. 1, SUB-SECT. 4.—**  
**E. (f) iii.**

**b. Whether seizable.]**—Testator bequeathed to J. E. B. & his wife B. J. B. certain real & personal estate:—*Held*: the gift was for the benefit of deft. J. E. B., & his wife jointly, & his interest could not be attached by an execution creditor.—*FISKEN v. BROOKE* (1879), 4 A. R. 8.—**CAN.**

**c. — Indivisible chattel.]**—A. having purchased from B. a half interest in a brood mare, paid in his purchase money \$50 more than the half interest was worth, on the understanding that B. was to keep & take care of the mare for a year, when A.

was to have her, & her expenses were thereafter to be shared equally between them. During the year, & while in B.'s possession, she was seized & sold by the sheriff under an execution against B. Subsequently the mare had a colt which was *in gremio* at the time of the sale:—*Held*: A. & B. were tenants in common of the mare; B.'s possession of the mare was not his sole or exclusive possession, but the possession of both; the sheriff's sale passed only B.'s interest in the mare, & C. by his purchase became a co-owner with A.; the property in the colt followed that of its dam, & A. was an owner of an undivided moiety in both.—*GUNN v. BURGESS* (1884), 5 O. R. 685.—**CAN.**

**PART III. SECT. 1, SUB-SECT. 4.—**  
**E. (f) ix.**

**d. Trust property—Vested in administratrix—In trust for herself & others.]**—Where property is vested in an administratrix in trust for the use of herself & others, such property cannot be seized in execution for her personal debt, though her legal estate be coupled with a beneficial interest in herself for life.—*COLONIAL BANK OF AUSTRALASIA v. COOPER* (1876), 2 V. L. R. 41.—**AUS.**

**e. — Remedy of cestui que trust—In equity.]**—A dry legal estate may, at law, be sold by the sheriff under a *fi. fa.* against the property of the trustee, & the only remedy of the

A.'s own benefit. C., a creditor not in the schedule, sued A., & recovered & took out execution against the chattels in the hands of B. B. sued the sheriff's officer & recovered at law. Bill for an injunction on the ground that the deed was void against creditors for the moiety. The ct. refused the injunction; for there can be no execution, against goods in the hands of a trustee.

There are different situations in which an execution cannot reach: first, from the nature of the property, as stock in the funds; secondly, from the hands in which it is, as a trustee's. Here B. held the property in trust for certain creditors, & A. If he had converted it, or suffered it to be taken to any other purposes, it would have been a breach of trust in him; his action seems therefore to have been properly brought. Cts. of equity have never granted an injunction on a similar case (MACDONALD, C.B.).—CAILLAUD v. ESTWICK (1794), 2 Anst. 381; 145 E. R. 909.

**726. Party holding goods as trustee — Manager of business.]**—Pltf. having purchased a public-house, for which he could not himself obtain a license, because he resided in another tavern, put B., an insolvent person, into the house as his servant, to keep it for him, & supplied him with money to pay for the license, which was granted to B.:—*Held*: the sheriff was not entitled to take, under an execution against B., pltf.'s liquors & chattels in the house, committed to B.'s custody.—DAWSON v. WOOD (1810), 3 Taunt. 256; 128 E. R. 102.

*Annotations*:—**Consd.** *Re Morgan, Pillgrem v. Pillgrem* (1881), 18 Ch. D. 93. **Refd.** *Reed v. Blades* (1813), 5 Taunt. 212; *Jarmain v. Hooper, Pilcher & Heenan* (1843), 13 L. J. C. P. 63.

**727. — Vendor for purchaser.]**—A., for a good consideration, assigned his interest in a farm, & his cattle & implements of husbandry then in the possession of the sheriff under a writ of *fi. fa.* at the suit of C., & the property was liberated by the sheriff on his taking security from B. B., after the assignment, managed the property, but A. continued in possession; on the property being afterwards taken in execution at the suit of D.:—*Held*: it was protected by the assignment to B.—JEZEPIH v. INGRAM (1817), 8 Taunt. 838; 1 Moore, C. P. 189; 129 E. R. 609.

*Annotations*:—**Refd.** *Latimer v. Batson* (1825), 4 B. & C. 652; *Martindale v. Booth* (1832), 3 B. & Ad. 498.

**728. — Mortgagor for mortgagee.]**—A. being seised in fee of a close, on which a windmill was erected, mortgaged the close to B. for 1,000 years, & in same deed there was a conveyance by bargain & sale of the mill to him in fee. The mill was built of wood, removable at pleasure, & fixed to brickwork, which was let into the ground:—*Held*: the mill could not be taken in execution under *fi. fa.* sued out against A. by one of his creditors, although A. had continued in possession, & carried on his trade therein.—STEWART v. LOMBE (1820), 1 Brod. & Bing. 506; 4 Moore, C. P. 281; 129 E. R. 818.

*Annotations*:—**Mentd.** *Hubbard v. Bagshaw* (1831), 4 Sim. 326; *Ex p. Loyd* (1834), 3 Deac. & Ch. 765; *Ex p. Belcher* (1835), 4 Deac. & Ch. 703; *Ex p. Reynal* (1841), 2 Mont. D. & De G. 443; *Cook v. Walker* (1855), 25 L. T. O. S. 51.

**729. — Land under trust for sale — Debtor**

*cestuique trust* is in equity.—HORWOOD v. MURDOCH (1877), 3 V. L. R. 358.—AUS.

**1. — Debentures.]**—BROCKVILLE v. SHERWOOD (1859), 7 Gr. 297.—CAN.

PART III. SECT. 1, SUB-SECT. 4.—E. (f) x.

**g. Crops—Upon land fraudulently assigned.]**—Crops grown upon land

J.—VOL. XXI.

transferred or leased in fraud of creditors, which are grown at the sole expense of the fraudulent vendee or lessee, belong to him & cannot be seized under execution as the goods of the vendor or lessor.—COTTON v. ROYD (1915), 31 W. L. R. 797.—CAN.

**h. — Wife registered owner.]**—Where grain seized in execution is claimed by the wife of the execution-

**the beneficiary.]**—A judgment creditor has no claim on a fund, the produce of land over which a discretionary power of sale is given, & which is limited to debtor in default of sale if the power should at any time be exercised. Thus, where lands were limited to trustees, in trust to sell at discretion, & to pay certain debts, & to pay the surplus of the moneys to B., & in default of sale the lands were limited to B. in fee:—*Held*: B.'s judgment creditors could claim no lien on the produce of the lands when sold.—FOSTER v. BLACKSTONE (1833), 1 My. & K. 297; 2 L. J. Ch. 84; 39 E. R. 694; *subsequent proceedings, sub nom.* FOSTER v. COCKERELL (1835), 9 Bli. N. S. 332, H. L.

*Annotations*:—**Refd.** *Arden v. Arden* (1885), 29 Ch. D. 702. **Mentd.** *Peacock v. Burt* (1834), 4 L. J. Ch. 33; *Timson v. Ramsbottom* (1837), 2 Keen, 35; *Jones v. Jones* (1838), 8 Sim. 633; *Meux v. Bell* (1841), 1 Haro, 73; *Meek v. Kettlewell* (1842), 11 L. J. Ch. 293; *Bugden v. Bignold* (1843), 2 Y. & C. Ch. Cas. 377; *Etty v. Bridges* (1843), 2 Y. & C. Ch. Cas. 486; *Wiltshire v. Rabbits* (1844), 14 Sim. 76; *Wilmot v. Pike* (1845), 5 Haro, 14; *Rice v. Rice* (1853), 2 Drew. 73; *Rooper v. Harrison* (1855), 2 K. & J. 86; *Consolidated Investment & Insee. Co. v. Riley* (1859), 1 Giff. 371; *Macleod v. Buchanan* (1864), 4 De G. J. & Sm. 265; *Ward v. Duncombe*, [1893] A. C. 369.

**730. — Bailee.]**—Pltfs., brewers, supplied a customer with porter in casks on the terms that the empty casks were to be returned at his expense & risk, within six months from the date of the contract, or paid for at invoice price, at the option of the shippers:—*Held*: as soon as the casks were empty, the vendee of the porter was a mere bailee of the casks during pleasure, & the vendors had such an immediate right of possession as entitled them to maintain trover against a sheriff who wrongfully took them in execution.—MANDERS v. WILLIAMS (1849), 4 Exch. 339; 18 L. J. Ex. 437; 13 L. T. O. S. 325; 154 E. R. 1242.

*Annotation*:—**Consd.** *Jelks v. Hayward*, [1905] 2 K. B. 460.

— **Property comprised in marriage settlement.]**—See Nos. 735, 730, *post*.

**Husband for wife.]**—See Nos. 735, 740, 741, *post*.

#### x. Goods Fraudulently Assigned.

**731. Authority to levy—What amounts to.]**—In trespass against the sheriff for seizing & converting goods, as the goods of A., in which pltfs. claimed property under a prior bill of sale from A., it is necessary for the sheriff, in order to be let in to contend that the bill of sale is fraudulent & void, to give some evidence that he seized by authority from an execution creditor of A., as the bill of sale would be valid between the parties & against strangers, but void only as against creditors. To connect the sheriff with the transaction, pltfs. put in evidence his warrant to his officer to levy on the goods of A., which warrant recited a writ of *fi. fa.* at the suit of an execution creditor:—*Held*: the recital in the warrant was sufficient evidence, & the sheriff was not obliged to put in the judgment or the writ of *fi. fa.*—BESSEY v. WINDHAM (1844), 6 Q. B. 166; 14 L. J. Q. B. 7; 8 Jur. 824; 115 E. R. 64.

*Annotations*:—**N.F.** *White v. Morris* (1852), 11 C. B. 1015. **Consd.** *Haylock v. Sparke* (1853), 1 E. & B. 471; *Bowes v. Foster* (1858), 27 L. J. Ex. 262. **Mentd.** *Phillipotts v. Phillipotts* (1850), 10 C. B. 85.

debtor, & the execution-debtor & his wife were at the time of seizure living on the farm where the grain was, & farm had been transferred by the execution-debtor to his wife, the *onus* is on execution-creditor to establish that the grain belonged to debtor. If the farm on which the grain was grown had been transferred by the execution-debtor to his wife fraudulently to defeat the execution, although



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (f) x. & xi*

**732.** ———.]—In trespass against an execution creditor & a bailiff of a county ct., for seizing goods, assigned as security for an advance of money, upon trust to permit the assignor to remain in possession until default in payment at the time stipulated & upon further trust to sell them upon such default being made, pltf. put in the warrant of execution, with the indorsement thereon by the officer that he had taken the goods under it:—*Held*: (1) the bailiff, as well as the execution creditor, was bound to prove the judgment; (2) the warrant, reciting the judgment, though put in by pltf., was no evidence of such judgment.—*WHITE v. MORRIS* (1852), 11 C. B. 1015; 21 L. J. C. P. 185; 18 L. T. O. S. 77, 256; 16 Jur. 500; 138 E. R. 778.

*Annotations*:—*Consd.* Haylock v. Sparke (1853), 1 E. & B. 471; McMahon v. Lennard (1858), 6 H. L. Cas. 970. *Refd.* Bowes v. Foster (1858), 2 H. & N. 779; Burling v. Harley (1858), 3 H. & N. 271. *Mentd.* Barker v. Furlong, [1891] 2 Ch. 172.

**733.** ——— *Evidence of.*]—*BESSEY v. WINDHAM*, No. 731, *ante*.

**734.** ———.]—*WHITE v. MORRIS*, No. 732, *ante*.

*Justification.*]—*See* Part II., Sect. 20, sub-sect. 4, A., *ante*.

*What amounts to fraudulent conveyance.*]—*See* FRAUDULENT & VOIDABLE CONVEYANCES.

#### xi. Goods of Husband and Wife.

*See, now, Married Women's Property Act, 1882 (c. 75).*

**735. Property of wife—Debt of husband—Term of years—Assigned by her to trustees.**]—*PIT v. HUNT* (1681), 2 Cas. in Ch. 73; 1 Eq. Cas. Abr. 58; 22 E. R. 852; *sub nom.* *PITT v. HUNT*, 1 Vern. 18; *sub nom.* *HUNT v. PIT*, Freem. Ch. 78, L. C.

*Annotations*:—*Mentd.* Jewson v. Moulson (1742), 2 Atk. 417; Inledon v. Northcote (1746), 3 Atk. 430; Becket v. Becket (1760), 1 Dick. 340; Doe d. Shaw v. Steward (1834), 1 Ad. & El. 300; Sturgis v. Champneys (1839), 9 L. J. Ch. 10; Hanson v. Keating (1844), 4 Hare, 1.

**736.** ———.]—(1) Goods of testator in the hands of his exor. cannot be seized in execution of a judgment against the exor. in his own right.

(2) The wife has a term of years vested in her before marriage. By the marriage the husband acquires a right to dispose of that term. . . .

that does not necessarily mean that the crop belonged to execution-debtor rather than his wife, yet the mere fact that she is the registered owner is not sufficient to give the wife the crop; if the farm operations went on after the transfer just the same as before & the seed grain for the crop was purchased by execution-debtor the ct. may find that he is the owner of the crop, so that it is subject to the execution.—*LEHPI v. FRET*, [1921] 2 W. W. R. 326.—CAN.

**k. Mortgage—In fraud of creditors—Voidable.**]—*SYKES v. SOPER* (1913), 29 O. L. R. 193; 4 O. W. N. 1554.—CAN.

#### PART III. SECT. 1, SUB-SECT. 4.—E. (f) xi.

**1. Property of wife—Debt of husband.**]—A married woman, married before 1859, without any settlement, owned land about a mile from the farm on which she was living with her husband. The husband who managed this land sowed it with hay, the seed being his own, & the crop was afterwards cut at the expense of the wife, & taken to the husband's farm, where it was kept separate from his hay:—*Held*:

the hay belonged to the wife, & was not seizable under an execution against the husband.—*PLOWS v. MAUGHAN* (1877), 42 U. C. R. 129.—CAN.

**m.** ———.]—Pltf., who had been married in 1864, cultivated land, living upon it with her husband & working it under his advice, one-half of the land having been in 1874 devised to her by the father of her husband, the other half having been in like manner devised to her son. In an interpleader action brought by her against an execution-creditor of her husband:—*Held*: pltf. was entitled to the crops on the whole farm as against the execution creditor.—*INGRAM v. TAYLOR* (1881), 7 A. R. 216.—CAN.

**n.** ———.]—In order that the property of a married woman who carries on a business for herself may be protected from executions against her husband, it is not necessary that she should live separate & apart from her husband, or that the business should be carried on in a house other than that in which the husband & his wife reside.—*MURRAY v. MCCALLUM* (1883), 8 A. R. 277.—CAN.

**o.** ———.]—Pltf., a married

Such a term may be taken in execution for husband's debt (*BULLER, J.*).

(3) Upon information given to the sheriff that the goods were the goods of testator, unappropriated by the exor., & on which he had no demand, he might have summoned a jury; & had the jury found them to be the goods of testator, not of the exor., he would have been justified in returning *nulla bona* (*GROSE, J.*).—*FARR v. NEWMAN* (1792), 4 Term Rep. 621; 100 E. R. 1209.

*Annotations*:—*As to* (1) *Distd.* Quick v. Staines (1798), 1 Bos. & P. 293. *Consd.* M'Leod v. Drummond (1810), 17 Ves. 152. *Distd.* Ray v. Ray (1815), Coop. G. 264. *Apld.* Gaskell v. Marshall & Poland (1831), 1 Mood. & R. 132. *Refd.* Fenwick v. Laycock (1841), 2 Q. B. 108; Rouch v. Wright (1841), 8 M. & W. 155; Kinderley v. Jarvis (1856), 22 Beav. 1. *As to* (3) *Refd.* Balme v. Hutton (1833), 9 Bing. 471. *Generally, Mentd.* Hill v. Simpson (1802), 7 Ves. 152; Doe d. Woodhead v. Fallows (1832), 2 Cr. & J. 481; Wilson v. Moore (1834), 1 My. & K. 337.

**737.** ——— *Bigamous marriage—Goods not seizable.*]—*GLASSPOOLE v. YOUNG*, No. 710, *ante*.

**738.** ——— *Agreement to settle by husband—No transfer in fact effected.*]—N., in a marriage settlement, reciting that I., his intended wife, was possessed of certain goods, & that it had been agreed, that in case she survived him she should have the goods & such articles as might be brought in lieu thereof, for her own use, & in case she should die before him, that she might dispose of the goods, covenanted with trustees that he would not dispose of the goods without the consent of I., that he would purchase new articles in lieu of those which might be worn out or disposed of, that if she survived him she should have the goods for her own use, & if he survived her she should dispose of them, subject to his life interest. No assignment of the goods was made to the trustees. N. & I. separated after their marriage, & I. demised the goods to F., as a yearly tenant:—*Held*: (1) the goods were, notwithstanding the settlement, the property of N., & might be seized under a *fi. fa.* against him; but (2) they could not be seized for his debt during the continuance of the demise to F.—*IZOD v. LAMB* (1830), 1 Cr. & J. 35.

*Annotation*:—*As to* (2) *Folld.* Powlett v. Lee (1852), 19 L. T. O. S. 23.

**739.** ——— *Settlement by wife's father.*]—The savings of a married woman's separate estate, like the income itself, become her separate estate in equity.

Furniture was settled upon a married woman

woman, carried on business separate & apart from her husband, with her husband's consent, on premises occupied by her under a lease to herself. Deft., sheriff, under an execution against the husband, levied upon a piece of machinery on the premises, & upon a number of saws used in connection with the machine. The trial judge found that the machine levied upon was the property of the husband, but there was uncontradicted evidence that the saws were the property of the wife, having been purchased by her personally for use in connection with the business:—*Held*: pltf. was entitled to recover for the value of the saws.—*SLAUNWHITE v. ARCHIBALD* (1897), 30 N. S. R. 240.—CAN.

**p.** ———.]—*HARVEY v. SILZER* (1905), 1 W. L. R. 360.—CAN.

**q.** ——— *Onus of proof.*]—Where property, apparently in the husband's possession, is claimed to belong to the wife as her separate property, so as to exempt it from seizure under execution against the husband, the evidence of the separate property of the wife ought to be clear & satisfactory, & in order to justify such

[by her father] to her separate use; with money also her separate property she from time to time renewed such as wore out. The whole were seized by the sheriff for a debt of her husband:—*Held*: as a ct. of equity would under the circumstances have restrained the sheriff from selling the accretions as well as the original furniture, a ct. of law, upon an interpleader summons, must take notice of the equitable claim of the wife's trustee, & direct the sheriff to withdraw.—*DUNCAN v. CASHIN* (1875), L. R. 10 C. P. 554; 23 W. R. 561; *sub nom.* *DUNCAN v. CASHIN, CARR CLAIMANT*, 44 L. J. C. P. 225; 32 L. T. 497.

*Annotations*:—*Apld.* *Engelback v. Nixon* (1875), L. R. 10 C. P. 645. *Refd.* *Norman v. Villars* (1877), 36 L. T. 663; *Jennings v. Mather*, [1901] 1 K. B. 108.

**740. ——— Goods purchased from husband.]**  
—A wife, who had separate estate, agreed to purchase from her husband some furniture & other personal chattels belonging to him, which were in the house in which she lived with him. She stipulated that a receipt for the purchase-money should be given to her, & instructed her solr. to draw the receipt. After the purchase-money had been paid to the husband he signed a receipt which the wife's solr. had prepared. This document acknowledged the receipt from the wife of the agreed sum, as the purchase-money "for all my furniture, plate, etc., which I hereby acknowledge are now absolutely her property." There was no formal delivery of the goods by the husband to the wife, but they remained, as they had previously been, in the house in which the husband & the wife were living together. She subsequently sent part of the goods to her own bankers, & the remainder were afterwards taken in execution by a judgment creditor of the husband. In an interpleader issue between the wife & the execution creditor:—*Held*: (1) the receipt, notwithstanding the words at the end of it, did not form part of the transaction passing the property in the goods to the wife, but the property had passed to her by the prior & independent bargain, & consequently the receipt did not require registration under Bills of Sale Act, 1878 (c. 31), & the wife was entitled to the goods as against the execution creditor; (2) the wife had a sufficient possession of the goods to take the case out of the Act, for the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife who had the legal title.—

claims being sustained, there ought to be no reasonable doubt of their correctness.—*SEERY v. TEMPLE* (1879), 19 N. B. R. (3 P. & B.) 362.—*CAN.*

**r. ———.]**—Goods purchased by a married woman were seized under execution issued on a judgment recovered against her husband:—*Held*: the property having been found in the possession of the husband & wife, the *onus* was on the wife, claiming to be owner of the property, to prove that she bought it with her own money.—*CORMIER v. MATTINSON* (1895), 27 N. S. R. (15 R. & G.) 354.—*CAN.*

**-.]**—Judgment was obtained against pltf.'s husband & horses, waggons, machinery, etc., were seized by the sheriff under execution on it. On an interpleader issue to try the question of property in these articles, pltf. contended that the articles were hers, acquired mainly through a bill of sale & in a business carried on by her separately from her husband:—*Held*: the business might be hers & yet her husband although her manager might do business for himself if he chose; pltf. had not discharged the *onus* of proving her title

to the property; on the facts, the property other than that covered by the bill of sale was her husband's & liable to seizure under deft.'s execution.—*DAVISON v. SCHWARTZ* (1908), 8 W. L. R. 359.—*CAN.*

**t. ———.]**—Pltf., a married woman, was the registered owner of land, & lived thereon with her husband & children. She had bought the land without assistance from her husband, who was insolvent, & she farmed it, with the assistance of her children & others, & her husband at times assisted in the farm-work, but had a separate occupation. Produce of the land was seized by the sheriff, under deft.'s execution against the husband, & was claimed by pltf. as her separate property:—*Held*: in spite of certain suspicious circumstances, the evidence did not justify the conclusion that pltf. was guilty of fraud, & therefore, the property seized should be declared to be pltf.'s as against deft.'s execution.—*KARST v. COOK* (1910), 15 W. L. R. 679; 3 Sask. L. R. 406.—*CAN.*

**a. ———.]**—Where a crop is grown on land owned by a married woman, & both herself & her

*RAMSAY v. MARGRETT*, [1894] 2 Q. B. 18; 63 L. J. Q. B. 513; 70 L. T. 788; 10 T. L. R. 355; 9 R. 407; 1 Mans. 184, C. A.

*Annotations*:—*As to* (1) *Apld.* *Clapham v. Ives, Holmes, Claimant* (1904), 91 L. T. 69. *Consd.* *Re Reels, Ex p. Clough*, [1904] 1 K. B. 451. *As to* (2) *Consd.* *Re Satterthwaite, Ex p. Trustee* (1895), 2 Mans. 52. *Folld.* *Withers v. Berry* (1895), 39 Sol. Jo. 559; *French v. Gething*, [1922] 1 K. B. 236. *Refd.* *Re Magnus, Ex p. Salaman* (1910), 80 L. J. K. B. 71; *Rogers, Eungblut v. Martin* (1910), 103 L. T. 527; *Re Lavey, Ex p. Trustee*, [1919] B. & C. R. 116; *Canvey Island Comrs. v. Preedy*, [1922] 1 Ch. 179.

**741. ——— Post-nuptial gift by husband.]**  
By a post-nuptial deed in May, 1914, a husband gave his wife certain household furniture in the house in which the husband & wife lived together. The furniture remained in the house, which continued to be occupied by the husband & wife. The deed was not registered under Bills of Sale Act, 1878 (c. 31). Execution creditors under a judgment recovered in 1920 against the husband levied execution at the house. The wife claimed the furniture. In an interpleader issue between the wife & the execution creditors:—*Held*: the furniture was not in the possession or apparent possession of the husband within Bills of Sale Act, 1878 (c. 31), s. 8; nor in his order & disposition or reputed ownership within Married Women's Property Act, 1882 (c. 75), s. 10.

*Qu.*: whether Married Women's Property Act, 1882 (c. 75), s. 10, applies only when a husband & wife are living together in premises where the husband carries on business.—*FRENCH v. GETHING*, [1922] 1 K. B. 236; *sub nom.* *FRENCH v. GETHING, GETHING CLAIMANT*, 91 L. J. K. B. 276; 126 L. T. 394; 38 T. L. R. 77; 66 Sol. Jo. 140; [1922] B. & C. R. 30, C. A.

**Execution against married woman.]**—*See HUSBAND & WIFE.*

**742. Property of husband — Comprised in marriage settlement—Interest to wife.]**—One being indebted by settlement before marriage, in consideration of the marriage, & of £10,000 his wife's portion, which was supposed to be more than the amount of his debts at that time; conveys all his real estate, & likewise his household goods, his real estate, alone not being thought an adequate settlement, in trust for himself for life; remainder to his wife for life, remainder to his first & other sons in strict settlement. The lady being a ward of Chancery, the settlement was approved of by the master, & the goods enumerated in a schedule. A. after the marriage, continued

husband reside upon that land, the crop, being the property of her land, *prima facie* belongs to her, & it can only be held to be the husband's when it is shown that he carried on the farming operations as head of the family or as tenant of the land.—*MOOSE MOUNTAIN LUMBER & HARDWARE CO. v. HUNTER* (1910), 13 W. L. R. 561; 3 Sask. L. R. 89.—*CAN.*

**b. ———.]**—Pltf. purchased from a married woman certain furniture & other personal property contained in a building erected by her husband upon land, the deed of which was taken in the name of the wife. The property in question was claimed by the wife as having been purchased out of her own earnings. In the absence of evidence to show that the wife ever had any title to the property or any possession of it other than what must be construed to be the possession of the husband:—*Held*: pltf., although a *bona fide* purchaser for value, could not recover as against an attaching creditor of the husband.—*NICHOLLS v. MCNEIL* (1916), 50 N. S. R. 67.—*CAN.*

**c. ———.]**—Where grain seized in execution is claimed by the wife of the execution debtor, &



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (f) | taken by such third person.—CROSS v. GLODE*  
*xi. & xii.]* (1797), 2 Esp. 574, N. P.

in possession of the goods; after which a creditor at the time of the settlement, having obtained judgment, took them in execution:—*Held*: the settlement was good against creditors, & the trustees entitled to the possession of the goods.—*CADOGAN v. KENNETT* (1776), 2 Cowp. 432; 98 E. R. 1171.

*Annotations:—Consd.* Jarman v. Woollaton (1790), 3 Term Rep. 618; Farr v. Newman (1792), 4 Term Rep. 621; Holbird v. Anderson (1793), 5 Term Rep. 235. *Follid.* Cross v. Glode (1797), 2 Esp. 574. *Consd.* Dewey v. Bayntun (1805), 6 East, 257; Dawson v. Wood (1810), 3 Taunt. 256. *Refd.* Arundell v. Phipps & Taunton (1804), 10 Ves. 139; Hartley v. Smith (1819), Buck, 368; Simpson v. Forrester (1829), 1 Knapp, 231; Doe d. Richards v. Lewis, Richards v. Lewis (1852), 11 C. B. 1035; Wright v. Dickenson (1861), 4 L. T. 21. *Mentd.* Edwards v. Harben (1788), 2 Term Rep. 587; Gordon v. East India Co. (1797), 7 Term Rep. 228; Doe d. Otley v. Manning (1807), 9 East, 59; Montford v. Cadogan (1810), 17 Ves. 485; Doe d. Dixon v. Willis (1829), 3 Moo. & P. 24; Clarke v. Wright (1861), 6 H. & N. 819.

**743. ——— After acquired property.]—**  
*ANON.*, [1875] W. N. 203; Bitt. Prac. Cas. 19.

**744. ——— Debts of wife — Writ to seize wife's goods only.]—**Ejectment against a *feme sole* who married before trial, & verdict & judgment against her by her original name:—*Held*: it was regular to issue an *habere facias possessionem*, & *fi. fa.* against her by the same name, though the *fi. fa.* was inoperative.

It would be irregular under the *fi. fa.* to take the goods of the husband, for the writ is only to take her goods & she has none (*BAYLEY, J.*).—*DOE d. TAGGART v. BUTCHER* (1815), 3 M. & S. 557; 105 E. R. 719.

*Annotation:—Appld.* Thorpe v. Argles (1844), 1 Dow. & L. 831.

**745. ——— Assigned by husband to wife.]—**  
*RAMSAY v. MARGRETT*, No. 740, *ante*.

**746. ———.]—***FRENCH v. GETHING*, No. 741, *ante*.

**Wearing apparel of wife.]—***See* No. 701, *ante*.

**747. Property in possession of husband — Ownership in third party—As trustee for wife.]—**The mere possession of goods is not sufficient to subject them to an execution issued against the person so possessing them, if it be satisfactorily proved that they were really *bona fide* sold to a third person as a trustee for his wife, & possession

bequeathed all his property to his daughter, a single woman, in terms amounting to a gift to her for her separate use, & appointed her sole extrix. She married after her father's death; & a sum of stock, part of the property bequeathed to her was assigned, to trustees, in trust for her separate use, for life, & if she survived her husband, in trust for her absolutely, & if not, then in trust as she should appoint by will, & subject thereto, in trust for her husband; but the settlement did not notice any other part of the property:—*Held*: the husband did not become entitled, in his marital right to the property remaining unsettled, but was a trustee of it for his wife; & therefore, it could not be taken in execution under a judgment recovered against him.—*NEWLANDS v. PAYNTER* (1810), 4 My. & Cr. 408; 4 Jur. 282; 41 E. R. 158, L. C.; *subsequent proceedings, sub nom.* *HOLMES v. NEWLANDS* (1844), 5 Q. B. 634.

*Annotations:—Consd.* Whitworth v. Gaugain (1844), 3 Hare, 416; Wright v. Wright (1862), 2 John. & H. 647. *Refd.* Langton v. Horton (1842), 1 Hare, 549; Humphrey v. Richards (1856), 25 L. J. Ch. 442; Ashton v. Blackshaw (1870), 39 L. J. Ch. 205.

**749. Parties passing as husband & wife — Property of woman—Whether seizable.]—**Although A. cohabits with B. & assumes his name & passes for his wife, & permits him to appear to be the owner of the furniture of the house in which they live, the furniture, being her property, is not liable to be taken under an execution against B.—*EDWARDS v. BRIDGES* (1818), 2 Stark. 396.

*Annotation:—Dtd.* Edwards v. Farebrother (1828), 2 Moo. & P. 293.

**750. ———.]—**Where a woman has cohabited with a man for several years & passed as his wife, it seems that she cannot maintain trespass against a sheriff for taking goods in execution against the man, they being in the house where the parties resided; but it having been left to the jury to say, whether they thought that the property might not have been given up by the woman to the man during cohabitation, & they having found in the affirmative:—*Held*: their verdict was conclusive.—*EDWARDS v. FAREBROTHER* (1828), 2 Moo. & P. 293; 7 L. J. O. S. C. P. 72.

**751. ———.]—***GLASSPOOLE v. YOUNG*, No. 710, *ante*.

the execution debtor & his wife were at the time of seizure living on the farm where the grain was, & which farm had been transferred by the execution debtor to his wife, the *onus* is on the execution creditor to establish that the grain belonged to the debtor.—*LEHTI v. FREY*, [1921] 2 W. W. R. 326.—*CAN.*

**d. ———.]—**If a wife claims a chattel seized under execution against her husband, & being made *pltf.* in the interpleader issue thereon, shows that it was bought by her with money realised from the sale of crops grown upon her land acquired with her money, she has established a *prima facie* case in favour of her ownership of the chattel, & the *onus* is shifted to the other parties, notwithstanding the fact that her husband, owning the adjoining land on which they reside, has carried on the farming operations on the land, in the absence of evidence to show that he farmed her land as the head of the family or as a tenant.—*PIERCE v. THOMPSON*, [1921] 3 W. W. R. 573.—*CAN.*

**e. ——— Effect of non-compliance with statute.]—**At the time of the conviction & seizure under a warrant, A.

was a married woman carrying on business separately from her husband, but had not complied with Married Women's Property Act, s. 52 by registering the consent in writing of her husband to her acquiring separate property:—*Held*: the property was that of the husband.—*RODENHISER*

**f. ——— Effect of ante-nuptial settlement.]—**By an ante-nuptial settlement made in Lower Canada in 1833, it was agreed between the parties to the marriage that no community of property between them should exist, but that each should hold & continue to enjoy what each then had, or should thereafter acquire. In 1848 certain goods of the husband were sold at sheriff's sale, on execution against the husband, & having been bought in by a third party, were, by a deed of donation, conveyed to the wife for her separate use. The parties having removed to Upper Canada, brought with them these goods, which were seized under execution issued on judgments obtained against the husband:—*Held*: the goods were not liable to seizure for the husband's debts.—

*RYLAND v. ALNUTT* (1865), 11 Gr. 135.—*CAN.*

**g. Where part of purchase money belonged to husband.]—***BELL v. WERMORE* (1880), 19 N. B. R. (3. P. & B.) 534.—*CAN.*

**h. Joint property — Seizable for husband's debts.]—**Deft. commenced an hotel business about the time her husband became insolvent & her husband assisted her in the business. Subsequently, deft. moved to E. & went into partnership with another in a real estate business, the husband acting as manager & agent with authority to sign cheques, etc. *Pltf.* obtained a judgment against the husband in respect of a debt incurred before his insolvency. In an action to enable *pltf.* to realise their judgment against defts.' property:—*Held*: a married woman has, in respect of personal property, all the rights of a *feme sole*; here, on the facts, wife & husband were, however, carrying on the business together & the earnings were therefore the earnings of both; *pltf.* were entitled to judgment.—*FRASER v. KIRKPATRICK* (1907), 5 W. L. R. 581.—*CAN.*

xii. *Goods Let or Hired.*

**752. Execution against lessor — Goods let to lessee — Not seizable.]**—Injunction to restrain sheriff from executing a *fi. fa.* against the furniture & effects of deft. at law, which, with a house & land, had been let by him to pltf., who was in possession, refused.—*GARSTIN v. ASPLIN* (1815), 1 Madd. 150; 56 E. R. 57.

**753. — — — — —.]**—*IZOD v. LAMB*, No. 738, ante.

**754. — — — — —.]**—Furniture let to a tenant cannot be seized under an execution against the lessors.—*POWLETT (EARL) v. LEE* (1852), 19 L. T. O. S. 23, N. P.

**755. Execution against lessee or hirer — Goods of lessor taken — Whether interest of bailee or lessee in goods seizable.]**—*LANCASHIRE WAGGON CO. v. FITZHUGH*, No. 761, post.

**756. — — — — — Action by lessor against sheriff.]**—(1) A. having let his house ready furnished to B. cannot maintain trespass against the sheriff for taking the furniture under an execution against B.; though notice were given that the goods belonged to A.

(2) The distinction between the actions of trespass & trover is well settled; the former is founded on possession, the latter on property. Here pltf. had no possession; his remedy was by an action of trover founded on his property in the goods taken (*LORD KENYON, C.J.*).—*WARD v. MACAULEY* (1791), 4 Term Rep. 489; 100 E. R. 1135.

*Annotations:—As to (1) Folld. Izod v. Lamb* (1830), 1 Cr. & J. 35. *Refd. Jelks v. Hayward, Hackney Furnishing Co., Claimants* (1905), 92 L. T. 692. *As to (2) Overd. Gordon v. Harper* (1796), 7 Term Rep. 9.

**757. — — — — —.]**—Where goods leased as furniture with a house have been wrongfully taken in execution by the sheriff, the landlord cannot maintain trover against the sheriff pending the lease, because to maintain such an action he must have the right of possession as well as the right of property at the time.—*GORDON v. HARPER* (1796), 7 Term Rep. 9; 2 Esp. 465; 101 E. R. 828.

*Annotations:—Distd. Farrant v. Thompson* (1822), 5 B. & Ald. 826. *Folld. Pain v. Whittaker* (1824), Ry. & M. 99. *Apld. Donatty v. Crowther* (1826), 11 Moore, C. P. 479; *Ferguson v. Cristall* (1829), 5 Bing. 305. *Folld. Izod v. Lamb* (1830), 1 Cr. & J. 35; *Bradley v. Copley* (1845), 1 C. B. 685. *Apld. Manders v. Williams* (1849), 4 Exch. 339. *Consd. Jelks v. Hayward*, [1905] 2 K. B. 460. *Refd. Nicolls v. Bastard* (1835), 2 Cr. M. & R. 659; *White v. Morris* (1852), 11 C. B. 1015. *Mentd. Hall v. Pickard* (1812), 3 Camp. 187; *Davis v. Connop* (1814), 1 Price, 53; *Bloxam v. Sanders* (1825), 4 B. & C. 941; *Owen v. Knight* (1837), 4 Bing. N. C. 54; *White v. Teal* (1840), 12 Ad. & El. 106; *Fenn v. Bittleston* (1851), 7 Exch. 152; *Wiltshire v. Cottrell* (1853), 1 E. & B. 674; *Mears v. L. & S. W. Ry.* (1862), 11 C. B. N. S. 850; *Nyburg v. Handelaar* (1892), 61 L. J. Q. B. 709; *Nelson Murdoch v. Wood* (1922), 126 L. T. 745.

**758. — — — — —.]**—Where goods lent on hire have been wrongfully taken in execution by the sheriff:—*Held*: the owner cannot maintain trover against the sheriff, he not having the right of possession as well as the right of property at the time of the sale.—*PAIN v. WHITTAKER* (1824), Ry. & M. 99, N. P.

*Annotations:—Folld. Ferguson v. Cristall* (1828), 2 Moo. & P. 524. *Refd. Nicholls v. Bastard* (1835), 2 Cr. M. & R. 659.

**759. — — — — — Goods unsold.]**—An action by the owner of goods, let for an unexpired term, against the sheriff, for taking them under an execution against the party who hired them, is not maintainable, if it appear that the sheriff

has not sold; & it is in such case the duty of the party letting to give notice to the sheriff, of the limited nature of the hirer's interest.—*DUFFILL v. SPOTTISWOODE* (1828), 3 C. & P. 435, N. P.

*Annotation:—Distd. Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117.

**760. — — — — — Sale of goods by sheriff.]**—If a party has goods on hire for a term, & the sheriff seizes them under an execution against such party, the owner of the goods may maintain an action on the case against the sheriff, if the sheriff sells the entire property of such goods; but to support the action, he must show, that, as soon as the goods were seized, he apprised the sheriff that the goods were lent for a term only, in order that the sheriff might know that he had only a right to sell the qualified property that the hirer had in the goods.—*DEAN v. WHITTAKER* (1824), 1 C. & P. 317, N. P.; *subsequent proceedings*, 3 L. J. O. S. K. B. 67.

*Annotations:—Folld. Duffill v. Spottiswoode* (1828), 3 C. & P. 435. *Consd. Jelks v. Hayward*, [1905] 2 K. B. 460. *Distd. Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117. *Refd. Tancred v. Allgood* (1859), 4 H. & N. 438.

**761. — — — — —.]**—The mere sale by the sheriff, not in market overt, under a *fi. fa.* of a chattel let to the execution debtor, without notice of the owner's interest in it, is not a conversion or ground of action against the sheriff, but an absolute sale, & delivery of the chattel under the sale, to a purchaser; & a user by the purchaser, causing damage to the chattel, constitutes a cause of action.

(1) To a declaration alleging that pltf. having bailed & let to one P. railway waggons for a term, & being the owners, subject to the interest of P., deft. converted them & sold them to some persons unknown, whereby pltf. were injured in their title & interest to & in the waggons, & same had become lost to pltf., deft. pleaded that he sold the waggons & in market overt & converted them to his use as & being sheriff, under a writ of *fi. fa.* against P. & that at the time of such sale & conversion deft. had not any notice of pltf.' title to or interest in the waggons:—*Held*: the plea was an answer to the action.

(2) Pltf. new assigned for a conversion further than in the plea admitted, to wit, by absolutely selling pltf.' interest, & delivering the waggons to divers persons in pursuance of the sale, & thereby causing them to be used by the said persons, & worn by such user, & also that deft. damaged the waggons by causing them to be used, whereby they were worn; & that the waggons were lost to pltf. by reason of the matters mentioned in the declaration, & that by reason of the newly-assigned matters pltf. were injured in their title & interest:—*Held*: the new assignment was good, & was not a departure from the declaration.

*Qu.*: whether the interest of a bailee or lessee of chattels can be taken in execution.—*LANCASHIRE WAGGON CO. v. FITZHUGH* (1861), 6 H. & N. 502; 30 L. J. Ex. 231; 3 L. T. 703.

*Annotations:—As to (1) Refd. Jelks v. Hayward Hackney Furnishing Co., Claimants* (1905), 92 L. T. 692. *Generally, Mentd. Johnson v. Stear* (1863), 15 C. B. N. S. 330; *Hollins v. Fowler* (1875), L. R. 7 H. L. 757; *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495.

**762. — — — — — Necessity for actual damage.]**—An action against the sheriff for selling the reversionary interest of pltf. in goods in the possession of an execution debtor, cannot be



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (f) , xiii. & xiv.]*

supported unless actual damage has been sustained. The declaration alleged that pltf. was the owner of goods let to hire to T., & that deft. took them out of T.'s possession, & absolutely sold & disposed of them, so as to prevent them being followed, whereby pltf. was injured in her reversionary estate. Plea, that deft. sold the goods as sheriff under a *fi. fa.* & not in market overt, & that pltf. had not sustained, & would not sustain any damage by reason of the premises:—*Held*: the plea was an answer, the sale not affecting pltf.'s rights.—*TANCRED v. ALLGOOD* (1859), 4 H. & N. 438; 28 L. J. Ex. 362; 33 L. T. O. S. 150.

*Annotation*:—*Mentd.* *Mears v. L. & S. W. Ry.* (1862), 11 C. B. N. S. 850.

**763. — Notice by owner of goods to sheriff —Of debtor's limited interest.]—***DEAN v. WHITTAKER*, No. 760, *ante*.

**764. — — — — —.]—***DUFFILL v. SPOTTISWOODE*, No. 759, *ante*.

**765. — — — — — Goods on hire purchase agreement.]—**Under a hire-purchase agreement pltf. let to the tenant of premises certain furniture the value of which was about half of that of all the goods upon the premises. Deft., who was the lessor of the premises, having recovered judgment against the tenant for arrears of rent, obtained a *fi. fa.* thereon, under which the sheriff seized all the goods on the premises & some days later, on Apr. 27, 1921, sold them by public auction. The sale realised £105 8s. 8d., & after deduction of the sheriff's charges & other sums, about one-half of that amount, or £52 10s. 6d., was received by deft. in respect of the judgment debt. Pltfs. were informed of the seizure of the goods some days before the sale, but they gave no notice to any one that the goods hired belonged to them, & they made no inquiries until May, 1922, when they for the first time learned of the execution & sale. In an action by pltfs. against deft. to recover the sum last above mentioned as money had & received by deft. to the use of pltfs.:—*Held*: (1) the action for money had & received was well founded; (2) in the circumstances pltfs. were not estopped from maintaining the action by reason of their not having informed the sheriff as agent of deft., or at all, that the goods hired belonged to them & should not be sold; (3) pltfs. were not entitled to recover the whole amount received by deft., but only a proportion thereof corresponding to their share of the goods sold.—*JONES BROTHERS (HOLLOWAY), LTD. v. WOODHOUSE*, [1923] 2 K. B. 117; 92 L. J. K. B. 638; 129 L. T. 317; 67 Sol. Jo. 518, D. C.

**766. — — — — —.]—**Furniture was let for hire with an option to purchase under a hire-purchase agreement, which contained a clause giving the owners the right without previous notice to determine the hiring & retake possession of the furniture, if it should at any time be seized or taken in execution. The furniture was taken in execution by the high bailiff of a county ct., & no claim having been made to it, was appraised & sold under the execution & the proceeds paid into ct., & the furniture delivered to the purchaser. On the day after the sale the owners heard for the first time of the seizure & sale of the furniture, & gave notice of their claim to the proceeds. An interpleader summons was issued at the instance of the high bailiff, & in the course of the interpleader proceedings the

execution creditor admitted the title of claimants, who gave a notice claiming damages against the high bailiff in respect of the alleged conversion of the furniture by selling it:—*Held*: as under the hiring agreement claimants had a right to its possession immediately upon its being taken in execution, the sale by the high bailiff amounted to an act of conversion for which he was responsible in damages to them.—*JELKS v. HAYWARD*, [1905] 2 K. B. 460; *sub nom.* *JELKS v. HAYWARD, HACKNEY FURNISHING CO. CLAIMANTS*, 74 L. J. K. B. 717; 92 L. T. 692; 53 W. R. 686; 21 T. L. R. 527; 49 Sol. Jo. 685, D. C.

**767. — Lessor agent of owner of goods.]—**In an interpleader issue to try whether certain goods were the property of pltf. as against deft., the execution creditor, it was proved that the goods were, at the time of the seizure, in the possession of the execution debtor to whom they had been let by pltf. The goods were in fact the property of W., who had lent them to pltf., who was his agent, allowing her to let them as owner to whom she would:—*Held*: pltf. had sustained her claim.—*GREEN v. STEVENS* (1857), 2 H. & N. 146; 5 W. R. 497.

*Annotations*:—*Consd.* *Peake v. Carter*, [1916] 1 K. B. 652. *Refd.* *Richards v. Jenkins* (1886), 17 Q. B. D. 544.

**Termination of bailment.]—***See* *BAILMENT*, Vol. III., pp. 106, 107, 111, Nos. 315–326, 350.

### xiii. Goods Subject to Lien.

**768. Whether seizable—Without satisfying lien.]—**A. deposits goods with B. as a security for money advanced by B., with a promise to deliver the bill of lading, when it should arrive, indorsed to B. C. is employed as a broker to dispose of the goods for B.'s benefit. Before the bill of lading arrives, the goods are attached in the mayor's ct. in the hands of C. by a creditor of A.:—*Held*: (1) the transfer of the property to B. was complete, though the bill of lading had never been indorsed, & therefore, the foreign attachment was no answer to an action by B. against C. for the proceeds.

(2) Pltf. in a foreign attachment cannot take the money or goods out of the hands of a garnishee who has a lien thereon, without discharging the lien.—*NATHANS v. GILES* (1814), 5 Taunt. 558; 128 E. R. 808; *sub nom.* *GILES v. NATHAN*, 1 Marsh. 226.

*Annotations*:—*Mentd.* *Smidt v. Ogle* (1815), 6 Taunt. 74; *Giles v. Hutt* (1848), 1 Exch. 701; *Dearle v. Ker* (1849), 4 Exch. 82.

**769. — — — — —.]—**A. sells to B. a carriage, to be paid for partly by a bill upon the delivery, & partly by a bill at a future day, & B. neglecting to take the carriage, A. obtains a verdict against him for goods bargained & sold. Until the amount is paid to A., he has a lien upon the carriage, & the sheriff cannot seize it under a *fi. fa.* against the goods of B.—*HOULDITCH v. DESANGES* (1818), 2 Stark. 337, N. P.

**770. — — — — —.]—**The landlord of an inn has a lien on the goods of his guest for board, lodging, & wine supplied to such guest by the guest's order, whatever may be the amount, provided the guest be possessed of his reason, & not an infant. Therefore the sheriff, under a writ of *fi. fa.* against the guest, can only take the guest's goods, subject to the lien of the landlord for such his bill, & not merely subject to a lien for a reasonable quantity of wines, etc., only. The landlord of an inn has a lien for money lent to his guest, if it was agreed

been seized by the sheriff under a *fi. fa.* upon a judgment obtained by defts. against B., pltf.

claimed them, & upon trial of an interpleader issue:—*Held*: verbal sales, if *bond fide*,

were good against subsequent execution creditors of the vendor.—*ESNOUF v. GURNEY* (1895), 4 B. C. R. 144.—*CAN.*

between them at the time of the loans that the guest's goods should be a security for the sums lent.—**PROCTOR v. NICHOLSON** (1835), 7 C. & P. 67, N. P.

*Annotation* :—**Mentd.** *Hughes v. Done* (1841), 1 Q. B. 294.

**771.** —.]—**W.**, captain of a ship, pledged his chronometer, then in the possession of the makers, to defts., the owners of the ship, in consideration of their advancing him £50, & allowing him the use of the instrument during a voyage on which he was about to depart. After the voyage he placed it at the makers, & there pledged it to pltf., for whom the makers, being ignorant of the pledge to defts., agreed to hold it, the money advanced by defts. not having been repaid :—**Held** : the property in the instrument was in defts.—**REEVES v. CAPPER** (1838), 5 Bing. N. C. 136 ; 1 Arn. 427 ; 6 Scott, 877 ; 8 L. J. C. P. 44 ; 2 Jur. 1067 ; 132 E. R. 1057.

*Annotations* :—**Refd.** *Flory v. Denny* (1852), 7 Exch. 581 ; *Young v. Lambert* (1870), L. R. 3 P. C. 142 ; *Mills v. Charlesworth* (1890), 25 Q. B. D. 421. **Mentd.** *Walker v. Clyde* (1861), 10 C. B. N. S. 381 ; *Langton v. Waring* (1865), 18 C. B. N. S. 315 ; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585 ; *Meyerstein v. Barber* (1866), L. R. 2 C. P. 38 ; *Burdick v. Sewell* (1883), 10 Q. B. D. 363 ; *Hilton v. Tucker* (1888), 39 Ch. D. 669 ; *Cochrane v. Moore* (1890), 25 Q. B. D. 57 ; *Morris v. Flipo* (1892), 66 L. T. 320 ; *Dublin City Distillery v. Doherty*, [1914] A. C. 823.

**772.** —.]—**LEGG v. EVANS**, No. 598, *ante*.

**773.** —.]—**BALLS v. PINK**, No. 563, *ante*.

**774.** —.]—**ROGERS v. KENNAY**, No. 777, *post*.

**775.** — **Equitable lien.**]—Deft. T., a ship-builder, being the owner of certain ships, & being engaged in building a screw yacht, pltf. advanced him moneys from time to time. In Oct. 1856, deft. gave pltf. a memorandum, whereby he undertook, "in consideration of the advances to receive as pltf.'s agent the amount due to him, deft., for the screw yacht, & to account to pltf. for same, the amount being pltf.'s property." In Nov. following deft. signed another memorandum whereby he undertook "to forthwith assign all his estate & effects to pltf., on behalf of himself & the rest of his creditors." No assignment was ever made as contemplated in the agreement ; but pltf. continued to employ deft. at a salary in managing the property & completing the screw yacht, until deft. left the premises, taking his furniture with him, & having assigned his lease to the pltf. Pltf. then removed all the vessels & employed another person to look after them.

The vessels were shortly after seized in execution in an action for debt brought against deft. T., by L., another deft. Pltf. claimed to be owner of the vessels. An order for sale in default of payment was obtained in chambers, whereupon the bill was filed :—**Held** : whatever may have been the legal right of pltf. in the vessels before the execution, pltf. had clearly established his right to relief in equity.—**WITHALL v. TUCKWELL** (1859), 34 L. T. O. S. 3 ; 5 Jur. N. S. 929.

**776.** **Sale subject to lien—Refusal of holder of goods to deliver up.**]—The sheriff sold a vessel & her stores by public auction under an execution. The sails were seized on the premises of a sailmaker. At the time the purchase was completed in Aug.

1822, the sheriff gave to the purchaser an order on the sailmaker to deliver up the sails ; but he refused, alleging that he had a lien upon them for £60. The writ was returnable in Michaelmas Term, 1822. In Apr. 1823, the purchaser gave notice to the sheriff that he could not use the vessel without the sails & should redeem them :—**Held** : the purchaser had accepted the order by not informing the sheriff before the return of the writ, that he could not obtain the sails.—**DUNCAN v. GARRATT** (1824), 1 C. & P. 169 ; 2 L. J. O. S. K. B. 142.

**Ship subject to lien.**]—*See* No. 681, *ante*.

#### xiv. *Goods Mortgaged.*

**777. Not seizable.**]—Under an execution against the goods of A., the sheriff cannot seize goods which A. has deposited with another person as security for a debt.—**ROGERS v. KENNAY** (1846), 9 Q. B. 592 ; 15 L. J. Q. B. 381 ; 11 Jur. 14 ; 115 E. R. 1401.

**778.** — **Machinery—Tools.**]—Trustees were empowered under a local Act to purchase land, etc., for the purpose of making public docks, & to raise funds by borrowing money on the security of the rates & tolls to be levied under the Act, & of any property vested in the trustees by virtue of the Act, & the mtges. executed for this object were to be pursuant to a certain form, & to be registered. In the course of the execution of the works a large quantity of tools, machinery, & materials were purchased by the trustees for the purposes of the works, which they subsequently mortgaged to the contractor by two deeds which were not in the form given by the statute or registered. Subsequently these materials, tools, & machinery were seized under an execution against the company :—**Held** : the mtge. was valid, & the materials, etc., were not liable to be seized.—**M'CORMICK v. PARRY** (1852), 7 Exch. 355 ; 21 L. J. Ex. 143 ; 18 L. T. O. S. 291 ; 155 E. R. 984.

**779.** — — —.]—**CROSS v. BARNES**, No. 641, *ante*.

**780.** — **Goods in bond.**]—Goods imported from England into Quebec, consigned to M. & S. & stored in the Customs' warehouse there, according to the Customs' regulations for freight, duties, & storage, were, by a contract in writing, pledged by M. & S. for advances made to them by G. & K., & a note of such pledge entered in the book of the chief officer of the Customs, specifying the conditions on which the loan was made, with a request to such officer to hold the goods subject to the orders of G. & K., they paying the duty & storage charges before removal. L., a creditor of M. & S. obtained judgment in an action against them, & under a *fi. fa.*, seized the goods so in bond, the execution of which was opposed by G. & K., who made an application *main levée* to the ct., on the ground, that by the above contract the property of M. & S. in the goods in question was conveyed to them to secure repayment of the advances made by them. The judge of the superior ct. allowed such opposition, holding that the opposants, G. & K., were pledgees of the goods in question. Such judgment, though overruled by the full ct., & afterwards by the Ct. of Q. B. in Lower Canada on appeal, was upheld by the

#### PART III. SECT. 1, SUB-SECT. 4.— E. (f) xiv.

1. *Whether seizable.*]—Under a writ against the mtgor. of goods, the sheriff, under 20 Vict. c. 3, cannot sell the goods themselves & transfer the possession to the purchaser.—**SQUAIR v. FORTUNE** (1859), 18 U. C. R. 547.—**CAN.**

m. — *Chattels in possession of mortgagee.*]—*Semble* : under an execution against a mtgor. of chattels the sheriff may seize goods in possession of the mtgee., so that he may expose them to view, although he can sell only the equity of redemption.—**SMITH v. COBBOURG & PETERBOROUGH RY. CO.** (1859), 3 P. R. 113.—**CAN.**

n. —.]—A deft. at the time of his arrest & examination had personal property subject to a chattel m.  
**Held** : such property was not liable to be taken under an execution.—**RE MILLER v. SMITH, Ex p. MILLER** (1896), 34 N. B. R. 5.—**CAN.**

\* o. —.]—A sale or mtge., if real, though made for the purpose of



Sect. 1.—*Writ of fieri facias: Sub-sect. 4, E. (f)*

Judicial Committee, who were of opinion, that the circumstances of the case & the dealings of the parties constituted a constructive delivery, & that the judgment which dismissed the opposition of G. & K., & gave effect to the seizure under the execution to their prejudice as pledgees, could not be supported.—*YOUNG v. LAMBERT* (1870), L. R. 3 P. C. 142; 6 Moo. P. C. C. N. S. 406; 39 L. J. P. C. 21; 22 L. T. 499; 18 W. R. 497; 3 Mar. L. C. 412; 16 E. R. 779, P. C.

**Ships.**—See Nos. 677–680, *ante*.

**Goods pawned.**—See Nos. 782–784, *post*.

xv. *Goods Pawned or Pledged.*

**781. Not seizable.**—A man gages his goods in pledge for £40 borrowed, & after the debtor is convicted in £100 in debt to another, these goods shall not be taken in execution till the £40 be paid, for the creditor has an interest in them; & also goods taken for distress cannot be taken in execution.—*ANON.* (1543), Bro. N. C. 149; 73 E. R. 912.

**782.** —.—]—Goods in the hands of the pawnee shall not be taken in execution . . . until the money is paid to the pawnee, because he had a qualified property in them, & the judgment creditor had only an interest (*HOLT, C.J.*).—*COGGS v. BERNARD* (1703), 3 Salk. 268; 2 Ld. Raym. 909; 1 Com. 133; Holt, K. B. 528; 91 E. R. 817.

**Annotations:**—*Mentd.* *Anon.* (1693), 2 Salk. 522; *Buckmyr*

*Lawson* (1736), Lee temp. Hard. 194. *Kettle v. Bromsall* (1738), Willes, 118; *Charitable Corpn. v. Sutton* (1742), 2 Atk. 400; *Hartop v. Hoare* (1743), 3 Atk. 44; *Ryall v. Rolle* (1749), 1 Atk. 165; *Pasley v. Freeman* (1789), 3 Term Rep. 51; *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357; *Elsee v. Gatward* (1793), 5 Term Rep. 143; *Guilliam v. Barnett* (1804), 2 Smith, K. B. 155; *Gibson v. Inglis* (1814), 4 Camp. 72; *Cavenagh v. Such* (1815), 1 Price, 328; *Pippin v. Sheppard* (1822), 11 Price, 400; *Storr v. Crowley* (1825), M'Cle. & Yo. 129; *Whitehead v. Greetham* (1825), 2 Bing. 464; *Corbett v. Packington* (1827), 6 B. & C. 268; *Gledstane v. Hewitt* (1831), 1 Tyr. 445; *Ex p. Cording* (1832), 4 B. & Ad. 198; *M'Kenzie v. M'Leod* (1834), 10 Bing. 385; *Vaughan v. Menlove* (1837), 3 Bing. N. C. 468; *Boorman v. Brown* (1842), 3 Q. B. 511; *Ross v. Hill* (1846), 2 C. B. 877; *G. N. Ry. v. Shepherd* (1852), 8 Exch. 30; *Micklethwaite v. Merrill* (1852), 19 L. T. O. S. 61; *Shepherd v. G. N. Ry.* (1852), 19 L. T. O. S. 324; *Balfre v. West* (1853), 13 C. B. 466; *Crouch v. L. & N. W. Ry.* (1854), 14 C. B. 255; *Dansey v. Richardson* (1854), 3 E. & B. 144; *Baxendale v. Eastern Counties Ry.* (1858), 27 L. J. C. P. 137; *Blakemore v. Bristol & Exeter Ry.* (1858), 8 E. & B. 1035; *Syred v. Carruthers* (1858), E. B. & E. 469; *Belfast & Ballymena, etc. Ry. v. Keys* (1861), 9 H. L. Cas. 556; *MacCarthy v. Young* (1861), 6 H. & N. 329; *Marriott v. Anchor Reversionary Co.* (1861), 3 De G. F. & J. 177; *Martin v. Reid* (1862), 11 C. B. N. S. 730; *Taylor v. Caldwell* (1863), 3 B. & S. 826; *Beal v. South Devon Ry.* (1864), 11 L. T. 184; *Pigot v. Cubley* (1864), 15 C. B. N. S. 701; *P. & O. Steam Navigation Co. v. Shand* (1865), 3 Moo. P. C. C. N. S. 272; *Swire v. Leach* (1865), 5 New Rep. 314; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Grill v. General Iron Screw Collier Co.* (1866), 12 Jur. N. S. 727; *Skelton v. L. & N. W. Ry.* (1867), L. R. 2 C. P. 631; *Giblin v. McMullen* (1868), L. R. 2 P. C. 317; *Readhead v. Mid. Ry.* (1869), L. R. 4 Q. B. 379; *Searle v. Laverick* (1874), L. R. 9 Q. B. 122; *Liver Alkali Co. v. Johnson* (1874), L. R. 9 Exch. 338; *Nugent v. Smith* (1875), 1 C. P. D. 19; *Harris v. G. W. Ry.* (1876), 1 Q. B. D. 515; *Hoare v. G. W. Ry.* (1877), De Colyar's County Court

defeating an intended or probable execution, is valid against the execution creditor.—*TILLAKCHAND HINDUMAL v. JITAMAL SUDARAM* (1873), 10 Bom. 206.—*IND.*

PART III. SECT. 1, SUB-SECT. 4.—*E. (f) xv.*

**p. Whether goods seizable.**—*YOUNG* (1870), C. R. 5 A. C.—*CAN.*

**q. —.**—]—In execution of a r. — *Cattle in pledgee's con-*

*Cases*, 192; *Bergheim v. G. E. Ry.* (1878), 3 C. P. D. 221; *Foulkes v. Met. Dist. Ry.* (1880), 28 W. R. 526; *Cutler v. North London Ry.* (1887), 56 L. T. 639; *The Moorcock* (1889), 14 P. D. 64; *Shaw v. G. W. Ry.*, [1894] 1 Q. B. 373; *The Winkfield*, [1902] P. 42; *Harris v. Perry*, [1903] 2 K. B. 219; *Wallis v. G. N. Ry. (Ireland)* (1903), 12 Ry. & Can. Tr. Cas. 38; *Cheshire v. Bailey*, [1905] 1 K. B. 237; *Clarke v. West Ham Corpn.*, [1909] 2 K. B. 858; *Shrimpton v. Hertfordshire County Council* (1910), 74 J. P. 305; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618; *Attenborough v. Solomon*, [1913] A. C. 76; *Hatton v. Car Maintenance Co.* (1914), 110 L. T. 765; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Coldman v. Hill*, [1919] 1 K. B. 443; *The Empress* (1923), 92 L. J. P. 42; *Ellis Trustee v. Dixon-Johnson*, [1924] 1 Ch. 451; *Pratt v. Patrick*, [1924] 1 K. B. 488.

**783.** —.—]—If this had been the case of pawned or pledged goods before the day they could not be legally seized because the property would be altered.—*R. v. COTTON* (1751), Park. 112; 2 Ves. Sen. 288; 145 E. R. 729; *subsequent proceedings* (1755), Park. 142, Ex. Ch.

**Annotations:**—*Refd.* *Farr v. Newman* (1792), 4 Term Rep. 621; *R. v. Lee* (1819), 6 Price, 369. *Mentd.* *Cooper v. Chitty* (1756), 1 Burr. 20; *Uppom v. Sumner* (1779), 2 Wm. Bl. 1294; *Bradyll v. Ball* (1785), 1 Bro. C. C. 427; *Rorke v. Dayrell* (1791), 4 Term Rep. 402; *R. v. Wells* (1807), 16 East, 278; *Swain v. Morland* (1819), 1 Brod. & Bing. 370; *R. v. Giles* (1820), 8 Price, 293; *Whitley v. Roberts* (1825), M'Cle. & Yo. 107; *Giles v. Grover* (1832), 9 Bing. 128; *R. v. Edwards* (1853), 9 Exch. 32; *Carlisle v. Whaley* (1867), L. R. 2 H. L. 391; *Lehain v. Philpott* (1875), L. R. 10 Exch. 242; *Secretary of State for War v. Wynne* (1905), 75 L. J. K. B. 25.

**784.** —.— *Whether still redeemable or not.*—*Re ROLLASON, ROLLASON v. ROLLASON, HALSE'S CLAIM*, No. 787, *post*.

**785. Redemption moneys—Right of sheriff to.**—A. having signed judgment against B., upon a warrant of attorney, a writ of *fi. fa.* issued to levy the sum of £600, under which the sheriff took possession in Feb. Between Feb. & Mar. he realised part of the levy, £390, partly by the sale of B.'s goods, but principally by the receipt of moneys on the redemption of goods, which had been pledged with B., who was a pawnbroker. In Mar. B. became insolvent & went to prison, & a vesting order, under Judgments Act, 1838 (c. 110), was made upon Apr. 7, & an assignee appointed. The sheriff had not paid over the £390 to the execution creditor. Upon an application by the assignee to the ct., under Interpleader Act, 1831 (c. 58), s. 61, to order the sheriff to pay over the above sum to him for the body of the creditors:—*Held*: the execution creditor, & not the assignee, was entitled to that money.—*SQUIRE v. HUETSON* (1841), 1 Q. B. 308; 4 Per. & Dav. 633; 10 L. J. Q. B. 116; 5 Jur. 840; 113 E. R. 1149.

**786.** —.—]—*Re ROLLASON, ROLLASON v. ROLLASON, HALSE'S CLAIM*, No. 787, *post*.

**787. Right to sell unredeemed articles.**—In levying execution upon a pawnbroker, the sheriff is entitled to seize articles deposited in pledge with him in the course of his business, whether the same are still redeemable or not, & to receive redemption moneys, & to sell when the period of redemption has expired.—*Re ROLLASON, ROLLASON v. ROLLASON, HALSE'S CLAIM* (1887), 34 Ch. D. 495; 56 L. J. Ch. 768; 56 L. T. 303; 35 W. R. 607; 3 T. L. R. 326.

*tról.*—Cattle, the property of a judgment debtor, were pledged to a creditor, who thereafter lent them to his servant for the purpose of ploughing his (the servant's) lands. While in the servant's possession they were attached in execution on a judgment obtained by a third party:—*Held*: as the pledgee's so lending them did not take them out of his control, the cattle must be declared not executable.—*PHILLIPS v. SOQAKA* (1915), E. D. L. 37.—*S. AF.*

xvi. *Goods of Testator in Hands of Personal Representative.*

**788. Whether seizable—Death of debtor after execution awarded.]**—If debt. die after *fi. fa.* awarded, the goods may be taken in the hands of his exor. ; & the officer shall not be affected by a false return.—*PARKES v. MOSSE* (1590), Cro. Eliz. 181 ; 78 E. R. 437.

*Annotations* :—*Consd.* Anon. (1724), 8 Mod. Rep. 225. *Refd.* Harwood v. Phillips (1663), O. Bridg. 461.

**789. ——— Teste of writ before death.]**—ANON. (1690), 2 Vent. 218 ; 86 E. R. 403.

**790. ——— Alienation of testator's goods—By personal representative—Valuable consideration.]**—At law an exor. may alien the assets of testator, & when aliened, no creditor can follow them, & where the alienation is for a valuable consideration, this ct. suffers it as well as at law.—*NUGENT v. GIFFORD* (1738), 1 Atk. 463 ; West temp. Hard. 494 ; 26 E. R. 294, L. C.

*Annotations* :—*Consd.* *Whale v. Booth* (1784), 4 Doug. K. B. 36 ; *Farr v. Newman* (1792), 4 Term Rep. 621. *Refd.* *Mead v. Orrery* (1745), 3 Atk. 235 ; *Hill v. Simpson* (1802), 7 Ves. 152 ; *M'Leod v. Drummond* (1810), 17 Ves. 152 ; *Graham v. Drummond*, [1896] 1 Ch. 968. *Mentd.* *Ithell v. Beane* (1749), 1 Ves. Sen. 215 ; *Taner v. Ivie* (1752), Belt's Sup. 386 ; *Scott v. Tyler* (1788), 2 Bro. C. C. 431 ; *Andrew v. Wrigley* (1792), 4 Bro. C. C. 125 ; *Dickenson v. Lockyer* (1798), 4 Ves. 36 ; *Keane v. Roberts* (1819), 4 Madd. 332 ; *Wilson v. Moore* (1834), 1 My. & K. 337.

**791. ——— Debt of personal representative—Effect of acquiescence of representative—Whether devastavit committed.]**—The goods of testator in the possession of his exors. are taken, & sold, under a *fi. fa.*, on a judgment against the exor. for a debt of his own, & with his consent :—*Held* : the property would pass by such execution, notwithstanding the pltf. in the action against the exor. knew they were assets. *Semble* : otherwise if he had known of an unsatisfied debt ; & so had colluded with the exor. to make a *devastavit*.—*WHALE v. BOOTH* (1784), 4 Doug. K. B. 36 ; 4 Term Rep. 625, n. ; 99 E. R. 755.

*Annotations* :—*Consd.* *Farr v. Newman* (1792), 4 Term Rep. 621 ; *Quick v. Staines* (1798), 1 Bos. & P. 293 ; *Fenwick v. Laycock* (1841), 2 Q. B. 108. *Refd.* *Hill v. Simpson* (1802), 7 Ves. 152 ; *M'Leod v. Drummond* (1810), 17 Ves. 152 ; *Ray v. Ray* (1815), Coop. G. 264 ; *Graham v. Drummond*, [1896] 1 Ch. 968. *Mentd.* *Shirreff v. Wilks* (1800), 1 East, 48 ; *Doe d. Woodhead v. Fallows* (1832), 2 Cr. & J. 481.

**792. ———.]**—*FARR v. NEWMAN*, No. 736, ante.

**793. ———.]**—The effects of testator cannot be taken in execution for the debt of the exor. (LORD ELDON, C.).—*M'LEOD v. DRUMMOND* (1810), 17 Ves. 152 ; 34 E. R. 59, L. C.

*Annotations* :—*Consd.* *Kinderley v. Jervis* (1856), 22 Beav. 1. *Refd.* *Spackman v. Timbrell* (1837), Donnelly, 209. *Mentd.* *Keane v. Roberts* (1819), 4 Madd. 332 ; *Wilson v. Moore* (1834), 1 My. & K. 337 ; *Haynes v. Forshaw* (1853), 11 Hare, 93 ; *Russell v. Plaice* (1854), 18 Beav. 21 ; *Barrow v. Griffith*, *Barrow v. Newman* (1864), 11 Jur. N. S. 6 ; *Re Brettell*, *Brettell v. Burdett* (1864), 2 De G. J. & Sm. 244 ; *Re Morgan*, *Pillgrem v. Pillgrem* (1881), 18 Ch. D. 93 ; *Re Cooper*, *Cooper v. Vesey* (1882), 20 Ch. D. 611 ; *Re Ingham*, *Jones v. Ingham*, [1893] 1 Ch. 352 ; *Graham v. Drummond*, [1896] 1 Ch. 968 ; *Re Kennal & Still's Contract*, [1923] 1 Ch. 293.

**794. ———.]**—*GASKELL v. MARSHALL*, No. 800, post.

**795. ———.]**—Where the goods of testator, which have long remained in the hands of his exors. but consistently with the trusts of the will, are seized by the sheriff under a *fi. fa.*, on a judgment against the exor. in his own right, the sheriff may be liable to an action ; & if debt. in the execution disputes the seizure, on the ground, that

the goods were held by him, as executor in trust for others, & not in his own right, that is a claim by a person "not being the party against whom the process issued," which will entitle the sheriff to an interpleader rule under Interpleader Act, 1831 (c. 58), s. 6.—*FENWICK v. LAYCOCK* (1841), 2 Q. B. 108 ; 1 Gal. & Dav. 532 ; 11 L. J. Q. B. 146 ; 6 Jur. 341 ; 114 E. R. 43.

*Annotation* :—*Consd.* *Re Morgan*, *Pillgrem v. Pillgrem* (1881), 18 Ch. D. 93.

**796. ———.]**—In the case of personal assets of a deceased person these could not be taken in execution by the judgment creditor of the exor. (ROMILLY, M.R.).—*KINDERLEY v. JERVIS* (1856), 22 Beav. 1 ; 25 L. J. Ch. 538 ; 27 L. T. O. S. 245 ; 2 Jur. N. S. 602 ; 4 W. R. 579 ; 52 E. R. 1007.

*Annotations* :—*Refd.* *Baker v. Tynte* (1860), 6 Jur. N. S. 1192 ; *Pickering v. Ilfracombe Ry.* (1868), L. R. 3 C. P. 235 ; *Robinson v. Nesbitt* (1868), L. R. 3 C. P. 264 ; *Gill v. Continental Gas Union Co.* (1872), 41 L. J. Ex. 176 ; *Price v. Price* (1887), 35 Ch. D. 297 ; *Re Leavesley*, [1891] 2 Ch. 1. *Mentd.* *Nicholls v. Rosewarne* (1859), 6 C. B. N. S. 480 ; *Eyre v. M'Dowell* (1861), 9 H. L. Cas. 619.

**797. ———.]**—L., one of the exors. of M., & of the devisees in trust of M.'s estate, gave a bond to O. for £7,000 describing himself as sole exor. of M., but the condition was for payment by L., his heirs, exors. & administrators :—*Held* : the real estate of testator M. could not be taken in execution under a judgment against L. *de bonis propriis*, & purchasers for value having notice of the will of M., which showed that there were several joint devisees, had no good title, though in possession of the estate.—*LINDSAY v. ORIENTAL BANK AT COLUMBO* (1860), 13 Moo. P. C. C. 401 ; 3 L. T. 98 ; 15 E. R. 151, P. C.

*Annotations* :—*Mentd.* *Lindsay v. Duff* (1862), 15 Moo. P. C. C. 452 ; *Gavin v. Hadden* (1871), L. R. 3 P. C. 707.

**798. ——— Representative carrying on testator's business.]**—*Re MORGAN, PILLGREM v. PILLGREM*, No. 802, post.

**799. ——— Effect of long possession by representative—Six or seven years.]**—After a lapse of six or seven years, equity will not restrain by injunction a creditor of an exor. from taking in execution the goods of testator for the exor.'s own debt.—*RAY v. RAY* (1815), Coop. G. 264 ; 35 E. R. 553.

*Annotations* :—*Distd.* *Re Morgan*, *Pillgrem v. Pillgrem* (1881), 18 Ch. D. 93. *Mentd.* *Re Thomas*, *Ex p. Thomas* (1842), 3 Mont. D. & De. G. 40 ; *Kitchen v. Ibbetson* (1873), L. R. 17 Eq. 46.

**800. ———.]**—An intestate died in Aug. ; her next of kin took out letters of administration in same month, & went & lived in her house till Nov., when the goods of the intestate in the house were seized under a *fi. fa.* against the administrator for a debt of his own :—*Held* : an action lay against the sheriff by the administrator, in his representative capacity, for this seizure. *Semble* : if the administrator had remained in possession for a very long time, it would have been otherwise.—*GASKELL v. MARSHALL* (1831), 5 C. & P. 31 ; 1 Mood. & R. 132.

*Annotations* :—*Consd.* *Fenwick v. Laycock* (1841), 2 Q. B. 108. *Refd.* *Re Morgan*, *Pillgrem v. Pillgrem* (1881), 18 Ch. D. 93.

**801. ——— Consistent with terms of testator's will.]**—*FENWICK v. LAYCOCK*, No. 795, ante.

**802. ——— Inconsistent with terms of testator's will.]**—If an exor., in pursuance of the directions contained in testator's will, carried on testator's business, & in so doing contracts debts,

## PART III. SECT. 1, SUB-SECT. 4.—E. (f) xvi.

**788 i. Whether seizable — Death of debtor after execution awarded.]**—The death of a debt., after the placing of an

execution against goods in the sheriff's hands, did not make it necessary to revive the judgment against his exors. or administrators to make valid the seizure under the writ, of goods

which were owned by debt. at the time of his death.—*TURNER v. PATTERSON* (1863), 13 C. P. 412—CAN.

s. ——— *Chattels real—Liability of executor de son tort.]*—Under a writ



**Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (f) *xvi.* & (g) *i.* & *ii.***

the fact that he has carried on the business in his own name & that testator's assets employed in it are ostensibly the exor.'s own property, will not entitle a judgment creditor of the exor. to take in execution testator's assets.

Lapse of time & an enjoyment of the assets in a manner inconsistent with the trusts of the will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the exor., & entitle his judgment creditor to take them in execution. But, when the possession & the time which has elapsed are in accordance with the trusts of the will, no such inference can arise.—*Re MORGAN, PILGREM v. PILGREM* (1881), 18 Ch. D. 93; 50 L. J. Ch. 834; 45 L. T. 183; 30 W. R. 223, C. A.

*Annotations*:—*Consd.* *Jennings v. Mather*, [1901] 1 K. B. 108. *Refd.* *Graham v. Drummond*, [1896] 1 Ch. 968.

*Mentd.* *Re Gorton, Dowse v. Gorton* (1889), 60 L. T. 305.

**803. — Debts of husband of personal representative—Executrix using goods as own & husband's property.**—If an extrix. use the goods of her testator as her own, & afterwards marry, & then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debts.—*QUICK v. STAINES* (1798), 1 Bos. & P. 293; 2 Esp. 657; 126 E. R. 911.

*Annotations*:—*Distd.* *Gaskell v. Marshall* (1831), 5 C. & P. 31. *Refd.* *Re Moore, Ex p. Moore* (1842), 2 Mont. D. & De G. 616.

**804. Goods in hands of agent of personal representative—Debts of agent—Goods not seizable.**—Where an exor. before probate by his agent takes the goods & carries on the business of deceased, & judgment is recovered against the agent as exor., & a writ of *fi. fa.* issued thereunder directing the sheriff to levy on goods of deceased in his hands as exor. of deceased to be administered, the sheriff is not justified, as against the exor., in seizing goods of deceased in such agent's hands.—*SYKES v. SYKES* (1870), L. R. 5 C. P. 113; 39 L. J. C. P. 179; 22 L. T. 236; 18 W. R. 551.

*Annotation*:—*Refd.* *A.-G. v. New York Breweries Co.*, [1898] 1 Q. B. 205.

**805. Purchaser from personal representative—Without notice of unsatisfied debts—Has good title—In respect of legal & equitable assets.**—The rule that a purchaser for value of an asset of testator, from an exor. who is also residuary legatee, acquires a title free from the claims of unsatisfied creditors of testator, if the purchaser took without notice of the unsatisfied debts or of anything which made it improper for the exor. so to deal with the asset, applies in the case of equitable as well as legal assets; provided that neither the exor. nor the ct. administering testator's estate still retains control over the asset.

In 1878 the registered holder of railway stocks covenanted to pay an annuity to the trustees of a settlement during the joint lives of himself & his wife & the life of the survivor. In 1882 he died having bequeathed all his property to his widow, & appointed her his extrix. The widow proved the will, & by various deeds from 1886 to 1892 transferred the stocks to her bankers to secure a debt of her own. In Dec. 1892, the widow gave an equitable charge on the stocks to pltf. to secure advances made to her. Neither the bankers nor pltf. when taking their respective securities had knowledge or notice that any debt of testator remained unpaid, or that the widow was not

entitled to deal with the stocks as she did, & pltf., before he had notice that there was any indebtedness of testator, gave notice of his charge to the bankers. The bankers sold the stocks, & having retained the amount owing to them, paid the balance into ct.:—*Held*: the pltf.'s charge on the balance had priority over the claims of the settlement trustees.

If an exor. who is also residuary legatee sells or mortgages an asset of testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of testator, or of any ground which rendered it improper for the exor. so to deal with the asset, that person's purchase or mtge. is valid against any unsatisfied creditor of testator (*ROMER, J.*).—*GRAHAM v. DRUMMOND*, [1896] 1 Ch. 968; 65 L. J. Ch. 472; 74 L. T. 417; 44 W. R. 596; 12 T. L. R. 319, C. A.

*Annotation*:—*Refd.* *Bank of Bombay v. Suleman Somji* (1908), 99 L. T. 532.

**(g) Effect of S.**

**i. Where Several Writs.**

**806. Further seizure—In respect of subsequent writs—Whether permissible.**—Goods being once seized & in custody of law they could not be seized again by the same or another sheriff, & if they were sold thereon such bargain would be void (*HOLT, C.J.*).—*BACHKURST v. CLIMKARD* (1690), Holt, K. B. 643; 1 Show. 174; 90 E. R. 1255.

*Annotations*:—*Refd.* *R. v. Manning* (1739), 2 Com. 616; *Farr v. Newman* (1792), 4 Term Rep. 621; *Johnson v. Evans* (1844), 7 Man. & G. 240. *Mentd.* *Skipp v. Harwood* (1747), 2 Swan. 586; *Ryall v. Rowles* (1750), 1 Ves. Sen. 348; *Burnell v. Hunt* (1841), 5 Jur. 650.

**807. — — — Possession retained by debtor.**—Goods, though seized in execution, if suffered to remain in the custody of debt., may be taken at the suit of another creditor.—*RICE v. SERJEANT* (1702), 7 Mod. Rep. 37; 87 E. R. 1078.

**808. — — — Necessity for.**—Though a sheriff make a warrant & seizure of goods under a *fi. fa.* last delivered to him, yet pltf. in a *fi. fa.* first delivered to the sheriff is entitled to be first satisfied out of the fruits of that seizure. If a second *fi. fa.* be delivered to a sheriff after he has debt.'s goods in possession under the prior *fi. fa.* of another, the goods are bound by the second execution, subject to the first execution, from the date of the delivery of the last writ to the sheriff; & that, without warrant on the second writ, or further seizure.—*JONES v. ATHERTON* (1816), 7 Taunt. 56; 2 Marsh. 375; 129 E. R. 23.

*Annotations*:—*Expld.* *Belcher v. Patten* (1848), 6 C. B. 608. *Refd.* *Giles v. Grover* (1832), 6 Bli. N. S. 277; *Lucas v. Nockells* (1833), 7 Bli. N. S. 140.

**809. — — —**—Where there were two actions by distinct pltf's. against same debt., & writs of *fi. fa.* were issued in each action, & delivered to a bailiff, together with the sheriff's warrant to execute them, & the bailiff thereupon, in execution of one of the writs, seized debt.'s goods, which were insufficient to satisfy the debt & costs in that action:—*Held*: the second writ of *fi. fa.* was not executed by the seizure under the first; & the issuing of a writ of *ca. sa.* in the same action, without returning the unexecuted writ of *fi. fa.*, was not irregular.—*SMITH v. JACKSON* (1864), 4 F. & F. 352, N. P.

**810. — — —**—*Re HENDERSON, Ex p. SHAW*, [1884] W. N. 60, C. A.

**811. — In respect of writs already delivered—Necessity for.**—*HUTCHINSON v. JOHNSTON*, No. 533, ante.

812. ———.]—JONES v. ATHERTON, No. 808, *ante*.

813. ———.]—In trover against the sheriff whose officer has seized the goods of A. as under a *fi. fa.* against B., it is sufficient to produce the warrant without producing the writ; & it lies upon deft. to show that no such writ issued.

When goods are taken into the custody of the sheriff, it must be taken to be a seizure under all the writs then delivered to him.—GIBBINS v. PHILLIPS (1828), 8 B. & C. 437; 2 Man. & Ry. K. B. 238; 6 L. J. O. S. K. B. 371; 108 E. R. 1105.

*Annotations*:—*Mentd.* Harrison v. Bennett (1832), 2 Tyr. 740; *Re* Hunt, *Ex p.* Simpson (1844), De G. 9; Bills v. Smith (1865), 5 New Rep. 364.

814. ———.]—DREWE v. LAINSON, No. 534, *ante*.

815. ———.]—*Re* HENDERSON, *Ex p.* SHAW, [1884] W. N. 60, C. A.

816. Seizure under first delivered writ—Claim of party under subsequent writ—Having first initiated proceedings.]—A.-G. v. ALDERSEY (1786), cited 1 East, at p. 341; 102 E. R. 132.

*Annotations*:—*Reid.* Butler v. Butler (1801), 1 East, 338; Giles v. Grover (1832), 6 Bli. N. S. 277. *Mentd.* R. v. Sloper & Allen (1818), 6 Price, 114.

Priority of creditors.]—See Sub-sect. 4, B. (b), *ante*.

#### ii. On Property in Goods Seized.

817. Property still remains in debtor.]—Pltf. may have a *venditioni exponas* to the sheriff to sell goods seized under a *fi. fa.* if the *supersedeas* upon error brought be not delivered till after such seizure (HOLT, C.J.).—MILTON v. ELDRINGTON (1554), 1 Dyer, 98 b; 73 E. R. 215.

*Annotations*:—*Reid.* Giles v. Grover (1832), 9 Bing. 128. *Mentd.* Charter v. Peeter (1599), Cro. Eliz. 597; Clerk v. Withers (1704), 6 Mod. Rep. 290; Hughes v. Rees (1838), 8 L. J. Ex. 46.

818. ———.]—The property is not altered upon the sheriff's taking of goods upon a *fi. fa.*, but remains in deft.—ANON. (1608), 1 Brownl. 123 E. R. 653.

819. ——— Until execution executed.]—LOWTHAL v. TONKINS, No. 994, *post*.

820. ———.]—PAYNE v. DREWE, No. 548, *ante*.

821. ———.]—(1) The general property in the goods seized remains until sale in the debtor & is not changed by seizure (ALDERSON, J.).

(2) At common law the goods of the debtor were bound from the teste of the writ of *fi. fa.* This is altered by the Stat. Frauds. Since which they are bound only from the delivery of the writ . . . to the sheriff (PATTESON, J.).

(3) The binding relates only to the debtor & his acts so as to vacate any intermediate assignment made by him otherwise than in market overt. And even when made in market overt in the case of the King it in no way affects the priority of conflicting writs (PATTESON, J.).

(4) It is undoubtedly true that the sheriff does by the seizure acquire a special property in the goods; he may maintain trespass or trover for them (PATTESON, J.).—GILES v. GROVER (1832), 9 Bing. 128; 6 Bli. N. S. 277; 1 Cl. & Fin. 72; 2 Moo. & S. 197; 131 E. R. 563, H. L.

*Annotations*:—*As to* (1) *Consd.* *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26. *Reid.* Godson v. Sanctuary (1832), 4 B. & Ad. 255; Grove v. Aldridge (1832), 9 Bing. 428; Grainger v. Hill (1838), 5 Scott, 561; Woodland v. Fuller (1840), 11 Ad. & El. 859; Doe d. Hughes v. Jones (1842), 9 M. & W. 372; Playfair v. Musgrove (1845), 14 M. & W. 239; *Re* Clarke, [1898] 1 Ch. 336. *As to* (2) *Reid.* Balme v. Hutton (1833), 9 Bing. 471. *As to* (3) *Reid.* Bothamley v. Heyward (1862), 8 Jur. N. S. 1156. *As to* (4) *Consd.* *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26. *Reid.* Garland v. Carlisle (1837), 4 Cl. & Fin. 693; Doe d. Hughes v. Jones (1842), 9 M. & W.

372; Playfair v. Musgrove (1845), 14 M. & W. 239. *Generally, Mentd.* R. v. Maberley (1834), 4 Tyr. 345; R. v. Archdall (1838), 2 J. P. 486 Whitworth v. Gaugain (1846), 1 Ph. 728.

822. ———.]—LUCAS v. NOCKELLS, No. 997, *post*.

823. ——— Term of years.]—Where the sheriff had taken a lease of certain premises in execution under a *fi. fa.* & sold the term to the execution creditor, without any assignment in writing:—*Held*: the estate remained in debtor, who might recover it from the execution creditor, in an action of ejectment.—DOE d. HUGHES v. JONES (1842), 9 M. & W. 372; 1 Dowl. N. S. 352; 1 Hare, 385, n.; 12 L. J. Ex. 265; 6 Jur. 302; 152 E. R. 158.

824. ———.]—PLAYFAIR v. MUSGROVE, No. 694, *ante*.

825. ——— Right of debtor to sell—In market overt.]—SAMUEL v. DUKE, No. 998, *post*.

826. ——— Delivery to purchaser.]—UNION BANK OF LONDON v. LENANTON, No. 675, *ante*.

827. ———.]—*Re* A DEBTOR, *Ex p.* SMITH, No. 193, *ante*.

828. How far property of sheriff—Sufficient to maintain trover or trespass—If taken out of his possession.]—A sheriff may maintain either trover or trespass for goods taken out of his possession after seizure by virtue of a *fi. fa.*, for he has a special property in them after seizure: but in trover he can only recover the value of the goods; & not, as he may in trespass, damages for the tortious taking.—WILBRAHAM v. SNOW (1670), 2 Keb. 588; 1 Lev. 282; 1 Sid. 438; 2 Wms. Saund. 47; 1 Vent. 52; 86 E. R. 37; *sub nom.* WILLBRAHAM v. SNOW, 1 Mod. Rep. 30.

*Annotations*:—*Consd.* Jeanes v. Wilkins (1749), 1 Ves. Sen. 195. *Expld.* R. v. Giles (1820), 8 Price, 293. *Consd.* Giles v. Grover (1832), 9 Bing. 128. *Reid.* Mildmay v. Smith (1671), 2 Wms. Saund. 343; Bealy v. Sampson (1688), 2 Vent. 93; Clerk v. Withers (1704), 2 Ld. Raym. 1072; Wharam v. Broughton (1748), 1 Ves. Sen. 180; R. v. Cotton (1751), Park. 112; Slater v. Pinder (1871), L. R. 6 Exch. 228; *Re* Davies, *Ex p.* Williams (1872), 7 Ch. App. 314. *Mentd.* Collins v. Evans (1844), 5 Q. B. 820; Ford v. Beech (1848), 17 L. J. Q. B. 114; Wiltshire v. Cotterel (1853), 20 L. T. O. S. 259; Crouch v. G. N. Ry. (1856), 11 Exch. 742; Jeffries v. G. W. Ry. (1856), 5 E. & B. 802; Lee v. Bayes & Robinson (1856), 20 J. P. 694; Levy v. Hale (1859), 29 L. J. C. P. 127; Burroughes v. Bayne (1860), 5 H. & N. 296; Richardson v. Trundle (1860), 8 C. B. N. S. 474; Harper v. Godsell (1870), L. R. 5 Q. B. 422; Brinsmead v. Harrison (1871), L. R. 6 C. P. 584; England v. Cowley (1873), L. R. 8 Exch. 126; Hollins v. Fowler (1875), L. R. 7 H. L. 757; R. v. Wynn (1887), 56 L. T. 749; Cochrane v. Moore (1890), 59 L. J. Q. B. 377; The Winkfield, [1902] P. 42; Wallis v. G. N. Ry. (Ireland) (1903), 12 Ry. & Can. Tr. Cas. 38; Clayton v. Le Roy, [1911] 2 K. B. 1031.

829. ———.]—GILES v. GROVER, No. 821, *ante*.

830. Not property of execution creditor—Payment into court pending interpleader proceedings—Withdrawal by sheriff—Seizure under subsequent writs.]—Where goods have been seized in execution to satisfy a judgment, & the sheriff withdraws from possession upon payment into ct. by claimant of a sum which is to abide the event of an interpleader issue, claimant by payment of that sum into ct. does not acquire any property in the goods, but such goods are free goods in the hands of the execution debtor, so that if they are again seized in execution to satisfy a judgment obtained by another creditor, claimant if he again claims the goods is liable as a condition for an interpleader issue to an order for the payment into ct. of the full value of the goods seized.—KOTCHIE v. GOLDEN SOVEREIGNS, LTD., [1898] 2 Q. B. 164; 67 L. J. Q. B. 722; 78 L. T. 409; 46 W. R. 616, C. A.

831. Goods in custodia legis.]—The judgment of the Q. B. Div. seems to say that the execution



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, E. (g) ii. & iii. & F. (a), (b) & (c).]*

creditor, on putting in the execution, is to be looked upon as himself in possession of the goods. . . . I do not think that is the right view. The execution creditor has never been in possession of the goods. The actual possession is that of the sheriff. . . . The goods are therefore not the possession of party but of the law (LORD ESHER, M.R.).—RICHARDS v. JENKINS (1887), 18 Q. B. D. 451; 56 L. J. Q. B. 293; 56 L. T. 591; 35 W. R. 355; 3 T. L. R. 425, C. A.

*Annotations:—Mentd.* Japp v. Campbell (1887), 57 L. J. Q. B. 79; Usher v. Martin (1889), 24 Q. B. D. 272; Jennings v. Mather, [1901] 1 K. B. 108; Peake v. Carter, [1916] 1 K. B. 652.

### iii. As Discharge of Judgment Debts.

**832. Whether a discharge of debt.]**—CLERK v. WITHERS, No. 66, *ante*.

**833. —.]**—The seizure of the debtor's goods & the conversion of them into money extinguishes the debt (BAYLEY, J.).—MORLAND v. PELLATT (1829), 8 B. & C. 722; 3 Man. & Ry. K. B. 411; 7 L. J. O. S. K. B. 54; 108 E. R. 1211.

*Annotations:—Refd.* Giles v. Grover (1832), 9 Bing. 128. *Mentd.* Cumming v. Welsford, Same v. Harris (1830), 8 L. J. O. S. C. P. 168; Bower v. Hett, [1895] 2 Q. B. 51; Re Greer, Napper v. Fanshawe, [1895] 2 Ch. 217.

**834. — Pro tanto.]**—LEE v. DANGAR, GRANT & CO., No. 170, *ante*.

**835. — & finally.]**—Re A DEBTOR, Ex p. SMITH, No. 193, *ante*.

### F. Possession.

#### (a) In General.

**836. Possession not taken—Remaining in debtor—Rights of second execution creditor.]**—RICE v. SERJEANT, No. 807, *ante*.

**837. Possession to be retained.]**—DEEMES v. PANSTON (1731), 2 Barn. K. B. 58; 94 E. R. 354.

**838. —.]**—Where a sheriff has taken possession of goods & chattels under a *fi. fa.*, the officer should continue the possession; or if he may (*sed quare*) abandon it even necessarily for a time, he must clearly & satisfactorily account for so doing, if he would sustain his right against others, afterwards claiming under legal authority to seize same goods.

In case of an abandonment on the return day of the writ, possession cannot afterwards be resumed.—ACKLAND v. PAYNTER (1820), 8 Price, 95; 146 E. R. 1142.

*Annotations:—Consd.* Bagshawes v. Deacon, [1898] 2 Q. B. 173. *Refd.* Balls v. Thick (1845), 9 Jur. 304; Lumsden v. Burnett, [1898] 2 Q. B. 177.

**839. — Absolutely or constructively — Al-**

### PART III. SECT. 1, SUB-SECT. 4.— F. (a).

**836 i. Possession not taken—Remaining in debtor—Rights of second execution creditor.]**—A sheriff having seized goods under execution, took a bond for the delivery thereof when required, & allowed the debtor to remain in possession & carry on his business as before the seizure; & while the debtor so continued in possession, & after the return day of the writ had expired, a second execution at the suit of another creditor, was received by the sheriff:—*Held*: the second took precedence of the first.—CASTLE v. RUTAN (1854), 4 C. P. 252.—CAN.

**t. — Right of landlord to distrain.]**—A sheriff seized goods under an execution, but left them in the possession of the debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested to do so. The landlord of the debtor having seized & sold the goods for rent due to him by

the debtor:—*Held*: the sheriff had not at the time of the distress such possession of the goods as precluded the landlord from distraining for rent.—MCINTYRE v. STATA & CRYSLER (1854), 4 C. P. 248.—CAN.

**u. —.]**—A sheriff, having seized goods of a tenant upon a farm under a *fi. fa.*, left them in possession of the tenant, taking a receipt from him & an adjoining farmer. The landlord distrained & sold the goods, & buying them in, left them on the premises under charge of his former tenant as a hired servant, his lease having expired. The sheriff, without any subsequent seizure, proceeded as if the goods were the original tenant's & sold them under the original *fi. fa.*:—*Held*: he was liable to the landlord for the rent due at the time of seizure, of which he had notice, & for damages to the value of the goods over the rent due.—ROBERTSON v. FORTUNE (1860), 9 C. P. 427.—CAN.

**837 i. Possession to be retained.]**—

though goods in possession of third party.]—BALLS v. PINK, No. 563, *ante*.

**840. Possession for undue time — Liability of sheriff in trespass.]**—On attachment of goods, the officer cannot legally continue in possession of debt.'s house, or keep the goods therein for a long & unreasonable time, but must remove them to a place of safe custody; else he is a trespasser *ab initio*.—REED v. HARRISON (1778), 2 Wm. Bl. 1218; 96 E. R. 717.

*Annotation:—Refd.* Lucas v. Nockells (1828), 4 Bing. 729.

**841. — Possession after return day of writ.]**—If a sheriff continues in possession after the return day of the writ that irregularity makes him a trespasser *ab initio*, but will not support the allegation of a new trespass committed by him after the acts which he justifies under the execution.

—AITKENHEAD v. BLADES (1813), 5 Taunt. 198; 128 E. R. 663; *sub nom.* AIKINHEAD v. BLADES, 1 Marsh. 17.

**842. —.]**—PLAYFAIR v. MUSGROVE, No. 694, *ante*.

**843. —.]**—A sheriff who has entered under a writ of *fi. fa.* & continues on the premises in possession of the goods for more than a reasonable time, is liable in trespass for so continuing beyond the time allowed by law.—ASH v. DAWNAY (1852), 8 Exch. 237; 22 L. J. Ex. 59; 20 L. T. O. S. 103; 17 J. P. 183; 155 E. R. 1334.

*Annotation:—Refd.* Lee v. Dangar, Grant, [1892] 1 Q. B. 231.

**844. Removal of goods to safe custody — Duty of sheriff.]**—REED v. HARRISON, No. 840, *ante*.

**845. Possession illegally obtained — Whether seizure justifiable.]**—Where a plea justifies a trespass under a *fi. fa.* on the ground that the outer door was open at the time of the entry & seizure, that allegation is put in issue by the replication *de injuriâ*. A., a sheriff's officer, to whom a writ of *fi. fa.* was directed, offered, for a pecuniary consideration, to delay its execution for a few days. B., who exercised the office of bailiff to the sheriff, in partnership with A., afterwards illegally executed the writ, by breaking open an outer door; & A. subsequently withdrew his men from possession on payment of the amount indorsed on the writ, & of a bonus to himself:—*Held*: (1) sufficient to warrant the jury in finding A. to be a co-trespasser as having authorised the unlawful act of his partner, B.; (2) in such a case, the damages are peculiarly in the discretion of the jury; & they may include the sum paid for the withdrawal of the execution. *Qu.*: to what extent a seizure of goods under a *fi. fa.* can be justified, when properly pleaded, where the

The sheriff must not only take but retain possession in some form. This does not mean constructive but actual possession, & actual possession means actual visible possession.—YOUNG v. DENCHER, BANK OF TORONTO v. ADAMES, [1923] 1 W. W. R. 136; [1923] 1 D. L. R. 432; 18 Alta. L. R. 496.—CAN.

**y. Right of sheriff to place debtor in possession.]**—On seizure of debtor's goods under *fi. fa.* the sheriff may appoint debtor himself to take charge of goods.—FEDERAL BANK v. KRETSCHMANN (1886), 7 N. S. W. L. R. 183.—AUS.

**a. Right of sheriff to go into possession — Fieri facias goods.]**—Although there is no express power in a writ of *fi. fa.* goods to enter upon land there is an implied power to do so for the purpose of seizing the goods & to remain in possession of the goods on the land for a reasonable time.—COCHLIN v. MASSEY-HARRIS (1915),

possession of the goods has been illegally obtained.—**BRUNSWICK (DUKE) v. SLOWMAN** (1849), 8 C. B. 317; 18 L. J. C. P. 299; 137 E. R. 532.

**Instructions to delay execution of writ.]—See Nos. 541–543, ante.**

(b) *Withdrawal.*

**846. When withdrawal necessary—Reasons for withdrawal to be explicit.]—ACKLAND v. PAYNTER**, No. 838, *ante*.

**847. — Notice of rent due.]—**Where the sheriff executes a *fi. fa.*, & he receives notice of a year's rent being due, & the goods on the premises are not sufficient to satisfy a year's rent, he must withdraw; & if he sells, the ct. will not stay proceedings in an action against him under 8 Ann., c. 14, s. 1, on paying over the proceeds of the sale.—**FOSTER v. HILTON** (1831), 1 Dowl. 35.

**848. Who may order withdrawal—Attorney of execution creditor.]—**The sheriff having seized certain goods in the house of A., under a *fi. fa.* against him at the suit of B., & a claim having been made by C. under a bill of sale, B. not choosing to contest the claim so made by C., his attorneys gave the sheriff a direction to withdraw, in the following terms: “A. v. B. Withdraw under the *fi. fa.* herein, the goods having been claimed.” The officer finding that the bill of sale under which C.'s claim was made did not convey the whole of the goods he had seized, retained possession of those to which the claim did not apply; & three days afterwards informed the attorneys for the execution creditor what he had done. The attorneys, as well as the execution creditor, expressed their approbation of the course the officer had adopted, the former observing that the direction to withdraw was only intended to apply to the goods that were the subject of the claim. In trespass for entering the house & seizing & converting the goods the sheriff justified entering under the writ. Pltf. replied, admitting the writ & warrant, that, after the seizure, A. discharged & forbade debts. from further executing the writ, & new-assigned that he brought his action for the subsequent trespass & conversion. Debts. in their rejoinder traversed the discharge to the sheriff:—**Held**: (1) construing the direction to the sheriff to withdraw, with reference to the surrounding circumstances, it amounted to no more than a partial direction to retire from the possession of the goods to which C.'s claim applied; (2) the subsequent ratification by A. of the detention of the rest of the goods, being an act done for his benefit, was a sufficient justification to the sheriff; (3) the issue was not divisible, & therefore A. would not be entitled to recover, even though it should appear that some of the goods subsequently detained, were within the claim.—**WALKER v. HUNTER** (1845), 2 C. B. 324; 15 L. J. C. P. 12; 6 L. T. O. S. 154; 9 Jur. 1079; 135 E. R. 970.

**Annotations:—Generally, Rejd. Re A Debtor, Ex p. Smith, [1902] 2 K. B. 260. Mentd. Simpson v. Margitson (1847), 11 Q. B. 23; Bruner v. Moore, [1904] 1 Ch. 305.**

**849. — .]**—To a *testatum fi. fa.* the sheriff returned that he seized debt's goods, & kept possession until he received from the

attorney of pltf. an order to withdraw from possession:—**Held**: the return was good, for the attorney of pltf. meant the attorney in the action, & he had power to order the sheriff to quit possession.

The attorney in a suit has the power to direct & manage the execution against the goods (**ALDERSON, B.**).—**LEVI v. ABBOTT** (1849), 4 Exch. 588; 19 L. J. Ex. 62; 14 L. T. O. S. 353; 154 E. R. 1348.

**Annotations:—Rejd. National Asso. & Investment Asso. v. Best (1857), 2 H. & N. 605; Lovegrove v. White (1871), L. R. 6 C. P. 440; Re Commonwealth Land, Building, Estate & Auction Co., Ex p. Hollington (1873), 43 L. J. Ch. 99; Smith v. Keal (1882), 9 Q. B. D. 340.**

**850. Effect of withdrawal—Goods no longer subject to writ.]—**A bailiff having seized goods under a *fi. fa.* against B., was authorised by A., the creditor, to quit possession, B. consenting that he might return & sell. The bailiff quitted possession, & afterwards returned & sold, & the sheriff paid the proceeds to A. Before the sale C. issued a *fi. fa.* against B., to which the sheriff returned *nulla bona*. C. recovered the value of the goods from the sheriff in an action for a false return:—**Held**: A. was liable to the sheriff for the damages & costs recovered by C., unless he could show that the sheriff was conscious of the misconduct, or that the action was brought for the benefit of the bailiff.

The general rule is, that the act of the officer is, in point of law, the act of the sheriff, but the present case forms an exception to that rule. Where the misconduct of the officer is produced by the act of the execution creditor, it is not competent for the latter to say that the act of the officer, committed in violation of his duty to the sheriff, & induced by the execution creditor is the act of the sheriff (**BAYLEY, J.**).—**CROWDER v. LONG** (1828), 8 B. & C. 598; 3 Man. & Ry. K. B. 17; 7 L. J. O. S. K. B. 86; 108 E. R. 1164.

**Annotations:—Rejd. Raphael v. Goodman (1838), 8 Ad. & El. 565; Brown v. Copley (1844), 7 Man. & G. 558.**

**851. — Writ by second execution creditor—Liability of sheriff to.]—CROWDER v. LONG**, No. 850, *ante*.

**852. — — Liability of first creditor to sheriff—Wrongfully inducing bailiff to withdraw.]—CROWDER v. LONG**, No. 850, *ante*.

**On payment into court—Pending interpleader proceedings.]—See No. 830, ante.**

**853. What amounts to withdrawal—Part of goods claimed under bill of sale—Retention of remainder—Liability of sheriff.]—WALKER v. HUNTER**, No. 848, *ante*.

**Amounting to abandonment.]—See Nos. 854–857, post.**

(c) *Abandonment.*

**854. What amounts to abandonment—No person left in charge—Writ locked in drawer.]—**Where a sheriff's officer executed a writ of *fi. fa.* by going to the house & informing the debtor he came to levy on his goods, & laying his hand on a table & saying, “I take this table,” & then locked up his warrant in the table drawer, took the key, & went away, without leaving any person

30 W. L. R. 923; 8 W. W. R. 286.—**CAN.**

**PART III. SECT. 1, SUB-SECT. 4.—F. (c).**

**b. What amounts to abandonment—No person left in charge.]—**The sheriff seized goods, but put no bailiff in possession on debt. promising not to remove them. Debt. subsequently removed the goods, whereupon the landlord seized them for rent, on the

ground that the removal was fraudulent. The sheriff then made a second seizure under the execution:—**Held**: the first seizure by the sheriff had been abandoned, & that he could not retake them while under seizure for rent.—**CRAIG v. CRAIG** (1877), 7 P. R. 209.—**CAN.**

**c. — .]**—A sheriff received two executions against goods, on Jan. 18 and Feb. 15, respectively. He made a formal seizure on the

delivery of the first writ, but left no one in possession, & the debtor remained in possession, & carried on his business as before the seizure. There had been a stay on this writ by the creditor, but on the delivery of the second writ the sheriff was directed to proceed on both. On Mar. 6, the goods were sold by the debtor to pltf., who removed them to their own place of business. On Mar. 22, the sheriff seized all the goods then in pltf.'s possession, which he had received



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, F. (c) (d), G. & H.*

in possession, & after the *fi. fa.* was returnable, but not continued, the landlord distrained the goods for rent:—*Held*: the sheriff could not maintain trespass against him.

The question here is whether by quitting the premises after the seizure, & leaving no one in charge of the goods he did not relinquish possession. . . . The possession, as soon as the sheriff abandoned it, reverted back to the original owner (LORD ELLENBOROUGH, C.J.).—BLADES v. ARUNDALE (1813), 1 M. & S. 711; 105 E. R. 265.

*Annotations*:—*Consd.* Ackland v. Paynter (1820), 8 Price, 95; *Re Davis, Ex p. Pollen Trustees* (1885), 55 L. J. Q. B. 217. *Refd.* Doker v. Hasler (1825), 2 Bing. 479; Hartley v. Moxham (1842), 12 L. J. Q. B. 41; Balls v. Pink (1845), 4 L. T. O. S. 356; Gladstone v. Padwick (1871), L. R. 6 Exch. 203; Bagshawes v. Deacon, [1898] 2 Q. B. 173.

**855. — Intimation only of seizure—Warrant shown.**—BALLS v. PINK, No. 563, *ante*.

**856. — Questions of fact.**—Where a sheriff, who has seized goods under a writ of execution, goes out of possession the question whether he has abandoned possession is a question of fact.—BAGSHAWES, LTD. v. DEACON, [1898] 2 Q. B. 173; 67 L. J. Q. B. 658; 78 L. T. 776; 46 W. R. 618, C. A.

*Annotations*:—*Folld.* Lumsden v. Burnett, [1898] 2 Q. B. 177. *Refd.* Jones v. Biernstein, [1899] 80 L. T. 157; *Re A Debtor, Ex p. Smith*, [1902] 2 K. B. 260.

**857. — Whether abandonment intended.**—Where a sheriff goes out of possession & the point arises as to whether he has abandoned possession or not, the question always is one of fact & is whether the sheriff by going out of possession . . . abandoned possession (SMITH, L.J.).—LUMSDEN v. BURNETT, [1898] 2 Q. B. 177; 67 L. J. Q. B. 661; 78 L. T. 778; 46 W. R. 664; 14 T. L. R. 403, C. A.

#### (d) *Re-Entry.*

**858. Power to re-enter—After withdrawal—On return day of writ.**—ACKLAND v. PAYNTER, No. 838, *ante*.

**859. — Under interpleader rule.**—When the sheriff has been allowed to withdraw from possession by authority of a rule under

from the debtor. The sale to pltf's. was *bona fide*, & for value, & without notice of the executions:—*Held*: there was no abandonment of the executions.—PATTERSON v. MCKELLAR (SHERIFF) (1884), 4 O. R. 407.—CAN.

**d. —**—The sheriff's bailiff seized under execution wheat crop in stock. He then took, from the debtor, a bond without sureties, the condition of which was that the sheriff should be permitted by the debtor to enter upon the premises & retake the goods when required. The bailiff thereupon left the premises & did nothing further:—*Held*: the seizure had been abandoned.—NICOLL v. CANADIAN BANK OF COMMERCE (1915), 31 W. L. R. 667.—CAN.

**e. —**—*Necessity for notice of seizure.*—The fact of leaving the goods seized in the possession of the debtor for a reasonable time under an arrangement whereby they were to be held for the sheriff might not in itself constitute an abandonment, but some kind of notice should be given of the seizure such as posting up a notice thereof containing a list of the goods in some conspicuous place on the premises & an application for removal & sale be made promptly by the creditor.—YOUNG v. DENCHER, BANK OF TORONTO v. ADAMES, [1923] 1 W. W. R. 136; [1923] 1 D. L. R. 432; 18 Alta. L. R. 496.—CAN.

**f. —**—*Loan by sheriff of chattel seized.*—A chattel was seized by the sheriff, & lent by him before the return of the writ:—*Held*: no abandonment.—HAMILTON v. BOUEK (1837), 5 O. S. 664.—CAN.

**g. —**—*Renewal of writ.*—Taking a writ from the sheriff for renewal is not an abandonment.—MUIR v. MUNRO (1863), 23 U. C. R. 139.—CAN.

**h. —**—*Leaving goods with person in possession at time of seizure.*—A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands & goods seized under it. After the seizure the goods, with the consent of pltf.'s solr., were left by the sheriff in charge of S., who undertook that the same should be held intact:—*Held*: the act of leaving the goods in the possession of S. was not an abandonment by pltf.'s solr. of the seizure.—DUFFUS v. CREIGHTON (1887), 14 S. C. R. 740; 7 C. L. T. 389.—CAN.

**k. —**—The sheriff, after making a levy, went away saying that he was coming back, & that if the door was locked he would have to break in. A watchman was placed on the premises. The sheriff returned twice between the day of the levy & the day of the sale & found the house locked. On the day of the sale he forced open one of the doors:—*Held*:

Interpleader Act, 1831 (c. 38), he cannot afterwards or after he is out of office be compelled to re-enter.—WILTON v. CHAMBERS (1834), 3 Dowl. 12.

**860. — Where writ withdrawn—Not without further order—From execution creditor.**—SHAW v. KIRBY, No. 531, *ante*.

**861. — After sheriff out of office.**—WILTON v. CHAMBERS, No. 859, *ante*.

#### *G. Inquest as to Property.*

**862. Right of sheriff to hold.**—FARR v. NEWMAN, No. 736, *ante*.

**863. Court will not set aside.**—The ct. will not set aside the inquisition of a jury, summoned by the sheriff to inquire in whom the property of goods seized by him under a *fi. fa.* is vested.—ROBERTS v. THOMAS (1794), 6 Term Rep. 88; 101 E. R. 450.

**864. Costs of inquisition.**—(1) S. having given a *cognovit* for a certain sum, with a stay of execution, afterwards mortgaged certain premises as a security for the payment of that sum, & it was provided, that, in case of default of payment, it should be lawful for the mtgee. to issue execution on the judgment, & to levy the costs of the judgment, & all other costs & charges whatsoever attending same. The mtgee. having levied, his right to the goods seized under the writ was disputed in an action brought against him by the assignees of the mtgor., who had become bkpt.; & they having obtained a verdict, a new trial was granted on the application of the mtgee., in which he succeeded, on the ground, that the mtgor. was not a trader within the bkpt. laws:—*Held*: the mtgee. could not claim the costs of the first trial from the mtgor., as costs or charges attending the judgment under the *cognovit*.

(2) The mtgor., on the levy being made, gave the sheriff notice that the goods seized belonged to him jointly with another person, upon which the sheriff impaneled a jury to determine to whom the property belonged:—*Held*: the mtgee. was entitled to claim of the mtgor. the costs of the inquisition, if the mtgee. had paid them to the sheriff, & the ct. referred it to the prothonotary to ascertain that fact.—DOE d. HOLT v. ROE (1830), 6 Bing. 447; 4 Moo. & P. 177; 8 L. J. O. S. C. P. 147; 130 E. R. 1353.

this did not constitute an abandonment of the levy.—REID v. CREIGHTON (1894), 27 N. S. R. (15 R. & G.) 90.—CAN.

**l. —**—CORONA LUMBER CO., LTD. v. BRERETON, [1917] 1 W. W. R. 706.—CAN.

**m. Validity of sheriff's sale after abandonment.**—*Held*: where the levy had been abandoned & a *bona fide* sale afterwards made by the execution debt., no property passed by a subsequent sale by the sheriff.—GOULD v. WHITE (1835), 4 O. S. 124.—CAN.

**n. Right of execution creditor to abandon.**—A sheriff having made a seizure of goods which the execution creditor had not specially directed, & a claimant to the goods having appeared, the creditor refused to allow the sheriff to withdraw. On the return of an interpleader summons obtained by the sheriff, the creditor abandoned his claim:—*Held*: the creditor might abandon at that stage of the proceedings without costs.—CANADIAN BANK OF COMMERCE v. TASKER (1880), 8 P. R. 351.—CAN.

**o. Right of sheriff to abandon.**—A sheriff having seized under a writ of *fi. fa.* has no power to abandon the seizure, but must make a due return to the writ.—SUGRUE v. HOVENDEN (1857), 7 I. C. L. R. 318; 10 Ir. Jur. 113.—IR.

## PART III.—PARTICULAR FORMS OF EXECUTION.

### . Sale.

#### (a) In General.

**865. Sale of goods levied in another country—Valid.]**—ANON. (1808), 1 Brownl. 41; 123 E. R. 653.

**866. Sheriff superseded in office prior to sale—Old not new sheriff must sell.]**—ANON. (1598), Moore, K. B. 542; 72 E. R. 745.

*Annotation*:—**Refd.** *Giles v. Grover* (1832), 9 Bing. 128.

**867. ———.]**—CLERK *v.* WITHERS, No. 66, ante.

**868. ——— Distringas nuper vicecomitem—To new sheriff.]**—When a sheriff takes goods in execution he has a right to sell them notwithstanding his office be determined.—*WILCOX v. POKINHORN* (1728), 1 Barn. K. B. 81; 94 E. R. 57.

**869. ——— Must not re-deliver goods.]**—ANON. (1598), Moore, K. B. 542; 72 E. R. 745.

*Annotation*:—**Refd.** *Giles v. Grover* (1832), 1 Cl. & Fin. 72.

**870. No appraisement necessary.]**—BEALY *v.* SAMPSON (1688), 2 Vent. 93; 86 E. R. 328.

*Annotations*:—**Refd.** *Langdon v. Wallis* (1698), 1 Lut. 582; *Garland v. Carlisle* (1837), 11 Bli. N. S. 421.

**871. What to be sold or not—Court will not direct.]**—*R. v. CARLILE*, No. 1021, post.

**872. Restraint of sale—Indemnity offered by third party claimant—Court will not interfere.]**—The ct. will not interfere to restrain a sheriff from selling goods seized by him under a *fi. fa.* on an offer of indemnity by a third person claiming the goods.—*HARRISON v. FORSTER* (1836), 4 Dowl. 558; 1 Har. & W. 650.

**873. Failure to sell—Liability of sheriff.]**—NEEDHAM *v.* BENNET, No. 1052, post.

**874. Issue of several writs—Sale applicable to all writs.]**—In an action on the case against the sheriff for injury to the reversionary interests of pltf., by selling certain fixtures, under an execution against the goods of the tenant, it appeared that the officer entered under an old writ delivered to him by a former sheriff, as well as under that delivered by the present sheriff, & deft.; but that the sale took place under the old writ, the judgment creditor in which received all the proceeds:—**Held**: (1) defts. were liable for the acts of the purchaser, in removing the fixtures so sold by their officer, though he had nothing to do with their actual removal; (2) as the sale in legal effect took place under all the writs in respect of which a sheriff enters, & defts. were bound to execute the old writ as well as their own, they were liable in respect of the old as well as of their own writs.—*BRIGGS v. LAURIE* (1847), 12 J. P. 264.

**875. Sale on different days—Under same writ—All sales one transaction.]**—(1) The sheriff may make a valid sale by private contract of goods

seized under an execution, to the execution creditor.

I do not think that it makes any difference that the sale was made to the execution creditor himself (MELLISH, L.J.).

(2) If the sheriff sells goods seized under the same writ on different days, all the sales will be considered one transaction.—*Re ROGERS, Ex p. VILLARS* (1874), 9 Ch. App. 432; 43 L. J. Bcy. 76; 30 L. T. 104, 348; 38 J. P. 533; 22 W. R. 397, 603, C. A.

*Annotations*:—**Generally, Mentd.** *Re Condon, Ex p. James* (1874), 9 Ch. App. 609; *Re Husband, Ex p. Dawes* (1875), L. R. 19 Eq. 438; *Crew v. Terry* (1877), 2 C. P. D. 403; *Re McHenry, Ex p. McHenry* (1883), 24 Ch. D. 35; *Fligg v. Moore*, [1894] 2 Q. B. 690; *Burns-Burns Trustee v. Brown*, [1895] 1 Q. B. 324; *Re Thellusson, Ex p. Abdy*, [1919] 2 K. B. 735; *Re Gunsbourg*, [1920] 2 K. B. 426; *Scranton's Trustee v. Pearce*, [1922] 2 Ch. 87.

**876. Seizure necessary preliminary to sale.]**—The sheriff cannot make a valid contract for sale of the goods of a judgment debtor against whom he holds a writ of *fi. fa.* until he has actually seized the goods.—*Re TOWNSEND, Ex p. HALL* (1880), 14 Ch. D. 132; 42 L. T. 162; 28 W. R. 556, C. A.

**Sale of crops.]**—*See* Nos. 617, 619, ante.

**Writ of venditioni exponas.]**—*See* Sub-sect. 13, post.

#### (b) Duty of Sheriff to Sell.

**877. Cannot deliver goods in satisfaction.]**—On a *fi. fa.* the goods cannot be delivered to pltf. in satisfaction of his debt.—*THOMSON v. CLERK* (1596), Cro. Eliz. 504; Noy, 56; 78 E. R. 754.

*Annotations*:—**Fold.** *Garland v. Carlisle* (1837), 11 Bli. N. S. 421. **Refd.** *Giles v. Grover* (1832), 9 Bing. 128.

**878. ———.]**—BEALY *v.* SAMPSON (1688), 2 Vent. 93; 86 E. R. 328.

*Annotations*:—**Fold.** *Garland v. Carlisle* (1837), 11 Bli. N. S. 421. **Refd.** *Langdon v. Wallis* (1698), 1 Lut. 582.

**879. ——— Fl. fa. & extent distinguished.]**—Debt lies in an inferior ct. upon a judgment in the superior cts. The distinction between an extent & a *fi. fa.* is, that on the *fi. fa.* the sheriff cannot deliver the goods, but must levy, i.e. sell them. On an extent they may be delivered.—*MOORE v. ANDERSON* (1735), Lee temp. Hard. 103; Cunn. 108; 95 E. R. 64.

**880. ———.]**—Sheriff cannot deliver the goods taken by him upon a *fi. fa.* to pltf. in satisfaction of his debt (*BOSANQUET, J.*).—*GARLAND v. CARLISLE* (1837), 11 Bli. N. S. 421; 4 Cl. & Fin. 693; 4 Scott, 587; 6 E. R. 386, H. L.; *affg.* (1834), 10 Bing. 452, Ex. Ch.; *sub nom.* *CARLISLE v. GARLAND* (1831), 7 Bing. 298.

*Annotations*:—**Refd.** *Dillon v. Langley* (1831), 9 L. J. O. S. K. B. 143; *Hutton v. Balme* (1832), 2 Tyr. 620; *Scott v. Lewis* (1835), 2 Cr. M. & R. 289; *Reynolds v. Wedd* (1838), 7 L. J. C. P. 244; *Tharpe v. Stallwood* (1843), 5 Man. & G. 760; *Cannan v. S. E. Ry.* (1852), 7 Exch. 843; *Edwards v. Scarsbrook* (1862), 3 B. & S. 280; *Hollins v.*

### PART III. SECT. 1, SUB-SECT. 4.— H. (a).

**p. Notice of sale—Irregularity—Acquiescence of debtor.]**—Any want of regularity in giving public notice of an adjourned sale under a *fi. fa.* will not invalidate the sale where the debtor attended the sale by his agent & afterwards ratified what had been done.—*DOE d. DISSETT v. MOLEOD* (1847), 3 U. C. R. 297.—CAN.

**q. ———.]**—*Qu.*: whether the sheriff should advertise leasehold property for three months previous to sale under execution.—*DOE d. MASSON v. GRIFFITH* (1880), 20 N. B. R. (4 P. & B.) 113.—CAN.

**r. ——— Failure to give.]**—The omission to advertise at all, where there is no uncertainty as to what has been sold, though it may give a right of action against the sheriff, will not

affect the validity of the sale.—*LEE v. HOWES* (1870), 30 U. C. R. 292.—CAN.

**s. ——— Effect of defective notice.]**—Failure to give notice of a sheriff's sale under a *fi. fa.*, or a defect in the notice, does not invalidate the sale to an innocent purchaser.—*MAPLE LEAF LUMBER CO. v. CALDBRICK & PIERCE* (1917), 40 O. L. R. 512.—CAN.

**t. After proof in master's office.]**—A creditor having proved his claim in the master's office, afterwards proceeded to sell under a *fi. fa.* Upon application of a co-deft. the sale was restrained with costs.—*CAHUAC v. DURIE* (1863), 9 Gr. 485.—CAN.

**u. Promise by execution creditor—To allow debtor additional sum beyond bid—Nudum pactum.]**—A promise by an execution creditor, who has purchased part of the debtor's property at sheriff's sale, to allow the

debtor an additional sum beyond what he had bid for the property is *nudum pactum*.—*FRASER v. DESBRISAY* (1866), 6 All. 436.—CAN.

**b. Transcript from divisional court—Necessity for issue of writ.]**—Upon a transcript from a div. ct. to a district ct., it is not necessary to issue a *fi. fa.* goods from such district ct. before a valid sale can take place under a *fi. fa.* lands issued therefrom.—*DABY v. GEHL* (1889), 18 O. R. 132.—CAN.

**c. Court scrutinises carefully for taint of fraud by ministers.]**—In sales under the direction of the ct. it is incumbent on the ct. to be scrupulous in the extreme & very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers.—*KALA MEA v. HARPERINK* (1908), 1 L. R. 36 Calc. 323.—IND.



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, H. (b), (c), (d) & (e)*

Fowler (1875), L. R. 7 H. L. 757. *Mentd.* Grainger v. Hill (1838), 1 Arn. 42; O'Connell v. R. (1844), 11 Cl. & Fin. 155; Heslop v. Baker (1853), 22 L. J. Ex. 333.

**881. Cannot satisfy debt out of own money—Retaining property to himself.]**—The sheriff cannot detain the goods taken upon an execution in his own hands & satisfy the debt of his proper money (*per* CUR.).—WALLER v. WEEDALE (1604), Noy, 107; 74 E. R. 1072.

*Annotations:—*Reid. Langdon v. Wallis (1698), 1 Lut. 582; Garland v. Carlisle (1837), 11 Bli. N. S. 421.

**882. Although execution subsequently proved fraudulent.]**—DENNIS v. WHETHAM, No. 515, *ante*.

**883. Bankruptcy of debtor before sale.]**—*Re* DAWSON, *Ex p.* DAWSON, No. 705, *ante*.

(c) *To whom Sheriff can Sell.*

**884. To judgment creditor—Assignment by bill of sale.]**—Where a sheriff has seized the goods of debtor under a *fi. fa.* delivered to him by a judgment creditor, & has executed a bill of sale of them to the creditor, & given him possession, a *levari facias*, issued by the Crown, on a judgment entered up for penalties incurred by debtor for frauds on the Revenue, under a verdict obtained on an information filed before the subject creditor's judgment, comes too late; for the property in the goods becomes, by the bill of sale, completely altered. In such a case the sheriff may well return *nulla bona*. If, however, any of the goods included in the bill of sale have been made chargeable with the duties of Excise in arrear on a breach of the Revenue Laws, on which the information was founded, the Crown will be entitled to a verdict for the value of those notwithstanding the sale; & the return of *nulla bona* will not be a

good return as to them.—*A.-G. v. FORT* (1804), 8 Price, 365; 146 E. R. 1230.

*Annotations:—*Folld. *A.-G. v. Trueman* (1843), 11 M. & W. 694. *Refd.* *Giles v. Grover* (1832), 8 Bing. 128.

**885. ———.]**—An assignment from the sheriff under a *fi. fa.* on a judgment obtained by a friendly creditor, with intent to preserve the use of the property to debtor & defeat another execution, although the transaction will be of no greater force than an assignment from debtor, will be valid, provided there was a real debt, & the assignment by the sheriff was *bonâ fide*. A bill of sale or warrant signed by a deputy of the undersheriff is valid.

Under an execution the judgment creditor may take an assignment of the goods on a fair valuation; if it were unfair the transaction would be set aside; & if there was no debt, & the transaction was merely a sham, then it would not stand. Although the object was to defeat the debt's execution, the proceeding would be valid (WILLES, J.).—*COOKSON v. FRYER* (1858), 1 F. & F. 328.

**886. ———.]**—A creditor taking out execution is not precluded from becoming the purchaser of the property seized under it. *Semble*: there is no jurisdiction in equity to set aside a sale under an execution.—*STRATFORD v. TWYNAM* (1822), Jac. 418; 37 E. R. 908.

**887. ———.]**—*Re* ROGERS, *Ex p.* VILLARS, No. 875, *ante*.

(d) *Time for Sale.*

**888. Must be within reasonable time.]**—An action on the case lies against a sheriff for wilfully & without any reasonable or probable cause delaying to sell goods of pltf., which he has seized by virtue of a writ of *levari facias*.—*CARLILE v. PARKINS* (1822), 3 Stark. 163, N. P.

**889. ——— Liability of sheriff for unreasonable delay.]**—3 Geo. 4, c. 39, requiring a warrant of

### PART III. SECT. 1, SUB-SECT. 4.— H. (b).

**883 i. Bankruptcy of debtor before sale.]**—A liquidator of a co. has no right to demand that the sheriff should hand over to him the goods of the co. seized under a *fi. fa.* before the commencement of the winding up; if he wishes to prevent the sheriff from selling such goods his proper course is to apply to the ct. for an injunction restraining the execution creditor from proceeding with the execution.—*Re MUNN'S MAIZENA, LTD.* (1912), 12 S. R. N. S. W. 614; 29 N. S. W. W. N. 152.—*AUS.*

**d. Sale after interpleader order—Default of security.]**—In trover for the value of a piano, sold by the debt., as sheriff, under an execution, it appeared that an interpleader had been directed as to the piano, pltf. to give the usual security within twenty days for its value, to be appraised by debt. Debt., though applied to, neglected to appraise the piano until it was impossible for pltf. to give security within the required time. Security was, however, afterwards given, but debt. nevertheless sold the piano, contending that he was justified in so doing, as pltf. had not complied with the terms of the order.—*Held*: the effect of debt.'s neglect was either to deprive him of the protection of the order or to operate as a waiver of the time thereby limited for giving security; if the former, he was not justified by the order in selling; if the latter, he was not justified, after the bond was allowed & filed, of which he had notice; but whether he had or had not notice of the allowance & filing of the bond, his duty, under the circumstances, was to have ascertained whether the payment had been made or security given before selling,

& if so, to have withdrawn from possession.—*BLACK v. REYNOLDS* (1878), 43 U. C. R. 398.—*CAN.*

**e. Interpleader issue tried.]**—When an interpleader issue has been tried, & the chattels seized have been found to be the property of the execution debtor, the ct. will not interfere to restrain the sheriff from selling them.—*JACKSON v. ROSSITER* (1857), 9 Ir. Jur. 410.—*IR.*

**f. Insufficient disposable property.]**—Where all the disposable property pointed out by a debtor to the sheriff is manifestly insufficient to satisfy a writ, the sheriff is not bound to attach or sell such property & the creditor is entitled to apply for his debtor's sequestration without realising such property.—*KENT v. TRANSVAALSCHE BANK* (1907), T. S. 765.—*S. AF.*

### PART III. SECT. 1, SUB-SECT. 4.— H. (c).

**g. To judgment creditor—Whether sheriff can recover price.]**—Where an execution creditor purchases goods at sheriff's sale, with the knowledge of the sheriff that the purchase is made in order to satisfy his execution, & the goods are delivered to him by the sheriff without any demand of payment, the sheriff cannot recover from him the price of the goods.—*WETMORE v. DES BRISAY* (1858), 4 All. 199.—*CAN.*

**886 i. ———.]**—Where an execution creditor conducts a sale hastily, & is himself the purchaser, he will be censured by the ct.—*Re* MACDONNELL (1851), 17 L. T. O. S. 246.—*IR.*

**h. Not to himself.]**—A sheriff cannot in any manner become the purchaser of property sold under an execution.—*DOE d. THOMPSON v.*

*e* (1838), (1823-1900) 2 Ont. Dig. 2663.—*CAN.*

**k. ——— Unless fair transaction.]**—As a general rule a sheriff, like an auctioneer or attorney or any other person holding a fiduciary character, is incapable of purchasing property sold under execution by himself or under his authority or direction, & such purchase is absolutely void.

The transaction, however, in this case being a fair one (the sheriff, although he purchased the land of the execution debtor through a third party at his own sale under execution, having brought the judgment from the execution creditor, & having paid him in full therefor, & no offer being shown by debt. to repay the sheriff the amount so paid), the ct. upheld the sale.—*SMITH v. SMITH* (1866), 6 N. S. R. (2 Old) 303.—*CAN.*

**l. To person without free miner's certificate—Certificate acquired after execution & delivery of bill of sale of claim.]**—Where mineral claims are knocked down at a sheriff's auction sale to a person who at the time of the sale is not the holder of the free miner's certificate called for by R. S. B. C. 1911, c. 157, but who acquires one before the execution & delivery to him of a bill of sale of the claims, the sale is valid.—*ROUNDY v. SALINAS* (1915), 31 W. L. R. 338; 8 W. W. R. 912.—*CAN.*

### PART III. SECT. 1, SUB-SECT. 4.— H. (d).

**889 i. Must be within reasonable time—Liability of sheriff for unreasonable delay.]**—Deft., a division ct. bailiff, received an execution against K. on May 12, 1873, on a judgment recovered on that day, under which, on May 14, he seized two horses. On

attorney to be filed within 21 days after execution, otherwise to be void, & fraudulent against assignees, is confined to the case of a valid commission; therefore such warrant of attorney, though not filed under the statute is good against a party acting as assignee under a commission illegally sued out:—*Semble*: an action lies against the sheriff, if he do not sell in a reasonable time after making the seizure, & if he, by such delay, suffer a bkpcy. to intervene, by which pltf. loses the fruits of his execution.—*AIRETON v. DAVIS* (1833), 9 Bing. 740; 3 Moo. & S. 138; 131 E. R. 792; *sub nom.* *AIRTON v. DAVIS*, 2 L. J. C. P. 89. *Annotations*:—*Reid*. *Brown v. Jarvis* (1836), Tyr. & Gr. 1033; *Randell v. Wheble* (1839), 10 Ad. & El. 719. *Mentd.* *Anon.* (1833), 2 L. J. Bcy. 80; *Brancher v. Molyneux* (1842), 4 Man. & G. 226; *Fletcher v. Manning* (1844), 12 M. & W. 571.

**890.** ——— In nominal damages—No injury to plaintiff proved.]—Case lies for a judgment creditor against a sheriff for not selling within a reasonable time after a seizure under a *fi. fa.* But pltf. in such action can recover nominal damages only, unless actual injury be proved.—*BALES v. WINGFIELD* (1833), 4 Q. B. 580, n.; 2 Nev. & M. K. B. 831; 114 E. R. 1016, n.

*Annotations*:—*Consd.* *Wyllie v. Birch* (1843), 4 Q. B. 566. *Reid*. *Brown v. Jarvis* (1836), Tyr. & Gr. 1033; *Clifton v. Hooper* (1844), 6 Q. B. 468.

**891.** ———.]—A declaration in case against the sheriff, stated a delivery to him of a writ of *fi. fa.*, issued upon a judgment recovered against one R. W. indorsed to levy, etc.; that he seized the goods of R. W., within his bailiwick, & remained in possession of them for a long time, during which he might & ought to have sold, yet that he neglected the execution of his office, & forbore to sell; & afterwards falsely returned that the goods remained in his possession for want of buyers. Pleas, first, that deft. did not take in execution any goods of R. W.; or remain in possession, by virtue of the writ for the space of time, or any part thereof. Second, that deft. could not, nor might, nor ought to have sold the goods, or any of them, under or by virtue of the writ, or to have raised thereout the moneys indorsed to be levied, within the space of time in the declaration mentioned. Third, that R. W. became bkpt.; & that within two months after the issuing of the writ in the declaration mentioned, & the delivery thereof to deft., & of the seizure of the goods, & before the passing of 2 & 3 Vict. c. 29, & before deft. could or ought to have sold the goods, a *fiat* issued, & R. W. was declared bkpt.; that before the commencement of the action, an official assignee was appointed, in whom the goods so taken in execution became & were vested; concluding

with a verification:—*Held*: the pleas were bad; the first, for duplicity; the second, as amounting to the general issue; the third, as being an argumentative denial of the seizure of the goods of R. W.

*Semble*: the declaration was not for a false return, but for not selling in due time.—*ROWE v. AMES* (1840), 6 M. & W. 747; 8 Dowl. 750; 9 L. J. Ex. 260; 151 E. R. 614.

**892.** ——— Before return to venditioni exponas.]—*JACOBS v. HUMPHREY*, No. 1209, *post*.

**893.** ——— What amounts to reasonable time—Notice to sheriff that debtor committed act of bankruptcy.]—A sheriff, who, having seized goods under a *fi. fa.* receives notice in general terms that the execution-debtor has committed an act of bkpcy., may take reasonable time to inquire whether the statement is true before proceeding to sell, unless he is aware of circumstances which cause him to think that the notice is a mere pretence. *Semble*: a sheriff who forbears to sell for a period of more than a week after receiving such notice, & who makes no inquiries in the meanwhile, waits an unreasonable time, & is liable in damages to the execution creditor for the consequences of the delay.—*AYSHFORD v. MURRAY* (1870), 23 L. T. 470, N. P.

**894.** ——— Duty of county court bailiff distinguished.]—*Re CROOK, Ex p. SOUTHAMPTON, SHERIFF*, No. 516, *ante*.

(e) Amount to be Sold.

**895.** Enough to satisfy execution.]—A justification under a *fi. fa.* is bad, if it appear that more was levied than was warranted by the writ.—*HARDING v. FERNE* (1677), 2 Mod. Rep. 177; 86 E. R. 1009.

**896.** Liability of sheriff for excessive sale—Trespass.]—If a *fi. fa.* for £20 be awarded to the sheriff, upon which he takes an entire chattel & sells it for £40 & returns the *fi. fa.* with the £20 in ct., he may detain the surplusage until deft. comes to demand it of him (*POPHAM, J.*).

If a *fi. fa.* be awarded for 40s. by force of which the sheriff takes five oxen, every one of the value of £5 & sells them all, it is clear that deft. shall have an action of trespass against the sheriff (*GAWDY, J.*).—*WOODDY v. COLES* (1595), Noy, 59; 74 E. R. 1027.

**897.** ——— Trover.]—Where the sheriff sells under an execution more than sufficient to satisfy the debt & costs he is liable in trover for the excess.—*BATCHELOR v. VYSE* (1834), 4 Moo. & S. 552.

*Annotation*:—*Folld.* *Aldred v. Constable* (1844), 6 Q. B. 370.

**898.** ———.]—Trover against sheriff for goods particularly described in the declaration.

May 10 K. executed a voluntary assignment under Insolvent Act, but the assignee on being made acquainted with it advised a private settlement, & did not receive & act on the assignment until June 7. The bailiff, who had left the horses in K.'s possession, taking a bond for their forthcoming, took them again & advertised them for sale on June 2, but on being notified by the official assignee he delivered them over to him on June 9. Pltf. then sued the bailiff & his sureties on their covenant for not selling & paying over the money between the seizure & the claim by the assignee:—*Held*: he could not recover; for there was no misconduct, because the horses passed to the assignee on the execution of the assignment, which was before the judgment; & if the delivery was a breach of duty, pltf. had sustained no damage from it, for if the bailiff had proceeded to sell sooner, the assignee would no doubt have claimed

the horses, as he did afterwards.—*BROWN v. WRIGHT* (1874), 35 U. C. R. 378.—*CAN.*

**m.** ——— Effect of notice of intention to surrender.]—Where damages were claimed against a messenger for delay in proceeding with a sale in execution, & it appeared that on the earliest day on which the messenger could have sold in execution a notice of intention to surrender the judgment debtor's estate had appeared in the Gazette at P.:—*Held*: the action must fail.—*ACKERMANN v. RAVENSCROFT* (1914), C. P. D. 882.—*S. AF.*

**n.** After expiration of writ—If seizure made while writ in force.]—If a seizure is made while the writ of execution is in force, a sale may be made after the writ has expired.—*DIXON v. MACKAY* (1903), 21 Man. L. R. 763.—*CAN.*

**o.** Immediate sale ordered to

prevent deterioration—Time allowed absent defendant to appear.]—When the sale of a vessel belonging to an absent deft., which was held by attachment, under the process of the ct., was ordered to take place immediately for the purpose of preventing the deterioration of the property, time was allowed to appear & plead.—*SIMMS v. HODDERN* (1818), 1 Nfld. L. R. 93.—*NFLD.*

PART III. SECT. 1, SUB-SECT. 4.—**H. (e).**

**p.** Whole interest remaining in termor.]—The sheriff under a *fi. fa.* may sell what the termor continues to hold under a lease, but he cannot sell part of his interest, or a part of the premises.—*OSBORNE v. KERR* (1859), 17 U. C. R. 134.—*CAN.*

**q.** Sale of railway shares en bloc—For amount in excess of judgment debt.]—Where a number of shares of railway stock were seized & advertised



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, H. (c), (f), (g), (h) & (i) i. & ii.]*

Plea, that debt. seized & sold the goods under a *fi. fa.*, at the suit of J. Replication, that the conversion complained of in the declaration is not the seizing & taking of the goods in the plea mentioned under the writ, & that plffs. sue, not in respect of such seizing & taking, nor of goods seized, taken & sold under the writ, but for that plffs. were lawfully possessed of the goods in the declaration mentioned, which were other than & different from the goods seized, etc., by debts. under J.'s writ, & that debts. converted & disposed of the goods in the declaration mentioned, etc. Plea, not guilty. It was proved that the sheriff received J.'s writ, & seized under it goods of debtor, including those claimed in the action of trover: he then received a writ at the suit of C., which afterwards proved invalid. After receiving the second writ he sold the goods on two successive days. The first day's sale produced enough to satisfy J.'s writ: the action of trover was brought by the assignees of debtor, who had become bkpt., for the goods sold after J.'s execution was satisfied:—*Held*: (1) the sale was not to be considered entire & indivisible; but the sheriff, after selling enough to satisfy the first writ, was liable in trover for the goods sold beyond that amount.

(2) A sheriff, after selling enough to satisfy an execution, is not justified in selling more on the supposition that, by accident for which he is not answerable, the amount levied may become insufficient.—*ALDRED v. CONSTABLE* (1844), 6 Q. B. 370; 3 L. T. O. S. 299; 8 Jur. 956; 115 E. R. 142.

*Annotation*:—*As to (1) Refd. Re Pearce, Ex p. Crossthwaite* (1885), 14 Q. B. D. 966.

**899.** ———.]—*GAWLER v. CHAPLIN*, No. 966, *post*.

**900. Provision for probable additional claim—Sheriff may not sell additional goods—Where not answerable for contingency.]—ALDRED v. CONSTABLE**, No. 898, *ante*.

#### (f) Mode of Sale.

See Bkpcy. Act, 1883 (c. 52), s. 145; Bkpcy. Act, 1890 (c. 71), s. 12; R. S. C., Ord. 43, rr. 8–14.

**901. Sale by private contract—Instead of public auction.]—Re ROGERS, Ex p. VILLARS**, No. 875, *ante*.

**902.** ———. On ex parte application by execution creditor—Power of master or judge to order.]—*HUNT v. CLIFFORD*, [1884] W. N. 86; Bitt. Rep. in Ch. 136.

**903.** ———. Discretion of court.]—

to be sold in one lot, neither debt. nor any one interested in the sale requesting the sheriff to sell the shares separately, & such shares were sold for an amount far in excess of the judgment debt for which the property was taken in execution, in the absence of proof of fraud or collusion:—*Held*: such sale was good & valid.—*CONNECTICUT & PASSUMPSIC RIVERS RY. Co. v. MORRIS* (1887), 14 S. C. R. 318.—*CAN.*

*r. Sale under money decree—Sale under decree enforcing mortgage—Distinguished.]—*There are substantial differences between a sale in execution for a money decree & a sale under a decree ordering a sale to enforce a mtge. In the former case the ct. proposes to sell whatever interest in the property would, under any circumstances, be available to creditors at the date of the attachment; in the latter case, whatever interest the mtgor. was, under any circumstances, competent to create, & did create at

the time of the mtge.—*PONNAPPA PILLAI v. PAPPUVAYANGAR* (1881), 1 L. R. 4 Mad. 1.—*IND.*

#### PART III. SECT. 1, SUB-SECT. 4.—H. (g).

**906 i. Liability for failure to obtain—Action.]—**A sheriff levied under a *fi. fa.* for £166, on mining plant, etc., & being informed that there was an existing mtge. on the plant etc., & arrears of money due to the co.'s workmen, he on the following day sold for £10. There was in fact no mtge., & the purchaser three weeks afterwards sold for £240. In an action by the execution creditor against the sheriff for negligence:—*Held*: the sheriff was liable for the difference between the net amount realised by the sale, & the amount of the *fi. fa.*—*SMITH v. COLLES* (1871), 2 V. R. (Law) 195.—*AUS.*

**906 ii.** ———.]—*Held*: it was the duty of the sheriff to both creditors

Under Bkpcy. Act, 1883 (c. 52), s. 145, the ct. has a discretion to order goods taken in execution by the sheriff to be sold by private contract instead of by public auction, notwithstanding that the application for leave to sell by private contract is made by the execution creditor *ex p.*, & in the absence of all the other creditors of the execution debtor.—*HUNT v. FENSHAM* (1884), 12 Q. B. D. 162; 32 W. R. 316.

**904.** ———. Execution for more than twenty pounds—Effect of such sale without leave of court.]—Where a sheriff under an execution for more than £20 sells by private contract, with the consent of debtor, but without leave of the ct., such sale, although against Bkpcy. Act, 1883 (c. 52), s. 145, is, until set aside by the ct., valid against a subsequent execution creditor.—*CRAWSHAW v. HARRISON*, [1894] 1 Q. B. 79; 63 L. J. Q. B. 94; 69 L. T. 860; 10 T. L. R. 29; 1 Mans. 407; 10 R. 608, D. C.

#### (g) Must Obtain Best Price.

**905. Liability for failure to obtain—Indictment.]—**An indictment will lie against an under-sheriff for under-valuing goods taken under a *fi. fa.*—*SAYRE'S CASE* (1617), Cro. Jac. 426; 79 E. R. 364.

*Annotation*:—*Mentd. Inledon v. Burgess* (1688), 2 Salk. 636.

**906.** ———. Action.]—An action lies against the sheriff for selling goods for less than appraised.—*TAYLOR v. BATTEN* (1694), Comb. 255; 90 E. R. 462.

**907.** ———.]—*GAWLER v. CHAPLIN*, No. 966, *post*.

**908.** ———. Sale improperly conducted.]—Case against sheriff by execution creditor. The count averred that there were goods of debtor within debt.'s bailiwick, of which debt. had notice & might have levied the money. Breach, that debt. would not levy or cause to be made the moneys. Pleas, not guilty, & a traverse of the averment that there were goods of which debts. might have levied, etc. Proof, that the sheriff seized goods of debtor & sold them, but that the sale was improperly conducted, so that he did not make so much as ought to have been made, & plff. received less than he otherwise would have done & not enough to satisfy the debt:—*Held*: this evidence supported the breach, & it was not necessary that plff., being the execution creditor, should declare more specially.—*MULLET v. CHALLIS* (1851), 16 Q. B. 239; 20 L. J. Q. B. 161; 16 L. T. O. S. 340; 15 Jur. 243; 117 E. R. 870.

**909.** ———. Goods not properly lotted.]—

& debtors to make all that he could out of the goods seized under his writ: the statement of the debtors that there was nothing to seize could not save the sheriff, for he did seize; no conduct by way of estoppel was proved; & the sheriff was liable to plffs. for the damages they had sustained from his omission to perform his duty in the premises.—*MAPLE LEAF LUMBER CO. v. CALDBRICK & PIERCE* (1917), 40 O. L. R. 512.—*CAN.*

**s.** ———.]—*Semble*: a sheriff is liable for selling goods under execution at an unreasonably low price.—*DE ZOUCHE v. COOKE*, [1920] 2 W. W. R. 268; 13 Sask. L. R. 227.—*CAN.*

**1. What amounts to best price.]—***PARR v. MONTGOMERY* (1880), 27 Gr. 521.—*CAN.*

**a. Reserved price named by execution creditor—Not reached at sale—Execution creditor purchaser.]—**Defts. recovered judgment against plff. in an action upon notes given for the

A debtor whose goods had been seized under a writ of *fi. fa.* persuaded the officer executing the writ not to advertise the sale, & himself interfered to prevent the issue of the bills; on the day of sale his agent induced the officer to postpone it to a later hour & on the officer's proceeding to sell, directed him to sell also for a writ that day lodged with him & under which he could not otherwise have then sold. In the management of the sale the officer conducted himself negligently in not properly lotting the goods & they consequently sold at an undervalue:—*Held*: the above facts did not constitute the officer the agent of the execution debtor so as to absolve the sheriff from liability for the officer's negligence in the conduct of the sale.—*WRIGHT v. CHILD* (1866), L. R. 1 Exch. 358; 4 H. & C. 529; 35 L. J. Ex. 209; 15 L. T. 141; 30 J. P. 646.

**910. What amounts to best price—Not necessarily offer by highest bidder.]**—The sheriff having taken goods in execution under a *fi. fa.* is not justified in selling them to the highest bidder greatly under their value; but if he cannot obtain a reasonable price, should return that they remain in his hands for want of buyers.—*KEIGHTLEY v. BIRCH* (1814), 3 Camp. 521, N. P.

*Annotation*:—*Refd.* Mullett v. Challis (1851), 16 L. T. O. S. 340.

**911. — Previous valuation for different purpose—Sale at less than valuation.]**—A. succeeded B. in the occupation of a house, & on taking possession agreed with B. for the lease at the sum of £80 & to take the furniture & fixtures at a valuation as between an outgoing & incoming tenant. The goods were accordingly valued at £109 15s. 10d. & the amount paid by A., & an assignment executed. Pltf. afterwards commissioned the auctioneer who had valued the goods, to sell them, but before he could do so the sheriff entered & seized them under an execution against B. & the same auctioneer being employed by the sheriff, the goods were sold, & produced only £73, pltf. himself being a purchaser to the amount of £20. In an action of trespass brought by A. against the sheriff:—*Held*: the jury were justified in giving damages for the full amount of the valuation.—*LOCKLEY v. PYE* (1841), 8 M. & W. 133; 9 Dowl. 744; 10 L. J. Ex. 305; 5 Jur. 346; 151 E. R. 979.

#### (h) Receipt for Proceeds.

**912. By bill of sale—Necessity for.]**—Goods seized by a sheriff under a *fi. fa.* were valued & delivered to the execution creditor, upon a *bonâ fide* purchase by him; but no bill of sale was executed:—*Held*: there was a valid sale of the

goods.—*HERNAMAN v. BOWKER* (1856), 11 Exch. 760; 25 L. J. Ex. 69; 26 L. T. O. S. 224; 4 W. R. 261.

*Annotation*:—*Refd.* Salter v. Brooks (1879), De Colyar's County Court Cases, 82.

**Ship.]**—*See* No. 683, *ante*.

*See, also*, *BILLS OF SALE*, Vol. VII., pp. 7–12, Nos. 17–51.

#### (i) Effect of Sale.

##### i. Title of Sheriff.

**913. Implied promise—Knowledge of title.]**—The law raises an implied promise in a sheriff selling goods taken in execution, that he does not know that he is destitute of title to the goods. To an action founded on the implied promise that the vendor of goods did not know his title to them was bad, it is no defence that the vendor was a sheriff's auctioneer, & desired pltf. to give him a written notice not to pay over the proceeds, & that pltf., having omitted to give such notice, deft. paid over.—*PETO v. BLADES* (1814), 5 Taunt. 657; 128 E. R. 849.

*Annotation*:—*Refd.* Baylis v. London (Bp.), [1913] 1 Ch. 127.

**914. Liability of auctioneer—Goods claimed by assignees of debtor.]**—*PETO v. BLADES*, No. 913, *ante*.

##### ii. Title of Purchaser.

**915. General rule—Precise interest of debtor.]**—The A. railway co. incorporated by a local Act, being also a land co., transferred by agreement, together with the undertaking, all its property, lands, rights, & appurtenances to the C. railway co., also incorporated, such agreement being confirmed by a private Act of the Imperial Parliament. The C. railway co. having borrowed money issued debentures to secure the same; these were termed mtge. debentures, the principal & interest thereon being secured on the undertaking, & all moneys to arise from the sale of the lands of the co., all future calls on shareholders, & all tolls & sums of money which should become due, with the plant & rolling-stock, & with power of entry & possession of the same, in failure by the co. of payment of principal & interest as therein specified, with a proviso that nothing therein contained should be held to limit the power of sale or appropriation by the co. of any of the lands of the co., nor constitute a charge on the same. These bonds were not registered:—*Held*: (1) such debentures did not constitute a charge in the nature of an equitable mtge. on the lands of the co., so as to give the holders of such debentures a right to restrain the sale of lands by judgment creditors of the co., or any title to the proceeds of the lands

price of a threshing outfit, & issued execution & placed the writ in the hands of a sheriff, with instructions to levy the amount out of the goods of pltf. The sheriff seized a yoke of oxen & the threshing outfit, & advertised that he would sell the chattels seized. Defts. notified the sheriff that he was not to sell the outfit unless he got an offer of \$1,200. The highest bid was \$800, & the sheriff did not sell the outfit but left it where it was:—*Held*: the instructions to the sheriff not to sell for less than \$1,200 were equivalent to an offer by defts. of that sum; & that offer, being the highest made, must, in the light of the sheriff's & deft.'s conduct, be regarded as having been accepted by the sheriff, & the outfit must be treated as having been sold to defts.—*CORSBIE v. CASE THRESHING MACHINE CO.* (1913), 25 W. L. R. 466; 14 D. L. R. 55; 6 Sask. L. R. 118.—**CAN.**

**b. Inability to obtain reasonable price—Goods must remain unsold.]**—Where a sheriff selling under execution cannot obtain a reasonable price, it is his duty to make a return that the goods & chattels seized remain in his hands unsold for want of buyers.—*PEASE v. TUDGE* (1914), 30 W. L. R. 198; 7 W. W. R. 804; 19 D. L. R. 158.—**CAN.**

#### PART III. SECT. 1, SUB-SECT. 4.—H. (i) ii.

**915 i. General rule—Precise interest of debtor.]**—A conveyance, by bargain & sale, by the sheriff, of chattels real taken in execution & sold under 54 Geo. 3, c. 15, s. 4, will pass the legal as well as the equitable estate in the lands to the purchaser, the conveyance taking effect by operation of law.—*WINCHESTER v. HUTCHINSON* (1861), 2 Leggo. 1353.—**AUS.**

**915 ii. — — —.]**—A sheriff's deed

*primâ facie* conveys the title of deft.—*SUTHERLAND v. WHIDDEN* (1858), 2 Thom. 410.—**CAN.**

**915 iii. — — —.]**—*GUNN v. BURGESS* (1884), 5 O. R. 685.—**CAN.**

**915 iv. — — —.]**—A member of a firm of native bankers which had become insolvent, with a view to protect his property from the general body of his creditors, in Mar. 1870, deposited property to the value of R30,000 with applts., another firm of bankers, to whom he owed R1,500. In Apr. 1871 applts. brought an action against him for R1,500, the balance of that debt, & obtained a decree, in execution of which the property was put up for sale & purchased by resp.:—*Held*: resp. was entitled to the property.—*DWARKA DASS v. RAI SITA RAM* (1879), 5 C. L. R. 430.—**IND.**

**915 v. — — —.]**—The purchaser at an auction sale acquires the right, title, & interest of the judgment-



**Sect. 1.—Writ of fieri facias: Sub-sect. 4,**

when sold; (2) as judgment creditors under an execution take the precise interest, & no more, which the debtor possesses in the property seized, the sale being a sale by the law, & not by the co., such judgment creditors took the lands, subject to any incumbrances, legal or equitable, that they were subject to in the hands of the co.—**WICKHAM v. NEW BRUNSWICK & CANADA RY. CO.** (1865), L. R. 1 P. C. 64; 3 Moo. P. C. C. N. S. 416; 34 L. J. P. C. 6; 14 L. T. 311; 12 Jur. N. S. 34; 14 W. R. 251; 16 E. R. 158, P. C.

*Annotation:—As to (2) Refd. Re Panama, New Zealand & Australian Royal Mail Co. (1869), 39 L. J. Ch. 162.*

**916. Judgment or writ afterwards set aside—Sale of term of years—Term remains with purchaser—Proceeds returned to debtor.]—**The sheriff under a *fi. fa.* sells a term; afterwards judgment is reversed; the produce & not the term shall be restored.—**ANON.** (1578), 3 Dyer, 363 a, pl. 24; 73 E. R. 815.

*Annotations:—Refd. Hoe's Case (1600), 5 Co. Rep. 89 b. Mentd. Baker v. Brereman (1635), Cro. Car. 418.*

**917. ———.]—****ANON.** (1599), Moore, K. B. 573; 72 E. R. 767.

*Annotation:—Mentd. Foy v. Lister (1705), 2 Salk. 554.*

**918. ———.]—**If the sheriff sell a term under a writ of *fi. fa.* which is afterwards set aside for irregularity & the produce of the sale directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the sheriff.—**DOE v. THORN** (1813), 1 M. & S. 425; 105 E. R. 159.

*Annotations:—Refd. Farrant v. Thompson (1822), 2 Dow. & Ry. K. B. 1; Garland v. Carlisle (1837), 11 Bli. N. S. 421.*

**919. ——— Sale not invalidated.]—****HOE'S CASE**, No. 369, *ante*.

**920. ———.]—**One possessed of a lease for ninety-nine years, devised it to his wife for life, & after her death to her children unpreferred, & made his wife extrix., & died, the wife entered & was possessed as legatee. The wife married, a judgment was obtained against the husband, & a *fi. fa.* directed to the sheriff of London, who sold the term. The judgment was reversed by writ of error; the wife died; upon ejectment brought by the executory devisee against the vendee:—*Held*: (1) the sale by the sheriff on the *fi. fa.* should not destroy the executory devise, although the person to whom the executory devise was made was then uncertain; (2) the sale by force of the *fi. fa.* should stand, & pltf. in the writ of error should be restored to the value.—

debtor, & in virtue of that is put in possession, by reason of which he becomes liable to be sued by the true owner.—**ALI SAHEB v. KAJI AHMAD** (1891), 1 L. R. 16 Bom. 197.—**IND.**

**915 vi. ———.]—**The purchaser at a ct.'s sale buys only the then existing right, title, & interest of the judgment debtor, & therefore ordinarily takes, subject to the prior right, contingent on confirmation, of a former purchaser, though such former purchase be confirmed subsequently to his own.—**KONAPA BIN MAHADAPA v. JANARDAN SUDDEV** (1874), 11 Bom. 193.—**IND.**

**c. Writ issued — Before return of execution against goods—Whether purchaser at sheriff's sale affected.]—**A *fi. fa.* issued before the return of the execution against goods, is only an irregularity, & a purchaser at sheriff's sale cannot be affected by it.—**DOE d. SPAFFORD v. BROWN** (1833), 3 O. S. 92.—**CAN.**

**d. From execution creditor.]—**A purchaser at a sheriff's sale is not held

to stricter proof of title against the servant of the execution debtor in possession, than he would be against the debtor himself.—**DOE d. LYON v. LEGG** (1848), 4 U. C. R. 360.—**CAN.**

**e. Purchase by execution creditor — From execution debtor—Loan of goods purchased to execution debtor—Whether goods can be seized by subsequent creditor.]—**Where goods have been openly set up for sale under a *fi. fa.* & *bona fide* bought by the execution creditor, he may, if he please, lend them immediately after sale to the execution debtor, & while in his possession they cannot be seized by the sheriff at the suit of a subsequent execution creditor.—**WILLIAMS v. M'DONALD** (1850), 7 U. C. R. 381.—**CAN.**

**f. Purchaser pleading title — Necessary averments.]—**Where a title is pleaded by purchase at sheriff's sale under a *fi. fa.*, the judgment supporting such *fi. fa.* should be set out, & it should be averred that the sheriff seized while the writ was in

**MANNING'S CASE** (1609), 8 Co. Rep. 94 b; 77 E. R. 618.

*Annotations:—As to (1) Refd. Woodcock v. Woodcock (1600), Cro. Eliz. 795; Johns v. Pink, [1900] 1 Ch. 296. As to (2) Consd. Cooper v. Chitty & Blackiston (1756), 1 Burr. 20. Generally, Mentd. Lampet's Case (1612), 10 Co. Rep. 46 b; Price v. Almory (1612), Moore, K. B. 831; Roberts v. Roberts (1613), 2 Bulst. 123; Blamford v. Blamford (1615), 3 Bulst. 98; Haverhill v. Hare (1618), Cro. Jac. 510; Pills v. Brown (1621), Palm. 131; Alford's Case (1662), O. Bridg. App. 584; Bate v. Amherst & Norton (1663), T. Raym. 82; Goring v. Bickerstaffe (1663), 2 Freem. Ch. 163; Burgis v. Burgis (1674), 1 Mod. Rep. 114; Warman v. Seaman (1677), Cas. temp. Finch, 279; Howard v. Norfolk (1681), 3 Cas. in Ch. 14; Smith v. Clever (1688), 2 Vern. 59; Jerman v. Orchard (1694), Skin. 528; Ayres v. Falkland (1697), 1 Ld. Raym. 325; Scattergood v. Edge (1699), 12 Mod. Rep. 278; Young v. Holmes (1717), 1 Stra. 70; Gower v. Grosvenor (1740), Barn. Ch. 54; Beauclerk v. Dormer (1742), 1 Atk. 308; Bagshaw v. Spencer (1748), 1 Ves. Sen. 142; Goodtitle d. Hayward v. Whitby (1757), 1 Burr. 228; Haigh v. Jaggard (1847), 16 M. & W. 525.*

**921. Sale of term of years—Assignment by sheriff—Misrecital of term of debtor—Effect of.]—**If the sheriff upon a *fi. fa.*, takes upon himself to recite the term which debt. has, & misrecites it, & sells same term, the sale is void; but if he sells all the interest that debt. has in the land, it is good enough, notwithstanding the misrecital.—**PALMER'S CASE** (1597), 4 Co. Rep. 74 a; 76 E. R. 1045; *sub nom.* **PALMER v. HUMPHREY**, Cro. Eliz. 584; Gouldsb. 172.

*Annotations:—Refd. Foot v. Berklay (1670), 1 Keb. 654; Bealy v. Sampson (1689), 2 Vent. 93. Mentd. Gold v. Death (1615), Cro. Jac. 381; Miller & Johns v. Manwaring (1635), Cro. Car. 397; Jemmot v. Cooley (1667), 2 Keb. 270.*

**922. ——— Sale of term before writ returnable—Assignment executed after.]—**The sheriff under a *fi. fa.* seized a lease, & sold the term before the writ was returnable, but did not execute the assignment to the vendee till a subsequent period:—*Held*: this was a valid assignment.—**DOE v. DONSTON** (1818), 1 B. & Ald. 230; 106 E. R. 85.

*Annotation:—Refd. Gloucestershire Banking Co. v. Edwards (1887), 20 Q. B. D. 107.*

**923. ——— Proof of authority of under-sheriff.]—**Where an assignment of a lease by deed, taken in execution, was made in the name & under the seal of office of the sheriff, by A., acting as under-sheriff:—*Held*: such assignment was sufficiently proved, without proving further the appointment of A. as under-sheriff, & he had power by deed to execute deeds in the name of the sheriff.—**DOE d. JAMES v. BRAWN** (1821), 5 B. & Ald. 243; 106 E. R. 1181.

*Annotations:—Consd. Doe d. Bowley v. Barnes (1846), 8 Q. B. 1037. Refd. Wood v. Rowcliffe (1846), 6 Hare, 183.*

**924. ———.]—**Assignment by the

force.—**MCDONELL v. MCDONELL** (1852), 9 U. C. R. 259.—**CAN.**

**g. Sale of term of years—Merger of term in life estate.]—****DALYE v. ROBERTSON** (1860), 19 U. C. R. 411.—**CAN.**

**h. No actual seizure by sheriff—Sale of property—On which sheriff made no actual levy.]—**The property of a judgment debtor in goods is not divested by a sale by the sheriff, unless there has been some overt act of seizure by him, such as marking or taking possession of them or separating them from others. The sheriff must have done some act to enable him to deliver possession of the property to the purchaser, & he cannot, by a general sale of all a debtor's goods, pass the title to property not in his view, & on which he has made no actual levy.—**REYNOLDS v. AYRES** (1862), 5 All. 333.—**CAN.**

**k. Inadequacy of purchase price—Whether absolute purchase.]—**Where an execution creditor purchased property at sheriff's sale at one-sixth of its

sheriff proved by the bill of sale of the under-sheriff, without proof of the authority by the sheriff to the under-sheriff.—*WOOD v. ROWCLIFFE* (1846), 6 Hare, 183; 11 Jur. 707; 67 E. R. 1132; *affd.* (1847), 2 Ph. 382, L. C.

*Annotations*:—*Mentd. Carrington v. Pell* (1849), 3 De G. & Sm. 512; *Daniell v. Daniell* (1849), 3 De G. & Sm. 337; *Farina v. Silverlock* (1857), 5 W. R. 827; *Gobind Chunder Sein v. Ryan* (1861), 15 Moo. P. C. C. 230; *Lamb v. Attenborough* (1862), 1 B. & S. 831; *Raines v. Swainson* (1863), 4 B. & S. 270; *Cole v. North Western Bank* (1875), L. R. 10 C. P. 354.

**925. — Whether seizure of lease necessary.]**—*COLEMAN v. RAWLINSON*, No. 685, *ante.*

**926. — Necessity for written assignment.]**—*DOE d. HUGHES v. JONES*, No. 823, *ante.*

**927. — ]**—*PLAYFAIR v. MUSGROVE*, No. 694, *ante.*

**Ownership pending assignment.]**—*See* Sub-sect. 4, E. (g) ii., *ante.*

**928. Sale after return to writ expired—No venditioni exponas—Assignment of goods by vendee.]**—Debtor in custody on *ca. sa.* sheriff seizes under a *fi. fa.* & sells after the return of the writ expired, & no *venditioni exponas*; vendee assigns to the sons of debtor, who join in assignment to C. The sale by sheriff is good; but an inquiry into the fairness of the transaction. Purchaser under a *fi. fa.* may justify whether the proceedings regular or not.

Sheriff under a *fi. fa.* has a special property & the goods bound from delivery of the writ in the case of a common person, although in the case of the Crown it remains as at common law (*LORD HARDWICKE, C.*).—*JEANES v. WILKINS* (1749), 1 Ves. Sen. 195; 27 E. R. 978, L. C.

*Annotations*:—*Consd. Gore v. Bowser* (1855), 3 Sm. & G. 1. *Reid. Scott v. Scholey* (1807), 8 East, 467.

**929. Title as against Crown—Process of Crown subsequent in time—When title of Crown prevails.]**—*A.-G. v. FORT*, No. 884, *ante.*

**930. Title of purchaser from execution creditor—Good if purchase bonâ fide—Although debtor remains in possession of goods.]**—The goods of A. were seized under a *fi. fa.* & the judgment creditor took a bill of sale from the sheriff & afterwards sold the goods to B., who put a man into possession, but the goods remained in A.'s house, & were used by him as before the execution. The circumstance of the execution was, however, notorious in the neighbourhood. Another judgment creditor issued a *fi. fa.* against A.; under which the sheriff seized these goods. In trespass against him by B.:—*Held*: the jury were properly directed to give a verdict for pltf. or deft., as they should be of opinion that the purchase by B. was *bonâ fide* or otherwise, for if the goods were *bonâ fide* bought & paid for with his money, the sale was not rendered void by debtor's continuing

to enjoy the use of the property.—*LATIMER v. BATSON* (1825), 4 B. & C. 652; 7 Dow. & Ry. K. B. 106; 4 L. J. O. S. K. B. 25; 107 E. R. 1203.

**931. Sale under judgment to defeat creditors.]**—Trespass for taking pltf.'s goods; plea, that the goods were not pltf.'s. Pltf. proved that the sheriff had seized the goods, being the property of B., under an execution against B., & had sold them to pltf.:—*Held*: deft. might show, on the issue here joined, that the sale was fraudulent as against creditors, that he himself had taken the goods under an execution against B., & that this was the alleged trespass.—*ASHBY v. MINNITT* (1838), 8 Ad. & El. 121; 3 Nev. & P. K. B. 231; 1 Will. Woll. & H. 155; 112 E. R. 782; *sub nom.* *ASHLEY v. MINNETT*, 7 L. J. Q. B. 133; 2 Jur. 888.

**932. — Debt & assignment by sheriff bonâ fide—How far valid.]**—*COOKSON v. FRYER*, No. 885, *ante.*

**933. Goods seized not property of judgment debtor—Whether purchaser has title—Landlord's fixtures—Improperly removed by debtor.]**—*FARRANT v. THOMPSON*, No. 637, *ante.*

**934. — Mortgaged ship.]**—A ship, which was mortgaged by bill of sale duly registered, continued in the possession of the mtgor., & went on a voyage abroad. The ship was English, & the mtge. was executed in England, where the parties to it resided. The ship arrived at a foreign port, & was there seized under an attachment issued by a foreign ct., at the suit of a foreign creditor of the mtgor., who had suspended payment. The mtgee., by his agent, intervened in the proceedings thus commenced, & opposed the sale of the ship. The mtgee.'s opposition was dismissed after hearing by the foreign ct., on the ground that, as the law of the foreign country did not allow a mtge. of a chattel without possession, the right of the attaching creditor must prevail over the mtgee.'s right conferred by the English law. The ship was sold under a process similar to a *fi. fa.* & the proceeds were brought into ct., & after satisfying certain prior claims for wages, wharfage, etc., the balance of purchase money was paid to the attaching creditor. The purchaser sent the ship to England, where she was claimed by the mtgee., who filed a bill to enforce his security:—*Held*: (1) the sale under the *fi. fa.* could only pass the property of the person against whom it issued, & therefore if the mtgee. had not intervened his right to the ship would have been clear; (2) the mtgee. having intervened, the judgment of the foreign ct., against him must be considered as a judgment *inter partes*.

(3) Such a judgment is examinable for error apparent on its face, & therefore, as the foreign ct., being informed what the English law which

value:—*Held*: effect could only be given to such a transaction as a security for the debt & costs, & not as an absolute purchase.—*KERR v. BAIN* (1865), 11 Gr. 423.—*CAN.*

**l. — ]**—Where property worth £1,500 had been sold at sheriff's sale for £90, in consequence of the title being disputed, the ct. refused to give effect to the sheriff's deed as an absolute purchase.—*CHALMERS v. PIGGOTT* (1865), 11 Gr. 475.—*CAN.*

**m. — ]**—Pltf. having purchased at a sheriff's sale, for a small sum, the interest of his debtor in property which the debtor had previously mtged. for a large sum, the validity of the mtge. or the amount due upon it being doubtful, the ct. declined to enforce the purchase as absolute.—*MALLOCH v. PLUNKETT* (1865), 11 Gr. 439.—*CAN.*

**n. — ]**—Deft.'s chattel interest in a farm of land was set up for sale under a *fi. fa.* at suit of the landlord who was the execution creditor. The sale was fully advertised & after two adjournments for want of bidders the solr. for pltf., who was the only bidder at the third sale, was declared the purchaser for £1. The interest in the farm was admittedly of value, but in the absence of collusive or improper conduct by the sheriff the ct. refused to set aside the sale.—*CRAMER v. MURPHY* (1887), 20 L. R. Ir. 572.—*IR.*

**o. — ]**—Deft.'s chattel interest in a farm of land was put up for sale by public auction by the sheriff under a *fi. fa.* at the suit of the landlord, who was the execution creditor. The sale was advertised by a public notice posted on the ct. house

of M. situate about 10 miles from the lands & pltf.'s agent, who was the only bidder, was declared the purchaser for £5. The interest in the lands was admittedly valued at £600. The ct. set aside the sale & conveyance on the ground that the sheriff did not take reasonable & proper care to advertise the sale & that the farm was sold at an undervalue.—*EDGE v. KAVANAGH* (1888), 24 L. R. Ir. 1.—*IR.*

**p. Purchase by third party—Of property originally conveyed by sheriff—Irregularities in first sale.]**—A third person who purchases & gets the sheriff's deed is not affected by irregularities on the part of the sheriff, unless the circumstances are such that the purchaser's taking the deed can be said to amount to a fraud.—*MCDONALD v. CAMERON* (1867), 13 Gr. 84.—*CAN.*

**q. Sale of goods exempted under**



*Sect. 1.—Writ of fieri facias: Sub-sect. 4, H. (i) ii.*

ought to govern the contract, was, had wilfully refused to recognise it, the judgment of that ct. was disregarded & the mtgee. was declared entitled to the ship.—*SIMPSON v. FOGO* (1863), 1 Hem. & M. 195; 1 New Rep. 422; 32 L. J. Ch. 249; 8 L. T. 61; 9 Jur. N. S. 403; 11 W. R. 418; 1 Mar. L. C. 312; 71 E. R. 85; *previous proceedings* (1860), 1 John. & H. 18.

*Annotations:—As to (1) Refd.* *Voinet v. Barrett* (1885), 54 L. J. Q. B. 521. *As to (2) Refd.* *Schibbsby v. Westenholtz* (1870), L. R. 11 Q. B. 155; *Taylor v. Ford* (1873), 22 W. R. 47. *As to (3) Consd.* *Liverpool Marine Credit Co. v. Hunter* (1868), 3 Ch. App. 479; *London & Mediterranean Bank v. Strutton* (1869), 21 L. T. 415. *Refd.* *The Halley* (1868), L. R. 1 P. C. 193; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Voinet v. Barrett* (1885), 54 L. J. Q. B. 521; *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600; *Re Queensland Mercantile & Agency Co., Ex p. Australasian Investment Co., Ex p. Union Bank of Australia*, [1892] 1 Ch. 219. *Generally, Mentd.* *Colliss v. Hector* (1875), L. R. 19 Eq. 334; *Re Kloebe, Kannreuther v. Geiselbrecht* (1884), 54 L. J. Ch. 297; *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 3 K. B. 532.

— **Goods on hire purchase agreement.]—**

*See Nos. 765, 766, ante.*

**935. ——— Seizure by county court bailiff—Claim made by owner.]—**Where, a claim having been made to goods taken in execution by the bailiff of a county ct., claimant does not make the deposit or give the security required by County Cts. Act, 1888 (c. 43), s. 156, & the bailiff sells the goods under the authority given by that sect., the sale gives the purchaser a good title to the goods, although they were the property of claimant at the time of the seizure.—*GOODLOCK v. COUSINS*, [1897] 1 Q. B. 558; 66 L. J. Q. B. 360; 76 L. T. 313; 45 W. R. 369; 13 T. L. R. 294, C. A.

*Annotations:—Distd.* *Crane v. Ormerod*, [1903] 2 K. B. 37. *Consd.* *Jelks v. Hayward*, [1905] 2 K. B. 460.

**936. ——— No claim made by owner.]—**Where goods are taken in execution by the bailiff of a county ct., & no claim having been made to them, are sold by the bailiff, & it subsequently appears that they were not the property of the judgment debtor at the time of the seizure or sale, the purchaser does not acquire a good title to the goods as against the real owner.—*CRANE & SONS v. ORMEROD*, [1903] 2 K. B. 37; 72 L. J. K. B. 507; 89 L. T. 45; 52 W. R. 11; 47 Sol. Jo. 517; 67 J. P. Jo. 231, D. C.

*Annotation:—Consd.* *Jelks v. Hayward*, [1905] 2 K. B. 460.

**937. ——— Re-sale by purchaser to third party—No warranty of title by purchaser.]—***Assumpsit* by purchaser against vendor of goods, on an alleged warranty that vendor had title to sell; count for money had & received. Plea: *Non assumpsit*. Deft. at a sheriff's sale bought the goods from the sheriff for £18; pltf., who was also at the sale, bought deft.'s bargain of him for £5, & paid him the £23. Deft. paid the sheriff the £18, & the

*Homesd Act, R. S. B. C. (c. 100)—Whether purchaser acquires any title.]—*A purchaser at a sheriff's sale does not acquire any right or interest to or in goods which are exempt from sale under the above Act, & which have been claimed as exempt pursuant to the statutory option given to the judgment debtor by sect. 17.—*FLETCHER v. PENDRAY* (1916), 31 W. L. R. 310; 10 W. W. R. 441.—**CAN.**

*r. Whether purchaser bound to inquire—Into correctness of order for execution.]—*If a ct. ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues.—*REWA MAHTON v. RAM KISHEN*

*SINGH* (1886), 1 L. R. 14 Calc. 18; L. R. 13 Ind. App. 106.—**IND.**

*s. Fraud in execution sale—Whether sale can be set aside.]—*A judgment-debtor cannot have a ct. sale set aside on the ground of fraud in the absence of proof that the auction purchaser was a party to the fraud, & that the fraud came to the judgment-debtor's knowledge subsequent to the confirmation of the sale.—*ABBUBAKER SAHEB v. MOHIDIN SAHEB* (1896), 1 L. R. 20 Mad. 10.—**IND.**

**PART III. SECT. 1, SUB SECT. 4.—H. (j).**

**940 i. General rule—Sheriff debtor to execution creditor.]—**In an action against the sheriff & his sureties, for not paying over moneys levied under

sheriff began to deliver the goods to pltf.; but they were then claimed as not being the property of the execution debtor, & were recovered by the true owner:—*Held*: (1) there was no implied warranty by pltf. that he had title; (2) nor any failure of consideration, pltf. having paid the £23 to deft., not for the goods, but for the right which deft. had acquired by his purchase; & that this consideration had not failed.—*CHAPMAN v. SPELLER* (1850), 14 Q. B. 621; 19 L. J. Q. B. 239; 15 L. T. O. S. 158; 14 Jur. 652; 117 E. R. 240.

*Annotations:—As to (1) Expld.* *Dorab Ally Khan v. Abdool Azeez* (1878), L. R. 5 Ind. App. 116. *Refd.* *Eichholz v. Bannister* (1864), 17 C. B. N. S. 708; *Bagueley v. Hawley* (1867), L. R. 2 C. P. 625. *As to (2) Refd.* *Bagueley v. Hawley* (1867), L. R. 2 C. P. 625.

**938. Validity of assignment of property—Bill of sale—Signed & sealed by clerk of under-sheriff.]—**

A clerk of an under-sheriff attended with the sheriff's officer & pltf. at the execution of a writ of *fi. fa.*, & immediately after the seizure, the goods having been valued, filled up a bill of sale to pltf., the judgment-creditor, which he had brought with him, & signed it in the name of the sheriff, & affixed to it the sheriff's seal, of which he had the custody, & which he had brought with him from the office of the under-sheriff. He had acted for some years in that part of the business at the office, but except upon one other occasion had never affixed the seal to assignments elsewhere than at the under-sheriff's office. Upon the occasion in question no money passed, but a stool was delivered to pltf. by the officer in the name of all the goods included in the bill of sale:—*Held*: (1) there was sufficient evidence to warrant the jury in finding that the clerk & the officer had authority to sell the goods in the name of the sheriff; (2) as it was not necessary to transfer them by instrument under seal, the affixing of the seal by the clerk, if done without sufficient authority in point of law, would not invalidate the transfer.—*HOBSON v. HOLT* (1850), 16 L. T. O. S. 263, Ex. Ch.

*Annotation:—As to (2) Apld.* *Hernaman, etc. (Assignees of Howarth, etc.) v. Bowker* (1856), 25 L. J. Ex. 69.

— **].—See, also, BILLS OF SALE, Vol. VII., pp. 7–12, Nos. 17–51.**

**939. Previous illegal entry—To take goods—Sale not invalidated.]—***PERCIVAL v. STAMP*, No. 592, *ante*.

(j) *Duty of Sheriff as to Proceeds.*

**940. General rule—Sheriff debtor to execution creditor.]—***HOLLAND v. LEY* (1620), as reported in *Palm.* 123; 81 E. R. 1008.

*Annotations:—Mentd.* *Stone v. Newman* (1635), Cro. Car. 427; *Foxwith v. Tremain* (1670), 1 Mod. Rep. 296; *Adams v. Savage* (1704), 2 Salk. 601; *Swaine v. Stevens* (1705), 11 Mod. Rep. 65; *Wynne v. Wynne* (1743), 1 Wils. 42; *Fowler v. Rickerby* (1841), 9 Dowl. 682.

a *fi. fa.*, it appeared that certain goods of H. had been seized by the sheriff at pltf.'s suit, & claimed by the debtor's brother under a sale, which pltf. alleged to be fraudulent. The debtor also claimed exemption for \$60 worth, under 23 Viet. c. 25, & these latter goods the sheriff sold under a subsequent execution, the debt for which that judgment was recovered, having been contracted before May 19, 1860, as appeared by an exemplification of the judgment. Pltf. alleged that these goods were not subject to that writ, there being no certificate indorsed upon it under 24 Viet. c. 27, s. 2:—*Held*: the sheriff was responsible to the execution debtor, not to pltf., for the proceeds.—*MICHIE v. REYNOLDS* (1865), 24 U. C. R. 303.—**CAN.**

**940 ii. ———.]—**A bailiff is

**941.** — — —.]—*RYBOT v. PECKHAM* (1778), 1 Term Rep. 731, n. ; 99 E. R. 1347.

*Annotations* :—**Consd.** *Hutchinson v. Johnston* (1787), 1 Term Rep. 729. **Refd.** *Giles v. Grover* (1832), 9 Bing. 128 ; *Lucas v. Nockells* (1833), 10 Bing. 157 ; *Graham v. Witherby* (1845), 7 Q. B. 491.

**942. Balance of proceeds—Sheriff may detain—Until demanded by debtor.**—*WOODDY v. COLES*, No. 896, *ante*.

**943.** — — — **After deduction of rent—Payable to creditor issuing first writ.**—*SAWLE v. PAYNTER*, No. 1249, *post*.

**944.** — — — **Detained for several years—Interest payable by sheriff—Costs of application.**—Where a sheriff had retained for several years a sum of money in his hands, the balance of the produce of effects of a Crown debtor seized by him & sold under an extent after the Crown debt had been satisfied, claiming himself a lien thereon for poundage, etc. the ct. ordered that he should pay interest on the amount of such balance to the parties from whom he had withheld it, from the time when the ct. had determined, on a former occasion, that the claim of the sheriff was unfounded, notwithstanding which determination he had continued to keep the question before the ct. ; & that although the sheriff should not have made interest or any use or advantage of the money in the meantime, the ct. proceeding wholly on the ground of the injury done to the party entitled to it.

The ct. gave the party applying the costs of the application, but they refused to order the sheriff to pay the costs of former applications, disposed of in respect of the same question.—*R. v. VILLERS* (1823), 11 Price, 575 ; 147 E. R. 569.

**945.** — — — **Joint debtors—Dispute as to share—Indemnity to sheriff.**—Where the sheriff, under a writ of *fi. fa.* levied & sold a vessel, the joint property of two debtors, & after satisfying *pltf.* his demand & expenses of the levy, a surplus remained in his hands, & debtors disputing their interests in the vessel, the sheriff refused to pay over such surplus, unless the one to whom it was paid would indemnify him against the claims of the other, which they both refused to do ; the ct. would not interfere, nor allow the sheriff to pay the money into ct., to remain there, until an indemnity was given to the satisfaction of the prothonotary.—*HARTLEY v. STEAD* (1824), 8 Moore, C. P. 466 ; 2 L. J. O. S. C. P. 42.

**946. Action pending between creditor & debtor—Regarding acceptance of bill of exchange—Court will not impound proceeds.**—*Pltf.*, having obtained a verdict against *deft.*, entered up judgment, & sued out execution against his goods. The ct. refused to allow the sum levied to be impounded in the hands of the sheriff, until an action, which *deft.* had commenced against *pltf.*, as the acceptor of a bill of exchange, had been determined.—*WILLIAMS v. COOKE* (1825), 10 Moore, C. P. 321 ; 3 L. J. O. S. C. P. 143.

**947. Execution in fraud of creditors—Whether court will order payment to bona fide creditor—Knowledge of sheriff as to fraud.**—A *fi. fa.* issued to the sheriff at the suit of A., against B., on the

next day another *fi. fa.* issued at the suit of C., against B., a levy was made under the first writ but notice was given to the sheriff by C., not to pay over the money to A. on the ground that the judgment obtained by him was fraudulent. The sheriff notwithstanding paid the money over to A., & the officer filed the second writ with a return of *nulla bona* in the K. B. treasury instead of the office of the *custos brevium* of the ct. On this, an attachment issued against the sheriff for not returning that writ, to which attachment, after moving the ct. to discharge it, on the ground that the writ in question was filed in the wrong place by mere mistake of the officer & that the mistake was corrected immediately on notice of the attachment by filing it in the proper office, but with which motion the ct. refused to comply chiefly on account of strong circumstances of fraud respecting the execution of A., the sheriff put in bail & was afterwards examined on interrogatories. The prothonotary, to whom the examination was referred, having reported that neither the contempt of the ct. nor the imputation of fraud appeared to him to be done away, the ct. ordered the sheriff immediately to pay the whole debt & costs due to C. together with the costs of all the applications.—*R. v. BAKER & NEWMAN* (LATE SHERIFF OF MIDDLESEX) (1791), 1 Hy. Bl. 543 ; 126 E. R. 312.

*Annotation* :—**Refd.** *Heppel v. King* (1797), 7 Term Rep. 370.

**948.** — — — **Question of fraud to be first settled.**—Although there is strong reason to believe that a *fi. fa.* had been issued in order to defraud the exors. of a *bona fide* creditor, & that the sheriff is a party to the fraud the ct. will not interfere summarily to compel the sheriff to pay over the proceeds of the levy to the *bona fide* creditor, but the question of fraud must be tried by a jury.—*BARBER v. MITCHELL* (1834), 2 Dowl. 574.

*Annotation* :—**Mentd.** *Imray v. Magnay* (1843), 11 M. & W. 267.

**949. Where several writs—Payment in order of delivery.**—*DREWE v. LAINSON*, No. 534, *ante*.

**950. Claim to proceeds disputed—By creditor & assignees of debtor—Court will not order sheriff to pay—Issue as to respective rights to be tried.**—*SNODEN v. RAMSEY* (1856), 27 L. T. O. S. 185.

**951. Execution against executor—Payment before decree for administration of assets.**—Where, before a decree for the administration of assets, the proceeds of an execution on a judgment by default obtained against the exor. were in the hands of the sheriff, the ct. refused to restrain the sheriff from paying those proceeds to the execution creditor.—*Re SKIGGS, MARRIAGE v. SKIGGS* (1859), 4 De G. & J. 4 ; 28 L. J. Ch. 433 ; 33 L. T. O. S. 21 ; 5 Jur. N. S. 325 ; 7 W. R. 320 ; 45 E. R. 2, L. JJ.

*Annotation* :—**Mentd.** *Hewat v. Davenport* (1872), 21 W. R. 77.

**952. Bankruptcy of debtor—Rights of creditors & assignees—Payment to assignees—Knowledge of creditor.**—Where a sheriff by mistake returned to a *fi. fa.* that he had a sum in his hands to be

debtor to an execution creditor on whose execution he receives money, not a trustee for him of the particular fund.—*Re MONKMAN & GORDON* (1886), 3 Man. L. R. 254.—CAN.

**940 iii.** — — —.]—*NEWTON v. FOLEY* (1911), 17 W. L. R. 105 ; 20 Man. L. R. 519.—CAN.

**t. Balance of proceeds—Applicability to second execution.**—If a second execution comes into the sheriff's hands after he has sold under a former

one, he has no right to apply any money remaining in his hands, after satisfying the first execution, towards the second one.—*STEVENSON v. DOUGLAS* (1838), Ber. 440.—CAN.

**a. Where several writs—Ratable distribution.**—Under Executions Act, R. S. M. 1902, c. 58, s. 25, a sheriff, who realises any money under a writ of execution, is bound to give notice thereof forthwith in the *Manitoba Gazette*, & to keep the money for

three months, & then to distribute it ratably among all persons having unsatisfied executions in force in his hands at that time, & it makes no difference that the execution is for costs only.—*THOMPSON RURAL MUNICIPALITY v. BRETHOUR* (1913), 25 W. L. R. 615 ; 14 D. L. R. 229 ; 23 Man. L. R. 590.—CAN.

**b. Bankruptcy of debtor—Rights of creditors & assignees—Money paid in addition to proceeds of sale—To sheriff**



paid to pltfs., when in truth he had not, the sum in question having been paid, through want of caution in the sheriff's officer, to the solr. of a commission of bkpt. issued against debt., under which commission one of pltfs. was an assignee:—*Held*: this pltf. knowing of such payment & having omitted to make an early objection to it, the sheriff was absolved from paying to pltfs. the sum mentioned in his return.—*TOMLINSON v. SHYNN* (1820), 2 Brod. & Bing. 77; 4 Moore, C. P. 505; 129 E. R. 886.

954. ————.]—Deft., having recovered judgment against H., on Apr. 25 lodged with pltf., who was the sheriff, a writ of *fi. fa.* Pltf. neglected to execute the writ until May 11, when he seized the goods of H. & assigned them to deft. by bill of sale, which stated the consideration to be £256 paid by deft. to him. He then returned *feri feci*. Before the seizure deft. had notice of an act of bkptcy. committed by H. before Apr. 25, upon which a fiat issued in Aug., & assignees were appointed, who sued & recovered from pltf. the value of the goods seized, whereupon he brought the present action to recover back the money so paid:—*Held*: (1) though no money in fact passed, pltf. & deft. were, as between themselves, in the same situation as if pltf. had sold the goods to deft. & received the money; (2) though the money was not pltf.'s still he was entitled to recover, since it was money which he ought to have received as soon as he had been compelled by the owner to pay for the goods seized; (3) the money having been paid by pltf. in ignorance of the facts, he was entitled to recover it back, although deft. could not in every respect

957 i. ——— Bankruptcy subsequent to execution.]—Under a *fi. fa.* against a trader, the sheriff sold his goods; on the following day the execution debtor was adjudicated bkpt., of which the sheriff had notice; the landlord afterwards gave the sheriff notice of rent in arrear at the

c. *Action for surplus—Necessity for demand prior to action.*—In an action against a sheriff for the overplus

960. ———— **Effect of completed execution.]**—By a deed of gift dated Oct. 7, 1919, debtor, who was adjudged bkpt. on Nov. 23, 1920, “in consideration of his natural love & affection for the donee” purported to assign & convey to his sister, resp., “the business carried on by him at 58a Old Compton Street, Soho, & the stock-in-trade wine & produce in & about the premises.” At the date of the deed petitioning creditors were proceeding to enforce judgment under R. S. C., 1883, Ord. 14, & on Mar. 18, 1920, obtained final judgment against debtor for £527 7s. 4d., for goods sold & costs. On Mar. 20,

**i. Money not paid over — Debtor released.]—Action on a promissory note. Defence no consideration. W.**

1920, execution was levied. Upon such levy being made, resp. claimed under the deed of gift the whole of the furniture & stock seized by the sheriff. An interpleader summons was taken out by the sheriff, & upon the hearing thereof, on Mar. 26, 1920, the master ordered claimant to pay into ct. £600 or give security for such amount, & in default the sheriff was authorised to sell the property seized & pay the proceeds into ct. to abide the result of an issue directed to be tried between claimant & the execution creditors. Pursuant to the order the sheriff sold the goods on Apr. 28, 1920, & on May 20, 1920, paid the sum of £202 12s. 2d. into ct. On Nov. 3, 1920, the parties to the interpleader summons agreed to divide the money between them & to withdraw the record; these terms were embodied in an order of the master of that date. In the meantime, however, a receiving order was made on Nov. 1, 1920, & petitioning creditors, the execution creditors, informed the official receiver of the sum of money being in ct. & of the terms of settlement so agreed as aforesaid. Thereupon the official receiver intervened, & on Nov. 1, 1920, gave notice in writing to the Paymaster-General of the Supreme Ct. of the receiving order, & this notice had the effect of preventing the order being acted upon. The trustee moved for a declaration that the deed of gift was void as against him:—*Held*: (1) the deed of gift was a voluntary settlement &, being made within two years of the bkpcy., was void; (2) the execution having been completed & the proceeds held by the sheriff for fourteen days, the trustee's title was barred, because, although the execution was not completed before the sheriff had been in possession for twenty-one days, the act of bkpcy. thereby created had not occurred within three months of the presentation of the petition & was not therefore available to establish the trustee's title.—*Re CHIANDETTI, Ex p. TRUSTEE* (1921), 91 L. J. K. B. 70; 37 T. L. R. 984; [1921] B. & C. R. 82.

961. ————.]—On Jan. 14, 1921, the sheriff, in executing a writ of *fi. fa.* for £144, levied on debtor's goods, but on Jan. 29 being paid £72 on account of the debt in addition to costs, fees & possession money, he withdrew by arrangement reserving a right of re-entry for the £72 balance. He retained the £72 received on account for fourteen days & then paid it to the execution creditors. On Mar. 16 the sheriff made a second levy, but on being paid £53 on account of the debt in addition to fees & possession money, he again withdrew reserving a right of re-entry for the £19 balance. After retaining the £53 for fourteen days he paid it to the execution

creditors. On Apr. 26 the sheriff made a third levy, but the goods seized being found on interpleader to belong to a third party, he finally withdrew & made a return of *nulla bona* on May 2. On Sept. 5 a petition in bkpcy. based on an act of bkpcy. of Aug. 19 was presented. A receiving order was made on Sept. 29 followed by an adjudication on Oct. 1 & an order for summary administration on Oct. 3:—*Held*: the execution was completed within Bankruptcy Act, 1914 (c. 59), ss. 40, 41, by the return of *nulla bona* on May 2, & the trustee had no title to the £72 & £53 realised by that completed execution.

*Qu.*: whether the trustee would in any case have been entitled to the moneys paid before June 8, the earliest possible date to which his title could relate back under s. 37.—*Re FAIRLEY*, [1922] 2 Ch. 791; 92 L. J. Ch. 141; 38 T. L. R. 893; [1922] B. & C. R. 127.

962. ———— **Bankruptcy prior to execution.** —Pltf. after action brought having received notice from deft.'s attorneys that deft. had executed a composition deed which was about to be registered, nevertheless signed judgment in default of appearance, & issued execution. The sheriff levied on Jan. 30, & advertised a sale for Feb. 1. On Jan. 31 deft.'s attorneys gave notice to the officer that the composition deed had been executed, & requested him to withdraw. He refused to do so without an undertaking for payment, & they gave him such undertaking in the evening of the day on which the deed, which contained a release of all claims & demands of creditors, had in fact been registered. Deft.'s attorneys subsequently paid the amount to the officer, with a notice that they should proceed to recover it back, & the sheriff having taken out an interpleader summons, the amount paid to him, less his fees, was paid into ct. by order of a judge:—*Held*: the registration of the deed prevented pltf. from proceeding with his execution, & the money paid into ct. being in fact the proceeds of the execution, deft. was entitled to have it paid to him.—*MILNER v. RAWLINGS* (1867), L. R. 2 Exch. 249; 36 L. J. Ex. 250; 16 L. T. 829; 15 W. R. 1044.

———.]—*See, also*, BANKRUPTCY, Vol. V., pp. 808–837, Nos. 6902–7077.

**Proceedings to recover amount levied.**—*See* Sub-sect. 11, *post*.

#### SUB-SECT. 5.—PAYMENT OF RENT, RATES, AND TAXES BY SHERIFF.

##### A. Rent.

*See* Landlord & Tenant Act, 1709 (c. 18); Landlord & Tenant Act, 1851 (c. 25), s. 2;

& M. obtained a judgment against S., & under an execution issued on this judgment & a prior execution the sheriff in Feb. 1859, levied on the goods of S. & sold them at a great sacrifice. After satisfying the prior execution there remained in the sheriff's hands a balance of £60, which he did not pay over to W. & M., & it appeared that they never took any steps to compel him to do so. S. on several occasions attempted to get an account from the sheriff, but failed. S. subsequently made several payments on account of the judgment debt. In Sept. 1864, S. was arrested at the instance of W. & M., &, to avoid going to jail, paid £70 in cash, & gave two notes, one of which was the note sued upon. The defence set up was, that the notes were without consideration, as if S. were credited with the balance in the sheriff's hands, the judgment debt would be more than paid:—*Held*: as through the negligence of the judgment creditors the remedy against

the sheriff had been lost, they, & not the debtor, must suffer the loss, & therefore the note was without consideration.—*COLEMAN v. DUNLAP* (1868), 7 N. S. R. 216.—CAN.

g. *Entry of proceeds.*—*Held*: the word "forthwith," contained in Creditors' Relief Act, R. S. O. 1887, c. 65, s. 4, with reference to the entry by the sheriff of money levied under execution, must receive a strict construction, & means "without any delay." Even if equivalent to "within a reasonable time," a delay of fifteen days after the sale was not reasonable.—*MAXWELL v. SCARFE* (1889), 18 O. R. 529.—CAN.

h. *Proceeds stolen from sheriff's bailiff*—*Responsibility of sheriff.*—A sheriff is responsible for all money realised by his bailiff by a sale under a *fi. fa.* though the money be stolen from the bailiff as a result of his carelessness, & never comes to the sheriff's hands.—

*MASSEY-HARRIS CO. v. MOLLAND* (1905), 15 Man. L. R. 364; 1 W. L. R. 424.—CAN.

k. *Assignment by debtor for benefit of creditors*—*Execution creditors entitled against assignees.*—*Re HENDERSON ROLLER BEARINGS, LTD.* (1910), 17 O. W. R. 515; 2 O. W. N. 273; 21 O. L. R. 306.—CAN.

l. *Private creditor of sheriff*—*Not permitted to garnishee money of execution creditors in hands of sheriff.*—A private creditor of a sheriff will not be permitted to garnishee moneys of judgment creditors placed to the credit of the sheriff's official trust account in a bank.—*STEBBINGS, SPINNING & WALKER v. WILLIAMS & SEARS* (1914), 20 B. C. R. 240.—CAN.

#### PART III. SECT. 1, SUB-SECT. 5.—A.

m. *Restrictions on removal & sale*—*In respect of what tenancies*—*Mortgagor becoming tenant of mortgagee.*—A mtgo.



Sect. 1.—Writ of fieri facias: Sub-sect. 5, A.]

Execution Act, 1844 (c. 96), s. 67; County Courts Act, 1888 (c. 43), s. 160; Bkpcy. Act, 1914 (c. 59), s. 352.

**Goods distrained—Whether seizable in execution.]**

—See Sub-sect. 4, E. (f) viii., ante.

**Goods seized in execution—Whether distrainable.]—**See DISTRESS, Vol. XVIII., pp. 342, 343, Nos. 782–786.

**Priority of Crown debts.]—**See DISTRESS, Vol. XVIII., p. 343, Nos. 787–790.

**Restrictions on removal & sale—In respect of what tenancies.]—**See DISTRESS, Vol. XVIII., p. 345, Nos. 803–806.

**963. — Liability of sheriff.]—**In an action under Landlord & Tenant Act, 1769 (c. 18), s. 1, against the sheriff for removing goods taken in execution without paying a year's rent, the measure of damages is *prima facie* the amount of rent due, but it is competent to the sheriff to prove in mitigation of damages that the value of the goods removed was less than the amount of rent due.

The law appears to stand thus. When notice has been given by the landlord to the sheriff that rent is due, it becomes the duty of the sheriff under the statute not to sell anything upon the demised premises till the rent has been paid. Even if there are goods upon the demised premises of a value many times exceeding the amount of rent due his duty is the same. He must refuse to sell the smallest part of the goods until the claim of the landlord is satisfied. Now, of course, the sheriff is not bound to find money with which to satisfy the claim of the landlord. He must, therefore, before he proceeds with the execution, apply to the execution creditor for the sum which is necessary. If the execution creditor provides it, the sheriff pays the landlord & proceeds with the execution. If the execution creditor does not provide it, the sheriff cannot be called on to infringe the statute, & may either return *nulla*

*bona* & withdraw from possession or may himself pay the rent, looking to the execution creditor for reimbursement, & proceed to sell. This is the position of the sheriff under the Act (LORD ESHER, M.R.).—THOMAS v. MIREHOUSE (1887), 19 Q. B. D. 563; 56 L. J. Q. B. 653; 36 W. R. 104; 3 T. L. R. 804.

*Annotation:—*Consd. *Re Mackenzie, Ex p. Hertfordshire, Sheriff*, [1899] 2 Q. B. 566.

See, further, DISTRESS, Vol. XVIII., pp. 343, 344, Nos. 791–801.

**964. In respect of what rent—Rent due at time of seizure—Forehand rent.]—**It was proved that the usual time of entry on the neighbouring farms was on May 12, & that the rents of the estate of which the farm of G. was a part, were reserved payable at Michaelmas. The audit day being in January, T. entered on the farm in the spring of 1840, & continued in possession until 1842. In May, 1842, he was in arrear for rent to the extent of £160 & on being pressed by his landlord executed a warrant of attorney for £420, the amount of the arrears, & of the year's rent; the understanding being, that a *fi. fa.* was to be delivered to the sheriff upon a judgment to be entered up, but that it was not to be executed unless the writs of other creditors were sent to the sheriff. In Oct. 1842, T. was again applied to for another year's rent, at which time he paid a portion of it, promising to pay the residue before Christmas. In Nov. the sheriff, who had received writs from other persons against the property of T., executed the *fi. fa.* in question:—*Held*: these facts warranted the jury in finding that a year's rent became due at Michaelmas.—GORE v. LLOYD (1844), 12 M. & W. 463; 13 L. J. Ex. 366; 2 L. T. O. S. 329; 152 E. R. 1279.

*Annotation:—*Mentd. *Doe d. Wood v. Clarke* (1845), 7 Q. B. 211.

—.]—See DISTRESS, Vol. XVIII., pp. 347, 348, Nos. 846–851.

**965. In respect of what amount of rent—Year's rent.]—**Landlord entitled to one year's rent before a debt. can sell upon an execution for costs on a

contained an attornment clause & a covenant conferring upon mtgee., in the event of default in payment of principal or interest, power to enter into possession, collect the rents & profits, & to lease the mortgaged land. Default having been made, the mtgee. entered into possession & the mtgor. executed a lease by which was reserved a rent of half the yearly crop. Subsequently all the grain on the land was seized by the sheriff on behalf of execution creditors:—*Held*: the lease was valid & the mtgee. was entitled to half the crop as against the execution creditors.—ROLLEFSON BROTHERS CO. v. OLSON & MUTUAL LIFE ASSURANCE CO. (1915), 31 W. L. R. 157; 8 W. W. R. 481.—CAN.

**n. — Must be real tenancy.]—**The ordinary attornment clause in a mtge. made under Land Titles Act, Alberta, cannot create any real tenancy in the mtgor. so as to enable the mtgee. to claim the priority over an execution creditor given by 8 Anne, c. 14.—N Co. (1916), 33 W. L. R. 1142.—CAN.

**5. In respect of what rent—Rent due at time of seizure.]—**Premises were let for a year at a rent of £75, to be paid on May 1; & it was agreed that if the tenant should leave before May 1, then the rent was to become payable immediately. The tenant did leave on the Saturday before May 1, & on Monday the goods were seized under execution:—*Held*: the landlord was entitled to his rent.—VANCE RUTAN (1855), 12 U. C. R. 632.—C.

**p. —.]—**A sheriff, having

seized goods of a tenant upon a farm under a *fi. fa.*, left them in possession of the tenant, taking a receipt from him & an adjoining farmer. The landlord distrained & sold the goods, & buying them in, left them on the premises under charge of his former tenant as a hired servant, his lease having expired. The sheriff, without any subsequent seizure, proceeded as if the goods were the original tenant's & sold them under the original *fi. fa.*:—*Held*: he was liable to the landlord for the rent due at the time of seizure, of which he had notice, & for damages to the value of the goods over the rent due.—ROBERTSON v. FORTUNE (1860), 9 C. P. 427.—CAN.

**q. —.]—**Where the rent is not due the landlord is not entitled to be paid rent from proceeds of the sale under an execution.—*Ex p. FISH* (1877), 17 N. B. R. (1 P. & B.) 273.—CAN.

**r. —.]—**Before an order can be made on a sheriff to pay rent out of the proceeds of goods sold by him under execution, & taken from leased premises, it must be shown that the rent is actually due.—R. v. WILLISTON (1878), 18 N. B. R. (2 P. & B.) 149.—CAN.

—.]—Under 8 Anne, c. 14, where a portion of crop on leased premises were reserved by the landlord as rent, the sheriff could not sell the said portion to satisfy an execution against the tenant unless the sheriff paid the landlord all the rent due.—

—CAN.

**t. — Bond fide rental—Not security for past indebtedness.]—**S. was indebted to a bank, & to secure the indebtedness, made a mtge. upon certain lands to pltf., representing the bank; the mtge. was dated Jan. 11, 1909; & the moneys secured thereby were made payable on Feb. 15, 1909. The mtge. was subject to a prior mtge. to a loan co. On Mar. 15, 1909, the bank demanded further security, & a lease of the mtged. lands was made to S. by pltf. & executed by S. on that date, for nine months, the *reddendum* being one-third of the crop which should be grown upon the demised premises. On Mar. 1, 1910, S. was in arrears in respect of the first mtge., & the bank advanced him \$700 more to pay the arrears, S. then executing a lease to pltf. for two years, reserving a rental of two-thirds of the crop. On Aug. 30, 1910, the sheriff seized the grain upon the land under debt's execution against the goods of S. Pltf. claimed two-thirds of the grain seized:—*Held*: upon an interpleader issue directed to determine whether pltf. was entitled under his lease to a two-thirds share of the crop, the crop reserved as rental was not in reality a rental, but a security for a past indebtedness, as well as for future advances; & the issue should be determined in favour of debt.—STIKEMAN v. FUMMERTON (1911), 16 W. L. R. 502.—CAN.

**965 i. In respect of what amount of rent—Year's rent.]—**Property seized under an execution for taxes against a tenant, is liable to the landlord for a

—HENCHETT v. KIMPSON (1762), 2 Wils. 140; 95 E. R. 731.

*Annotations*:—**Consd.** Smallman v. Pollard (1844), 1 Dow. L. 901. **Refd.** Brandling v. Barrington (1827), 5 J. O. S. K. B. 181; Wharton v. Naylor (1848), 12 673; *Re Mackenzie, Ex p. Hertfordshire, Sheriff*, 2 Q. B. 566.

**966.** ———.]—(1) In an action on the case against the sheriff, the declaration, after reciting that two writs of *fi. fa.* had been delivered to him & executed, stated, that deft., as such sheriff, under colour of the writs, wrongfully & injuriously seized goods of pltf., of much greater value than sufficient to pay & satisfy the sum of money, interest, poundage, etc., indorsed on the writs, although defts. well knew that the money arising from a part of the goods so seized would be sufficient to satisfy the indorsement on the writs, yet deft. contriving, etc., afterwards under colour of the said writs, wrongfully, etc., did sell & dispose of more goods than necessary to satisfy the indorsement on the writs; & deft., further disregarding his duty, etc., then sold the said goods for a much less sum of money than he could, might, & ought to have sold the same. On motion in arrest of judgment:—*Held*: sufficient.

(2) A sheriff is only bound under process of execution to seize in the first instance, & to sell goods which will be reasonably sufficient to pay the amount indorsed on the writ, that is, the debt, interest upon the debt, poundage & expenses.

(3) The duty to seize in respect of a year's rent due to a landlord does not arise in the first instance until the landlord has made his claim, & then if the same be not paid, there is an obligation on the sheriff to levy under the original writ, & consequently to seize to a larger amount.—GAWLER v. CHAPLIN (1848), 2 Exch. 503; 18 L. J. Ex. 42; 13 J. P. 154; 151 E. R. 590; *sub nom.* GWALLER v. CHAPLIN, 11 L. T. O. S. 68.

*Annotation*:—*As to* (2) **Consd.** Tebb v. Powell (1905), 93 L. T. 468.

—.]—*See* DISTRESS, Vol. XVIII., p. 347, Nos. 810–845.

**967. In respect of what goods—Goods of under-tenant.**—A landlord is not entitled to a year's rent out of the goods of an under-tenant.—CARR

year's rent.—NOWLIN v. ST. JOHN CORPN. (1887), 26 N. B. R. 503.—**CAN.**

**968 i. Notice of landlord's claim to sheriff—Necessity for.**—A sheriff is not liable under 8 Anne, c. 14, for the removal of goods off the premises in respect of which rent is due, unless at the time of removal he either had notice or otherwise received knowledge of the rent being due, & afterwards removed the goods without paying the rent.—KINGSTON CORPN. v. SHAW (1860), 6 C. L. J. O. S. 280.—**CAN.**

**968 ii.** ———.]—Formal notice by the landlord that rent is due him is not necessary; but the landlord having made an illegal seizure for rent:—*Held*: notice of such seizure to the sheriff was sufficient to render the sheriff liable.—SHARPE v. FORTUNE (1860), 9 C. P. 523.—**CAN.**

**968 iii.** ———.]—Where a sheriff, having seized & sold the goods of a trader under a writ of *fi. fa.*, in respect of a judgment for a sum exceeding £20, paid one quarter's rent due to the landlord of the trader's premises, in obedience to a demand made at the time of sale, & within fourteen days from the date of sale received notice of the trader's having been adjudicated a bkpt. on foot of the levy:—*Held*: the sheriff was entitled to deduct from the produce of the sale the amount of rent so paid by him.—*Re* M'CARTHY (1881), 7 L. R. Ir. 473.—**IR.**

**a.** ——— *Failure to seize—Liability of sheriff.*—Where at the time of placing

an execution against goods in the sheriff's hands there is a claim for unpaid rent, the sheriff cannot delay the seizure until the execution creditor first pays the rent. He must seize, but he need not sell the goods until the rent is paid, & if the execution creditor will not pay it he may withdraw from possession. In this case the sheriff abstained from seizing on receiving notice of the rent being due, of which the execution creditor was aware, when he issued the *fi. fa.*, & before he seized, certain crops were removed, which would have sufficed to pay pltf.'s claim:—*Held*: the sheriff was liable.—LOCKE v. MCCONKEY (1876), 26 C. P. 475.—**CAN.**

**b.** ——— *Effect of mistake.*—A claim of rent, stated by mistake to be for "interest" under an attornment clause in a mtge., allowed priority over execution creditor's claim.—STURGEON v. HENDERSON, [1917] 3 W. W. R. 56; 37 D. L. R. 54.—**CAN.**

**972 i. Wrongful removal—Liability of sheriff—To pay rent.**—A sheriff is not justified, having notice that rent is due, in paying over the proceeds of a sale under a *fi. fa.* goods against a tenant without satisfying the landlord's claim for rent.—GALBRAITH v. FORTUNE (1860), 9 C. P. 211.—**CAN.**

**972 ii.** ——— *Evidence of value of goods seized.*—In an action against a sheriff for selling goods under execution without paying a year's rent to the judgment debtor's landlord,

*v. GOSLINGTON* (1730), 11 Mod. Rep. 414; 88 E. R. 1122.

—.]—*See* DISTRESS, Vol. XVIII., pp. 344, 345, 346, Nos. 802, 808, 818.

**Who may proceed against sheriff.**—*See* DISTRESS, Vol. XVIII., pp. 345, 346, Nos. 807–820.

**968. Notice of landlord's claim to sheriff—Necessity for.**—GAWLER v. CHAPLIN, No. 966, *ante*.

—.]—*See* DISTRESS, Vol. XVIII., pp. 344, 346, 347, 348, Nos. 798, 826–833, 851.

**969. Inquiry by sheriff—As to landlord's claim—Retention of proceeds—Pending verification of claim.**—Where the sheriff has realised the amount of an execution on a *fi. fa.* he cannot justify the retention of the money on the ground that the landlord has made a claim to the whole of it for rent, which claim he has not yet been enable to prove the truth of; & upon a return to the writ setting forth such facts an attachment will issue.—HALL v. BADDEN (1863), 7 L. T. 721.

— *Duty to inquire.*—*See* DISTRESS, Vol. XVIII., p. 317, Nos. 831–839.

**970. Amount to be levied—Sufficient to cover execution & rent.**—GAWLER v. CHAPLIN, No. 966, *ante*.

**971. Amount to be paid over—No deduction of poundage.**—On execution the landlord's rent shall be paid without deduction of poundage for the sheriff.—GORE v. GOFTON (1725), 1 Stra. 643; 93 E. R. 754.

**972. Wrongful removal—Liability of sheriff—To pay rent.**—When the landlord gives notice to the sheriff in possession under a *fi. fa.* that a year's rent is due, & then afterwards removes the goods & sells them, he may on a summary application to the ct., grounded on an affidavit of the facts, be ruled to pay over such rent to the landlord.—DARLING v. HILL (1736), Lee temp. Hard. 255; 95 E. R. 163.

**973.** ——— *To action—Form of pleading.*—An action lies at the suit of a landlord against the sheriff for neglecting to pay him a year's rent on an execution on the goods of his tenant; & the declaration in such action need not recite Landlord & Tenant Act, 1709 (c. 14), nor the judgment

evidence that the value of the goods seized exceeded the amount of the rent due is sufficient in the absence of evidence by deft. of the amount which the goods realised on sale.—SHIRREFF v. VYE (1885), 24 N. B. R. 572.—**CAN.**

**973 i.** ——— *To action.*—In 1881 pltf. carried a resolution for a composition with his creditors, it being required by the resolution that pltf.'s estate & effects should vest in the official assignees & one H., as a security for the creditors, upon trust, in default in payment of the composition, to apply to realise the estate. Afterwards, & before the composition had been carried out, or pltf. had obtained any certificate, pltf., by lease dated Apr. 13, 1883, demised certain premises to T. Goods of T. in those premises were seized under a *fi. fa.*, & a quarter's rent then due under the lease was claimed from the sheriff by pltf., & by the official assignees & H. The sheriff paid the official assignees & H. & sold the goods. In an action by pltf. against the sheriff for allowing the goods to be removed without satisfying pltf., the above facts being stated in the pleadings:—*Held*: on demurrer, pltf. was entitled to maintain the action.—DORAN v. MOORE (1885), 16 L. R. Ir. 181.—**IR.**

**c.** *Notice of landlord's claim to judgment creditor—Liability of sheriff.*—There is no legal obligation on a sheriff to give an execution creditor notice of a landlord's claim for rent.—DAVIDSON v. ALLEN (1886), 20 L. R. Ir. 16.—**IR.**



*Sect. 1.—Writ of fieri facias: Sub-sect. 5, A. & B.; sub-sect. 6.]*

on which the execution was founded.—*PAIN v. WOMANSELL* (1738), 7 Mod. Rep. 257; 87 E. R. 1226.

**974.** ————.]—In an action against the sheriff for taking goods without leaving a year's rent, the declaration need not state all the particulars of the demise, but if it does, & they are not proved as stated, there shall be a nonsuit.—*BRISTOW v. WRIGHT* (1781), 2 Doug. K. B. 665; 99 E. R. 421.

*Annotations:—***Refd.** *Gwinnet v. Phillips* (1790), 3 Term Rep. 643; *Peppin v. Solomons* (1794), 5 Term Rep. 496; *Williamson v. Allison* (1802), 2 East, 446; *Miles v. Sheward* (1806), 8 East, 7; *Cossey v. Diggon* (1819), 2 B. & Ald. 546; *Draper v. Garratt* (1823), 3 Dow. & Ry. K. B. 226; *Bromfield v. Jones* (1825), 3 L. J. O. S. K. B. 232; *Harcourt v. Wyman* (1849), 3 Exch. 817. **Mentd.** *King v. Pippett* (1786), 1 Term Rep. 235; *Drewry v. Twiss* (1792), 4 Term Rep. 558; *Parish v. Burwood* (1803), 5 Esp. 33; *Hoar v. Mill* (1816), 4 M. & S. 470; *Mullett v. Hunt* (1833), 1 Cr. & M. 752; *Shearm v. Burnard* (1839), 2 Per. & Dav. 565; *R. v. Otway* (1849), 4 Cox, C. C. 59.

**975.** ————.]—In an action under that statute against a sheriff for removing goods without paying the year's rent due to the landlord, it is no ground for arresting judgment that the declaration does not show whose goods the levy was made upon if it appear that they were on the demised premises.—*FORSTER v. COOKSON* (1841), 1 Q. B. 419; 1 Gal. & Dav. 58; 10 L. J. Q. B. 167; 5 Jur. 1083; 113 E. R. 1193.

*Annotations:—***Refd.** *Anon.* (1853), 20 L. T. O. S. 238; *White v. Binstead* (1853), 13 C. B. 304; *Foulger v. Taylor* (1860), 5 H. & N. 202.

**976.** ———— **Proof of authority of party seizing—Necessity for production of warrant.]—**Case against a sheriff. The first count was framed upon Landlord & Tenant Act, 1709 (c. 18), s. 1, for seizing the goods of a tenant in execution, without leaving enough to pay the landlord rent then due, & of which arrear debt. had notice, & stated that debt. took the goods of T., the tenant of pltf., under a *fi. fa.* issued against T. at the suit of B. This was not traversed by the pleas, & no other execution appeared:—**Held:** the connection of the party, who was shown to have seized the goods, with debt., sufficiently appeared without producing any warrant from debt. to that party.—*REED v. THOYTS* (1840), 6 M. & W. 410; 9 L. J. Ex. 316; 151 E. R. 472.

—.]—*See* DISTRESS, Vol. XVIII., pp. 344, 346, Nos. 796, 797, 821–825.

**977.** ———— **What amounts to—Execution of bill of sale.]—**A bill of sale held to be a removal of goods taken by a *fi. fa.* & a year's rent ordered to be paid the landlord out of the money levied by the Sheriffs of London.—*WEST v. HEDGES* (1751), Barnes, 211; 94 E. R. 881.

*Annotations:—***Expld.** *Smallman v. Pollard* (1844), 1 Dow. & L. 901. **Consd.** *Wharton v. Naylor* (1848), 6 Dow. & L. 136. **Refd.** *Cocker v. Musgrove* (1846), 15 L. J. Q. B. 365.

—.]—*See* DISTRESS, Vol. XVIII., p. 348, Nos. 852–855.

**Withdrawal by sheriff.]—***See* DISTRESS, Vol. XVIII., p. 348, Nos. 856–859.

— **Landlord's right to distrain after.]—***See* DISTRESS, Vol. XVIII., p. 349, Nos. 860–870.

**Return of nulla bona—Where rent not provided for.]—***See* Nos. 1080–1085, *post*.

**Execution followed by bankruptcy.]—***See* BANKRUPTCY, Vol. V., pp. 820, 829, 861, Nos. 6966–6968, 7041, 7875, 7876.

**Execution in county courts.]—***See* COUNTY COURTS, Vol. III., pp. 515, 517, Nos. 647, 665.

### B. Rates and Taxes.

*See* Taxes Management Act, 1880 (c. 19).

**978. Seizure of goods of ratepayer—Duty of sheriff to pay rates—Local Act.]—**By a local Act, where in a certain metropolitan parish the goods of any person liable to pay a rate by virtue of the Act shall have been "taken in execution" by a sheriff before the rate shall have been paid, the sheriff upon demand by the rate-collector is "directed & required in the first place" to pay the rate to the collector; & by the Metropolis Management Act, 1855 (c. 120), the vestry of the parish are to have, for the purpose of levying the rates therein mentioned, the same powers, remedies & privileges as for levying money for the relief of the poor.

A sheriff seized under a *fi. fa.* the goods of a judgment debtor who was at the time liable to pay to the vestry as the rating authority of the parish a certain rate made up of a poor rate by virtue of the local Act & a general rate under the Metropolis Management Act, 1855 (c. 120). A demand was made on the sheriff by the rate-collector, for the amount of the rate, but the sheriff, having subsequently received from the debtor the amount of the judgment debt, withdrew from possession without having paid the rate:—**Held:** the goods had been taken in execution within the local Act, & the sheriff was liable to the vestry for the amount of rate.—*MARYLEBONE VESTRY v. LONDON, SHERIFF*, [1900] 2 Q. B. 591; *sub nom.* *ST. MARYLEBONE VESTRY v. LONDON COUNTY, SHERIFF*, 69 L. J. Q. B. 848; 83 L. T. 355; 64 J. P. 628; 49 W. R. 36; 16 T. L. R. 512, C. A.

**Return of nulla bona—Validity of.]—***See* No. 1086, *post*.

### SUB-SECT. 6.—FROM WHEN DEBTOR'S PROPERTY BOUND.

*See* Stat. Frauds, s. 15; Sale of Goods Act, 1893 (c. 71), s. 26 (1); Mercantile Law Amendment Act, 1856 (c. 97), s. 1.

**979. From date & teste of the writ—As against purchaser—Former law.]—**Pltf. recovered against debt. & had execution. Debt., after the day of the teste of the *fi. fa.* & before the sheriff had meddled with the execution of the writ *bond fide* for money sold certain goods & chattels & delivered them to the buyers:—**Held:** notwithstanding the sale the sheriff might do execution of those goods in the hands of the buyers, for they were liable to execution, & execution once granted or made shall have relation to the teste of the writ.

—*WANGFORD & SEXTONS CASE* (1580), 1 Leon. 304; 74 E. R. 277.

### PART III. SECT. 1, SUB-SECT. 5.—B.

**d. Seizure of goods of ratepayer—Duty of sheriff to pay rates—Necessity for prior distress by collector.]—**A sheriff returned to a *ven. ex. & fi. fa.* residue against goods, that he had made \$50, out of which he had paid a collector of taxes \$48.39 claimed by the collector as taxes due by debt. at the time of the seizure under the writ on land which

the goods were, & of which the sheriff had notice prior to the sale, & that he had retained the balance towards his fees, etc. No distress had been made by the collector:—**Held:** the sheriff must account to the execution creditor for the \$50, because a distress by the collector is a necessary antecedent to obtaining the benefit of the statute.—*ADSHED v. GRANT* (1867), 4 P. R. 121. —CAN.

### PART III. SECT. 1, SUB-SECT. 6.

**e. From delivery of writ to sheriff—Must be for execution—Not merely to defeat other writ.]—**An execution put in the sheriff's hands, with instructions not to levy on it unless it should become necessary to prevent another execution from taking precedence, will not bind the goods of debt., nor defeat a purchase of them before a seizure

**980.** ———.]—A *fi. fa.* may be executed on goods *bond fide* sold after the award of the writ.—ANON. (1589), Cro. Eliz. 174; 78 E. R. 431.

*Annotation* :—**Refd.** Harwood v. Phillips (1663), O'Bridg. 464.

**981.** ———.]—A *fi. fa.* binds the goods of deft. from the date of it, & over-reaches a *bond fide* sale on that day.—BOUCHER v. WISEMAN (1595), Cro. Eliz. 440; 78 E. R. 680.

*Annotation* :—**Refd.** Bailly v. Bunning (1666), 2 Keb. 32.

**982.** ———.]—Goods are liable to execution from the date of the teste of the *fi. fa.*, not from the time when the *fi. fa.* was actually sued out.—BAILY v. BUNNING (1666), 1 Sid. 271; 2 Keb. 32; 82 E. R. 1100; *sub nom.* BAYLY v. BUNNING, 1 Lev. 173.

*Annotations* :—**Refd.** Phillips v. Thompson (1684), 3 Lev. 191; Letchmere v. Thorowgood (1688), 1 Show. 12; **Refd.** Cooper v. Chitty (1756), 1 Burr. 20; Smith v. Milles (1786), 1 Term Rep. 475; Balme v. Hutton (1833), 9 Bing. 471; Garland v. Carlisle (1837), 11 Bl. N. S. 421. **Mentd.** Anon. (1704), 2 Salk. 655; Bloxham v. Oldham (1750), 1 Burr. 26, n.; Magrath v. Hardy (1838), 4 Bing. N. C. 782.

**983.** ——— **As against debtor.**]—Execution may be levied after the death of the party, for the exor. being privy is bound as well as testator. Stat. Frauds intended to remedy the inconvenience of selling goods after the teste of the writ so that now the writ binds only from the delivery *quoad* a purchaser, but *quoad* the party or his exors. it binds from the teste.—HORTON v. RUESBY (1686), Comb. 33; 90 E. R. 326; *sub nom.* HOUGHTON v. RUSHBY, Skin. 257.

**As against assignees of debtor.**]—Trespass will not lie, by assignees of bkpts., against an officer for executing a *fi. fa.* tested before, though not executed till after, the act of bkpcy.; nor are the goods levied liable to an extent sued out after the seizure & before any *venditioni exponas*.—LETCHMERE v. THOROWGOOD (1688), 3 Mod. Rep. 236; 1 Show. 12; 87 E. R. 153; *sub nom.* LECHMERE v. THOROWGOOD, Comb. 123; *subsequent proceedings, sub nom.* LECHMORE v. TOPLADY (1690), 1 Show. 146.

*Annotations* :—**Consd.** Giles v. Grover (1832), 9 Bing. 128. **Refd.** Cooper v. Chitty (1756), 1 Burr. 20; Hitchin v. Campbell (1772), 2 Wm. Bl. 827; Uppom v. Sumner (1779), 2 Wm. Bl. 1294; Smith v. Milles (1786), 1 Term Rep. 475; Rorke v. Dayrell (1791), 4 Term Rep. 402; Payne v. Drewe (1804), 4 East, 523; R. v. Giles (1820), 8 Price, 293; Balme v. Hutton (1833), 9 Bing. 471; Garland v. Carlisle (1837), 11 Bl. N. S. 421. **Mentd.** Belshaw v. Bush (1851), 11 C. B. 191.

**985.** ———.]—FARRER v. BROOKS, No. 74, *ante*.

**986.** ——— **Against executor of debtor.**]—HORTON v. RUESBY, No. 72, *ante*.

**987.** ———.]—The Statute of Frauds & Perjuries which says that the property of the goods taken in execution shall be bound only from the delivery of the writ to the sheriff & not from the tests thereof is to be understood only in respect of purchasers of them, but in respect of exors. where the party dies after the teste & before execution the property shall be bound from the teste (*per CUR.*).—RAWLINSON v. ORIEL (1688), as reported in Comb. 144; 90 E. R. 394.

*Annotations* :—**Mentd.** Wade v. Stiff (1827), 1 Moo. & P. 26; Henry v. Goldney (1846), 15 M. & W. 494.

**988.** ———.]—A creditor recovered judgment, & sued out a writ *fi. fa.* thereupon, in the lifetime of his debtor, & placed the writ in the

actually made under the execution.

placed in the sheriff's hands with instructions not to sell until another writ comes in, is not in his hands to

be executed, & will not bind the goods, either against a subsequent execution or a *bond fide* purchaser for value.—FOSTER v. SMITH (1856), 13 U. C. R. 243.—**CAN.**

**g.** ———.]—Judgment creditors having execution in the sheriff's

hands of the sheriff on the day after the debtor died. A decree was afterwards made in the suit of an equitable mtgee. of certain parts of the real & personal estate of the debtor against his devisee & exor., for the sale of the mortgaged property, & if the proceeds of such sale should be insufficient to satisfy pltf.'s debt, then for an account & application of the general personal & real estate of testator, in a due course of administration. After this decree the judgment creditor levied, under the *fi. fa.*, on goods left by the debtor. The exor. thereupon moved for an injunction to restrain execution, which the ct. refused on two grounds, first, because the decree for an account & administration of the general estate was not absolute, but was conditional on the mortgaged property proving insufficient to satisfy pltf.'s demand; & secondly, because the judgment creditor acquired a right to the goods of the debtor, by virtue of the writ of *fi. fa.*, from the teste of the writ, & therefore paramount to the right of the exor.—RANKEN v. HARWOOD, RANKEN v. BOULTON (1846), 5 Hare, 215; 15 L. J. Ch. 446; 7 L. T. O. S. 467; 10 Jur. 794; 67 E. R. 892; *appeal*, 2 Ph. 22, L. C.

*Annotation* :—**Refd.** Marriage v. Skiggs, *Re Skiggs* (1859), 4 De G. & J. 4.

**989.** From delivery of writ to sheriff—In favour of purchasers.]—FARRER v. BROOKS, No. 74, *ante*.

**990.** ———.]—FINCH v. WINCHELSEA (EARL) (1719), 3 P. Wms. 399, n.; 24 E. R. 1119, L. C.

*Annotation* :—**Refd.** Waghorne v. Langmead (1796), 1 Bos. & P. 571.

**991.** ——— **Stat. Frauds.**]—A bkpt.'s goods are not bound by the delivery of the writ to the sheriff on the new statute till the writ is actually executed as to the comrs.; *aliter* as to bkpt.

Whereas before that statute [Stat. Frauds] the goods were bound to pltf. in the action from the teste of the writ, now they are not bound till the delivery of the writ to the sheriff (*per CUR.*).—PHILIPS v. THOMPSON (1684), 3 Lev. 191; 83 E. R. 645.

*Annotations* :—**Consd.** Giles v. Grover (1832), 9 Bing. 128; Garland v. Carlisle (1837), 11 Bl. N. S. 421. **Refd.** Newland v. ——— (1706), 1 P. Wms. 92; Brassey v. Dawson (1734), 2 Stra. 978; Cooper v. Chitty & Blackiston (1756), 1 Burr. 20. **Mentd.** A.-G. v. Allgood (1743), Park. 1; Hitchin v. Campbell (1772), 2 Wm. Bl. 827; Balme v. Hutton (1833), 9 Bing. 471.

**992.** ——— **Only in respect of purchasers.**]—RAWLINSON v. ORIEL, No. 987, *ante*.

**993.** ———.]—HORTON v. RUESBY, No. 72, *ante*.

**994.** ———.]—Before Stat. Frauds deft.'s goods were bound in his hands from the teste of the writ of execution. To avoid this that statute was made whereby it is directed that the goods shall only be bound from the delivery of the writ to the sheriff. But neither before this statute nor since is the property of the goods altered, but continues in deft. till the writ of execution executed. But then it may be asked, what is the meaning of those words of the statute, whereby it is said that the goods shall be bound from the delivery of the writ to the sheriff? The meaning is that after the writ is so delivered to the sheriff, if deft. makes an assignment of his goods unless in market overt the sheriff may take them in execution (LORD HARDWICKE, C.).—LOWTHAL v.

hands under which a seizure had been made, signed an agreement giving deft. an extension of time for payment on certain condition therein mentioned. Upwards of thirty days afterwards deft. assigned under Insolvent Acts, the conditions of the agreement having



Sect. 1.—*Writ of fieri facias: Sub-sects. 6 & 7.*

TONKINS (1740), Barn. Ch. 39; 2 Eq. Cas. Abr. 380; 27 E. R. 546, L. C.

*Annotations:—*Reid. Waghorne v. Langmead (1796), 1 Bos. & P. 571; Paine v. Drew (1804), 1 Smith, K. B. 170; Giles v. Grover (1832), 9 Bing. 128.

995. ——— Application to Crown.]—JEANES v. WILKINS, No. 928, ante.

996. ———.]—GILES v. GROVER, No. 821, ante.

997. ———.]—(1) A *virtute cuius* is traversable, if it involve matter of fact. Therefore, where defts. justified an entry into pltf.'s ship, a seizure of goods there, & sale of them, by virtue of a *fi. fa.*, against the goods of A.; & pltf., admitting the *fi. fa.*, replied, *de injuria absque residuo causæ*:—*Held*: under this issue he might show that defts., although in possession of a *fi. fa.*, did not seize in order to levy, & did not levy money by sale under the writ; but, being consignees of the goods, merely exhibited the writ, in order to defeat a claim of pltf. for freight, & then sold the goods in the character of importers.

(2) At common law the *fi. fa.* had relation to the teste & bound deft.'s goods from that time, so that if deft. had sold the goods they were liable to be seized in execution: this was altered by Stat. Frauds, which enacted that the property should be bound from the time of the delivery of the writ to the sheriff; the meaning of that is that, after such delivery, if deft. make an assignment of the goods, the sheriff may take them in execution. But neither before nor since is the property of the goods altered but continues in deft. till execution executed. The execution is not executed till actual seizure under the writ (LITTLEDALE, J.).—LUCAS v. NOCKELLS (1833),

been so far performed:—*Held*: the writs were not in the sheriff's hands for execution, & the assignment made more than thirty days after their delivery to the sheriff took priority.—*Re* ROSS (1866), 3 P. R. 394.—CAN.

998 i. ———.]—Where a debtor assigned to a creditor property, which was seized by the sheriff on several executions received on the same day, & these writs were subsequently satisfied, but before they were satisfied, & a fortnight after the assignment, an attachment against the debtor's property came also into the hands of the sheriff:—*Held*: the property assigned was secured to the assignee against the attachment, although it had been liable to the preceding executions.—HOOKER v. JARVIS (1843), 6 O. S. 439.—CAN.

998 ii. ———.]—Executions from a division ct. do not bind the property before they are placed in the bailiff's hands.—CULLODEN v. McDOWELL (1859), 17 U. C. R. 359.—CAN.

998 iii. ———.]—On an interpleader to try the title to two locomotives, it appeared that in Sept. 1858, pltf. orally agreed with G., to buy them for \$16,000, & on Jan. 3, 1859, by deed reciting this arrangement, G. conveyed them to pltf. Defts. claimed under an execution issued after the agreement, & when that was made there was an execution in the sheriff's hands, at the suit of a third party, which was subsequently paid:—*Held*: the execution in the sheriff's hands clearly could not affect pltf.'s claim as against defts.—BURTON v. BELLHOUSE (1860), 20 U. C. R. 60.—CAN.

998 iv. ———.]—The registration of a chattel mtge. does not cause it to relate back to its date, & therefore a writ placed in the sheriff's hands between its date & registry takes precedence of it.—HAIGHT v. MCINNIS (1862), 11

C. P. 518.—CAN.

998 v. ———.]—Where a writ of *fi. fa.* or sequestration is placed in the sheriff's hands, it forms a lien on deft.'s equitable estate from the date of such delivery, & not merely from the date of pltf.'s filing a bill to enforce the same.—MOORE v. CLARK (1865), 11 Gr. 497.—CAN.

998 vi. ———.]—A sheriff received two executions against goods, on Jan. 18 & Feb. 15, respectively. He made a formal seizure on the delivery of the first writ, but left no one in possession, & the execution debtor remained in possession, & carried on his business as before the seizure. There had been a stay on this writ by the solr. for the execution creditor, but on the delivery of the second writ the sheriff was directed to proceed on both. On Mar. 6, the goods, consisting of the whole of the execution debtor's stock-in-trade, were sold by the execution debtor to pltf., who removed them to their own place of business. On Mar. 22, the sheriff seized all the goods then in pltf.'s possession, which they had received from the execution debtor. The sale to pltf. was found to be *bond fide*, & for value, & without notice of the executions:—*Held*: the sheriff was entitled to the goods of the execution debtor then in pltf.'s possession.—PATTERSON v. MCKELLAR (SHERIFF) (1884), 4 O. R. 407.—CAN.

998 vii. ———.]—CAMERON v. PERRIN (1887), 14 A. R. 565.—CAN.

998 viii. ———.]—A bill of sale taken to secure a debt due pltf. after notice of execution in the sheriff's hands:—*Held*: void.—BLAKIE v. MCLENNAN (1901), 33 N. S. R. 558.—CAN.

998 ix. ———.]—The effect of placing the execution in the sheriff's hands is to bind the goods of the partnership, so that they are liable to be seized.—

10 Bing. 157; 7 Bli. N. S. 140; 1 Cl. & Fin. 438; 3 Moo. & S. 627; 131 E. R. 863, H. L.

*Annotations:—*As to (1) *Consd.* Carnaby v. Welby (1838), 8 Ad. & El. 872. *Reid.* Drewe v. Lainson (1840), 11 Ad. & El. 529; Hewitt v. Macquaire (1851), 7 Exch. 80. *Generally, Mentd.* Bristol Grdns. v. Wait (1834), 1 Ad. & El. 264; Price v. Peek (1834), 1 Bing. N. C. 380; Ridgway v. Hungerford Market Co. (1835), 4 Nev. & M. K. B. 797; Sabourin v. Neale (1836), 2 Har. & W. 103; Oakes v. Wood (1837), 2 M. & W. 791; Ransford v. Copeland (1837), 6 Ad. & El. 482; Nockells v. Lingham (1838), 2 Jur. 438; R. v. Thomas (1838), 3 Ad. & El. 183; Woods v. Durrant (1846), 16 M. & W. 149; Cobbett v. Hudson (1849), 13 Q. B. 497; Spotswoode v. Barrow (1850), 19 L. J. Ex. 226; The Alan Ker, How v. Kirchner (1857), 30 L. T. O. S. 296; Morant v. Chamberlain (1861), 30 L. J. Ex. 299; Sinclair v. Broughton & Government of India (1882), 47 L. T. 170; Allen v. Flood, [1898] A. C. 1; Assets Development Co. v. Close (No. 2) (1901), 46 Sol. Jo. 12.

998. ———.]—(1) Although the goods of a debtor are bound from the delivery of a writ of execution to the sheriff, yet the property in them is not changed by it, & is still in the debtor, & he may sell them, subject to the rights of the execution creditor, to which they will be liable in the hands of a purchaser, unless the sale took place in market overt.

(2) In trover against the sheriff & the execution creditor for taking goods under an execution, it is not competent for the sheriff, upon the plea of not possessed, to give in evidence certain facts justifying the seizure, distinguishing his case from that of the other defts.; but such a defence should be specially pleaded.—SAMUEL v. DUKE (1838), 3 M. & W. 622; 6 Dowl. 537; 1 Horn. & H. 127; 7 L. J. Ex. 177; 150 E. R. 1294.

*Annotations:—*As to (1) *Consd.* McPherson v. Temiskaming Lumber Co., [1913] A. C. 145. *Generally, Mentd.* Webb v. Tripp (1842), 11 L. J. Q. B. 154; Holmes v. Tutton (1855), 5 E. & B. 65.

999. ———.]—A transfer by a judgment debtor of the stock, etc., on his farm, the price being

RENNIE v. QUEBEC BANK (1902), 22 C. L. T. Occ. N. 171; 3 O. L. R. 541; 1 O. W. R. 286.—CAN.

998 x. ———.]—Delivery of a writ of execution to the sheriff for execution creates a lien or "charge" on the property of the execution debtor in favour of the execution creditor.—DEERING v. GIBBON (1907), 1 Alta. L. R. 7; 7 W. L. R. 178.—CAN.

998 xi. ———.]—TRUST & LOAN CO. v. COOK (1910), 15 W. L. R. 727.—CAN.

998 xii. ———.]—ROBERTS v. GRAY (1911), 17 W. L. R. 277.—CAN.

998 xiii. ———.]—Under Rule 478, the writs of *fi. fa.* bound all the goods & chattels of deft. from the day when they were placed in the sheriff's hands, & the crops grown on the land subsequent thereto, being the property of deft. were bound by the execution as they came into existence.—KIDD & CLEMENTS v. DOHERTY (1914), 27 W. L. R. 636; 16 D. L. R. 525; 7 Sask. L. R. 137.—CAN.

998 xiv. ———.]—Under 11 & 12 Vict., c. 21 (India), the mere delivery of the writ of *fi. fa.* to the sheriff or his deputy for execution bound the goods as against the assignees in insolvency, subject to the right of the execution creditor to have satisfaction of his debt by sale.—FINANCIAL ASSOCN. OF INDIA & CHINA, LTD. v. PRANJIVANDAS HARJIVANDAS & BHAGVANDAS PURSHOTAMDAS (1865), 3 Bom. O. C. 25.—IND.

h. ——— *Must be levied on.*]—The placing of a writ of attachment in the sheriff's hands does not of itself bind the goods: the writ must be levied on.—POTTER v. CARROLL (1860), 9 C. P. 442.—CAN.

k. ———.]—Pltf. claimed a horse under bill of sale from L., which was taken by the sheriff under execution. At the time the bill of sale was made & filed, the sheriff had the writ

paid to third parties, for rent, etc. :—*Held* : valid. Up to the day of the delivery of the writ to the sheriff, the judgment debtor may sell his goods provided it is not a mere trick to evade the execution. The question is whether it is a real transaction. Here money not only passes, but is paid to third parties for rent, etc., so that clearly the payment was not colourable, & the price was really paid (WILLES, J.).—BUNYARD v. SEABROOK (1858), 1 F. & F. 321, N. P.

**1000. — Knowledge of delivery—Mercantile Law Amendment Act, 1856 (c. 97), s. 1.**—HOBSON v. THELLUSON, No. 1171, *post*.

**1001. — — — — —**—GLADSTONE v. PADWICK, No. 564, *ante*.

**1002. — Sale of Goods Act, 1893 (c. 71), s. 26.**—JOHNSON v. PICKERING, No. 565, *ante*.

**Execution in county courts.**—See COUNTY COURTS, Vol. XIII., p. 515, Nos. 612, 613.

#### SUB-SECT. 7.—AGAINST WHOM PROPERTY BOUND.

**1003. General rule.**—PAYNE v. DREWE, No. 548, *ante*.

**Priority of extent by Crown.**—See CROWN PRACTICE, Vol. XVI., p. 225.

of execution outstanding in his hands against L., of which the latter had notice, but no levy had been made, & it was clear that the bill of sale was received by pltf. *bonâ fide* for valuable consideration & without notice :—*Held* : the title of pltf. was not affected by the notice to L.—CUNNINGHAM v. MORSE (1887), 20 N. S. R. (S. R. & G.) 110.—CAN.

**l. From date of service of copy writ.**—Under Transfer of Land Act, 1890, s. 139 the service of a copy writ of *fi. fa.* binds the land specified in such writ for three months from the date of such service, unless in the meantime the property specified is sold under the writ.—*Re* SHEARS & ALDER (1891), 17 V. L. R. 316.—AUS.

**m. Stock of incorporated company — From time when notice of writ given by sheriff to company.**—The stock of an incorporated co. is only bound from the time when the notice of the writ is given to the co. by the sheriff, under C. S. C., c. 70, ss. 3, 4, & not from the time of the delivery of the writ to the sheriff.—HATCH v. ROWLAND (1870), 5 P. R. 223.—CAN.

**n. From time of seizure — Goods subject to overdue chattel mortgage.**—A *fi. fa.* goods does not bind goods of the execution debtor, which at the time of the delivery of the writ to the sheriff are subject to an overdue chattel mtge., until actual seizure under the writ.—ALLAN v. PLACE (1908), 15 O. L. R. 476; 11 O. W. R. 238.—CAN.

**o. — Shares.**—Shares being by the statute made exigible, the writ binds them only from the time of actual & constructive seizure.—*Re* MONTGOMERY & WRIGHTS, LTD. (1917), 38 O. L. R. 335.—CAN.

#### PART III. SECT. 1, SUB-SECT. 7.

**p. Purchaser before execution filed.**—An execution filed against land after it had ceased to be the property of the execution debtor does not attach any interest in the land &, although it is in the sheriff's hands at the time he realises the amount of an execution filed when the land was the property of the debtor, it is not entitled to share under Creditor's Relief Act, R. S. C., c. 63, in such amount.—ROGERS LUMBER YARDS, LTD. v. STUART, [1917] 3 W. W. R. 1000; 10 Sask. L. R. 403; 39 D. L. R. 771.—CAN.

**1004. Purchase in market overt.**—LOWTHIAL v. TONKINS, No. 994, *ante*.

**1005. — Whether extent by Crown overrides title.**—GILES v. GROVER, No. 821, *ante*.

**1006. — — — — —**—SAMUEL v. DUKE, No. 998, *ante*.

**1007. — — — — —**—Where execution is levied upon timber cut by an assignee of the licence under an assignment made subsequently to the issue of the writ, the levy is valid, unless it is shown that the assignee acquired his title in good faith & for valuable consideration without notice of the execution & has paid his purchase-money.—MCIPHERSON v. TEMISKAMING LUMBER CO., LTD., [1913] A. C. 145; 82 L. J. P. C. 113; 107 L. T. 664; 29 T. L. R. 80, P. C.

*Annotation* :—*Mentd.* Clarkson & Forgie v. Wishart & Myers, [1913] A. C. 828.

**1008. Trustee in bankruptcy.**—A judgment creditor, having issued a writ of *fi. fa.*, obtained an order appointing a receiver of debtor's goods. While the goods were unsold the debtor filed his own petition, & was adjudged bkpt. :—*Held* : (1) the order appointing a receiver of the debtor's goods did not constitute the execution creditor a secured creditor; (2) the order did not amount to equitable execution; (3) if it did, Bkpcy. Act, 1883 (c. 52), s. 45, applied, & the execution not having been completed by sale at the time of the

**q. Purchaser — Without notice of execution.**—*Held* : purchaser of goods was held not entitled thereto as against an execution creditor of the vendor, the trial judge finding on the evidence, & the Ct. of Appeal refusing to disturb such finding, that he had not acquired the goods *bonâ fide* without notice of the existence of the execution.—ISLAND AMUSEMENT CO. v. QUAGLIOTTI, [1920] 1 W. W. R. 1015.—CAN.

**r. — Necessity for notice of writ—Onus of proof.**—Two executions were lodged with the sheriff against deft.'s goods. The sheriff seized a quantity of grain which however was claimed by W. On an interpleader issue :—*Held* : there had been a delivery to & acceptance by W. of the grain; the *onus* of proving want of notice is on the person purchasing from the execution debtor & there was nothing in the evidence to show when the sheriff notified W. about the executions; on the facts, however, the conclusion seemed to be inevitable that the claimants had no notice of the executions at the time they took possession of the grain; deft. remained upon the premises until the time of seizure & there was no change of possession as would be apparent to the public; merely to board up & lock the granary was no notice to the public; there must be judgment that the property was that of the execution creditors under the seizure; that the claimants be barred; that no action be brought against the sheriff who should be paid his costs by the execution creditors; claimants to pay their costs to the execution creditors.—McCORMICK v. ANDERSON (1906), 5 W. L. R. 76.—CAN.

**s. — — — — —**—A writ of execution shall not take priority to a *bonâ fide* sale by the judgment debtor, followed by an actual & continued change of possession, without actual notice to the purchaser that such writ is in the hands of the sheriff. The *onus* of proof is upon the person upholding the sale to show that these requirements to make it valid as against a writ of execution are satisfied.—BELAIR v. BANQUE D'HOCHELAGA, [1923] 2 W. W. R. 771.—CAN.

**t. — Transfer unregistered.**—Deft. bought at a sheriff's sale the estate & interest of W., registered proprietor of land under the "Transfer of Land

Statute." Part of this land had been previously sold by W. to pltf., who was in possession, & before & at the sale gave deft. express notice of his interest. Deft. became registered proprietor of the allotment under a transfer by the sheriff, & brought an action of ejectment against pltf. On bill to restrain proceedings in ejectment, & to constitute pltf. registered proprietor of the land in his possession :—*Held* : his interest was that of a tenant within the meaning of sect. 49 of the Statute, & decree made as prayed.—ROBERTSON v. KEITH (1870), 1 V. R. 11.—AUS.

**a. — — — — —**—On Jan. 10, 1883, L. executed a transfer of land under Real Property Act, 1861, to B., but the same was not registered. On Feb. 16, 1883, a writ of *fi. fa.*, issued on a judgment against L., was lodged with the Registrar-General & registered. The sheriff afterwards sold to B. T. & executed a transfer to him :—*Held* : B.'s unregistered transfer took precedence of the unregistered transfer by the sheriff & B. was entitled to have his transfer registered.—*Re* BOSQUET (1883), 17 S. A. L. R. 173.—AUS.

**b. — — — — —**—Long before the recording in the Land Titles office against certain land of defts.' execution, the execution debtor had bound himself by agreement in writing to transfer the land to S., & this agreement was in full force & effect when the execution was recorded. A transfer of the land was executed, pursuant to the agreement, in favour of pltf. bank, as the nominee of S., contemporaneously with the making of the agreement, which was soon afterwards left at the Land Titles office; but, for some unexplained reason, it was not actually recorded until about eight months thereafter; & in the meantime defts.' execution had come in & been recorded against the land :—*Held* : pltf. bank was entitled to have defts.' execution removed from its certificate of title & to hold the land freed therefrom. The mere fact that, when the execution was recorded, the bank's interest in the land, under the agreement & transfer, had not ripened into a registered or registrable interest, could not avail to deprive the bank of its rights.—MERCHANTS BANK OF CANADA v. PRICE (1914), 27 W. L. R. 48; 16 D. L. R. 104; 7 Alta. L. R. 344.—CAN.

**c. — After one decree & before**



**Sect. 1.—Writ of fieri facias: Sub-sects. 7, 8, 9  
10. A. & B.]**

making of the receiving order in bkpcy., the execution creditor was not entitled to retain the benefit of it against the trustee.—*Re DICKINSON, Ex p. CHARRINGTON & Co.* (1888), 22 Q. B. D. 187; 58 L. J. Q. B. 1; 60 L. T. 138; 37 W. R. 130; 5 T. L. R. 82; 6 Morr. 1, C. A.; *affg.* S. C. *sub nom. Re DICKENSON, Ex p. MOORE*, 37 W. R. 96.

*Annotations:—As to (1) Rejd. Re Hastings, Ex p. Brown* (1892), 61 L. J. Q. B. 654; *Re Potts, Ex p. Taylor*, [1893] 1 Q. B. 648; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727. *As to (2) Consd. Re Potts, Ex p. Taylor*, [1893] 1 Q. B. 648; *Re Pearce, Ex p. Official Receiver, The Trustee*, [1919] 1 K. B. 354. *Rejd. Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727. *As to (3) Rejd. Re Tillett, Ex p. Kingscote* (1889), 5 T. L. R. 269; *Levasseur v. Mason & Barry* (1890), 63 L. T. 700. *Generally, Mentd. Re Detmold, Detmold v. Detmold* (1889), 58 L. J. Ch. 495; *Mason & Barry v. Soc. Industrielle et Commerciale des Métaux* (1889), 5 T. L. R. 582.

—.]—*See, also, BANKRUPTCY, Vol. V., pp. 765, 808–835, Nos. 6581, 6902–7067.*

**SUB-SECT. 8.—EFFECT OF DEATH OF EXECUTION CREDITOR OR DEBTOR.**

*See Part II., Sect. 8, sub-sect. 1, C. (a), ante.*

**SUB-SECT. 9.—EFFECT OF PAYMENT OF DEBT.**

**1009. Payment by sheriff out of own money—Whether he can recover.]—SPEAKE v. RICHARDS** (1617), Hob. 206; 2 Show. 281; 1 Brownl. 51; Hut. 11; Moore, K. B. 886; 80 E. R. 353; *sub nom. SPARK v. RICHARDS*, Noy. 22.

*Annotations:—Rejd. Langdon v. Wallis* (1698), 1 Lut. 582; *Morland v. Pellatt* (1829), 7 L. J. O. S. K. B. 54. *Mentd. Kempe v. Goodall* (1705), 2 Ld. Raym. 1154; *Magrath v. Hardy* (1838), 4 Bing. N. C. 782; *Wiles v. Woodward* (1850), 20 L. J. Ex. 261; *R. v. Blakemore* (1852), 21 L. J. M. C. 60; *Feversham v. Emerson* (1855), 11 Exch. 385.

**1010. Discharge of execution.]—(1) Payment to the gaoler by a party in execution under a ca. sa. is no discharge.**

(2) Payment to the sheriff upon a fi. fa. is good; *semble: aliter* upon a ca. sa.—*TAYLOR v. BAKER* (1677), Freem. K. B. 453; 3 Keb. 788; 2 Mod. Rep. 214; 89 E. R. 338; *sub nom. TAILER v.*

*another.]—Although, under the provisions of Act VIII. of 1859, s. 240, a private alienation by sale of property after attachment can be impugned by the holder of the decree in execution of which it was attached, if obstructive to the execution, yet such alienation cannot be impugned by the holder of the decree, under those provisions, because it obstructs the execution of another decree obtained by him subsequently to the date of the alienation.—MUSUMAT MAHBUBAN v. MUSUMAT RAHEEMUN* (1874), 0 N. W. 217.—IND.

*d. Mortgagee.]—DHURRUM DASS v. MUSSOORIE SAVINGS BANK* (1874), 6 N. W. 296.—IND.

*e. Donee.]—Certain land was attached under a decree & sold. Application was thereupon made by a person, who claimed as donee of the land from the judgment debtor, to have the sale set aside under Code of Civil Procedure, s. 310, A. It was alleged that the gift had been made prior to the date of the attachment:—Held: the interest of the donee, assuming his gift to be valid, could not be affected by the subsequent attachment & sale, & in consequence he could not seek to set the sale aside under sect. 310.—ERODE MANIKKOTH KRISHNAN NAIR v. PUTHIEDATH CHEMBAKKOSERI*

*KRISHNAN NAIR* (1902), 1 L. R. 26 Mad. 365.—IND.

**PART III. SECT. 1, SUB-SECT. 9.**

*f. Settlement between parties.]—Where a judgment debtor settles the amount of the judgment, being for a sum without costs, in full with the creditor personally, & the creditor's solrs., without knowledge of such settlement, subsequently issue execution on behalf of the creditor, the debtor is entitled to have such execution set aside since the creditor & consequently his solrs. had no right to issue execution at that time; the fact that the solrs. are able to establish collusion to deprive them of costs is no ground for refusing the debtor's application to set aside the invalid execution.—BIGFORD v. SQUIRRELL*, [1921] 2 W. W. R. 739.—CAN.

*g. Subsequent execution levied—Whether money formerly paid recoverable.]—N., having obtained a decree in a suit against K., requested him to discharge certain sums due on outstanding bonds which N. had given to third parties, promising to credit the sums so paid to the amount due under the aforesaid decree. K. paid as requested, but N. took out execution in full of the decree; & the ct. refused to recognise the payments made by K. out of ct. In a suit by K. for the*

*BAKER, T. Jo. 97; sub nom. TAYLOR v. BEKON*, 2 Lev. 203.

*Annotations:—As to (2) Consd. Slackford v. Auston* (1811), 14 East, 468. *Appld. Crozer v. Pilling* (1825), 4 B. & C. 26. *Fold. Woods v. Finnis* (1852), 7 Exch. 363. *Rejd. Langdon v. Wallis* (1698), 1 Lut. 582; *Cranmer's Case* (1702), 2 Salk. 508; *Morland v. Pellatt* (1829), 7 L. J. O. S. K. B. 54; *Hemming v. Hale* (1859), 6 Jur. N. S. 554; *Mortimore v. Cragg* (1878), 3 C. P. D. 216. *Generally, Mentd. Hackett v. Tilley* (1705), 2 Ld. Raym. 1207.

**1011. Tender of debt—Sheriff may not sell.]—R. v. BIRD, No. 584, *ante*.**

**1012. Payment to bailiff's assistant—Good as against sheriff.]—GREGORY v. COTTERELL, No. 1210, *post*.**

**1013. Goods of third party seized—Payment by him to prevent sale—Right of action for recovery.]—Appl't's mill having been, as he alleged, wrongfully attached by resps., applt. paid under protest the sum claimed, & thereafter sued for a return of the money so paid:—Held: although the payment under protest of the sum demanded by resps. was not the only course open to applt. to rid himself of the alleged unlawful interference with his property, it was an involuntary payment produced by coercion, & applt. was entitled to maintain an action for its recovery.—KANHAYA LAL v. NATIONAL BANK OF INDIA (1913), 29 T. L. R. 314, P. C.**

**SUB-SECT. 10.—RETURN OF WRIT.**

**A. In General.**

*See, now, R. S. C., Ord. 52, r. 11.*

**1014. Compellable.]—CLERK v. WITHERS, No. 66, *ante*.**

**1015. — Although exposing sheriff to penalties.]—WILSON v. ALDRIDGE (1724), 8 Mod. Rep. 315; 88 E. R. 225.**

**1016. — Goods found to belong to stranger.]—Where goods taken in execution have been found, by a jury summoned by the sheriff for that purpose, not to belong to deft., the sheriff must make his return at his peril.—ANON. (1825), 3 L. J. O. S. K. B. 174.**

**1017. — When court will compel—Execution under two writs—Indemnification of sheriff.]—Where a pltf. withdrew his execution under a consent from deft. that there should be a fresh**

money paid as aforesaid:—*Held: the payments not having been made directly in adjustment of a decree, the suit was not barred.—KUNHI MOIDIN KUTTI v. RAMEN UNNI* (1877), 1 L. R. 1 Mad. 203.—IND.

*h. Payment of sum due without costs—Subsequent execution for costs.]—An execution having issued against pltf. for non-payment of taxes, he paid the amount of the tax to the receiver under the 24 Vict., c. 29, but refused to pay the costs of the execution. A second execution was afterwards issued for the costs, under which pltf. was arrested:—Held: the first execution was not satisfied till the costs were paid, & the second execution was legal.—ALWARD v. ST. JOHN'S CORPN.* (1883), 23 N. B. R. 317.—CAN.

**PART III. SECT. 1, SUB-SECT. 10.—A.**

*k. Compellable—Whether court will compel.]—Pltf.'s attorney had voluntarily undertaken to point out deft.'s goods to the sheriff & had given him information calculated to mislead:—Held: the ct. would not subject the sheriff to the risk of an action for a false return by requiring him to return the writ.—BLACKBURN v. STRATTON* (1860), 11 L. C. L. R. App. XII.—IR.

*l. Writ not returned—Original exe-*

levy if the debt were not paid within a given time ; & debt.'s goods having been seized under an execution at the suit of another pltf., first pltf. placed his warrant in the hands of second pltf.'s officer, who, debt. having become a bkpt., left in the possession of his assignees all the effects remaining, after satisfying second pltf.'s execution, to the exclusion of first pltf., the ct., though the effects were sufficient to satisfy both executions, would not compel the sheriff to return first pltf.'s writ till he should have been indemnified, & the prothonotary should have decided which of the parties should indemnify him.—*BURR v. FREETHY* (1822), 1 Bing. 71 ; 7 Moore, C. P. 368 ; 130 E. R. 30.

**1018. ——— Although sheriff out of office—& withdrawn from possession.]—**Sheriff under special circumstances may be compelled to return a writ of *fi. fa.*, although he has been three years out of office, & has, by leave of the ct., withdrawn from possession of the property seized.—*WILTON v. CHAMBERS* (1835), 3 Dowl. 333 ; 1 Har. & W. 116.

*Annotation :—*Refd. *Gilbert v. Whalley* (1835), 2 Cr. M. & R. 722.

**1019. ——— Bankruptcy after execution—Agreement between assignees & sheriff.]—***GILBERT v. WHALLEY*, No. 1034, *post*.

**1020. Return as evidence—Action against creditor—For suing out execution maliciously.]—***GYFFORD v. WOODGATE*, No. 385, *ante*.

**1021. Quashing return—Where improper.** The ct. will not give sheriff directions how he shall dispose of property remaining in his hands, which has been seized in execution towards the payment of a fine imposed upon a debt. convicted of a blasphemous libel ; but if the sheriff has made an improper return, it may be quashed.

They could not give him special directions as to what property he should sell & what he should not (*per* CUR.).—*R. v. CARLILE* (1822), 1 Dow. & Ry. K. B. 474.

**1022. ——— Claim for possession money—More than sheriff entitled to.]—***REYNOLDS v. BARFORD*, No. 1060, *post*.

**1023. Execution in a liberty—Chief bailiff to make—Execution executed by deputy.]—**An instrument in form a sheriff's warrant to levy execution was addressed by the sheriff to S. & Doe. S. was deputy bailiff of the liberty of N., & having in consultation with the chief bailiff's agent acted on this warrant as if it were a mandate to the bailiff of the liberty :—*Held* : the chief bailiff was bound to make a return.—*PLATEL v. DOWSE* (1838), 4 Bing. N. C. 204 ; 1 Arn. 38 ; 5 Scott, 549 ; 7 L. J. C. P. 140 ; 2 Jur. 182 ; 132 E. R. 766.

*Annotation :—*Refd. *Jackson v. Hill* (1839), 3 Jur. 976.

**1024. Who may demand—Party against whom execution levied.]—**Deft., whose goods have been taken under a *fi. fa.*, is entitled to call on the sheriff to return the writ, whether the goods have been sold to another, or redeemed by himself.—*EDMUNDS v. WATSON* (1816), 7 Taunt. 5 ; 2 Marsh. 330 ; 129 E. R. 2.

**1025. ———.]—**Deft., as well as pltf., may

rule the sheriff to return the writ.—*FRANCE v. CLARKSON* (1834), 2 Dowl. 532.

*Annotations :—*Refd. *Daniels v. Gompertz* (1842), 3 Q. B. 322 ; *Williams v. Webb* (1842), 5 Scott, N. R. 898.

**1026. ———.]—**Where a writ of *fi. fa.* has been executed, it is competent to debt. to call upon the sheriff to return it.—*RICHARDSON v. TRUNDLE* (1860), 8 C. B. N. S. 474 ; 29 L. J. C. P. 310 ; 2 L. T. 568 ; 7 Jur. N. S. 28 ; 141 E. R. 1250.

**1027. ——— Creditor.]—***FRANCE v. CLARKSON*, No. 1025, *ante*.

#### B. When Necessary.

**1028. To found proceedings for rescue.]—**No attachment on affidavit of a rescue without a return.—*SHEATHER v. HOLT* (1722), 1 Stra. 531 ; 93 E. R. 681.

*Annotation :—*Refd. *Blackwell v. Tatlow* (1833), Coop. temp. Brough. 186.

**1029. Party appointing own bailiff—Sheriff discharged.]—**Where a special bailiff is nominated by pltf., or his agent, the sheriff is not bound to return the writ.—*HAMILTON v. DALZIEL* (1774), 2 Wm. Bl. 952 ; 96 E. R. 561.

*Annotations :—*Consd. *Harding v. Holden* (1841), 2 Man. & G. 914. Refd. *Taylor v. Richardson* (1800), 8 Term Rep. 505 ; *Higgins v. McAdam* (1829), 3 Y. & J. 1 ; *Angell v. Baddeley* (1877), 47 L. J. Q. B. 86. Mentd. *Alderson v. Davenport* (1844), 1 Dow. & L. 966.

**1030. ——— Liability if return is made.]—**When a party appoints his own bailiff, the sheriff cannot be called upon for a return of the writ ; but if he does return it, he subjects himself to an action if the writ has not been properly executed.—*BECKFORD v. WELBY* (1797), 2 Esp. 591, N. P.

*Annotation :—*Refd. *Higgins v. McAdam* (1829), 3 Y. & J. 1.

**1031. ———.]—**The sheriff is discharged by pltf.'s appointing a special bailiff & agent to manage the sale, though the sheriff returned that he had sold, & that he had paid the sum illegally deducted for the auction, etc.—*PALLISTER v. PALLISTER* (1816), 1 Chit. 614, n.

*Annotations :—*Consd. *Higgins v. McAdam* (1829), 3 Y. & J. 1. Refd. *Harding v. Holden* (1841), 2 Man. & G. 914.

**1032. ——— What amounts to appointment—Request to sheriff to appoint.]—**(1) The mere fact of pltf. requesting the sheriff to direct his warrant to a particular officer did not constitute the latter a special bailiff, so as to render him pltf.'s agent.

(2) The fact of a compromise between the parties or of a claim for rent by the landlord does not relieve the sheriff from the necessity of making a return to a writ of *fi. fa.*—*BALSON v. MEGGAT* (1836), 4 Dowl. 557 ; 1 Har. & W. 659.

*Annotations :—*As to (1) Expld. & Distd. *Ford v. Leche* (1837), 6 Ad. & El. 699. Consd. *Corbet v. Brown* (1838), 6 Dowl. 794. Refd. *Alderson v. Davenport* (1844), 1 New Pract. Cas. 46.

**1033. Whether return dispensed with—Compromise between parties.]—***BALSON v. MEGGAT*, No. 1032, *ante*.

**1034. ——— Bankruptcy of debtor—Arrangement between assignees & sheriff.]—**Where a debt., against whom a *fi. fa.* had issued, became a bkpt. after the seizure, & his assignees made an arrangement with the sheriff as to the disposal of the goods :—*Held* : the sheriff could not be ruled to

execution as evidence of title.]—In making title to land under a sheriff's deed, the original execution under which the land was sold, when not returned & filed in ct., is admissible in evidence.—*LINTON v. WILSON* (1841), 1 Kerr, 223.—CAN.

**m. Authority after return to receive payment.]—**The sheriff has no authority to receive money in satisfaction of a judgment after he has returned the writ.—*DEVENISH v. JOHNSTONE* (1847), 2 M. 82.—S. AF.

J.—VOL. XXI.

#### PART III. SECT. 1, SUB-SECT. 10.—B.

**n. Before transcript from divisional court to county court.]—**An execution against goods & chattels must first issue out of the div. ct. in which judgment was originally recovered, & be returned *nulla bona*, before a transcript of the judgment can be transmitted & filed in a county ct. Where, without the issue of such execution & its return *nulla bona*, a transcript was filed in the county ct., under which pltf.'s lands

were seized by the sheriff & sold :—*Held* : the sale was void.—*BURGESS v. TULLY* (1876), 24 C. P. 549.—CAN.

**o. Before order for examination of judgment debtor.]—**Application by way of chamber summons to examine a judgment debtor on a judgment of the ct. Objection was taken that there was no material before the ct., that writ of execution must issue & return of *nulla bona* made by the sheriff before order as asked for could be made :—*Held* : the objection must be

M M



*Sect. 1.—Writ of fieri facias: Sub-sect. 10, B., C., D. & E. (a).]*

return, the writ on behalf of bkpt.—*GILBERT v. WHALLEY* (1835), 2 Cr. M. & R. 722; Tyr. & Gr. 189; 5 L. J. Ex. 16; 150 E. R. 306.

**1035. — Debtor having no goods.]—**Pltf. sued out a *fi. fa.* into Bedfordshire, & lodged it in the office of the deputy under-sheriff in London. On the receipt of it the under-sheriff wrote to say deft. had no effects; pltf. thereupon immediately sued out a *ca. sa.*, & lodged it at the same office. Before the return of the *fi. fa.*, finding that deft. had effects, pltf.'s attorney wrote to the under-sheriff not to execute the *ca. sa.*:—*Held*: the sheriff was bound to return the *fi. fa.*; *semble*: the issuing of the *ca. sa.* was not a countermand of the *fi. fa.*—*SMITH v. JOHNSON* (1835), 2 Cr. M. & R. 350; 4 Dowl. 208; 1 Gale, 257; 5 Tyr. 981; 150 E. R. 151.

**Before issue of successive writs.]—**See Part II., Sect. 12, sub-sect. 1, *ante*.

### C. How Obtained.

See R. S. C., Ord. 52, r. 11.

**1036 Order of court.]—***MORELAND v. LEIGH*, No. 1174, *post*.

**1037. —.]—**A sheriff having neglected to make a return to a writ of *fi. fa.*, issued out of this ct., directing him to make a levy of a sum of money, an order was made by the ct. directing him to return the writ forthwith. The sheriff being in contempt for not returning the writ, the ct. ordered that he should within six days after notice of the order of the ct., return the writ or that he should stand committed to the Queen's Prison & that he should pay the costs of the former order & of the present application.—*EVANS v. DAVIES* (1843), 7 Beav. 81; cited 12 Ch. D. at p. 796; 49 E. R. 993; *sub nom.* *EVANS v. DAVIES*, *EVANS v. EVANS*, 13 L. J. Ch. 11.

*Annotation:—Folld. Re Helron's Estate, Hall v. Ley* (1879), 12 Ch. D. 795.

**1038. —.]—**Where a sheriff had failed to make any return to a writ of *fi. fa.*, notwithstanding an order of course directing him to make his return forthwith, he was, upon an application *ex parte* against him for an order *nisi*, directed, upon the authority of *Evans v. Davies*, No. 1037, *ante*, to pay both the costs of the order *nisi* & of the previous order of course.—*Re HEIRON'S ESTATE, HALL v. LEY* (1879), 12 Ch. D. 795; *sub nom. Re HIERON'S ESTATE, HALL v. LEY*, 48 L. J. Ch. 688; 27 W. R. 750.

**1039. —.]—**If after a reasonable interval the sheriff has failed to make a return to the writ, an order may be had requiring such return forthwith or in default an order for committal may be issued against the sheriff.—*OWEN v. PRITCHARD* (1876), 3 Char. Pr. Cas. 367.

**Attachment for non-compliance.]—**See Sub-sect. 10, F. (a), *post*.

sustained; writ of execution must issue & a return of *nulla bona* made before applying for order.—*Re PRUDENTIAL LIFE INSURANCE CO.*, [1919] 3 W. W. R. 428.—**CAN.**

### PART III. SECT. 1, SUB-SECT. 10.—D.

**p. Enlargement of time for — Conflicting claims.]—**It is not sufficient ground that there is a question pending before the ct. respecting the title to the goods. The sheriff should apply to have the time extended for his return. *STULL v. MCLEOD* (1843), 1 U. C. R. 402.—**CAN.**

*Provided before execution*

*runs out.]—*A parish ct. comr. has power to extend the return of an execution issued out of this ct., provided he does so before the execution is run out.—*LEVASSEUR v. BEAULIEU* (1896), 33 N. B. R. 569.—**CAN.**

**r. Delay in making return—Liability of sheriff—Attachment refused.]—**Where a sheriff enclosed the return to the clerk of the Crown three or four days after the rule expired, so that it was not found on search, but was produced in open ct. by the clerk, the ct. refused an attachment in order to make him pay the costs.—*ANDREWS v. ROBERTSON* (1834), 3 O. S. 304.—**CAN.**

### D. Time for.

**1040. Writ expiring in vacation—Return beginning of ensuing term.]—**Where a writ of *fi. fa.* expires in the vacation, the sheriff need not return it till the first day of the ensuing term, & has the whole of that day to file it.—*R. v. BERKS, SHERIFF* (1804), 5 East, 386; 102 E. R. 1118.

*Annotation:—Consd. R. v. Middlesex, Sheriff* (1814), 1 Marsh. 270.

**1041. Where interpleader applied for—Application refused—Reasonable time thereafter.]—**If a sheriff applies for relief under the Interpleader Act, 1831 (c. 58), & on hearing the case his rule is discharged, he has afterwards a reasonable time to make his return; & therefore an attachment obtained against him the same day for not making a return, is irregular.—*R. v. HERTFORDSHIRE, SHERIFF* (1836), 5 Dowl. 144; 2 Har. & W. 122.

**1042. — No immediate return.]—**On a levy by a sheriff under a writ of *fi. fa.* three persons claimed different portions of the goods. The sheriff interpleaded, & three separate orders were made directing that, on payment of certain distinct sums into ct. by the claimants within seven days, the sheriff should withdraw & issues should be tried; in default of payment he should sell & pay the proceeds into ct. One of the claimants paid money into ct., & the interpleader issue in his case was set down for trial. The other two abandoned their claims, but the sheriff withdrew from possession:—*Held*: the execution creditor, pending an interpleader issue, had no right to the immediate return of the writ.

The true test whether pltf. has an absolute right to the side-bar rule [for the immediate return to the writ] is this—could an immediate return be of any use to the person insisting on it (*BRETT, L.J.*).

The point which weighs with me as to the right to a return is that I cannot see how pltf. could be benefited by it (*COTTON, L.J.*).—*ANGELL v. BADDELEY* (1877), 3 Ex. D. 49; 47 L. J. Q. B. 86; 37 L. T. 653; 26 W. R. 137, C. A.

**1043. —.]—**Where goods are taken in execution under a judgment, have been claimed by a third party before the sheriff has made a return, & an interpleader summons has been taken out, & is pending, the judgment creditor is not in a position to issue execution for the amount of the judgment debt, & therefore is not entitled to serve a bkpcy. notice on the judgment debtor.—*Re FOLLOWS, Ex p. FOLLOWS*, [1895] 2 Q. B. 521; 65 L. J. Q. B. 15; 73 L. T. 222; 39 Sol. Jo. 726; 2 Mans. 495; 15 R. 621, D. C.

**1044. Enlargement of time for—Conflicting claims—Extent issued.]—**The ct., upon the application of the sheriff, enlarged the time for his making a return to a writ of *fi. fa.* upon suggestion of a reasonable doubt whether the goods seized under the writ, were not covered by an extent afterwards issued at the suit of the Crown for malt duties, under 28 Geo. 3, c. 37, s. 21, for the purpose of

**s. — No rule till after return day.]—**The sheriff cannot be ruled to return a writ until the return day is past.—*R. v. JARVIS* (1846), 3 U. C. R. 125.—**CAN.**

**t. May be after several terms.]—**A *fi. fa.* goods might be made returnable with an interval of several terms.—*FOSTER v. SMITH* (1856), 13 U. C. R. 243.—**CAN.**

**a. Not necessarily within year of judgment.]—**Before 20 Vict., c. 57, s. 10, it was sufficient to issue a writ of execution within a year from the entry of judgment, & it was unnecessary also to return & file it within that time.—

inducing pltf. to go into the Ct. of Exch. & there contest the question of right with the Crown in a more eligible manner than in this ct.—WELLS v. PICKMAN (1797), 7 Term Rep. 174; 101 E. R. 917; *subsequent proceedings, sub nom.* R. v. PICKMAN, 3 Anst. 852.

**1045.** — — — — —.]—The ct. allowed five days' time to the sheriff to make his return to a *fi. fa.*, on a suggestion of a difficulty occasioned by a writ of extent having been afterwards issued at the suit of the Crown; but the rule for further time was granted on payment of costs.—R. v. DEVON, SHERIFF (1819), 1 Chit. 643.

**1046.** — — — — —.]—Where a sheriff, having taken possession of goods under a *fi. fa.*, was served with notice by a person claiming under an assignment the goods taken, not to levy, & threatening an action, & pltf. had refused to indemnify him, he applied to the ct. for time to make his return, until the right to the goods should be determined between the parties, or an indemnity given; the ct. granted a rule to show cause, but they afterwards discharged it, giving the sheriff ten days to make his return.—ETCHELLS v. LOVATT (1821), 9 Price, 54; 147 E. R. 19.

**1047.** — — — — —.]—**Application to court—Duty of sheriff to make.**—BARNARD v. LEIGH, No. 1095, *post*.

**1048.** — — — — —.]—**Time for.**—The ct. will not require a sheriff to be as prompt in an application for the enlargement of the time for returning a *fi. fa.* on the ground of several claims having been made to the goods seized, as it is necessary he should be when applying under the Interpleader Act, 1831 (c. 58).—BAIL v. BALL (1838), 1 Will. Wbll. & H. 205.

**1049.** — — — — —.]—**Where sheriff neglected duty.**—Where the sheriff has neglected his duty, the ct. will not enlarge the time to return the writ, although the judgment creditor & the assignees of debt. refuse to indemnify.

In Aug. debt.'s goods were seized by the sheriff of Middlesex, under a *fi. fa.* founded on a judgment by confession. On Oct. 28 a commission of bkpcy. issued against debt. The assignees gave notice of the bkpcy. to the sheriff, & claimed the goods. On the other hand, pltf. had, before the bkpcy., repeatedly urged the officer to sell. The sheriff having been unable to obtain an undertaking from either party, obtained a rule to show cause why the time for making his return should not be enlarged:—*Held*: it was the duty of the sheriff to sell, & as he had neglected his duty he was not entitled to the assistance of the ct.—COLLEY v. HARDY (1829), 5 Man. & Ry. K. B. 123; 8 L. J. O. S. K. B. 121.

**1050.** Delay in making return—Liability of sheriff—Where plaintiff suffered no damage.]—R. v. ESSEX, SHERIFF, No. 23, *ante*.

HALL v. DOULTON (1863), 3 P. R. 142.—CAN.

**b. After expiration of writ.**—A return of *nulla bona* can be properly made after the expiration of the writ.—MOLSONS BANK v. MCMEKIN, *Ex p.* SLOAN (1888), 15 A. R. 535.—CAN.

**c. After winding-up order.**—The fact that an order has been made for winding up a co. under Dominion Winding-up Act after the sheriff has received a writ of execution, but before the making of his return thereto, does not prevent him from making his return thereto later.—PUKULSKI v. JARDINE, PERRYMAN v. JARDINE (1912), 21 O. W. R. 983; 3 O. W. N. 1172; 26 O. L. R. 323; 5 D. L. R. 242.—CAN.

PART III. SECT. 1, SUB-SECT. 10.—E. (a).

**d. Amendment of return — Fruits**

*of execution lost by plaintiff.*—Where the sheriff had, under an execution against B., at the suit of A., levied on the goods of C., & returned the execution satisfied, but C. had since recovered the amount from the sheriff, who was indemnified by A., the ct. allowed the execution to be taken from the files of the ct., in order that the sheriff might amend his return. A. having lost the fruits of his execution.—KETCHUM v. GIBERSON (1842), 1 Kerr, 519.—CAN.

**e. — Mistake by deputy.**—Where a sheriff returned a *fi. fa.* goods *nulla bona*, his deputy thinking that a water power held by lease required to be sold under a *fi. fa.* lands, the ct. allowed an amendment on terms.—BULL v. KING, BOOMER v. KING (1859), 8 C. P. 474.—CAN.

**f. — Mistake in advertisement**

*of sale.*—A sheriff, in his advertisement of sale of lands seized under a *fi. fa.*, had described them as the lands of debt., when they were pltf.'s. On an application on notice the return was allowed to be amended, on payment of costs of the notice.—McCANN v. EASTWOOD (*circa* 1867), 2 Ch. Ch. 182.—CAN.

**g. — To correspond with facts.**—The returns to writ of *fi. fa.* can be amended so as to correspond with the facts, but upon terms, although a sale had been made, & after a lapse of over ten years.—SCOTT v. BURGESS & BATHURST SCHOOL TRUSTEES (1870), 5 P. R. 228.—CAN.

**h. — — — — —.]**—The return by a sheriff to a writ of execution may, in general, be amended, even after execution has been executed, & in some cases, even though application for the

**1051.** — — — — —.]—On an application to set aside an attachment issued against a sheriff for not returning a *fi. fa.* it appeared that the writ was issued on July 21; the goods were seized on July 22; the sheriff was ordered on July 24 to return the writ; the goods were claimed on July 27; the sheriff applied under the Interpleader Act, 1831 (c. 58), on July 30; pltf. attended the summons & various adjournments thereof, & declined to contest the claim, which was allowed on Aug. 12; on Sept. 14 the sheriff returned *nulla bona*:—*Held*: the delay on the part of the sheriff having caused no damage to pltf., the attachment might be set aside on payment of all costs by the sheriff.—R. v. DEVON, SHERIFF (1847), 17 L. J. O. P. 116.

#### E. Form and Sufficiency of Return.

##### (a) In General.

**1052. Seizure made—Sheriff concluded by return—Not excused payment.**—After the return of a *venditioni exponas*, if the goods remain for default of buyers & perish without default of the sheriff, the sheriff shall not be chargeable. Where the sheriff had an opportunity of selling & refused a buyer, although the goods be not of the value, yet the sheriff shall be charged. The ct. refused leave to amend the return.—NEEDHAM v. BENNET (1669), 2 Keb. 464; 1 Sid. 407; T. Raym. 171; 84 E. R. 291.

*Annotation*:—Mentd. Jackson v. Hunter (1794), 6 Term Rep. 71.

**1053. Specification of particular goods—Sum for each article sold—Not requisite.**—The ct. will not compel a sheriff to specify in his return to a *fi. fa.* the particular goods taken & the sum for which each article was sold.—WILLETT v. SPARROW (1816), 6 Taunt. 576; 2 Marsh. 293; 128 E. R. 1159.

**1054. Where several writs—Return of seizure under the several writs.**—WINTLE v. CHETWYND (LORD), No. 1096, *post*.

**1055.** — — — — —.]—**“According to their priority.”**—CHAMBERS v. COLEMAN, No. 1058, *post*.

**1056.** — — — — —.]—**Delivered simultaneously—Return of receipt in such manner—Seizure under all.**—ASHWORTH v. UXBRIDGE (EARL), No. 552, *ante*.

**1057. Return as to value of goods—Sheriff bound by value returned.**—CLERK v. WITHERS, No. 66, *ante*.

**1058.** — — — — —.]—**Must be made—Omission an irregularity only.**—(1) A return to a writ of *fi. fa.* stating the previous delivery to the sheriff of several prior writs against debt., & that by virtue of the said several writs, & according to the priority thereof, he had seized the goods of debt.:—*Held*: sufficient.

(2) The sheriff ought, in all cases, to return some



*Sect. 1.—Writ of fieri facias: Sub-sect. 10, E. (a)*

value to the goods seized. But the omission to do so is an irregularity only, & not a nullity.

Where, therefore, a return, omitting to state the value, was made Mar. 6, & pltf. did not apply to quash it till Apr. 24:—*Held*: the application was too late.—*CHAMBERS v. COLEMAN* (1841), 9 Dowl. 588; 10 L. J. Q. B. 361; 5 Jur. 1156.

*Annotations*:—As to (1) *Consd.* *Ashworth v. Uxbridge, Foster v. Uxbridge* (1842), 12 L. J. Q. B. 39. *Refd.* *Graham v. Witherby, Graham v. Lynes* (1845), 9 Jur. 1104.

**1059.** ———.]—A return to a *fi. fa.*, that the sheriff has caused to be seized divers goods of G., the value whereof is to him unknown, which remain in his hands for want of buyers, is irregular; some value must be stated.—*BARTON v. GILL* (1843), 12 M. & W. 315; 1 Dow. & L. 593; 13 L. J. Ex. 83; 152 E. R. 1219.

**1060. Satisfaction of rent—Presumption as to nature—Rent due at time of seizure—Return need not so state.]**—(1) Under Distress Act, 1709 (c. 18), s. 1, the landlord is entitled as against the execution creditor, only to rent due at the time of the seizure; but if the sheriff returns that he has paid so much “for rent due for the premises,” the ct. will intend that the payment was for rent due at the time of the seizure; & it is no objection to the return that it does not expressly state that the rent was due at the time of the seizure.

(2) Where the sheriff returns that he has retained a sum for possession money, it is no ground for quashing the return, that pltf. is charged with more possession-money than the amount payable by him for keeping possession.—*REYNOLDS v. BARFORD* (1844), 7 Man. & G. 449; 2 Dow. & L. 327; 8 Scott, N. R. 233; 13 L. J. C. P. 177; 3 L. T. O. S. 162; 8 Jur. 961; 135 E. R. 180.

*Annotation*:—As to (1) *Refd.* *Re Davis, Ex p. Pollen Trustees* (1885), 55 L. J. Q. B. 217.

**1061. Amendment of return—Not after made & filed.]**—*NEEDHAM v. BENNET*, No. 1052, *ante*.

**1062.** ——— Not after action brought.]—An attorney sent a *fi. fa.* to the sheriff by the post, with directions to forward a warrant to a particular officer, whom the attorney named. Whether the sheriff would or would not have been discharged by a timely application to the ct. it is too late for him to apply to amend the return of *nulla bona* at the end of five months, an action having been brought, & pltf. having declared in the interval.—*Ex p. GLOUCESTER, SHERIFF* (1831), 9 L. J. O. S. C. P. 229.

**1063.** ———.]—A sheriff having returned that the goods seized by him remained in his

amendment be not made by the sheriff himself. In an action against a sheriff for a false return to writs of execution:—*Held*: the case was a proper one in which to allow the return to be amended to conform to the facts.—*GAULT'S, LTD. v. CHRISTOPHERSON*, [1918] 3 W. W. R. 898.—*CAN.*

**k. Impertinent matter—Contempt.]**—Impertinent matter in return to a writ is considered as a contempt.—*JONES v. SCHOFIELD* (1827), Tay. 441.—*CAN.*

**l. Surplusage.]**—It is not improper to return to a *fi. fa.* that the sheriff has made the money & paid it over to pltf.'s attorney, the words “& paid it over to pltf.'s attorney” being mere surplusage.—*DOYLE v. BERGIN* (1837), 5 O. S. 524.—*CAN.*

**m. Sheriff bound by return—Made by deputy sheriff.]**—The sheriff is bound by the return to a *fi. fa.* made by a

person who, though deputy sheriff when he signed the sheriff's name to the return, was not deputy until after the writ was returnable.—*BABY v. FOOTT (SHERIFF)* (1848), 4 U. C. R. 349.—*CAN.*

**n. — Except after verdict showing it incorrect.]**—As a general rule, the sheriff is bound by his return to a *fi. fa.*, but not after a verdict against him showing it incorrect.—*HOULDITCH v. CORBETT* (1850), 6 U. C. R. 549.—*CAN.*

**o. Return presumed correct.]**—In estimating the damages against deft. for fraudulent removal of goods liable to be seized under execution, the return of the sheriff as to the amount made on pltf.'s writ will be presumed to be correct, & if the sheriff should have applied other moneys made by him to satisfy pltf.'s execution, deft. must show it.—*TURNER v. PATTERSON* (1863), 13 C. P. 412.—*CAN.*

hands for want of buyers, an action was brought against him for a false return, when he obtained an order for time to plead on the usual terms, taking short notice of trial for the sittings in the next term. Having subsequently applied to amend his return to the *fi. fa.*, by the insertion of the words “*nulla bona*” in lieu of the return first made, the ct. refused to allow the amendment.—*WYLIE v. PEARSON* (1842), 1 Dowl. N. S. 807; 6 Jur. 806.

*Annotation*:—*Mentd.* *Levy v. Hale* (1859), 6 Jur. N. S. 702.

**1064. — Alteration of sum levied.]**—Where pltf.'s attorney after he had ceased to act for pltf. entered into the service of deft. & caused the under-sheriff to return on a *fi. fa.* a sum as levied for pltf. greater than had come to pltf.'s hands, the ct. directed the return to be amended according to the fact.—*GREEN v. GLASSBROOK* (1835), 2 Bing. N. C. 143; 1 Hodg. 193; 2 Scott, 261; 132 E. R. 57.

**1065. — Statement of value of unsold goods.]**—*GREGORY v. JONES* (1844), 2 L. T. O. S. 351.

*(b) Nulla bona.*

**1066. Meaning of return—No goods applicable to particular writ.]**—A return of *nulla bona* to a writ of *fi. fa.* means no goods applicable to pltf.'s writ.

Where a declaration for a false return of *nulla bona* alleged that the sheriff took in execution goods of the judgment debtor or of the value indorsed on the writs, & levied the same thereout, to which deft. pleaded, that he did not levy *modo et formâ*:—*Held*: deft. might under that plea show that pltf.'s judgment was obtained by fraud, & deft. had paid over the proceeds of the levy to another execution creditor, although the writ of the latter was subsequent in date to that of pltf. —*SHATTOCK v. CARDEN* (1851), 6 Exch. 725; 2 L. M. & P. 466; 21 L. J. Ex. 200; 17 L. T. O. S. 160.

**1067. When return justified—Goods affected by debtor's bankruptcy.]**—*Nulla bona* is a good return where the goods are affected by deft.'s bkpcy.—*COPPENDALE v. BRIDGEN* (1759), 2 Burr. 814; 2 Keny. 542; 97 E. R. 576.

*Annotations*:—*Refd.* *Balme v. Hutton* (1833), 1 Bing. 471; *Garland v. Carlisle* (1833), 2 Cr. & M. 31. *Mentd.* *Ponsford, Baker v. Union of London & Smiths Bank* (1906), 75 L. J. Ch. 724.

**1068.** ———.]—Pltf. sued out a *fi. fa.* against E.'s effects. E. having previously assigned all his effects to trustees for the benefit of his creditors, the sheriff, under an indemnity from the trustees, returned *nulla bona*. Pltf. sued the sheriff for a false return. The sheriff obtained a verdict. The ct. refused to allow pltf.'s judgment to be set off against the costs of the action against the

p. Where property attached not disposable or insufficient.]—If the sheriff, after attaching the property, is satisfied that it is not disposable, or if disposable, utterly insufficient to meet the judgment, he is justified in making a return that he has not found sufficient disposable property to satisfy the judgment.—*ALDERSON v. KERR* (1884), 1 Buch. A. C. 355.—*S. AF.*

**PART III. SECT. 1, SUB-SECT. 10.—E. (b).**

**q. When return justified—Not where some goods available.]**—Pltfs. recovered judgment in a div. ct. & issued an execution thereon, under which nothing was made & which expired by lapse of time. At the request of pltf.'s solr. the bailiff returned the writ *nulla bona*, although it was alleged that there were goods out of which the debt might have been

sheriff.—*HEWITT v. PIGOTT* (1831), 8 Bing. 61; 1 Dowl. 250; 1 Moo. & S. 122; 1 L. J. C. P. 43; 131 E. R. 323.

**1069.** ———.]—Where, before the issuing of a writ of *fi. fa.*, a fiat in bkpcy. issued against the debtor, but before the return of the writ an order was made by the Ct. of Review for annulling the fiat, & after the return that order was confirmed by the Lord Chancellor:—*Held*: the return of *nulla bona* was well founded.—*SMALLCOMBE v. OLIVIER* (1844), 13 M. & W. 77; 1 New Pract. Cas. 37; 2 Dow. & L. 217; 13 L. J. Ex. 305; 3 L. T. O. S. 222; 8 Jur. 606; 153 E. R. 32.

*Annotations*:—*Mentd.* *Re Newall, Ex p. Newall* (1865), 11 L. T. 782; *Lloyd v. Lloyd* (1866), L. R. 1 Eq. 722; *Re Tyrie, Ex p. Morris* (1866), 14 L. T. 606; *White v. Chitty* (1866), L. R. 1 Eq. 372; *Brandon v. McHenry* (1891), 64 L. T. 59.

**1070.** ———.]—A *fi. fa.* was lodged with the sheriff on Jan. 16 & the sheriff was unable to obtain an entry to execute it until Jan. 27 when the execution-debtor handed to the sheriff's officer an interim order for protection under Insolvent Debtor's Act, 1842 (c. 116), s. 1, granted on the same day, whereupon the officer withdrew, & the sheriff returned *nulla bona*:—*Held*: under the circumstances, a good return.—*BRIDGE v. TATTERSALL* (1857), 29 L. T. O. S. 76; 5 W. R. 506.

**1071.** ———. *Title of debtor void—Unregistered annuity.*]—Where a person against whom a writ of *fi. fa.* is taken out, is in possession of goods under a deed which was given in consideration of an antecedent debt, & a small annuity payable from thenceforth, the sheriff is warranted in returning *nulla bona*, if it appear that the memorial of such annuity was not registered according to 17 Geo. 3, c. 26, s. 1, for in that case the deed is absolutely void.—*CROSLY v. ARKWRIGHT* (1788), 2 Term Rep. 603; 100 E. R. 325.

*Annotations*:—*Mentd.* *Denn d. Dolman v. Dolman* (1794), 5 Term Rep. 641; *Doe d. Johnston v. Phillips* (1808), 1 Taunt. 356; *Tetley v. Tetley* (1827), 12 Moore, C. P. 441.

**1072.** ———. *Prior issue of writ of sequestration—No steps taken to enforce.*]—*PAYNE v. DREWE*, No. 548, *ante*.

**1073.** ———. *Not when execution stayed by order.*]—In an action against a sheriff for returning *nulla bona* to a *fi. fa.*, which had been lodged with him at seven o'clock in the evening to be levied, & no writ of error had been allowed at half-past six on the evening of that day, but it appeared that the allowance was made within the day:—*Held*: the sheriff should not have returned *nulla bona*, but that a writ of error had been allowed, & pltf. was entitled to recover nominal damages.—*CLEGHORN v. DES ANGES* (1819), 3 Moore, C. P. 83.

**1074.** ———. *Seizure under second of two writs—First writ not delivered for execution.*]—If a writ of *fi. fa.* be not delivered to the sheriff for the purpose of execution, & the goods of the party against whom it issued be taken under a second writ, the sheriff may return *nulla bona* to the first. Where, therefore, pltf.'s attorney enclosed a writ of *fi. fa.* to the sheriff's officer, in a letter, & told him that he might, with safety, put deft.'s mother, or any one else, in possession of deft.'s goods, & the officer acted accordingly, & left his warrant in the charge of one of deft.'s shopmen, & the business was transacted as usual for nearly three months, from the time the warrant was left; & the shopman accounted to the officer for the

moneys received, who paid them over to the sheriff; deft. having become bkpt., his assignees indemnified the sheriff in returning *nulla bona* to the writ issued previously to the bkpcy.; in an action against the sheriff, for a false return, the jury having found that the writ was sued out for the purpose of protecting the property of the party against other creditors, the ct. refused to grant a new trial, on the ground that pltf. had not made out the allegation in her declaration, that the writ was delivered to the sheriff to be executed in due form of law.—*DOKER v. HASLER* (1825), 2 Bing. 479; 10 Moore, C. P. 210; 3 L. J. O. S. C. P. 109; 130 E. R. 391.

**1075.** ———. *Where first judgment fraudulent—Knowledge of sheriff.*]—(1) In an action against the sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, the sheriff proved that he had seized all the goods of the debtor under a *fi. fa.* in another suit, before pltf.'s writ was delivered to him. Pltf., in answer, proved that the judgment upon which the first execution was sued out was entered up upon a warrant of attorney fraudulently executed by the debtor, in order to defeat pltf.'s execution, & that they gave notice to the sheriff to retain the proceeds of the goods levied. The sheriff, on the first day of the next term, was served with a rule to return the writ of *fi. fa.* under which he had first levied. He did not give any notice to pltf., by whom the second *fi. fa.* had been sued out, that he had been served with such a rule, & at the expiration of the six days mentioned in that rule, the sheriff's officer paid over the proceeds of the goods levied to pltf., at whose suit the first *fi. fa.* had been sued out:—*Held*: this was misconduct in the sheriff, & rendered him liable to pltf. in the second execution. *Qu.*: whether the sheriff, if not guilty of such negligence or misconduct, would have been liable to the action.

(2) If a sheriff act fairly & impartially between two contending judgment creditors, he will not be compelled to support the case of either, but if he show any favour or partiality, or give any aid to one & withhold it from the other, he will be bound by the rights & disabilities of the party whom he so aids & must stand or fall with him.—*WARMOLL v. YOUNG* (1826), 5 B. & C. 660; 8 Dow. & Ry. K. B. 442; 108 E. R. 246; *sub nom.* *WORMALL v. YOUNG*, 4 L. J. O. S. K. B. 293.

*Annotation*:—*As to* (2) *Reid.* *Imray v. Magnay* (1843), 11 M. & W. 267.

**1076.** ———. *Evidence of fraud.*]—*IMRAY v. MAGNAY*, No. 528, *ante*.

**1077.** ———.]—*CHRISTOPHERSON v. BURTON*, No. 529, *ante*.

**1078.** ———.]—*SHATTOCK v. CARDEN*, No. 1066, *ante*.

**1079.** ———. *Goods seized for customs' debt.*]—After seizure & before sale under a *fi. fa.*, while deft.'s goods were yet in the possession of the sheriff, the officers of the customs seized them under a warrant to levy a penalty incurred by deft. for an offence against the revenue laws:—*Held*: the sheriff was justified in returning *nulla bona* to the writ of *fi. fa.*—*GROVE v. ALDRIDGE* (1832), 9 Bing. 428; 2 Moo. & S. 568; 2 L. J. C. P. 44; 131 E. R. 677.

**1080.** ———. *Satisfaction of landlord's rent—& debt due upon prior writ.*]—Pltf. having issued a *fi. fa.* the sheriff seized goods, the proceeds of

levied:—*Held*: a return of *nulla bona* where there were goods was no more than an irregularity to be complained of by deft.—*MOLSONS BANK v. McMEEKIN, Ex p. SLOAN* (1888), 15 A. R. 535.—*CAN.*

*r.* ———. *Not when goods not properly saleable.*]—A sheriff having sold shares in a steamboat co. under an execution, & received the money, cannot return *nulla bona* on the ground that they were not properly saleable

under the writ.—*HEWITT v. CORBETT* (1857), 15 U. C. R. 39.—*CAN.*

*s.* *Proof of return.*]—*CREW v. DALLAS* (1908), 9 W. L. R. 598.—*CAN.*





goods remain in his hands for want of purchasers. He ought in such case to apply to the ct. for further time, on the ground of the special circumstances.

(2) *Semble*: in an action for a false return under these circumstances, the inadequate price offered is the proper measure of damages.—*BARNARD v. LEIGH* (1815), 1 Stark. 43, N. P.

**1096. Value of goods must be stated.]**—(1) If a sheriff returns to a writ of *fi. fa.* a seizure under that & another writ, it is bad.

(2) When there are two writs, & the goods remain in the sheriff's hands for want of buyers, he must make some return as to the value of the goods, although he will not be bound by the amount stated.—*WINTLE v. CHETWYND* (LORD) (1839), 7 Dowl. 554; 1 Will. Woll. & H. 581.

*Annotations*:—*As to* (1) *Consd.* *Chambers v. Coleman* (1841), 9 Dowl. 588. *Expld.* *Wintle v. Freeman* (1841), 11 Ad. & El. 539. *Refd.* *Ashworth v. Uxbridge*, *Foster v. Uxbridge* (1842), 12 L. J. Q. B. 39. *As to* (2) *Extd.* *Chambers v. Coleman* (1841), 9 Dowl. 588. *Generally*, *Mentd.* *Graham v. Witherby*, *Graham v. Lynes* (1845), 9 Jur. 1104.

**1097. — Must equal amount indorsed on writ.]**—A return to a *fi. fa.* by the sheriff, that he has caused to be seized goods & chattels of debt., which remain in his hands for want of buyers, & specifying the value, such value being less than the amount indorsed on the writ, is bad.—*LUCAS v. PARSONS* (1847), 9 L. T. O. S. 125.

#### (d) Other Returns.

**1098. Devastavit—Judgment against executor.]**—*MEADE v. CHEYNEY* (1591), Cro. Eliz. 216; 2 Leon. 188; 78 E. R. 471.

**1099. — By confession or default.]**—Judgment against exor. by confession or default is an admission of assets, & he is estopped to say the contrary on a *devastavit* returned.—*ROCK v. LAYTON* (1700), 1 Com. 87; 1 Ld. Raym. 589; 1 Salk. 310; 92 E. R. 973.

*Annotations*:—*Mentd.* *Ramsden v. Jackson* (1737), 1 Atk.

that "the lands remain unsold for want of buyers," this is a breach of his duty, & a false return.—*JARVIS v. MILLER* (1836), Ber. 311.—CAN.

#### PART III. SECT. 1, SUB-SECT. 10.—E. (d).

**a. Satisfaction.]**—The return to a writ of execution of "satisfaction" is open to attack on the facts, & may be set aside by the ct. on summary application for that purpose.—*BELL v. HART* (1915), 49 N. S. R. 348.—CAN.

**b. Property attached in custodia legis.]**—The property attached, & upon which the sheriff was directed to levy, under a *fi. fa.*, was in *custodia legis*, it having been delivered up by the sheriff to pltf., & subsequently attached at the suit of a third party, under which attachment it was held. Upon a rule upon the sheriff to show cause why he should not levy execution under the *fi. fa.*, & why the property attached should not be applied in satisfaction of the judgment:—*Held*: the rule must be discharged.—*BRYDEN v. JACKSON* (1859), 4 Nfld. L. R. 320.—NFLD.

**1100 i. Execution stayed by order.]**—Notwithstanding Dominion Winding-up Act, s. 23, a pltf. may by leave of the ct. proceed to judgment & execution, & such leave should be given where the purpose of such proceedings is to fulfil the conditions so as to justify proceedings by pltf. against directors of the co. under Cos. Ordinance (Alta.), s. 54. The sheriff's return is sufficient for that purpose in stating that by reason of the winding-up order the execution is unsatisfied.—*RISLER v. ALBERTA NEWSPAPERS, LTD.*, *GARNET v. ALBERTA NEWS-*

*292*; *Erving v. Peters* (1790), 3 Term Rep. 685; *Farr v. Newman* (1792), 4 Term Rep. 621; *Hooper v. Summersett* (1810), Wight. 16; *Leonard v. Simpson* (1835), 2 Bing. N. C. 176; *Higgins's Trusts* (1861), 2 Giff. 562.

**1100. Execution stayed by order.]**—*CLEGHORN v. DES ANGES*, No. 1073, ante.

**1101. Debtor's house barricaded—No knowledge whether debtor has goods.]**—If the sheriff returns that the premises of debt. are so barricaded that he is unable to ascertain whether debt. has goods within the bailiwick on which a levy may be made, it is a bad return, as he should state either that debt. has goods, or that he has none.—*MUNK v. CASS* (1841), 9 Dowl. 332; Woll. 100; 5 Jur. 71.

**1102. Sheriff ordered to withdraw—By plaintiff's attorney.]**—*LEVI v. ABBOTT*, No. 849, ante.

**Where several writs.]**—*See* Nos. 1054–1056, ante.

#### F. Liability for Non-Return or False Return.

##### (a) Non-Return.

**1103. When liability incurred—Not until called upon to return writ—Neglect to do so—Such neglect to be specifically alleged.]**—*SHAW v. KIRBY*, No. 531, ante.

**1104. Attachment & committal—Order to return not complied with—Cost of application—Borne by sheriff.]**—*EVANS v. DAVIES*, No. 1037, ante.

**1105. — — — — —.]**—*Re HEIRON'S ESTATE*, *HALL v. LEY*, No. 1038, ante.

**1106. — — — — —.]**—*OWEN v. PRITCHARD*, No. 1039, ante.

**1107. — — — — — R. S. C., Ord. 44, r. 2—Application "on notice."]**—An attachment against the sheriff for not returning a writ of *fi. fa.* is not, as formerly, obtained as of course; but, since above rule can only be applied for "on notice."—*JUPP v. COOPER* (1879), 5 C. P. D. 26; 28 W. R. 324.

*Annotation*:—*Refd.* *Eynde v. Gould* (1882), 9 Q. B. D. 335.

**1108. — — — — — Order nisi.]**—An application, on notice, under above rule, to attach the

*PAPERS, LTD.*, [1919] 2 W. W. R. 326.—CAN.

#### PART III. SECT. 1, SUB-SECT. 10.—F. (a).

**c. What amounts to—Insufficient return.]**—An insufficient return is no return, & the course is to move for an attachment, not to quash the return.—*EASTWOOD v. MCKENZIE* (1838), 5 O. S. 708.—CAN.

**d. — — — — —.]**—*SMITH v. BELLOWES* (1841), 2 P. R. 183.—CAN.

**e. When liability incurred—Not until called upon to return writ.]**—The ct. will not fix a sheriff with the debt merely because he has not returned a *fi. fa.* until after he has been ruled to do so.—*R. v. JARVIS* (1850), 6 U. C. R. 558.—CAN.

**f. — — — — —.]**—In order to attach the sheriff for contempt in not obeying the rule, it must appear that the original rule was shown to him.—*HILTON v. MACDONELL* (1850), 1 C. L. Ch. 207.—CAN.

**1104 i. Attachment & committal—Order to return not complied with—Costs of application—Borne by sheriff.]**—A sheriff cannot be attached for non-payment of the costs of a rule to return under 1 Will. 4, c. 9, unless there has been a rule specially calling on him so to do.—*DOE d. MCGREGOR v. GRANT* (1840), (1823–1900), 3 Ont. Dig. 6428.—CAN.

**1104 ii. — — — — —.]**—A rule to return a writ may issue in vacation; & if the sheriff do not return the writ within the time limited by the rule, the ct. will impose the costs of the rule upon him, unless under very peculiar circumstances.—

*McGOWAN v. GILCHRIST* (1844), (1823–1900), 3 Ont. Dig. 6432.—CAN.

**1106 i. — — — — —.]**—An attachment was granted against a sheriff who was a member of Parliament, for not returning a writ pursuant to a rule of ct.—*BELL v. BUCHANAN* (1837), (1823–1900), 3 Ont. Dig. 6429.—CAN.

**1106 ii. — — — — —.]**—A party who has ruled a sheriff to return a writ, & afterwards stayed proceedings for a certain time, cannot after that time proceed by attachment under the rule.—*BERGIN v. HAMILTON* (1838), (1823–1900), 3 Ont. Dig. 6429.—CAN.

**1106 iii. — — — — —.]**—An attachment will not be granted for not obeying the rule to return it, issued on the same day as the writ was returnable.—*R. v. HAMILTON* (1839), (1823–1900), 3 Ont. Dig. 6429.—CAN.

**1106 iv. — — — — —.]**—Where a sheriff had three executions against goods of a debt., & having seized & sold had partly satisfied the first & third, when a stranger claimed the property, & pltf. in the second writ refused to give the sheriff an indemnity, & the sheriff did not return his writ, an attachment was granted against him for not returning it.—*LAND v. BURN* (1841), (1823–1900), 3 Ont. Dig. 6428.—CAN.

**Attempt at compromise.]**—Where, after the delivery of a writ against lands to a sheriff, pltf. & debt. agreed to compromise, & after more than two years the compromise was not effected, the ct. set aside a rule for an attachment for not returning the writ.—*CROOKS v. O'GRADY* (1842), 1 U. C. R. 400.—CAN.

**b. Relief—When granted.]**—The ct. will sometimes relieve a sheriff by



*Sect. 1.—Writ of fieri facias: Sub-sect. 10, F. (a)*

sheriff for not returning a writ of *fi. fa* should be for an order *nisi*.—*FOWLER v. ASHFORD* (1881), 45 L. T. 46, D. C.

—.]—*See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 46 et seq., & SHERIFFS & BAILIFFS.*

(b) *False return—Action for.*

**1109. Against sheriff.**—At common law when a sheriff made a false return upon a writ an action might be brought against him for this falsity & in this action the sheriff's return might be traversed.—*ANON.* (1465), *Jenk.* 143; 145 E. R. 100.

**1110.** —.]—Sheriff's return is not traversable, but can have action for a false return.—*ANON.* (1774), *Lofft*, 372; 98 E. R. 700.

**1111.** — **Though defendant charged in former action.**—An action lies against the sheriff for a false return to a writ of *fi. fa.* notwithstanding the *pltf.*, before the commencement of the suit having charged *deft.* in the former action in execution.—*WORDALL v. SMITH* (1808), 1 *Camp.* 332, N. P.

*Annotations:—Mentd.* *Cromack v. Heathcote* (1820), 4 *Moore, C. P.* 357; *Eastwood v. Brown* (1825), *Ry. & M.* 312; *Latimer v. Batson* (1825), 4 B. & C. 652; *Cookson v. Fryer* (1858), 1 F. & F. 328.

**1112.** — **By second execution creditor—First writ set aside—Proceeds repaid to debtor.**—Two writs of *fi. fa.*, at the suit of different *ptf.s.*, were issued against one *deft.*; the goods were not more than sufficient to satisfy the first execution. The officer, under the second writ, continued in possession until the goods were sold by the sheriff. *Deft.* then obtained a rule for setting aside the first execution; &, pending that rule, there were conferences between all the parties. The rule, however, was made absolute, & the sheriff was ordered to pay to *deft.* the proceeds of the levy. The sheriff, having so paid the money, without having applied to the *ct.* for relief, & without having given any notice to *ptf.* in the second execution, was held liable to him for that amount, in an action for a false return of *nulla bona*.—*SAUNDERS v. BRIDGES* (1819), 3 B. & Ald. 95; 106 E. R. 597.

*Annotation:—Refd.* *Belcher v. Patten* (1848), 6 C. B. 608.

**1113.** — **Goods seized on bankruptcy petition—Afterwards dismissed.**—A sale, by the official assignee, of the goods of an insolvent petitioner

allowing a return even after motion to bring in his body, on the coroner's return of *cepi corpus* to the attachment against the sheriff for not returning the writ.—*R. v. JARVIS* (1844), 1 U. C. R. 415.—*CAN.*

**k. When attachment not granted—Deputation by party.**—If the sheriff appoints a special bailiff to execute a writ, at *ptf.*'s request, who himself takes charge of the writ & deputation, which do not again come to the sheriff's hand, in the regular course, *ptf.* cannot rule the sheriff to return the writ.—*KINGSTON v. O'SHEA* (1850), 1 All. 678.—*CAN.*

### PART III. SECT. 1, SUB-SECT. 10.— F. (b).

**l. Maintainable—Only if damage suffered.**—Where a *ptf.* declared, that on a *fi. fa.* against his goods a sheriff levied & made the debt, but falsely returned *nulla bona*, by reason of which a *ca. sa.* was issued & he was arrested & again compelled to pay the money:—*Held*: a sufficient damage was shown to make the sheriff's sureties liable as for the wilful misconduct of the sheriff.—*HEXON v. HAMILTON* (1841), 6 O. S. 115.—*CAN.*

**m.** — —.]—In an action against a sheriff for not levying, for a false return, & for not executing a civil-bill decree, *deft.* pleaded "that *ptf.* sustained no damage by reason of the matters alleged in the said counts":—*Held*: the plea was good.—*O'DOWD v. KIRWAN* (1877), 1 R. 11 C. L. 75.—*IR.*

**n.** — **On proof of breach of duty—Nominal damages.**—To an action against a *div. ct. bailiff*, & his sureties for neglect to execute a writ or return it in due time, & for a false return, *defts.* pleaded that *ptf.s.* suffered no damage in consequence of the breaches alleged:—*Semble*: *ptf.s.* were entitled to nominal damages upon proof of a breach of duty without showing any actual damages.—*NEK-LICH v. MALLOY* (1879), 4 A. R. 430.—*CAN.*

**o. Waiver of right of action—What constitutes—Compromise.**—Where a *fi. fa.* goods was placed in a sheriff's hands & a levy made, but *ptf.* afterwards compromised with *deft.*, receiving payment by instalments, but giving no directions to the sheriff to discharge *deft.*'s property:—*Held*: on a return of *nulla bona* months

under Execution Act, 1844 (c. 96), before final order, without the orders of the *comr.*, is invalid. Therefore, where goods had been so sold by the official assignee, & the insolvent's petition had been afterwards dismissed, &, the goods still remaining on the premises but claimed by the purchaser, the sheriff, sixteen days after the dismissal of the petition, had returned *nulla bona* to a writ of *fi. fa.* issued by a creditor:—*Held*: he was liable in an action for false return, for the whole amount of the money which he might have levied.—*CRUMP v. BONSOR* (1847), 9 L. T. O. S. 453, N. P.

**Only if damage suffered.**—Case against sheriff for a false return, to a *fi. fa.*, that the goods remained in his hands for want of buyers.

Plea, that the judgment was on a warrant of attorney, that the debtor became a *bkpt.*, & that the sale under the writ took place after the fiat. Special demurrer on the ground that the plea was an argumentative plea of not guilty:—*Held*: the action could not be maintained, it appearing that no damage had accrued to *ptf.*, as, even if the law would presume some damage from *deft.*'s breach of duty, the contrary was averred by the plea, & admitted by the demurrer.—*WYLIE v. BIRCH* (1843), 4 Q. B. 566; 3 Gal. & Dav. 629; 12 L. J. Q. B. 260; 1 L. T. O. S. 169; 7 Jur. 626; 114 E. R. 1011.

*Annotations:—Refd.* *Levy v. Hale* (1859), 29 L. J. C. P. 127; *Lloyd v. Harrison* (1865), 6 B. & S. 36; *Allen v. Flood*, [1898] A. C. 1.

**1115.** — —.]—*Ptf.*, an execution creditor, delivered a writ of *fi. fa.* to the sheriff, who proceeded to execute it by seizing goods upon the premises & apparently the property of the execution debtor, but which were then in fact, in possession of the holder of a bill of sale to whom they had been previously assigned. The sheriff remained on the premises until dismissed by *ptf.*'s attorney, &, being directed to return the writ, made a return that he had seized goods of the debtor & kept them until ordered by *ptf.*'s attorney to withdraw from possession. To an action brought by *ptf.* against the sheriff for not levying under the writ, & for a false return, *deft.* pleaded (*inter alia*) *nulla bona*, & at the trial set up, as his sole defence, the bill of sale, which the jury found to be valid, & a verdict was entered for *deft.*:—*Held*: (1) actual damage was necessary to support

afterwards, when *deft.* had absconded without satisfying the balance of the debt, *ptf.* could not sue for a false return, as he was precluded by his arrangement with *deft.*.—*EVERARGHIM v. LEONARD* (1833), 3 O. S. 121.—*CAN.*

**p.** — — **Obtaining return of nulla bona.**—A *fi. fa.* was placed in the sheriff's hands, with instructions not to enforce it until further orders, unless other executions should come in. No further instructions were received, & *ptf.* subsequently put in an execution with directions to proceed at once. The sheriff levied on both writs, & paid over the money to G., who had indemnified him. *Ptf.* then obtained a return to his writ of *nulla bona*, which the sheriff said was the only return he would make, & sued out a *ca. sa.*, on which R. was arrested:—*Held*: *ptf.*, by taking such return, had not precluded himself from proceedings against the sheriff, & he could maintain an action for a false return.—*AITKIN v. MOODY* (1856), 13 U. C. R. 169.—*CAN.*

**q. Evidence—Declarations of execution debtor—As to seized property.**—*Ptf.*'s attorney sent a *fi. fa.* to the

the action; (2) as they were found to be the property of the assignee they were not available for sale under the execution; & pltf. had sustained no damage from the conduct of the sheriff, & could not maintain the action.—*STIMSON v. FARNHAM* (1871), L. R. 7 Q. B. 175; 41 L. J. Q. B. 52; 25 L. T. 747; 20 W. R. 183.

**1116. Against bailiff of liberty—Return made by sheriff.]**—In an action against a bailiff for the false return of *nulla bona* upon a *fi. fa.*:—*Held*: (1) the bailiff of a liberty is concluded in point of evidence by the return of the sheriff; (2) if the sheriff made any other return than that which the bailiff made to him he might have his action against the sheriff.—*SHAW v. SIMPSON* (1697), 1 Ld. Raym. 184; 91 E. R. 1019.

**1117. By whom maintainable—Executor of execution creditor.]**—An exor. may have an action for a false return of a *fi. fa.*; & this by the equity of 4 Edw. 3, c. 7, because the right being determined after judgment the tort is more than personal (*per* CUR.).—*WILLIAMS v. CAREY* (1695), 1 Salk. 12; 3 Salk. 149; Comb. 322; 1 Ld. Raym. 40; 4 Mod. Rep. 403; 12 Mod. Rep. 71; 91 E. R. 12.

*Annotation*:—*Refd.* Twycross v. Grant (1878), 4 C. P. D. 40.

**1118. Waiver of right of action—What constitutes—Acceptance of amount levied—Though only part of indorsed debt.]**—If, after a sheriff has returned to a *fi. fa.* for £301, that he has levied only £13, pltf. goes & receives that £13, he cannot maintain an action for false return.—*BEYNON v. GARRAT & VENABLES* (1824), 1 C. & P. 154, N. P.

*Annotation*:—*Dbtd.* Holmes v. Clifton (1839), 10 Ad. & El. 673. The case of *Beynon v. Garrat & Venables*, if correctly reported, cannot be maintained; it might as well be argued that a creditor, who accepts part of his debt, is precluded from recovering the rest (*per* CUR.).

**1119. ———.]**—Where, after a return, to a *fi. fa.* that part only of a debt has been levied, & that the debtor has not goods whereon the whole can be levied, the creditor accepts that part on account, he does not thereby waive his right of action for a false return.—*HOLMES v. CLIFTON* (1839), 10 Ad. & El. 673; 2 Per. & Dav. 556; 4 Per. & Dav. 112; 8 L. J. Q. B. 247; 3 Jur. 629; 113 E. R. 255.

**1120. ——— Withdrawal of execution—Claim for rent.]**—(1) If the attorney for an execution creditor, on being informed of a claim by the landlord for rent, direct the sheriff's officer to withdraw the execution, & he do so, & pltf. sue out a *ca. sa.* for the debt, such execution

sheriff, with a letter saying that they wished to get at two shares of certain building society stock standing in the name of B. & his wife, which, though standing in their name in a representative capacity, were nevertheless the property of the wife, & therefore of debt. In an action against the sheriff for false return of *nulla bona* to this writ:—*Held*: evidence that B. & his wife spoke of these shares as their own was inadmissible in this action against the sheriff, even as *prima facie* evidence of ownership, & so also were answers on oath by B. to interrogatories.—*ROBINSON v. GRANGE* (1859), 18 U. C. R. 260.—*CAN.*

**r. Defence to the action—Prior writ.]**—Where writs of *fi. fa.* goods were placed in the hands of a sheriff by several pltf.s., with directions to levy, but not to sell unless another execution was delivered to him; & having received another execution returnable the same term as the former executions, he returned it *nulla bona*, & sold under the first:—*Held*: the sheriff was liable for a false return, the directions by the

first execution creditors being fraudulent as to the subsequent creditors, & the first executions thereby losing their priority.—*ROSS v. HAMILTON* (1840), (1823–1900), 2 Ont. Dig. 2617.—*CAN.*

**s. ———.]**—In an action against the sheriff for a false return, it appeared that on the day before pltf.s.' writ came in, he received a *fi. fa.* at the suit of K. for more than the value of the debtor's goods, & gave a warrant to his bailiff, who only went to the debtor's shop & told him of it, because he thought more could be got by allowing him to go on with his business. On pltf.s.' writ he did nothing. Pltf.s.' attorney wrote twice, urging him to act, & ruled him, & in Feb. 1866, he returned that writ *nulla bona*, K.'s writ having been previously renewed. The ct. being left to draw inferences of fact:—*Held*: as a matter of fact the sheriff never seized, or as a matter of law, he abandoned the seizure; & though his acts might not affect K. in an action between K. & pltf.s., yet they prevented him from setting up the first writ as a justifica-

tion for his return to the second; pltf.s. were, therefore, entitled to recover.—*FOSTER v. GLASS* (1867), 26 U. C. R. 277.—*CAN.*

**t. ———.]**—*Capias ad satisfaciendum sued out—& return accept with knowledge of falsity.]*—To an action against a sheriff for a false return of *nulla bona* to a writ of *fi. fa.* the bare fact that pltf. after such return sued out a *ca. sa.* will be no defence, unless it be further averred in the plea that pltf. accepted the return of *nulla bona* with a knowledge at the time that it was false.—*BAYS v. RUTTAN* (1849), 6 U. C. R. 263.—*CAN.*

**u. ———.]**—*By request of plaintiff—Return acted on—& venditioni exponas taken out.]*—To an action against a sheriff for falsely returning to a *fi. fa.* goods in hand to the value of 5s. & *nulla bona* as to the residue, when enough had in fact been seized to satisfy the writ, debt. pleaded by way of estoppel, that pltf. requested him to return *nulla bona* & accepted & acted on that return, & took out a *ven. ex.*, with a full knowledge of the facts:—*Held*: on demurrer, both

creditor cannot bring an action against the sheriff for falsely returning to the *fi. fa.* that so much rent was due; & he will not be entitled to recover though he show that the supposed landlord had not a right to the rent claimed; & that the attorney, at the time he directed the officer to withdraw the execution, did not know what the landlord's title was.—*STUART v. WHITAKER* (1825), 2 C. & P. 100; Ry. & M. 310, N. P.

**1121. The declaration—Statement of judgment debt.]**—In an action against the sheriff for a false return to a writ of *fi. fa.*, issued on a judgment on a *sci. fa.*; if the declaration states the sum recovered by the *sci. fa.*, without the costs, it is good, if the judgment in the *sci. fa.* states them so, distinctly.—*PHILLIPS v. EAMER* (1795), 1 Esp.

*Annotation*:—*Mentd.* Clifford v. Hunter (1827), 1 C. & P. 16.

**1122. ——— Goods of joint debtors—Proof of possession by one.]**—If pltf. declares against the sheriff for a false return of *nulla bona* to a *fi. fa.* against the goods of R. & J., & alleges that "although R. & J. had goods, etc., within his bailiwick, etc., yet debt." etc.; this allegation is sustained, though pltf. do not prove that R. had any goods; for it is severable that both or either of them had goods, etc.—*JONES v. CLAYTON* (1815), 4 M. & S. 349; 105 E. R. 863.

*Annotations*:—*Refd.* Fox v. Waters (1840), 12 Ad. & El. 43; Miller v. Mynn (1859), 5 Jur. N. S. 1257. *Mentd.* Wright v. Lainson (1837), Murp. & H. 202.

**1123. Evidence—Declarations of bailiff.]**—In an action against the sheriff for a false return to a writ, what was said by the bailiff to whom the warrant under it was directed, when asked by pltf.'s attorney before the return of the writ, why he did not execute it, is evidence against the sheriff.—*NORTH v. MILES* (1808), 1 Camp. 389, N. P.

*Annotation*:—*Refd.* Snowball v. Goodricke (1833), 4 B. & Ad. 541.

**1124. ——— To connect bailiff with sheriff—Officer's name in margin of writ—Instructions issued to bailiff.]**—In an action against the sheriff for a false return, to connect him with the acts of a particular officer in the execution of the writ, it is not enough to show that this officer's name is written in the margin of the examined copy of the writ & return. But without producing the warrant, it was held to be enough to give in evidence a paper issued by the sheriff's office & directed to this officer, requiring him to give instructions for



*Sect. 1.—Writ of fieri facias: Sub-sect. 10, F. (b); sub-sect. 11.]*

making a return to the writ.—*JONES v. WOOD* (1812), 3 Camp. 228, N. P.

*Annotations:—Refd. Morgan v. Brydges* (1818), 2 Stark. 314; *Francis v. Neave* (1821), 6 Moore, C. P. 120.

1125. ———.]—*SHAW v. SIMPSON*, No. 1116, *ante*.

1126. ——— **Proof of seizure—Prima facie evidence—False return of nulla bona.**—In an action on a false return to a writ of *fi. fa.* where the sheriff returned *nulla bona*, it is sufficient *prima facie* evidence for pltf. to prove that the sheriff seized the goods.—*STUBBS v. LAINSON* (1836), 1 M. & W. 728; 5 Dowl. 162; 2 Gale, 122; Tyr. & Gr. 1000; 5 L. J. Ex. 240; 150 E. R. 627.

*Annotations:—Mentd. Hammond v. Colls* (1845), 1 C. B. 916; *Giles v. Giles* (1846), 9 Q. B. 164.

1127. **Defence to the action—Inquisition to ascertain property in goods—Not admissible.**—In case against the sheriff for a false return of *nulla bona*, an inquisition taken by him to ascertain the property of the goods taken under the *fi. fa.* finding them to be the property of a third person, not deft. in the execution, is not admissible evidence for the sheriff.—*GLOSSOP v. POLE* (1814), 3 M. & S. 175; 105 E. R. 576.

1128. ——— **Impeachment of judgment—Collateral fraud—Circumstantial evidence.**—(1) The return purporting to be made by a lord of a manor to the sheriff's mandate to levy under a writ of *fi. fa.*, is *prima facie* evidence, that the person whose return it purports to be is the lord of the manor.

(2) Evidence that the person who actually made the return, has acted as bailiff to the lord of the manor for sixteen years, & during that time has made the returns for the lord of the manor, is sufficient to charge the lord of the manor with the acts of the bailiff.

(3) In an action against the sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, the sheriff cannot go into circumstantial evidence to impeach the judgment on the ground of a collateral fraud.

(4) In an action against the sheriff for not selling the joint property of A. & B. under an execution against the goods of A. *Semble*: half the value of the goods, is the proper measure of damages.—*TYLER v. LEEDS (DUKE)* (1817), 2 Stark. 218, N. P.

*Annotations:—As to (1) Refd. Newland v. Cliffe* (1832), 3 B. & Ad. 630. *As to (3) Refd. Lane v. Chapman* (1840), 11 Ad. & El. 966; *Imray v. Magnay* (1843), 11 M. & W. 627.

1129. ——— **Goods seized rescued by true owner—Evidence of rescuer.**—In an action against a sheriff for a false return of *nulla bona*, after he

pleas good.—*MILLER v. THOMAS* (1854), 11 U. C. R. 302.—**CAN.**

y. ——— **No notice as to lands—Duty of sheriff to inquire.**—Pltf. in an execution against lands, is expected to point out to the sheriff the property of the debtor, but his not doing so does not relieve the sheriff, if by reasonable inquiries he could have ascertained the fact. Where the deputy-sheriff had notice of the debtor owning lands:—*Held*: that was sufficient notice to the sheriff, although the latter had no personal knowledge on the subject, & he was liable in an action for a false

z. ——— **Misrepresentation by plaintiff—As to title.**—A sheriff having made a return of a writ of *fi. fa.* "lands on hand for want of buyers," & having subsequently, under a writ of *ven. ex.* in the same suit, sold the lands under a binding contract, on

which writ of *ven. ex.* he made a return of "no lands"; a plea on equitable grounds to a declaration against him for a false return, that pltf. misrepresented to the sheriff that the lands levied on were the lands of the execution debtor:—*Held*: to be no answer to the action.—*PATTERSON v. THOMAS* (1862), 11 C. P. 530.—**CAN.**

a. ——— **Certificate as to executions—Obtained by false representations.**—Declaration against a sheriff for falsely certifying that there were no executions against the lands of H. Plea, on equitable grounds, in substance, that pltf.'s agent duly authorised in that behalf, late in the day, & after deft.'s office was closed, applied to deft.'s clerk for the certificate on the street; that the clerk having declined to return to the office to make the requisite search, pltf.'s agent then represented to him that pltf. were aware of their own know-

ledge that there were no executions, which have been forcibly taken out of his possession & carried away by a person claiming property in them, such person is admissible to prove that they were not the property of the debtor, against whom the execution had issued, because the sheriff cannot maintain an action against him (the witness) for the rescue, & after having made such a return, & as to all other persons claiming the goods, the verdict would be *res inter alios acta*, & therefore could not be used to affect their rights in any proceeding against the witness.—*THOMAS v. PEARSE* (1818), 5 Price, 547; 146 E. R. 690; *subsequent proceedings*, 5 Price, 578.

1130. ——— **Expense of defending—Agreement by bailiff to indemnify sheriff.**—A sheriff's bailiff covenanted with a sheriff to give him correct instructions for his returns, & to pay him all the costs of defending actions, or making or opposing motions, touching any matter in which the bailiff should act as such; & also to indemnify him against all expenses he might pay or be liable to, by reason of the executing, not executing, returning, not returning or misreturn of any process, etc., occasioned by the act or default of the bailiff.

The bailiff gave correct instructions for a return of *nulla bona*, which was accordingly made. An action being brought against the sheriff for that return, he sustained expense in defending it:—*Held*: the bailiff was liable to indemnify the sheriff for the amount.—*FAREBROTHER v. WORSLEY* (1831), 1 Cr. & J. 549; 1 Tyr. 424; 9 L. J. O. S. Ex. 166; 148 E. R. 1541; *subsequent proceedings*, 5 C. & P. 102, N. P.

1131. ——— **Bankruptcy of debtor—Evidence of petitioning creditor.**—(1) The plea of not guilty, to a declaration in case against a sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, puts in issue only the fact of the sheriff having the money in his hands, & making the return alleged; & it is not competent to him, under that plea, to set up as a defence the bkpcy. of the debtor before the execution of the writ.

(2) *Semble*: where, in an action against a sheriff for a false return to a *fi. fa.*, he sets up as a defence the bkpcy. of the debtor, the petitioning creditor is a competent witness for deft.—*WRIGHT v. LAINSON* (1837), 2 M. & W. 739; 6 Dowl. 146; *Murp. & H.* 202; 6 L. J. Ex. 197; 150 E. R. 951.

*Annotations:—As to (1) Apld. Lewis v. Alcock* (1838), 3 M. & W. 188. *Consd. Taverner v. Little* (1839), 5 Bing. N. C. 678; *Cobbett v. Hudson* (1847), 10 L. T. O. S. 132. *Refd. Wintle v. Freeman* (1841), 10 L. J. Q. B. 161; *Howden v. Standish* (1848), 6 C. B. 504; *Cobbett v. Hudson* (1849), 12 L. T. O. S. 494. *Generally, Mentd. Sinclair v. Baggaley* (1838), 4 M. & W. 312; *Card v. Case* (1848), 5 C. B. 622; *Potez v. Glossop* (1848), 2 Exch. 191.

ledge that there were no executions, & would take the risk of there being any, & would not hold deft. responsible if such certificate should prove untrue, of which the agent said there was no danger whatever, & the clerk thereupon signed the certificate at the agent's request, in reliance solely upon such representations, & without searching as his duty required, & under the belief induced by such representations that there were no executions, & upon the understanding aforesaid that no responsibility should attach to deft.:—*Held*: on demurrer, a good defence, for it showed that the certificate was obtained by the false representation of pltf.'s agent made by him at the time, for which pltf. were responsible.—*COLONIAL SECURITIES CO. v. TAYLOR* (1869), 29 U. C. R. 376.—**CAN.**

b. ——— **Goods attached under another attachment.**—A sheriff having made return to a writ of attachment that

**1132. — Deposition.]** — In an action against a sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, in which the question is, whether the goods of the debtor had passed to his assignees under his bkpcy., deft. need not put in the deposition of the petitioning creditor, to show what the petitioning creditor's debt was; nor is deft. limited to the debt only, which is stated in the deposition of the petitioning creditor.—*BIRT v. STEPHENSON* (1839), 8 C. & P. 741, N. P.

**1133. — Not under plea of not guilty.]**—*WRIGHT v. LAINSON*, No. 1131, *ante*.

**Goods not those of execution debtor—Assigned to third party.]**—Declaration in case against a sheriff for a false return to a *fi. fa.*, stated the judgment & writ; that the writ was delivered to deft. as sheriff, to be executed; & that, although there were then & afterwards, before the return of the writ, goods of the debtor within deft.'s bailiwick, whereof he could & ought to have levied the moneys indorsed on the writ, & although a reasonable time to have made the levy had elapsed, yet deft., not regarding his duty, did not within such reasonable time levy the money, but therein wholly failed & made default, nor hath he paid the money, or any part thereof, to pltf.; & deft. afterwards falsely returned *nulla bona*:—*Held*: deft. could not set up as a defence, under the plea of not guilty, that the debtor had assigned the goods to a third party.—*LEWIS v. ALCOCK* (1838), 3 M. & W. 188; 1 Horn & H. 17; 7 L. J. Ex. 55; 150 E. R. 1110.

*Annotations*:—*Consd.* *Taverner v. Little* (1839), 5 Bing. N. C. 678. *Mentd.* *Lloyd v. Harrison* (1865), 6 B. & S. 36.

**1135. —.]**—*REMMETT v. LAWRENCE*, No. 540, *ante*.

**1136. — No goods of debtor available—Satisfaction of landlord's rent—Debt due on prior writ.]**—*WINTLE v. FREEMAN*, No. 1080, *ante*.

**1137. — Claim of creditor satisfied—Mitigation of damages.]**—(1) In an action on the case against the sheriff for a false return of *nulla bona*, it is competent to deft. to prove, under not guilty, that pltf. has been paid his debt, since the execution & before action brought [in mitigation of damages].

(2) Where two executions are in a house, & some goods are negligently allowed to be removed by the sheriff's men, & ultimately there is not enough to pay out the first execution, the second creditor cannot recover damages in an action on the case for a false return of *nulla bona* against the sheriff unless he shows that the goods so removed would have paid the first execution in full, & left a surplus for the second execution.—*BRENNAN v. FINNIS* (1850), 15 L. T. O. S. 562, N. P.

he had seized certain property under pltf.'s attachment, & held it subject to that attachment till the debt & costs were paid, is estopped, while that return stands, from returning *nulla bona* to the execution issued on pltf.'s judgment; & in an action for a false return, it is no defence to allege that at the time of delivery to him of the attachment in pltf.'s suit, the sheriff had already attached the same property under another attachment, which it was not sufficient to satisfy.—*EVERITT v. LYND* (1880), 20 N. B. R. (4 P. & B.) 384.—CAN.

**c. — Debtor's title merely that of personal representative—Onus of proof.]**—After the death, in May, 1880, of A., a shopkeeper, his daughter B. carried on the business. Judgment was obtained against B. personally, & a *fi. fa.* issued thereon & delivered to the sheriff in Mar. 1881. At this time B. was in possession of shop goods of

considerable value, some of which had been the property of A. in his lifetime & the rest were purchased out of the proceeds of sale of other goods of A. The sheriff, having required & obtained an indemnity from the execution creditor before seizure, received from the execution debtor a cheque for £98, which, according to the evidence of some of the witnesses on behalf of the sheriff, was given to him as a security that the goods would be forthcoming in a short time. The sheriff subsequently made a return of *nulla bona*, & the execution creditor having brought an action against him for a false return, & for money had & received, he repaid the amount of the cheque to the execution debtor, having retained it for a period of about ten months; & at the trial claimed to have a verdict directed in his favour, on the grounds that the goods were not the goods of B. & that the giving

**1138. Damages—Proper measure—On fraudulent sale by broker—Inadequate price.]**—*BARNARD v. LEIGH*, No. 1095, *ante*.

**1139. — When recoverable—Some goods negligently lost—Claim by second execution creditor.]**—*BRENNAN v. FINNIS*, No. 1137, *ante*.

**1140. — In respect of issue of venditioni exponas—Return by sheriff in ignorance of true facts.]**—(1) The sheriff having seized goods under a writ of *fi. fa.* employed an auctioneer to sell them, who was the brother of the execution creditor. The auctioneer sold the goods by private contract, & within an hour & a half afterwards the sheriff, who was ignorant at that time of the sale, returned to the writ of *fi. fa.* the seizure, & that the goods were in his hands for want of buyers. In an action by the execution creditor for a false return, the judge at the trial refused to direct the jury that they must find some damage for pltf. in respect of a writ of *venditioni exponas*, which he had issued the day after such return:—*Held*: considering the circumstances under which the writ was issued, the judge rightly refused to do so.

(2) To a writ of *venditioni exponas*, the sheriff made a return, in which he accounted for the proceeds of the goods by applying part thereof in the payment of rent due to the landlord of the premises wherein the goods were seized, & by retaining the residue for charges which he had a right to make, with the exception of a sum claimed for possession-money, to which the sheriff was not entitled. The premises, however, in which the seizure was made consisted of two houses held under separate landlords, & besides the sum so paid for rent to one of such landlords, there was owing for rent to the other landlord a sum exceeding the value of the proceeds. In an action against the sheriff for a false return:—*Held*: the sheriff was not estopped by his return from showing that such rent was due, & by reason of Landlord & Tenant Act, 1709 (c. 14), requiring the sheriff to pay one year's rent out of the proceeds, pltf. had sustained no damage by the false return, & had, therefore, no cause of action.—*LEVY v. HALE* (1859), 29 L. J. C. P. 127; 1 L. T. 132; 6 Jur. N. S. 702; *sub nom.* *LEVI v. HALE*, 8 W. R. 126.

*Annotation*:—*Generally, Mentd.* *Stimson v. Farnham* (1871), L. R. 7 Q. B. 175.

#### SUB-SECT. 11.—REMEDIES FOR RECOVERY OF PROCEEDS.

**1141. Scire facias—Goods allowed to be rescued.]**—If a sheriff suffers goods seized under an execution, & returned by him of such a value, to be

of the cheque under the circumstances was not a levy. No evidence was given of any testamentary disposition by A. The judge having refused to give such a direction, & a verdict having been found for pltf.:—*Held*: in the absence of any proof that the trading was carried on by B. as personal representative of A., the onus of which lay on the sheriff, the goods purchased by her after A.'s death could not be held to be assets of A., & the judge was right in refusing to direct a verdict in favour of the sheriff.—*KELLY v. BROWNE* (1883), 12 L. R. Ir. 348.—IR.

#### PART III. SECT. 1, SUB-SECT. 11.

**d. Attachment against sheriff—More than six months out of office.]**—The ct. will not attach a sheriff more than six months out of office before the rule issued against him, for not



*Sect. 1.—Writ of fieri facias: Sub-sect. 11.]*

rescued out of his hands, a *sci. fa.* lies to have execution against him of the money according to the value returned.—*MILDMAY v. SMITH* (1671), 2 Saund. 343; 2 Keb. 821; 85 E. R. 1139.

*Annotations:—***Consd.** *Stimson v. Farnham* (1871), L. R. 7 Q. B. 175. **Refd.** *Clerk v. Withers* (1704), 2 Ld. Raym. 1072; *Giles v. Grover* (1832), 1 Bing. 128; *White v. Chapple* (1847), 16 L. J. C. P. 233; *Levy v. Hale* (1859), 29 L. J. C. P. 127; *Willis, Winder v. Combe* (1884), 1 T. L. R. 36. **Mentd.** *Boson v. Sandford* (1689), 3 Mod. Rep. 321; *Parker v. Atfield* (1700), 1 Salk. 311; *Brasyer v. Maclean* (1875), L. R. 6 P. C. 398.

**1142. Order of court.]—**Sheriff ordered to pay money levied on a *fi. fa.*—*SPRAG v. RICHARDSON* (1700), 12 Mod. Rep. 349; 88 E. R. 1372.

—Rule for the sheriff to bring in money levied by him on *fi. fa.*, granted.—*THOMPSON v. DEMPSTER* (1735), Lee temp. Hard. 180; 95 E. R. 116.

—*DE MEDINA v. GROVE*, No. 401, ante.

**1145. —.]—**If execution is by mistake issued for a larger sum than is really due the party aggrieved should apply to the ct. Money had & received does not lie.—*HOLDWAY v. RAY* (1863), 1 New Rep. 273.

**1146. — Judgment against debtor—Without debtor's knowledge—Authority of solicitor.]—**Where it appeared that one of two joint defts. had no notice that he was party in an action, until the debt & costs were levied upon his goods, & that he had not employed the attorney who appeared for him; the ct., upon an application by deft. to have the proceeds of the levy returned to him, referred the rule to the prothonotary, for the purpose of ascertaining whether the attorney was in insolvent circumstances, & it being proved that he was, the rule was made absolute.—*STANHOPE v. FIRMAN* (1836), 3 Bing. N. C. 301; 2 Hodg. 253; 4 Scott, 39; 6 L. J. C. P. 12; 132 E. R. 426; *sub nom.* *STANHOPE v. EAVERY*, 5 Dowl. 357.

*Annotations:—***Mentd.** *Hambidge v. De La Cruet & Francois* (1846), 10 Jur. 1096; *Reynolds v. Howell* (1873), L. R. 8 Q. B. 398; *Yonge v. Toynbee*, [1910] 1 K. B. 215.

**1147. — Although sheriff ordered to repay money—By House of Commons.]—**(1) Goods of H. being taken under a *fi. fa.* for damages, a *venditioni exponas* was sued out, to which the sheriff, after obtaining an extension of time, returned Dec. 19 that he had sold for the money directed to be levied, & had the amount in ct. to be rendered to pltf., as commanded by the writ. He did not, however, on request, pay the money to pltf. who, on the first day of the following term, obtained a rule calling on the sheriff to show cause why he should not pay to pltf. the amount mentioned in the return:—*Held*: no answer to this application, that the House of Commons, by resolutions subsequent to the granting of the rule, had declared the levy a contempt of their privileges, ordered the sheriff to pay back the money to H., & committed the sheriff, for his alleged contempt, to the custody of the serjeant-at-arms, where he remained at the time of showing cause. *Qu.*: whether, after such return as above stated, the sheriff could excuse non-payment of the money under a rule of ct., by showing that, without actual laches on his part, he had been prevented from paying it by superior force.

giving an account of sales made & moneys received from a deft. on writs, although the rule directing the sheriff to render such an account had before been granted.—*MOTT v. GRAY* (1841), 1 U. C. R. 392; 2 P. R. 183.—**CAN.**

**e. Action against sheriff.]—**If the sheriff has parted with goods which he had levied on under an execution, he cannot be called on to sell under a *venditioni exponas*; the remedy against him is by action.—*PHILIPS v. DICKEN-*

*SON* (1831), (1825-1897), N. B. Dig. 713.—**CAN.**

**f. — For money had & received.]—**Money had & received may be had & maintained against a sheriff

(2) After the above return, & after the granting of the rule *nisi*, the Insolvent Debtors' Court, by an order purporting to be made in the matter of S., pltf., an insolvent, on the application of a creditor, directed the sheriff to retain the money

should show cause why the money should not be paid over to the provisional assignee:—*Held*: the pendency of such rule was no answer to the present application, since this ct., after directing the money to be paid over to S., could provide, by further order, for the interests of parties really entitled.

(3) The sheriffs not having paid over the money in obedience to the order, the ct. made a rule for an attachment absolute against them, though they deposed that they were personally under confinement, & had no means of obeying the order but by directing their subordinate officers to pay the money, which if the officers did, they would probably incur a like imprisonment.—*STOCKDALE v. HANSARD* (1840), 11 Ad. & El. 253; 8 Dowl. 522; 3 State Tr. N. S. 723; 3 Per. & Dav. 330; 9 L. J. Q. B. 75; 4 Jur. 68; 113 E. R. 411.

**1148. — Although fund claimed by assignees of debtor.]—***STOCKDALE v. HANSARD*, No. 1147, ante.

**1149. — Attachment for non-compliance.]—***STOCKDALE v. HANSARD*, No. 1147, ante.

—*See, further*, SHERIFFS & BAILIFFS.

**1150. — Sum claimed for sheriff's expenses.]—**On Jan. 26, 1846, the sheriff, under a *fi. fa.* sued out by pltf., seized deft.'s goods. At pltf.'s request the sale was deferred. On May 9, the pltf. paid all expenses up to that date, & then wrote to the officer in possession, "Provided deft. satisfies all future claims, the sale may be postponed." The officer remained in possession till Sept., & after a peremptory order from pltf., sold the goods on Sept. 20. On being ruled, the sheriff returned, on Oct. 24, that after deducting various sums for expenses, among which was an item of £20 possession money, he had £34 ready to pay pltf. Pltf. applied to the ct. to order the sheriff to pay him the sum of £20 possession money, as well as the sum of £34:—*Held*: pltf., by his communications with & directions to the officer, did not thereby discharge the sheriff, & the proper course to enforce the sheriff's liability was by summary application, & not by an action for money had & received.—*BOTTEN v. TOMLINSON* (1847), 16 L. J. C. P. 138.

**1151. — Notice to be served on sheriff.]—**A rule calling on a sheriff to show cause why he should not pay to the pltf.'s solrs. the money levied under a *fi. fa.* is a rule or order to show cause in an action within Ord. 53, r. 2, & the application cannot be heard unless notice of motion has been given to the sheriff under Ord. 53, rr. 3 & 4.—*DELMAR v. FREEMANTLE* (1878), 3 Ex. D. 237; 47 L. J. Q. B. 767; 26 W. R. 683.

**1152. Action for money had & received.]—***HOLDWAY v. RAY*, No. 1145, ante.

—**Money paid under threat of execution.]—***See CONTRACT*, Vol. XII., p. 556.

**1153. Action for debt—Against under-sheriff.]—**An action lies against an under-sheriff for money levied under a *fi. fa.*—*SPEAKE v. RICHARDS* (1617), 2 Show. 281; 1 Brownl. 51; Hut. 11; Hob. 206;

Moore, K. B. 886; 89 E. R. 940; *sub nom.* SPARK v. RICHARDS, Noy, 22.

*Annotations* :—**Refd.** Langdon v. Wallis (1698), 1 Lut. 582; Kempe v. Goodall (1705), 2 Ld. Raym. 1154; Morland v. Pellatt (1829), 7 L. J. O. S. K. B. 54; Magrath v. Hardy (1838), 4 Bing. N. C. 782. **Mentd.** Wiles v. Woodward (1850), 20 L. J. Ex. 261; R. v. Blakemore (1852), 2 Den. 410; Feversham v. Emerson (1855), 11 Exch. 385.

**1154. — Against executor of sheriff.**—Debt lies against the exors. of a sheriff for the non-payment of money levied on a *fi. fa.*—**PERKINSON v. GILFORD** (1639), Cro. Car. 539; 79 E. R. 1064. *Annotations* :—**Refd.** Mildmay v. Smith (1671), 2 Saund. 343; Williams v. Cary (1695), Comb. 322; Langdon v. Wallis (1698), 1 Lut. 582; Morland v. Pellatt (1828), 8 B. & C. 722; Higgins v. M'Adam (1829), 3 Y. & J. 1; Giles v. Grover (1832), 9 Bing. 128. **Mentd.** Hambly v. Trott (1776), 1 Cowp. 371.

**1155. — Against executor of under-sheriff.**—Where an under-sheriff, since deceased, acting as sheriff during the vacancy of the shrievalty under Estreats Act, 1716 (c. 15), s. 8, wrongfully retained the proceeds of an execution :—**Held** : an action for money had & received was maintainable against the exor. of the under-sheriff by the execution creditors to recover the sum so wrongfully retained.—**GLOUCESTERSHIRE BANKING CO. v. EDWARDS** (1887), 20 Q. B. D. 107; 57 L. J. Q. B. 51; 58 L. T. 463; 36 W. R. 116; 4 T. L. R. 112, C. A.

**1156. — By executor of creditor—Defence of Statute of Limitations.**—To an action of debt, brought by an exor. against a sheriff to recover money levied on a *fi. fa.* under an execution sued out by testator, deft. cannot plead Stat. Limitations.—**COCKRAM v. WELBY** (1677), 2 Mod. Rep. 212; 1 Freem. K. B. 236; 1 Mod. Rep. 245; 2 Show. 79; 86 E. R. 1031.

*Annotations* :—**Refd.** Morland v. Pellatt (1829), 7 L. J. O. S. K. B. 54. **Mentd.** Vaughan v. Guy (1729), 1 Barn. K. B. 271; Paget v. Foley (1836), 3 Scott, 120.

**1157. —**—If the sheriff levy money upon a *fi. fa.* pltf. may have an *indebitatus assumpsit* against him for so much money received to his use (HOLT, C.J.).—**JONES v. MORLEY** (1697), as reported in Comb. 429; 90 E. R. 571; *on appeal*, *sub nom.* MORLEY v. JONES (1698), Show. Parl. Cas. 140, H. L.

*Annotations* :—**Mentd.** Hales v. Owen (1703), 2 Ld. Raym. 904; Stapilton v. Stapilton (1739), 1 Atk. 2; Fleetwood v. Templeman (1740), Barn. Ch. 187; Houghton v. Tate (1829), 3 Y. & J. 486.

**1158. — For value returned.**—**CLERK v. WITHERS**, No. 66, *ante*.

**1159. — Without demand for payment.**—After a return to a writ of *fi. fa.* that the money is levied, the sheriff is liable to an action for money had & received, without any demand of payment.—**DALE v. BIRCH** (1813), 3 Camp. 347, N. P.

*Annotations* :—**Consd.** Swain v. Morland (1819), 1 Brod. & Bing. 370. **Refd.** Morland v. Pellatt (1828), 8 B. & C. 722.

**1160. — Subsequent extent by Crown—Proceeds paid to Crown.**—Where goods were taken in execution by the sheriff on a *fi. fa.*, & whilst they remained in his hands unsold, an extent came at the King's suit tested after the entry of the sheriff under the *fi. fa.*; & the sheriff thereupon seized the goods subject to the former seizure, & afterwards sold them under a *venditioni exponas* issued upon such extent, & paid over the proceeds of such sale by order of the Ct. of Exch. :—**Held** : at all events, without determining whether the King's extent was under the circumstances entitled to priority, pltf. could not maintain money

had & received against the sheriff for the proceeds of such sale.—**THURSTON v. MILLS** (1812), 16 East, 254; 104 E. R. 1085.

*Annotations* :—**Consd.** Giles v. Grover (1832), 9 Bing. 128. **Refd.** Swain v. Morland (1819), 1 Brod. & Bing. 370; R. v. Giles (1820), 8 Price, 293.

**1161. —**—Where goods had been seized under a *fi. fa.*, part of them sold on Saturday, & the remainder on Monday; an extent, tested on the Monday, was put into the sheriff's hand at six o'clock, after the goods had been delivered to the purchasers, & the money received by the sheriff :—**Held** : the execution was executed, & the party who issued the *fi. fa.* might recover of the sheriff, in an action for money had & received, the money levied under the sale.—**SWAIN v. MORLAND** (1819), 1 Brod. & Bing. 370; 3 Moore, C. P. 740; 129 E. R. 766.

*Annotations* :—**Refd.** Higgins v. M'Adam (1829), 3 Y. & J. 1; Giles v. Grover (1832), 9 Bing. 128; Discount Banking Co. of England v. Lambarde (1893), 42 W. R. 50. **Mentd.** Edwards v. R. (1854), 9 Exch. 628; Wright v. Mills (1859), 5 H. & N. 488; Clarke v. Bradlaugh (1881), 44 L. T. 779.

**1162. —**—An action for money had & received at the suit of a pltf. who has sued out a *fi. fa.* lies against the sheriff who executed it, if he retain more money in his hands than he is entitled to do, the party injured not being bound to proceed by motion in Bank.—**LONGDILL v. JONES** (1816), 1 Stark. 345, N. P.

**1163. — Defence by sheriff—Bankruptcy of debtor—Known to creditor at time of action brought.**—Where the sheriff returned to a *fi. fa.* issued on a judgment against C., that he had levied, & part of the goods remained in his hands for want of buyers, & afterwards a *venditioni exponas* issued, under which the sheriff sold part of the goods :—**Held** : in an action against the sheriff for not selling the residue nor paying the money, he might, notwithstanding his return, be admitted to prove that C. became bkpt. before the judgment, & that pltf. knew his insolvency at the time of action.—**BRYDGES v. WALFORD** (1817), 6 M. & S. 42; 105 E. R. 1158.

*Annotations* :—**Distd.** Field v. Smith (1837), 2 M. & W. 388. **Consd.** Standish v. Ross (1849), 3 Exch. 527.

**1164. — Stay of proceedings—Payment of sum levied—Without costs.**—In an action brought against the sheriff for money levied under a *fi. fa.* without any previous demand, the ct. will stay the proceeding, upon payment of the sum levied, without costs.—**JEFFERIES v. SHEPPARD** (1820), 3 B. & Ald. 696; 106 E. R. 815.

*Annotation* :—**Refd.** Copland v. Powell (1823), 8 Moore, C. P. 400.

**1165. — Surplus of proceeds—Sale by bailiff by direction of debtor's assignees.**—Where a sheriff's officer had seized under a *fi. fa.* goods of a trader, more than sufficient to satisfy the levy, & the trader having become bkpt., & assignees chosen before the goods were sold, the assignees authorised the officer to deliver the whole of the goods to B. & to receive from him a certain sum as the full value of the goods, which he did accordingly, & out of that money satisfied the execution creditor, but never paid over the residue to the assignees :—**Held** : they could not sue the sheriff for this money, the officer not having derived his authority to sell the whole of the goods from the sheriff, but from pltf., the assignees.—**COOK v. PALMER** (1827), 11 B. & C. 739; 9 Dow. & Ry.

by pltf. in the suit for money levied on an execution.—**SHUTER v. LEONARD** (1834), 3 O. S. 314.—**CAN.**

**g. Repayment when judgment reversed—Liability for interest.**—Pltf.

issued execution against defts., & received a sum of \$1,358.89, being proceeds of sale of goods of deft. C. On reversal of the judgment pltf. thereupon became liable to repay the \$1,358.89. The money was paid to

the solrs. for defts., but without interest :—**Held** : deft. entitled interest at lawful rate.—**Cox**

O. L. R. 96.—**CAN.**



*Sect. 1.—Writ of fieri facias: Sub-sects. 11 & 12, A. (a), (b) & (c).]*

K. B. 723; 5 L. J. O. S. K. B. 234; 108 E. R. 623.

**1166. — By debtor—Against sheriff—Goods conveyed away before execution.]—**The sheriff seized goods in the possession of S. to satisfy a *fi. fa.* issued against him upon a judgment of nonsuit for £67. S. had previously conveyed all his estate & effects to H. by a deed which it was contended was fraudulent & void against creditors: & H. gave notice to the sheriff's officer not to sell, & demanded the goods. The officer refused to deliver them except on payment of £97, the additional £30 being claimed for poundage expenses, etc., which the person sent by H. to demand the goods paid under protest. The sheriff being ruled to return the writ, returned that he had levied of the goods & chattels of pltf. S. the sum of £67. In an action for money had & received, brought by S. against the sheriff to recover back the £30:—*Held*: it was a question for the jury, & ought to have been left to them, whether the money paid to redeem the goods was the money of S. or not, & if it was not, he was not entitled to recover, & the sheriff was not estopped by his return to say that the excess beyond the £67 was not the money of S.—*SCARFE v. HALLIFAX* (1840), 7 M. & W. 288; 10 L. J. Ex. 332; 151 E. R. 775.

**1167. —.]—***HOLDWAY v. RAY*, No. 1145, *ante*.

#### SUB-SECT. 12.—LIABILITY FOR WRONGFUL OR IRREGULAR SEIZURE, ETC.

##### A. Sheriff.

###### (a) In General.

**1168. General rule.]—***LOVICK v. CROWDER*, No. 514, *ante*.

**1169. Failure to levy—Action lies.]—**If a minister of justice has warrant to attach the goods of another, if he can do it & do it not, an action upon the case lies against him (*COKE, C.J.*).—*ANON.* (1616), 3 Bulst. 212; 81 E. R. 179.

**1170. — Negligence.]—***JUSTICE v. GOWER* (1843), 2 L. T. O. S. 208.

**1171. — Not without actual pecuniary damage.]—**(1) An action cannot be maintained against a sheriff for negligence in not levying under a *fi. fa.* without showing actual pecuniary damage, & although *prima facie* the measure of damage is the value of the goods which might have been & were not levied, yet it is for the jury to say looking at the probabilities of the case, whether or not, if the execution had been levied pltf. would have derived any benefit from it, by reason of the other creditors of the execution debtor being in a position to make him bkpt.

(2) A conveyance by a debtor of his goods to two creditors for the benefit of themselves & the other creditors passes the property at once, on the execution of the deed by the debtor, without any assent on the part of the trustees; but the knowledge of the debtor, at the time of making the deed, that a writ of execution is out against his goods, must be taken to be the knowledge of the trustees within Mercantile Law Amendment Act, 1856 (c. 97), s. 1; & consequently the trustees' title is

not protected by that sect., & the goods are bound by the delivery of the writ to the sheriff.—*HOBSON v. THELLUSON* (1867), L. R. 2 Q. B. 642; 8 B. & S. 476; 36 L. J. Q. B. 302; 16 L. T. 837; 15 W. R. 1037.

*Annotations:—As to (1) Refd. Hodder v. Williams, [1895] 2 Q. B. 663. As to (2) Refd. Re Davies, Ex p. Williams (1872), 26 L. T. 303; Ehlers, Seel v. Kauffman & Gates (1883), 49 L. T. 806. Generally, Mentd. Woodhouse v. Murray (1867), 8 B. & S. 464; Muller & Co.'s Margarine v. I. R. Comrs. (1899), 69 L. J. Q. B. 291.*

**1172. Violation of priorities—Between several creditors.]—***SMALCOMB v. BUCKINGHAM*, No. 525, *ante*.

**1173. —.]—***DENNIS v. WHETHAM*, No. 515, *ante*.

**1174. Failure to have money in court—Sheriff not ruled to return writ.]—**An action on the case does not lie against a sheriff, who has not been ruled to return the writ, for neglecting to have the money in ct. according to the exigency of a *fi. fa.*—*MORELAND v. LEIGH* (1816), 1 Stark. 388, N. P. *Annotations:—Refd. Mullet v. Challis* (1851), 16 Q. B. 239; *Shaw v. Kirby* (1888), 4 T. L. R. 314.

**1175. Improper removal of goods—Liability to creditor—Rescue by third party.]—**If a deputy sheriff, being in possession of goods seized under an immediate extent & having received a subsequent *fi. fa.* at the suit of a subject, contract with the judgment creditor to deliver him, in satisfaction of his execution a certain quantity of the goods seized, on his paying into the sheriff's hands the debt due to the Crown, which is accordingly paid to him, & if afterwards whilst his officer is in the act of delivering & measuring the quantity specified to pltf.'s agent, to whom he had given up the key, the goods are rescued, the sheriff is liable to the judgment creditor, who may maintain a special *assumpsit* on the contract, whether the sheriff be authorised so to contract or not, or on a common count for goods sold & delivered, or for money had & received.—*THOMAS v. PEARSE* (1818), 5 Price, 578; 146 E. R. 699.

**1176. — No negligence by sheriff.]—**Pltfs. having instructed a sheriff's officer to seize certain property under a writ of *fi. fa.*, the sheriff's officer, upon taking possession, was turned out of the premises by men in the employ of the holder of a bill of sale over the property, the goods being greatly damaged by the disorder which took place. The property had on the date of seizure passed into the custody of the Bkpcy. Ct.:—*Held*: (1) the sheriff was not liable to pltfs. where goods which he had seized had been destroyed when no negligence was proved; (2) as at the date of seizure the property was in the possession of an officer of the Bkpcy. Ct., it could not also be in that of the sheriff, & the latter was not responsible for the damage done to them.—*WILLIS, WINDER & Co. v. COMBE* (1884), 1 T. L. R. 36; Cab. & El. 353.

**1177. — Removal by debtor—Negligence of sheriff's officer.]—**Where a sheriff's officer negligently allows goods which have been seized to be removed by the debtor the sheriff is liable to be sued for the damage caused by such removal.—*TRENT BROTHERS v. HODGSON* (1885), 1 T. L. R. 268.

**1178. Fraudulent representations—As to seizure Liability for loss or costs incurred.]—**Liability of sheriff for not seizing & selling under a *fi. fa.*

#### PART III. SECT. 1, SUB-SECT. 12.—A. (a).

**1168 i. General rule.]—**An action is not maintainable against a sheriff who has, in obedience to a valid writ, seized property privileged under Home-stead Acts, without prior legal notifica-

tion of its exemption.—*JOHNSON v. HARRIS* (1878), 1 B. C. R. pt. 1, 93.—*CAN.*

**h. What must be proved.]—**In an action against a sheriff for seizing goods it is sufficient to prove that they were seized *colore officii*, without

proving a writ of execution.—*HOLT v. JARVIS* (1830), Dra. 200.—*CAN.*

**k. Right of plaintiff—To have action tried by jury.]—**A party complaining of an illegal seizure of his goods has a right to have his action tried by a jury unless he expressly

*Semble*: liable for fraudulent representations of having held possession of goods under a *fi. fa.* where loss is incurred.—*JUSTICE v. GOWER* (1843), 2 L. T. O. S. 208.

**1179. Continuing undue time in debtor's house.]**—*COOKE v. BIRT*, No. 568, *ante*.

(b) *Illegal Entry.*

**1180. Trespass—Plea that outer door was open.]**—Trespass for breaking open the outer door of pltf.'s dwelling-house, & entering therein, etc. Plea, justifying the entry, generally, under a *pluries fi. fa.*

Demurrer, assigning for cause that in the plea it was not averred that the outer door was open at the time defts. entered under the writ:—*Held*: the plea was bad.—*BUCKENHAM v. FRANCIS* (1825), 11 Moore, C. P. 40; 4 L. J. O. S. C. P. 51. *Annotation*:—*Refd.* *Pugh v. Griffith* (1838), 7 Ad. & El. 827.

**1181. ———.]**—*KERBEY v. DENBY*, No. 591, *ante*.

**1182. ——— Allegation of breaking doors & locks —General justification insufficient.]**—Declaration in trespass charged that defts. broke & entered pltf.'s house & made a noise, etc., & also then broke open ten doors of pltf., of & belonging to the dwelling-house, & broke to pieces ten locks of the doors with which they were then fastened, & seized pltf.'s goods. Justification under a *fi. fa.*, by one deft., alleging that he sued out the writ, & that, by authority thereof, the other deft., being the sheriff, peaceably entered, the outer door being open, in order to seize, & did then seize, the goods then being in the house; & in so doing defts. unavoidably made some noise, etc.; which were the trespasses, etc. On special demurrer:—*Held*: the plea was bad, the breaking of the doors & locks being not aggravation merely, but a substantive trespass distinct from the breaking & entering, & requiring to be justified, which was not done.

If the breaking & entering & breaking the doors & locks were all one act, the plea, as to these, amounted to not guilty (*PATTERSON, J.*).—*CURLÉWIS v. LAURIE* (1848), 12 Q. B. 640; 11 L. T. O. S. 308; 116 E. R. 1009.

**1183. ———.]**—*PERCIVAL v. STAMP*, No. 592, *ante*.

**1184. ——— Substantial grievance done.]**—The sheriff held not entitled to protection against an action of trespass in wrongfully entering a house & taking certain goods in execution, where a substantial grievance had been done to the person whose house was entered.—*DE COPPETT v. BARNETT* (1901), 17 T. L. R. 273, C. A.

Right to break in, see Sub-sect. 4, E. (c) (ii.), *ante*.

(c) *Wrongful or Irregular Seizure.*

**1185. Punishment by court.]**—How far the ct. will not punish a sheriff for taking goods to an excessive value under an execution.—*WALKER v.* (1731), 2 Barn. K. B. 10; 94 E. R. 323.

**1186. Trover—Not for goods seized under extent.]**—Trover will not lie against a sheriff for the wrongful seizure of goods under an extent.—

*R. v. WOODWARD* (1699), 1 Ld. Raym. 736; 91 E. R. 1392.

**1187. ——— Production of warrant sufficient—Without writ.]**—*GIBBINS v. PHILLIPS*, No. 813, *ante*.

**1188. ——— Seizure under second writ—First writ alleged fraudulent—Declaration of debtor as to fraud.]**—A. sued out a writ of *fi. fa.* against the goods of B. & the sheriff executed a bill of sale of certain goods to A. After this, B. remained in possession of the goods, & the sheriff again took them, under another execution against B.:—*Held*: in an action brought by A. against the sheriff for taking these goods, the declarations of B. were evidence for deft. to show that A.'s execution was merely colourable.—*WILLIES v. FARLEY* (1828), 3 C. & P. 395.

**1189. ——— Goods of reputed wife—Not in fact so.]**—*GLASSPOOLE v. YOUNG*, No. 710, *ante*.

**1190. ——— Goods of third party—Falsely represented to be those of debtor—Action by assignees of third party.]**—In trover by assignees of a bkpt. against a sheriff for the conversion of the bkpt.'s goods, seized under a *fi. fa.* against C. & D., it appeared that, immediately before the seizure, the bkpt. told the officer that the goods were the property of C.; & immediately afterwards, he contradicted that statement, & said they were the goods of D. The jury found, that the goods were in reality the bkpt.'s; but also, that he represented the goods to the officer as the goods of C., so as to induce the officer, by that false representation, to seize them:—*Held*: under the plea of not possessed, this finding did not estop the bkpt., & pltfs. as assignees, from complaining of the seizure of the goods as their own.—*FREEMAN v. COOKE* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L. J. Ex. 114; 12 L. T. O. S. 66; 12 Jur. 777; 154 E. R. 652.

*Annotations*:—*Refd.* *Howard v. Hudson* (1853), 2 E. & B. 1; *Bill v. Richards* (1857), 26 L. J. Ex. 409; *Dunston v. Paterson* (1857), 2 C. B. N. S. 495; *Richards v. Johnson* (1859), 5 Jur. N. S. 520; *Harding v. Hall* (1866), 14 L. T. 410; *Stimson v. Farnham* (1871), L. R. 7 Q. B. 175; *Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117. *Mentd.* *Hallifax v. Lyle* (1849), 3 Exch. 446; *Foster v. Mentor Life Assce.* (1854), 3 E. & B. 48; *Jorden v. Money* (1854), 5 H. L. Cas. 185; *Lewis v. Clifton* (1854), 22 L. T. O. S. 259; *A.-G. v. Stephens* (1855), 1 K. & J. 724; *Kent v. Thomas* (1856), 1 H. & N. 473; *Bigg v. Strong* (1857), 3 Sm. & G. 592; *Simpson v. Accident Death Insee.* (1857), 2 C. B. N. S. 257; *Clarke & Chapman v. Hart* (1858), 6 H. L. Cas. 633; *Cornish v. Abington* (1859), 4 H. & N. 549; *Fletcher v. Fletcher* (1859), 1 E. & E. 420; *Sweeting v. Pearce* (1859), 6 Jur. N. S. 753; *Ward v. S. E. Ry.* (1860), 2 E. & E. 812; *Cave v. Mills* (1861), 8 Jur. N. S. 363; *Greenish v. White* (1861), 31 L. J. C. P. 93; *M'Canoe v. L. & N. W. Ry.* (1861), 7 Jur. N. S. 1304; *White v. Greenish* (1861), 11 C. B. N. S. 209; *Betts v. Menzies* (1862), 10 H. L. Cas. 118; *Ashpitel v. Bryan* (1863), 3 B. & S. 474; *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175; *Re Bahia & San Francisco Ry.* (1868), L. R. 3 Q. B. 584; *Webb v. Herne Bay Comrs.* (1870), L. R. 5 Q. B. 642; *Brook v. Hook* (1871), L. R. 6 Exch. 89; *Macted v. Paine* (1871), L. R. 6 Exch. 132; *Smith v. Hughes* (1871), L. R. 6 Q. B. 597; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 6 H. L. 352; *Wallis v. Biddick* (1873), 22 W. R. 76; *Arnold v. Cheque Bank, Same v. City Bank* (1876), 1 C. P. D. 578; *Harris v. G. W. Ry.* (1876), 1 Q. B. D. 515; *Polak v. Everett* (1876), 1 Q. B. D. 669; *Roden v. London Small Arms Co.* (1876), 46

waives such right.—*BARTLETT v. HOUSE FURNISHING CO.* (1906), 16 Man. L. R. 350; 4 W. L. R. 567.—*CAN.*

PART III. SECT. 1, SUB-SECT. 12.—  
A. (b).

1. *Trespass—Breaking open of store door —Unlawful.]*—Deft. bailiff in making a seizure under an execution broke open a store door, pltf. residing over the store, both being under one roof:—*Held*: breaking open the door was unlawful, & small damages allowed.

—*HUDSON v. FLETCHER* (1909), 12 W. L. R. 15.—*CAN.*

PART III. SECT. 1, SUB-SECT. 12.—  
A. (c).

m. *Trover—After-acquired property.]*—Pltfs. were the grantees, & H. the grantor, in a bill of sale, which specified certain property conveyed, & contained the following clause: " & all property owned, or to be owned by me, & including all renewal stock or stocks to be purchased by me." H. subsequently acquired pos-

session of a horse & colt. The colt was the progeny of a mare conveyed by the bill of sale. The horse was bought in for H. at a sale had at his direction to satisfy a lien which he claimed for keep. H. made a formal delivery of the horse & colt to pltfs., stating that he delivered them to hold on the terms of the bill of sale; but H. always retained the actual possession. Deft., the sheriff, seized & sold the horse & colt under an execution against H., & pltfs., claiming that the property was in them, brought trover:



**Sect. 1.—Writ of fieri facias: Sub-sect. 12, A. (c), (d) & (e).]**

L. J. Q. B. 213; *Angus v. Dalton* (1877), 3 Q. B. D. 85; *Johnson v. Credit Lyonnais Co.* (1877), 3 C. P. D. 32; *Burkinshaw v. Nicolls* (1879), 39 L. T. 308; *McKenzie v. British Linen Co.* (1881), 6 App. Cas. 82; *Scarf v. Jardine* (1882), 7 App. Cas. 345; *Hall v. West End Advance Co.* (1883), Cab. & El. 161; *Manchester & Oldham Bank v. Cook* (1883), 49 L. T. 674; *Miles v. McIlwraith* (1883), 8 App. Cas. 120; *Joseph v. Webb*, *Joseph v. Lyons*, *Joseph v. Pidcock*, *Joseph v. Jones* (1884), Cab. & El. 262; *Russell v. Watts* (1885), 10 App. Cas. 590; *Roe v. Mutual Loan Fund Assocn.* (1887), 56 L. T. 631; *Bank of England v. Vagliano*, [1891] A. C. 107; *Low v. Bouverie* [1891] 3 Ch. 82; *Sarat Chunder Dey v. Gopal Chunder Lala* (1892), 8 T. L. R. 732; *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396; *Re Bentley & Yorkshire Breweries, Ex p. Harrison* (1893), 69 L. T. 204; *Henderson v. Williams*, [1895] 1 Q. B. 521; *Scholfield v. Londonborough*, [1895] 1 Q. B. 536; *Bloomenthal v. Ford*, [1897] A. C. 156; *Palmer v. Moore*, [1900] A. C. 293; *Farquharson v. King*, [1901] 2 K. B. 697; *Bell v. Marsh*, [1903] 1 Ch. 528; *Sheffield Corpn. v. Barclay*, [1903] 2 K. B. 580; *Morison v. London County & Westminster Bank* (1913), 108 L. T. 379; *Pierson v. Altrincham U. C.* (1917), 86 L. J. K. B. 969; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777; *Bradford v. Price* (1923), 92 L. J. K. B. 871.

**1191. — Sheriff of County Palatine—Proof of authority—Mandate of Chancellor of county.]—**Where the sheriff of the County Palatine of Lancaster was sued in trover for goods alleged to have been wrongfully seized & sold under an execution & the defence was, that pltf. claimed the goods by virtue of an assignment which was void as against creditors:—*Held*: the could take advantage of this defence without, as in ordinary cases, showing his authority by proof of the writ, & proof of the mandate to him from the Chancellor of the county was sufficient for that purpose.—*OGDEN v. HESKETH* (1849), 2 Car. & Kir. 772.

**1192. Trespass—Goods of third party.]—**Trespass *vi et armis* lies against the sheriffs, for taking the goods of A. instead of the goods of B. by his bailiff, upon the sheriff's warrant upon a *fi. fa.*—*SAUNDERSON v. BAKER & MARTIN* (1772), 3 Wils. 309; 95 E. R. 1072; *sub nom.* *SANDERSON v. BAKER & MARTIN*, 2 Wm. Bl. 832.

*Annotations*:—*Consd.* *Ackworth v. Kempe* (1778), 1 Doug. K. B. 40. *Refd.* *Woodgate v. Knatchbull* (1787), 2 Term Rep. 148; *Snowdon v. Davis* (1808), 1 Taunt. 359; *Brown v. Copley* (1844), 8 Scott, N. R. 350.

**1193. — Proceedings stayed—Until sheriff indemnified.]—**The sheriff, without previously requiring an indemnity, seized, under an execution issued by A. against L., goods which were in the possession of pltf. under a bill of sale from L., notwithstanding notice of the bill of sale. He then applied to A. & pltf. severally for an indemnity before proceeding further, but both refused, & pltf. sued him in trespass for the seizure.

—*Held*: the sheriff, having seized & sold the horse & colt under an execution against H., could not set up that H. had no title, in answer to an action by persons claiming through H.—*NICHOLSON v. TEMPLER* (1880), 20 N. B. R. (4 P. & B.) 248.—CAN.

**1192 i. Trespass—Goods of third party.]—**Where, in trespass against the sheriff for taking goods the jury gave full value of all seized, although pltf. had expressly claimed only a portion, declaring that the rest were not his, a new trial was granted.—*ROBLIN v. MOODIE* (1857), 15 U. C. R. 185.—CAN.

**n. — Seizure of mortgaged goods.]—**B. mtged. to pltf. certain goods, with a covenant that in case of default in payment, or of B.'s attempting to dispose of the goods, pltf. might take possession & sell or retain them for his own use, but there was no clause authorising B. to remain in possession until default:—

*Held*: pltf. had a sufficient right to possession to maintain trespass against the sheriff seizing under a *fi. fa.* against B., the jury having found the mtge. to be *bond fide*.—*PORTER v. FLINTOFF* (1857), 6 C. P. 335.—CAN.

**o. — Withdrawal of claim to goods—Before sale.]—**In trespass against the sheriff for taking goods, pltf. called the bailiff who made the seizure & sale. He swore that pltf., after giving notice of his claim to the goods, withdrew it, & that the sale then went on. Pltf. offered to disprove the withdrawal:—*Semble*: if pltf. in fact withdrew his claim, & thus induced deft. to proceed with the sale, which was for the jury to decide, he would be estopped from recovering.—*ROBINSON v. REYNOLDS* (1864), 23 U. C. R. 560.—CAN.

**p. — Notice given to sheriff—Of claim to goods.]—**Some of the property seized under an execution was pltf.'s: the remainder was liable

The ct. stayed the proceedings till an indemnity should have been given.—*BEAVAN v. DAWSON* (1830), 6 Bing. 566; 4 Moo. & P. 387; 8 L. J. O. S. C. P. 226; 130 E. R. 1399.

**1194. — — — — —]**—*JARMAIN v. HOOPER*, No. 1235, *post*.

**1195. — — — — — Liability for special damage—Seizure from sheriff by wrongdoer.]—**If a sheriff wrongfully seizes goods which are afterwards taken from him by another wrongdoer, the owner of the goods may, in an action against the sheriff, recover as special damage, the amount necessarily paid to the other wrong doer in order to get back the goods.—*KEENE v. DILKE* (1849), 4 Exch. 388; 18 L. J. Ex. 440; 154 E. R. 1263.

**1196. — — — — —]**—After verdict, but before judgment, W., a pltf. in ejectment, on July 11, assigned a field of potatoes, with the crop growing on it, which he held under a lease, the subject-matter of the action, to his attorney in the action, as a security for money advanced by the attorney, & for the amount due for costs already incurred in the action. One of the defts., a sheriff's officer, on July 17, seized the crop of potatoes, under a *fi. fa.*, against W. On the same day, but afterwards, possession was delivered by another sheriff's officer of the field in question, under a *habere facias possessionem*, to W., who immediately transferred the possession to an agent attending for the attorney. On July 30 the first sheriff's officer sold the potatoes, by auction, as a separate lot, after notice given him of pltf.'s title, to J., who, after taking an assignment of the lease from the sheriff entered & took the potatoes:—*Held*: the assignment to the attorney was not void by reason of the statutes against maintenance & champerty, or as being against public policy, since it was not an absolute sale of the subject-matter of the ejectment, but only a security for past advances; & an action *quare clausum fregit* lay for the attorney against the sheriff & his officers as his title related back to the time when it accrued.—*RADCLIFFE v. ANDERSON* (1860), E. B. & E. 819; 29 L. J. Q. B. 128; 1 L. T. 487; 6 Jur. N. S. 578; 8 W. R. 283; 120 E. R. 715, Ex. Ch.; *affg.* *S. C. sub nom.* *ANDERSON v. RADCLIFFE* (1858), E. B. & E. 806.

*Annotations*:—*Mentd.* *Dickinson v. Burrell*, *Stourton v. Burrell* (1866), L. R. 1 Eq. 337; *Guy v. Churchill* (1888), 40 Ch. D. 481; *Dunlop v. Macedo* (1891), 8 T. L. R. 43; *Alabaster v. Harness*, [1894] 2 Q. B. 897; *Ocean Accident & Guarantee Corpn. v. Ilford Gas Co.*, [1905] 2 K. B. 493.

**1197. Tort—By assignees of debtor—Necessary payment by sheriff to third party—Mitigation of damages.]—***Qu.*: whether, in an action of tort against the sheriff, by the assignees of a bkpt.,

to the execution. Pltf. gave the sheriff a written statement of what he claimed. As pltf. put in no claim to the remainder to the sheriff he cannot now claim damages for the unlawful seizure of it.—*HUDSON v. FLETCHER* (1909), 12 W. L. R. 15.—CAN.

**q. Claimant purchasing at sale.]—**Where the sheriff under a *fi. fa.* seized & sold certain goods claimed by pltf.s:—*Held*: the fact of one of pltf.s. having attended & bid at the sale, did not estop them from complaining of the seizure of the goods as their own.—*LINES v. GRANGE* (1854), 12 U. C. R. 209.—CAN.

**r. Satisfaction of mortgage—Action by mortgagor—Execution against mortgagor & mortgagee.]—***HENDERSON v. FORTUNE* (1859), 18 U. C. R. 520.—CAN.

**s. Property seized not within jurisdiction.]—**A writ of *fi. fa.* issued to the sheriff authorises him to seize the property of the execution debtor

for seizing goods of the bkpt., deft. may, without specially pleading them, give in evidence payments necessarily made by him out of the proceeds, in reduction of the damages.—*GOLDSMID v. RAPHAEL* (1836), 3 Scott, 385; 5 L. J. C. P. 329.

**1198. Conversion & detainee—Seizure of privileged goods.]—***RIDEAL v. FORT*, No. 699, *ante*.

**Goods let or hired.]—***See* Nos. 756-759, *ante*.

**When debtor a bankrupt.]—***See* BANKRUPTCY, Vol. V., pp. 824-826, Nos. 6996-7012.

(d) *Improper Sale.*

**1199. Sale under value—Pleading.]—**In an action on the case against the sheriff for negligent & wrongful conduct in conducting the sale of pltf.'s goods under a writ of *fi. fa.* by which they were sold much under value, where, in stating the substance of the writ, the count alleged that the sheriff was commanded to levy 80s. awarded to C. for his damages sustained by occasion of the detaining the debt, that is proved by the writ which stated that the 80s. were awarded to C. for his damages sustained as well by reason of detaining the debt as for his costs, etc., for costs are in legal sense included in the word damages.—*PHILLIPS v. BACON* (1808), 9 East, 298; 103 E. R. 587.

*Annotation:—***Refd.** *Mullet v. Challs* (1851), 16 Q. B. 239.

*—***See, also,** Sub-sect. 4, II. (g), *ante*.

**1200. Failure to sell—Property of joint owners—Execution against one—Measure of damages.]—***TYLER v. LEEDS (DUKE)*, No. 1128, *ante*.

**1201. Sale of distrained goods—Action for pound-breach & rescue—At suit of landlord.]—**Where a bailiff in possession of goods under a landlord's distress receives a *fi. fa.* from the sheriff, & sells the goods under it, the sheriff is liable in an action, for pound-breach, & rescue, at the suit of the landlord.—*REDDELL v. STOWEY* (1841), 2 Mood. & R. 358, N. P.

**1202. Goods belonging to assignees in bankruptcy—Seized before bankruptcy—Sold after—Trover.]—**(1) Trover lies against a sheriff, who, having seized goods under an execution upon a judgment founded on a warrant of attorney, after an act of bkpcy. by debtor, but before the fiat, sells them subsequently to the issuing of the fiat.

(2) The effect of 6 Geo. 4, c. 16, s. 108, is to vary the legal operation of the writ of execution itself, & to prevent such an execution from being carried into effect for the benefit of creditors.

In trover by the assignees of a bkpt., defts. pleaded, that pltf.s., by relation of their title as assignees to the act of bkpcy., were entitled to the possession of the goods; that a writ of *fi. fa.* upon a judgment was directed to defts. as sheriff; & that, before the fiat, defts. executed & levied execution under the writ against the goods, &

thereby committed the grievances, etc.; that the execution was really & *bond fide* executed & levied; & that at the time of executing & levying it, neither defts. nor the execution creditor had notice of a prior act of bkpcy. Replication, that before the recovery of the judgment against bkpts., they executed a warrant of attorney, upon which judgment was entered up, & that the writ of *fi. fa.* was issued thereon; that before the execution of the *fi. fa.*, & the entering up of judgment thereon, bkpts. committed an act of bkpcy.; that a fiat issued within less than two months of the execution & sale; & that after the fiat, & before the sale, the sheriff had notice of the act of bkpcy. & fiat; that defts. did afterwards, & after the issuing of the fiat, & after notice thereof, sell & dispose of the goods, which is the same conversion as in the declaration mentioned. On special demurrer to the replication:—**Held:** (3) the words "executed" & "levied" were synonymous, & signified a seizure in execution; & the replication did not amount to an argumentative denial of the averment in the plea, that defts. executed & levied the execution before the date & issuing of the fiat, but was good by way of confession & avoidance.—*CHESTON v. GIBBS* (1843), 1 Dow. & L. 420; 12 M. & W. 111; 13 L. J. Ex. 43.

*Annotations:—***As to** (1) **Consd.** *Whitmore v. Greene* (1844), 2 Dow. & L. 174; *Re Pearce, Ex p. Crossthwaite* (1885), 14 Q. B. D. 966. **Refd.** *Belcher v. Magnay* (1843), 13 L. J. Ex. 49. **As to** (2) **Fold.** *Graham v. Witherby* (1845), 7 Q. B. 491. **Consd.** *Congrove v. Evetts* (1854), 10 Exch. 298; *Re Pearce, Ex p. Crossthwaite* (1885), 14 Q. B. D. 966.

**1203. ———.]—***EDWARDS v. EVANS* (1843), 2 L. T. O. S. 150.

*Annotation:—***Refd.** *Cheston v. Gibbs* (1843), 13 L. J. Ex. 53.

**1204. Delay in selling—Until return of venditioni exponas—Declarations of officer—Admissibility against sheriff.]—***JACOBS v. HUMPHREY*, No. 1209, *post*.

**Sale of goods let or hired.]—***See* Nos. 760-762, *ante*.

**Excessive sale.]—***See* Nos. 896, 966, *ante*.

**Where debtor a bankrupt.]—***See* BANKRUPTCY, Vol. V., pp. 824-826, Nos. 6996-7012.

(e) *For Acts of Officers.*

*See, generally,* SHERIFFS & BAILIFFS.

**1205. General rule.]—**A sheriff is liable to the acts of his officer acting under colour of his warrant.—*ANON.* (1772), Lofft, 81; 98 E. R. 543.

**1206. ———.]—**If on a *fi. fa.* A., a bailiff, takes the goods of B. trespass lies against the sheriff.—*ACKWORTH v. KEMPE* (1778), 1 Doug. K. B. 40; 99 E. R. 30.

*Annotations:—***Fold.** *Woodgate v. Knatchbull* (1787), 2 Term Rep. 148. **Refd.** *Price v. Peek* (1834), 1 Bing. N. C. 380; *Smith v. Pritchard* (1849), 8 C. B. 565.

**1207. ———.]—**The sheriff is responsible for the

which lies within his territorial jurisdiction & to pass the debtor's title to it without warranting that title to be good. But if the sheriff acts *ultra vires*, e.g. if he seizes & sells property not within his jurisdiction, he cannot invoke the protection which the law gives him when acting within his jurisdiction, & he stands in the same position as an ordinary person who has sold that which he had no title to sell.—*DORAB ALLY KHAN v. KHAJAH MOHEEOODDEEN'S EXECUTORS* (1878), 1 L. R. 3 Calc. 806; 1 L. R. 1 Calc. 55; 24 W. R. 372.—**IND.**

**PART III. SECT. 1, SUB-SECT. 12.—**  
**A. (d).**

**t. Sale before advertised date.]—**Where logs were cut by pltf., & carried away from the land of a judgment debtor after deft., as sheriff, **J.—VOL. XXI.**

had received an execution, under which he had advertised the land for sale, & deft. under the same execution seized the logs & sold them before the time for selling the real property arrived:—**Held:** he was justified in so doing, & might avail himself of such a defence under the general issue.—*FITZSIMMONS v. JONES* (1847), 3 Kerr, 596.—**CAN.**

**a. Material irregularity in publishing sale—Whether substantial injury caused thereby.]—**On an application to set aside a sale, it appeared that there had been a material irregularity in publishing the sale; but no witnesses were called to prove that substantial injury had been caused thereby:—**Held:** the ct. could not presume that substantial injury had been caused from the mere fact of there having been a material irregularity in pub-

lishing a sale; but when both a material irregularity & substantial injury have been proved, the ct. may reasonably presume that the substantial injury is due to such irregularity.—*BONOMALI MOZUMDAR v. WOOMESE CHUNDER BUNDHOPADHYA* (1881), 1 L. R. 7 Calc. 730; 9 C. L. R. 341.—**IND.**

**b. ———.]—***SATISH CHUNDER RAI CHOWDHURI v. THOMAS* (1885), 1 L. R. 11 Calc. 658.—**IND.**

**PART III. SECT. 1, SUB-SECT. 12.—**  
**A. (e).**

**c. Identification of sheriff with bailiff.]—**A sheriff is identified in interest with his bailiff & liable for whatever the latter does under colour of the writ.—*GORDON v. RUMBLE* (1892), 19 A. R. 440.—**CAN.**

**d. ———.]—***DE ZOUCHE v. COOKE*,  
**N N**



*Sect. 1.—Writ of fieri facias: Sub-sect. 12, A.  
B. & C.]*

acts of his officer, though not within the strict line of his duty, provided such acts be afterwards assented to or adopted by the sheriff.

Pltf.'s goods, farming-stock, etc., having been seized under an execution at the suit of P., the parties, with the assent of the officer, agreed that the latter should remain in possession for a certain period, & that the farm should in the meantime be managed by pltf. The sheriff in his return took credit for the money laid out upon the farm; & an action was brought in his name by the under-sheriff, wherein a sum of money was recovered upon a contract entered into by the officer with an in-coming tenant, for the sale of hay, etc., the receipt of which sum was admitted in a letter written by the under-sheriff to pltf.'s attorney:—*Held*: this was sufficient evidence of an assenting by the sheriff to the acts of his officer; & consequently he was liable to pltf. for the surplus proceeds of the goods after satisfying the levy & expenses.—*UNDERHILL v. WILSON* (1830), 6 Bing. 697; 4 Moo. & P. 568; 8 L. J. O. S. C. P. 290.

**1208.** —.]—The sheriff is civilly liable for misconduct of his officer in executing a writ, though the act done be contrary to the express terms of the writ; as if he take the person under a *fi. fa.*—*SMART v. HUTTON* (1833), 8 Ad. & El. 568, n.; 2 Nev. & M. K. B. 426; 3 L. J. K. B. 52; 112 E. R. 954, n.

*Annotations*:—*Consd.* *Smith v. Pritchard* (1849), 8 C. B. 565. *Folld.* *Gregory v. Cotterell* (1855), 5 E. & B. 571. *Consd.* *Burton v. Le Gros* (1864), 34 L. J. Q. B. 91. *Refd.* *Woods v. Finnis* (1852), 7 Exch. 363; *Bagge v. Whitehead* (1892), 66 L. T. 815.

**1209. Declaration by officer—Evidence against sheriff.**—(1) A sheriff is liable for neglect to sell goods taken under a *fi. fa.* within a reasonable time, & before the return of a *venditioni exponas*.

(2) Declaration made by an officer whilst in possession of goods under a *fi. fa.*, after the return of the *fi. fa.*, are evidence against the sheriff, & no new warrant is necessary, after a writ of *venditioni exponas*, to connect the officer with the sheriff.—*JACOBS v. HUMPHREY* (1834), 2 Cr. & M. 413; 4 Tyr. 272; 3 L. J. Ex. 82.

*Annotation*:—*As to* (2) *Refd.* *Brown v. Jarvis* (1836), Tyr. & Gr. 1033.

**1210. Liability for agent of bailiff.**—A sheriff having received a writ of *fi. fa.* directed his warrant to a bailiff, who authorised his son to seize under it. The son having seized, & left a man in possession, the execution debtor went to the office of the bailiff & paid the amount to his son, the bailiff himself being absent. The money never reached the sheriff; & he subsequently directed another warrant to another officer, who made a second seizure under it:—*Held*: the sheriff was bound by the payment to the bailiff's son, & was also liable for his acts.—*GREGORY v. COTTERELL* (1855), 5 E. & B. 571; 25 L. J. Q. B. 33; 26 L. T. O. S.

[1920] 2 W. W. R. 268; 13 Sask. L. R. 227.—CAN.

**e.** —.]—The sheriff is responsible for the acts of his bailiffs; & in the absence of evidence on the part of the sheriff or bailiffs, that the acts complained of were lawful, a cause of action is established.—*O'DEA v. HICKMAN* (1887), 20 L. R. Ir. 431.—IR.

**1. Deputy sheriff**—Warranting that goods belonged to debtor—*In sale under execution.*—*Semble*: the deputy sheriff cannot, in any sale of property in execution, bind the sheriff by giving of his own accord a warranty

that the goods belonged to the debtor in the *fi. fa.* The deputy sheriff would be clearly liable himself on such a warranty.—*MINK v. JARVIS* (1852), 8 U. C. R. 397.—CAN.

**g.** —.]—A deputy sheriff has power to depute an officer to execute a writ of *fi. fa.* & the sheriff is liable for the acts of such officer.—*MORICE v. CHAPMAN* (1889), 28 N. B. R. 224.—CAN.

**PART III. SECT. 1, SUB-SECT. 12.—  
B.**

**h. Seizure of stranger's goods—  
Liability of sureties of bailiff.**—The

125; 2 Jur. N. S. 16; 4 W. R. 48; 119 E. R. 593, Ex. Ch.

*Annotations*:—*Refd.* *Burton v. Le Gros* (1864), 34 L. J. Q. B. 91; *Bagge v. Whitehead* (1892), 66 L. T. 815; *Baker v. Wicks* (1904), 73 L. J. K. B. 410. *Mentd.* *Boulton v. Reynolds* (1859), 29 L. J. Q. B. 11; *Salisbury v. Gladstone* (1859), 5 Jur. N. S. 369; *Toms v. Willson* (1862), 4 B. & S. 442.

**1211. Where bailiff agent of execution debtor—  
What constitutes agency—Interference with sale  
by debtor.**—*WRIGHT v. CHILD*, No. 909, *ante*.

**1212. Identification of sheriff with bailiff.**—*JACOBS v. HUMPHREY*, No. 1209, *ante*.

**1213.** — **Warrant received from sheriff's agents.**—In an action against a sheriff for taking pltf.'s goods, to connect the sheriff with the affair, it was proved by the officer that he took the goods under a warrant, which he produced, & which he stated that he received from A. & Co., the London agents of the sheriff. It was also proved by the under-sheriff that A. & Co. were the London agents of the sheriff:—*Held*: sufficient.—*SHEPHERD v. WHEBLE* (1838), 8 C. & P. 534.

*Annotations*:—*Mentd.* *Brown v. Copley* (1844), 7 Man. & G. 558; *Taylor v. Steele* (1847), 16 M. & W. 605.

**1214. Where process issues out of county court.**—In trover against a sheriff & two bailiffs, the bailiffs pleaded separately, a justification under process issued out of the county ct. New assignment thereto, alleging the conversion to be the retainer of possession by the bailiffs after the issue of a *supersedeas* by the sheriff, & notice thereof to them. Plea to the new assignment, not guilty. The bailiffs were specially appointed, & the sheriff took an indemnity from pltf.'s attorney. A verdict having passed against the sheriff at the trial. On motion to enter the verdict in his favour:—*Held*: he was not liable for the wrongful acts of his bailiffs after the issuing of the *supersedeas*. *Semble*: the sheriff is a judicial officer, with respect to process issued out of the county ct., & therefore, not liable for the acts of his bailiffs; & also the new assignment was ill pleaded, as showing only evidence of a conversion.—*BROWN v. COPLEY* (1844), 7 Man. & G. 558; 2 Dow. & L. 332; 8 Scott, N. R. 350; 13 L. J. C. P. 164; 3 L. T. O. S. 182; 8 Jur. 577; 135 E. R. 224.

*Annotation*:—*Refd.* *Woods v. Finnis* (1852), 16 Jur. 936.

**1215. After bailiff has notice of supersedeas.**—*BROWN v. COPLEY*, No. 1214, *ante*.

**1216. For what acts responsible—Illegal exactions by bailiff.**—*BAKER v. WELLS* (1845), 5 L. T. O. S. 59, 179.

**1217.** — **Illegal removal of fixtures—By purchasers.**—*BRIGGS v. LAURIE*, No. 874, *ante*.

**1218.** — **Seizure of privileged goods.**—*BAGGE v. WHITEHEAD*, No. 700, *ante*.

**B. Bailiff.**

**1219. Seizure of stranger's goods—Procured by fraud of debtor—Plea of fraud in exoneration.**—*GROME v. GROME* (1623), Palm. 395; 81 E. R.

wrongful act of the bailiff, in seizing by mistake the goods of a stranger, was not misconduct or neglect of duty for which his sureties were liable.—*MCARTHUR v. COOL* (1860), 19 U. C. R. 476.—CAN.

**k. Personal misconduct—Demand of warrant.**—16 Vict., c. 177, s. 14 (C. S. U. C., c. 19, s. 195), requiring demand of perusal & copy of warrant does not apply in an action against a bailiff acting under a warrant of attachment or execution from a division ct., where the wrong complained of is the misconduct of debt., & not anything illegal in the writ itself, or in the fact of granting it.—

1140; *sub nom.* GROOM *v.* GROOM, 2 Roll. Rep. 393.

**1220. Unlawful entry—Action for trespass.]—**If A. be in possession of part of a house, & B. of the other part, & an officer enter into A.'s part under a writ against B.'s goods, which are not there, A. may maintain an action against the officer for breaking & entering his house, & need not make any new assignment to a justification under the writ against B.—FALLON *v.* ANDERSON (1792), Peake, 149, N. P.

**1221. ——— Facts showing bailiff a trespasser ab initio.]—**Trespass against a bailiff, for breaking & entering pltf.'s dwelling-house, & there remaining until pltf. paid debt. a sum of money. Plea, that debt. entered under a writ of *fi. fa.*, & warrant thereon directing him to levy. Replication, that before the writ & warrant were fully executed, debt. exacted more than the sum he was entitled to levy:—*Held*: the replication alleged no facts constituting debt. a trespasser *ab initio*, & was therefore bad on demurrer.—SHORLAND *v.* GOVETT (1826), 5 B. & C. 485; 8 Dow. & Ry. K. B. 257; 108 E. R. 181.

*Annotation*:—*Mentd.* Hickman *v.* Maisey, [1900] 1 Q. B. 752.

**1222. ——— Bailiffs working in partnership—Joint liability.]—**BRUNSWICK (DUKE) *v.* SLOWMAN, No. 845, *ante*.

**1223. ——— Measure of damages.]—**BRUNSWICK (DUKE) *v.* SLOWMAN, No. 845, *ante*.

**1224. Unlawfully remaining in possession.]—**LEE *v.* DANGAR, GRANT & Co., No. 170, *ante*.

SAYERS *v.* FINDLAY (1854), 12 U. C. R. 155.—CAN.

**l. Sale of goods seized—Subject to interpleader.]—**Goods seized under a division ct. execution were claimed by pltf., & the bailiff sold them expressly subject to the result of an interpleader, for which he intended to apply. Nothing was paid, & they were to remain in his custody until the decision. Afterwards, on an interpleader, the judge determined that the goods belonged to the execution debtor, & pltf. sued the bailiff in this action for selling the property:—*Held*: he could not recover, for the interpleader proceedings were not invalid, as having taken place after sale, the sale upon such conditions being ineffectual; & the goods, therefore, still remained subject to the execution.—HARMER *v.* COWAN (1864), 23 U. C. R. 479.—CAN.

**m. Withholding goods from true owner—After ownership decided by interpleader action.]—**An execution was issued from the division ct. on Feb. 1, & received by the bailiff on Feb. 3, when the horse in question was seized. Pltf. having claimed it, an interpleader summons issued, & the trial was fixed for Mar. 3. It was only partly heard on that day, & adjourned on pltf.'s application. The horse when seized was given by the bailiff, at pltf.'s request, to one A., who kept it. On the adjournment it was ordered to be given to pltf., on her giving security, & A. gave the security, but kept the horse in his own possession. The interpleader suit was tried on May 7, & pltf. succeeded in it, after which she brought this action of trespass:—*Held*: she was entitled to recover damages for the detention of the horse down to Mar. 3, until which time A. held it for the bailiff; but not after that time, for the order then made that she should give security, as a condition of getting the horse back, was the act of the judge, for which debt. was not responsible.—HENRY *v.* MITCHELL (1875), 37 U. C. R. 217.—CAN.

**—.]—**Deft. C., a division ct. bailiff, was employed by pltf.

to sell certain goods under a chattel mtge. given to pltf. by L. C. advertised & took possession of them, & afterwards executions came into his hands against L., under which the attorney for the execution creditors told him to seize these goods. Pltf. claimed them, & obtained judgment in his favour upon an interpleader issue. C. refused on demand to give up the goods to pltf. until he should consult the attorney, who told him to use his own judgment. Pltf. having brought trespass & trover:—*Held*: C. was liable; he was not entitled to a demand of perusal & copy of the warrants under which he acted, for the action was not brought by reason of any defect in the process; & the jury was warranted in finding, as they did, that he did not believe that he was discharging his duty as bailiff in refusing to give up the goods after the decision of the interpleader, which finding disentitled him to notice of action.—STEWART *v.* COWAN (1877), 40 U. C. R. 346.—CAN.

**o. Liability for guardian of goods under seizure.]—**A bailiff, who, contrary to law, appoints a minor as guardian to effects under seizure, is responsible for the damage suffered by the party seizing in consequence of the disappearance of the effects, & his being deprived of the right of proceeding against the guardian for not producing the same. The measure of damages in such case is the amount which the effects not produced would have realised if they had been sold in satisfaction of the debt.—BARRINGTON *v.* HUISSIERS CORPN. (1897), Q. R. 12 S. C. 284.—CAN.

**p. Improvident sale.]—**A sheriff's bailiff responsible for the sale of a debt's goods under execution should in selling exercise the judgment & discretion of a reasonable & careful business man. Where a bailiff sold *en bloc* for \$460, & the purchaser within a short time resold a part of the goods at auction in parcels for \$1,200, this was held to furnish a *prima facie* case of an absence of such reasonable care. The more acceptance

**1225. Liability for wrongful acts of servant—Levy of excessive sum.]—**Where a servant of a bailiff of a franchise was sworn to serve a process & by deputation from the bailiff he ought not to have served the process but to such a sum & he serves a process of a greater sum without any warrant, & after levies the money & parts with it, the bailiff shall be chargeable.—BAYLIFF'S SERVANT'S CASE (1627), Het. 12; 124 E. R. 302.

**Persons assisting bailiff.]—**See Nos. 1257, 1258, *post*.

### C. Execution Creditors.

**1226. Liability to sheriff—Seizure of third party's goods—Indemnity against damages—Recovered against sheriff.]—**DASHWOOD (SHERIFF OF LONDON) *v.* MANLOVE (1691), Nels. 192; 21 E. R. 823.

**1227. ——— Action for false representation.]—**A sheriff, upon the representation of pltf. in a suit, having seized goods under a *fi. fa.* as belonging to debt., & damages having been recovered against the sheriff by a third person claiming the goods, an action upon the case lies at the suit of the sheriff for the false representation.—HUMPHRYS *v.* PRATT (1831), 5 Bli. N. S. 154; 2 Dow. & Cl. 288; 5 E. R. 269, H. L.

*Annotations*:—*Distd.* Collins *v.* Evans (1844), 5 Q. B. 820; Childers *v.* Wooler (1859), 2 E. & E. 287. *Refd.* Moens *v.* Heyworth (1841), H. & W. 138. *Mentd.* Barley *v.* Walford (1846), 9 Q. B. 197; Dugdale *v.* Lovering (1875), L. R. 10 C. P. 196; Sheffield Corpn. *v.* Barclay, [1905] A. C. 392; Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94.

of the suggestion of the sheriff & of a probable bidder for a sale *en bloc*, without further inquiry, fell short of the care he should have used. Rather than have sacrificed the goods he should have made a return that they remained in his hands unsold for want of a buyer, & he ought to have waited for a writ of *venditioni exponas*. Damages against the bailiff for improvident sale were given to execution creditors for deficiencies on their executions after such sale.—FAIR (T. J.) & Co. & LIVINGSTON *v.* WARDSTROM, [1919] 3 W. W. R. 555; 47 D. L. R. 16.—CAN.

### PART III. SECT. 1, SUB-SECT. 12.—C.

**1226 i. Liability to sheriff—Seizure of third party's goods—Indemnity against damages—Recovered against sheriff.]—**Pltf., as sheriff of A., sued debts. on a joint & several bond of indemnity given by them to indemnify him against all losses, etc., incurred in respect of the sale of certain property taken by him under a writ of execution, issued on a judgment recovered by debts. against S., the property having been claimed by B. under a bill of sale. The property having been sold by pltf. under the execution, he was sued by B., & judgment recovered against him:—*Held*: the recovery of the judgment in respect to the matter against which pltf. had been indemnified, gave him a right of action, & he was not obliged to wait until payment of the amount of the judgment had been enforced before commencing his suit.—BONNETT *v.* RITCHIE (1887), 20 N. S. R. (8 R. & G.) 228; 8 C. L. T. 396.—CAN.

**q. ——— Under second execution—Prior execution by another creditor withdrawn.]—**A sheriff cannot maintain an action on the case as for a fraudulent representation, when, having seized goods on an execution of a third party, he is afterwards instructed by debt. to seize the same goods on his execution, although, on an adverse claim being set up, pltf. in the first writ withdraws his execution, & debt. refuses to withdraw his



*Sect. 1.—Writ of fieri facias: Sub-sect. 12, C.]*

**1228. — Debtor a bankrupt—Payment by sheriff to debtor's assignees—Right to recover.]—**STANDISH v. ROSS, No. 954, *ante*.

**1229. Liability to third party—Trespass.]—**DASHWOOD (SHERIFF OF LONDON) v. MANLOVE (1691), Nels. 192; 21 E. R. 823.

**1230. — Where directing seizure.]—**A declaration in an action against W. & S. stated, that pltf. was employed by the contractors of certain proposed buildings to cart & convey away the earth dug out of the excavations & sites of the proposed buildings with the horses & cart of pltf.; that an action was depending in the Ct. of Q. B. wherein S., one of depts., was pltf., & T. deft., in which action deft. allowed judgment to go by default, & a writ of *fi. fa.* thereupon issued against the goods of deft. in that action directed to W., the other deft., then being sheriff of York, to be put in execution by him as such sheriff; yet the last-mentioned deft., as such sheriff, contriving to injure pltf. by & with the aid, counsel & assistance of S., the other deft., by him wrongfully & maliciously given, seized, took, & carried away, in execution of the writ, divers goods & chattels of pltf., to wit, two horses & one cart, under pretence that the same belonged to T., & afterwards sold the goods & chattels as an execution under the writ against the goods of T. By means of the premises & for want of the use of the horses & cart, pltf. was unable to carry on his employment & business, & thereby lost great gains, etc.:—*Held*: the declaration showed no cause of action against S.—SEDMAN v. WALKER (1847), 1 Exch. 589; 10 L. T. O. S. 190.

**1231. — Question of fact.]—**(1) Whether a seizure of particular goods under a *fi. fa.* was directed by the execution creditor, so as to make him liable for the act of the sheriff, is a question of fact.

(2) It is not within the scope of the implied

or to indemnify the sheriff, & the adverse claimant afterwards prosecutes the sheriff, & recovers for the illegal seizure & detention.—JARVIS v. COMMERCIAL BANK (1842), 6 O. S. 337.—CAN.

**1229 i. Liability to third party—Trespass.]—**Seizure of personal property in execution of a decree is not an act of the ct., but one of the party himself seeking execution, for which he is liable if any trespass be committed on the property of a stranger.—ROY RASH BEHARY LALL v. WAJAN (1869), 12 B. L. R. 208, n.; 11 W. R. 516.—IND.

**r. — Whether protected by order of court—Barring claim to goods as against sheriff.]—**In an action of trespass against pltf. in a writ of *fi. fa.* for taking, etc.; the goods of the present pltf., deft. pleaded that he had committed the trespasses in aid of the sheriff's officer acting under the writ, & at his request, in the execution of the same, & then showed an interpleader order of the judge of the county ct. out of which the *fi. fa.* had issued, by which the present pltf., who had claimed the goods when seized under the *fi. fa.* was barred from prosecuting any claim to the goods against the sheriff or his officer, or against any person acting under or in aid of them:—*Held*: the order, though valid so far as respects the sheriff & his officer, could not be a protection to the execution creditor.—PARK v. TAYLOR (1852), 1 C. P. 414.—CAN.

**s. — When right of action accrues—On demand & refusal.]—**Deft. G. & two others, having executions against W. & K., directed the seizure

of certain goods. Pltf., to whom the goods belonged, demanded them of the bailiff, who refused to give them up. G. afterwards directed the bailiff not to sell or do anything more on his execution, but it did not appear that he told pltf. of this, or ordered the goods to be returned to him. Pltf. then brought trover against the bailiff & G., & the bailiff afterwards sold the goods under the other executions, paying over no portion of the proceeds to G.:—*Held*: G. was liable for the full value of the goods, for pltf.'s right of action accrued on the demand & refusal, & was not defeated by what took place afterwards.—MACKLEM v. DURRANT (1871), 32 U. C. R. 98.—CAN.

**1230 i. — Where directing seizure.]—**If the judgment creditor indorses the debtor's wrong address on the writ, & the bailiff being misled thereby goes to that address & seizes the goods of a person who is not the judgment debtor, the judgment creditor is liable to the person whose goods are seized.—ROBERTS v. JOHNSTON (1893), 14 N. S. W. L. R. 426; 10 N. S. W. W. N. 132.—AUS.

**1230 ii. — Under deft.'s writ of execution against A., the sheriff, upon deft.'s express instructions, seized hay knowing it was claimed to be, as in fact, under the finding of the ct., it was, the property of pltf. co., of which A. was secretary. No proceedings were taken for its removal or sale. The seizure was released, but for two months pltf. co. was not notified thereof:—Held: pltf. co. was entitled to recover against deft. for damage to the hay by water & loss of a beneficial sale while under**

authority of the solr. of a judgment creditor issuing a *fi. fa.* to direct the sheriff to seize particular goods.

(3) A person whose goods are wrongly seized by direction of the solr. has a remedy against the sheriff & also the solr., & I think that is a sufficient indemnity without making the execution creditor himself liable (JESSEL, M.R.).

(4) If a *fi. fa.* is necessary [the solr.] must issue it & make the proper indorsement on the writ, & if he makes a mistake in so doing his client is responsible (LINDLEY, L.J.).—SMITH v. KEAL (1882), 9 Q. B. D. 340; 47 L. T. 142; 46 J. P. 615; 31 W. R. 76, C. A.; *affg.* S. C., *sub nom.* KEAL v. SMITH, 51 L. J. Q. B. 489, D. C.

*Annotations*:—As to (1) **Consd.** Thomas v. Rowlands (1886), 3 T. L. R. 148; Morris v. Salberg (1889), 22 Q. B. D. 614. **Refd.** Montague v. Davies, Benaché, [1911] 2 K. B. 595. As to (2) **Folld.** Morris v. Salberg (1889), 22 Q. B. D. 614. **Consd.** Lee v. Rumilly (1891), 55 J. P. 519. **Folld.** Hewitt v. Spiers & Pond (1896), 13 T. L. R. 64. **Refd.** Serjeant v. Nash, Field (1903), 72 L. J. K. B. 630.

**1232. — Deft., having recovered judgment against C., directed the sheriff to levy the amount on the goods of C. at his place of business. Before the judgment C. had, by bill of sale, assigned these goods to pltf. as security for money lent. The sheriff seized the goods, & on an interpleader issue it was found that some of the goods in fact belonged to C. In an action of trespass to goods:—Held: as there was nothing inaccurate in the directions in the indorsement on the writ of *fi. fa.* given by deft. to the sheriff so as to mislead him, no action lay against deft.—CONDY v. BLAIBERG (1891), 55 J. P. 580; 7 T. L. R. 424, C. A.**

**1233. Liability to execution debtor—Writ sued out after debt paid—Trespass.]—**CLISSOLD v. CRATCHLEY, No. 393, *ante*.

**1234. Liability for acts of solicitor—Evidence of retainer necessary.]—**The conduct of a cause, by an attorney, in the name of B. does not make B. liable in trespass for acts done under a *fi. fa.* in

seizure.—MEADOW FARM, LTD. v. IMPERIAL BANK OF CANADA, [1922] 2 W. W. R. 909; 66 D. L. R. 743.—CAN.

**1230 iii. — Certain goods of H.'s were seized under an execution at the suit of deft., & claimed by pltf. The issue was decided in pltf.'s favour, who then sued deft. for the seizure, which he had directed:—Held: the action would lie.—HARMER v. GOUINLOCK (1861), 21 U. C. R. 260.—CAN.**

**1230 iv. — In execution of a decree against his judgment debtor, deft. caused the cattle of pltf., a stranger, to be seized & taken. Pltf. filed his claim under s. 246, Act VIII. of 1859, which was allowed. Subsequently to the admission of the claim, but before the order for release of the cattle, three of the bullocks died. Pltf. sued for damages consequent on the seizure of the cattle & for the value of the three bullocks which had died during the time they were in the custody of the officer of the ct.:—Held: deft. was liable to pltf. for damages sustained by him in consequence of the seizure & detention of the cattle.—MUSHAMAT SUBJAN BIBI v. SHEIKH SARIATULLA (1869), 3 B. L. R. A. C. 413; 12 W. R. 329.—IND.**

**t. Liability to execution debtor—Writ sued out before payment.]—**An action will not lie for levying & distraining on deft.'s goods after payment of the debt & cost owing to pltf. upon a writ of *fi. fa.* sued out before such payment. It is not the duty of a pltf. to run after his writ, when once it has rightfully issued. T. obtained a judgment against M. for £11 17s. in the district ct. & execution was issued

such cause, without some evidence of a retainer.—**CROOK v. WRIGHT** (1825), Ry. & M. 278, N. P.

**1235. — Directions by solicitor to sheriff—Indorsement on writ.]—**A direction by the attorney to the sheriff, to seize under a writ of execution, is an act done by an agent within the scope of his authority, & binds the principal. The client, therefore, is liable in trespass for the act of the attorney, in directing the sheriff to take the goods of the wrong party.—**JARMAIN v. HOOPER** (1843), 6 Man. & G. 827; 1 Dow. & L. 769; 7 Scott, N. R. 663; 13 L. J. C. P. 63; 2 L. T. O. S. 209; 8 Jur. 127; 134 E. R. 1126.

*Annotations:—***Appld.** Collett v. Foster (1857), 26 L. J. Ex. 412. **Distd.** Childers v. Wooler (1859), 2 E. & E. 287; Smith v. Keal (1882), 9 Q. B. D. 340. **Follid.** Morris v. Salberg (1889), 22 Q. B. D. 614. **Consd.** Lee v. Rumilly (1891), 55 J. P. 519. **Refd.** Barker v. Stead (1847), 3 C. B. 946; Whalley v. O'Connell (1849), 13 J. P. 585; Thomas v. Rowlands (1886), 3 T. L. R. 148; James v. Richnell (1887), 58 L. T. 278.

**1236. — — — — —.]—**Deft. having recovered judgment in an action against G. M. M., his solr. indorsed on a writ of *fi. fa.*, directing the sheriff to levy the amount of the judgment upon the goods of G. M. M., a statement that the execution debtor resided at a certain address, which, however, was not the address of such execution debtor, but that of his father, G. M. The sheriff seized the goods of G. M. the father. In an action brought by G. M. against the deft., the execution creditor, in respect of such seizure, the jury found that the sheriff seized the goods of the pltf. instead of those of G. M. M. the son, because he was misled by the direction he received from the solr. of deft.:—**Held:** upon such finding, deft. was liable in respect of the wrongful seizure of the goods.—**MORRIS v. SALBERG** (1889), 22 Q. B. D. 614; 58 L. J. Q. B. 275; 61 L. T. 283; 53 J. P. 772; 37 W. R. 469; 5 T. L. R. 376, C. A.

*Annotations:—***Distd.** Condy v. Blalberg (1891), 7 T. L. R. 424. **Consd.** Lee v. Rumilly (1891), 55 J. P. 519. **Follid.** Hewitt v. Spiers & Pond (1896), 13 T. L. R. 61. **Refd.** Clissold v. Cratchley (1909), 101 L. T. 911.

**1237. — — — — —.]—**Deft. having recovered

thereon. Before the writ was enforced M. paid to T.'s attorney £11; the attorney thereupon promised to stay execution; but as no notice was sent to the district ct. office the writ was enforced & a levy made on M.'s goods, the bailiff refusing to leave unless he received the whole amount specified in the writ, together with costs of execution. On the day following he was withdrawn:—**Held:** an action for trespass would not lie.—**VON MEYER v. TAYLOR** (1874), 12 N. S. W. S. C. R. 252.—**AUS.**

**a. — Judgment entered contrary to good faith.]—**A. gave to B. a *cognovit*, judgment to be entered immediately, but execution to issue only in certain events. On Nov. 8, B. put a *fi. fa.* into the sheriff's hands, & A.'s goods were seized at his store, but he was allowed to retain them on giving security to the sheriff. After the seizure A. obtained a summons to set aside the *fi. fa.* for breach of faith, which was enlarged at B.'s request. On Jan. 13, while the application was pending, B.'s attorney telegraphed to his agent at London not to let the sheriff close A.'s store. The sheriff then requested instructions from the agent what to do, but received none; afterwards this agent told him of reports that A. was selling the property, etc., & suggested a sale, & the sheriff accordingly sold a portion of the goods on Jan. 16 & 17. On Jan. 17 the sheriff received orders not to proceed, & immediately stopped the sale; he had no notice of the summons, which was made absolute on Jan. 22:—**Held:** the *fi. fa.* having been set aside, as obtained by B. on a judgment entered contrary to good faith, B. was

liable to A. in trespass for all damages sustained from the sale as well as the seizure.—**JACOBS v. ROBB** (1853), 10 U. C. R. 276.—**CAN.**

**b. — Municipal corporation.]—**A municipal corpn. is liable in damages for an illegal seizure of moveables belonging to its debtor.—**BLAIN v. GRANBY CORPN.** (1873), 5 R. L. O. S. 180.—**CAN.**

**c. — Execution levied after debt paid—Not at instigation of creditor—Mistake of clerk of court.]—**Deft. having recovered a judgment against pltf. in the division ct. at T., a transcript was ordered to be sent to another division ct. at U., but by some mistake in the division ct. office it was not sent until after the debt had been paid, & the clerk of the T. ct. indorsed on it a direction to the clerk of the other ct. to issue execution & remit the money to him when made. Pltf.'s goods having been seized under this execution, he sued deft. for having wrongfully & maliciously & without reasonable or probable cause caused the same to be issued & pltf.'s goods to be seized thereunder. Deft. had never interfered or given any directions beyond instructing the suit to be brought:—**Held:** pltf. could not recover; it was his duty to protect himself by seeing that the clerk of the division ct. was notified of payment of the debt; & there was therefore no malfeasance or omission on deft.'s part; deft. was not liable in trespass, for he had not authorised the direction by the clerk to issue execution, which was no part of the clerk's duty.—**TUCKETT v. EATON** (1884), 0 O. R. 486.—**CAN.**

**d. Liability for acts of solicitor—**

judgment in an action against Mrs. C., an administratrix, his solr. indorsed in a writ of *fi. fa.* a statement that Mrs. C. was a licensed victualler, & resided at the Scotch Stores, Kilburn, & directed the sheriff to seize the goods of Mrs. C. without reference to the fact that the judgment was against her as administratrix. The address given was really that of pltf., a licensed victualler, whose business Mrs. C. managed. Mrs. C. was not a licensed victualler. Deft. having seized pltf.'s goods at the address given:—**Held:** deft. was liable in an action for damages for wrongful seizure of pltf.'s goods.—**LEE v. RUMILLY** (1891), 55 J. P. 519; 7 T. L. R. 303, C. A.

*Annotation:—***Refd.** Clissold v. Cratchley (1909), 79 L. J. K. B. 274.

**1238. — — — — —.]—****SMITH v. KEAL**, No. 1231, *ante*.

**1239. — — — — —.]—**What was indorsed on the writ was to be taken to be within the solr.'s authority & therefore the act of the client, & if it might reasonably mislead the sheriff's officer into seizing the wrong goods, & the sheriff was so misled, the client would be liable (**LORD ESHER**, M.R.).—**HEWITT v. SPIERS & POND, LTD.** (1896), 13 T. L. R. 64.

**1240. — Scope of authority.]—****LEVI v. ABBOTT**, No. 849, *ante*.

**1241. — — — — —.]—****JARMAIN v. HOOPER**, No. 1235, *ante*.

**1242. — — — — —.]—****SMITH v. KEAL**, No. 1231, *ante*.

**1243. Ratification by creditor—Whether giving rise to liability—Wrongful seizure.]—**An act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him: in such case the principal is bound by the act, whether it be to his detriment or for his advantage, & whether it be founded on a tort or

*Writ sued out after debt paid.]—*In trespass for seizing goods it appeared that defts., who had a claim against B., instructed their attorney to collect it, & that the attorney, having issued execution, handed it to the sheriff, informing him that B. lived at Paris, where he kept a fruit store. The deputy sheriff said it would be a good time "to make a haul," being near Christmas, to which the attorney answered that it would: & the seizure was then made. Pltf. having claimed the goods, the attorney told the sheriff to hold possession, as they wished to make inquiries, & the sheriff did so until an interpleader order issued:—**Held:** defts. were bound by the acts & directions of their attorney, & there was sufficient evidence to go to the jury to connect them with the seizure.—**SLAUGHT v. WEST** (1866), 25 U. C. R. 391.—**CAN.**

**—.]—**A promise by the attorney of a judgment creditor to indemnify a sheriff for seizing goods under an execution issued on the judgment is binding upon his client where the attorney has the management of the business, & the subsequent acts of the client show that he had adopted the proceedings which his attorney had taken in reference to the execution.—**SHIRREFF v. MUIRHEAD** (1885), 25 N. B. R. 196.—**CAN.**

**Solicitor exceeding authority.]—**Where the endorsement of the writ of *fi. fa.* is not misleading, the execution creditor cannot be made liable by written instructions, given by his solr. to the sheriff. It is not within the scope of the implied authority of the solr. of a judgment creditor issuing a *fi. fa.* to direct



*Sect. 1.—Writ of fieri facias: Sub-sect. 12, C. & D.]*

a contract, to the same extent & with all the consequences which follow from the same act if done by his previous authority; but it is otherwise where the party did not at the time assume to act as agent.

Thus, where goods are wrongfully seized by the sheriff under a valid writ of *fi. fa.*, the execution creditor does not, by a subsequent ratification only, become liable in trespass for the original seizure.—*WILSON v. TUMMAN* (1843), 6 Man. & G. 236; 1 Dow. & L. 513; 6 Scott, N. R. 894; 12 L. J. C. P. 306; 1 L. T. O. S. 314; 134 E. R. 879.

*Annotations*:—*Consd.* *Walker v. Hunter* (1845), 3 C. B. 324; *Withers v. Parker* (1859), 4 H. & N. 524; *Ancona v. Marks* (1862), 7 H. & N. 686. *Folld.* *Woollen v. Wright* (1862), 1 H. & C. 554. *Consd.* *Brook v. Hook* (1871), L. R. 1 Exch. 89. *Appld.* *Morris v. Salberg* (1889), 22 Q. B. D. 614. *Consd.* *Keighley, Maxsted v. Durant*, [1901] A. C. 240. *Refd.* *Whitmore v. Green* (1844), 8 Jur. 697; *Collier v. Clarke* (1845), 5 L. T. O. S. 475; *Follett v. Hoppe* (1847), 5 C. B. 226; *Walker v. S. E. Ry., Smith v. S. E. Ry.* (1870), 23 L. T. 14; *McCaul v. Strauss* (1883), Cab. & Kl. 106; *Re Becket, Purnell v. Paine*, [1918] 2 Ch. 72.

**1244.** — — — **Becoming party to interpleader proceedings.**—If a sheriff's officer, without any direction from the execution creditor, or any interference by him, in executing a *fi. fa.* seize a stranger's goods, who makes a claim, & the officer takes out an interpleader summons, & the execution creditor appears & accepts an issue to try the ownership of the goods, the execution creditor does not thereby become liable to an action of trespass for the wrongful act of the sheriff's officer in taking the goods.—*WOOLLEN v. WRIGHT* (1862), 1 H. & C. 554; 31 L. J. Ex. 513; 10 W. R. 715; *sub nom.* *WRIGHT v. WOOLLEN*, 7 L. T. 73, Ex. Ch.

*Annotations*:—*Refd.* *Blaker v. Seager* (1897), 76 L. T. 392; *Durant v. Roberts & Keighley, Maxsted*, [1900] 1 Q. B. 629.

the sheriff to seize particular goods. Interpleader proceedings by the solr. without the express authority of the execution creditor is not a ratification of the act of the sheriff in seizing the particular goods.—*SPARROW v. CORNELL* (1900), 2 W. A. L. R. 78.—**AUS.**

**g.** — — — **Execution after judgment satisfied—Joint liability.**—Where, after a debt. had paid & satisfied a judgment recovered against him, pltf.'s attorney, acting under pltf.'s instructions, issued a *fi. fa.* under which debt.'s goods were taken in execution:—*Held*: pltf. & the attorney were jointly liable as trespassers; & the mere fact of the attorney acting under his client's instructions, without setting up, even if it would be a defence, want of notice or knowledge of the judgment being satisfied, afforded him no protection.—*MOONEY v. MAUGHAN* (1875), 25 C. P. 244.—**CAN.**

**h.** — — — **Authority presumed.**—Where an attorney issued an execution in the name of debt., an attorney residing at a distance from him, & delivered it to the sheriff, & afterwards attended before a judge to oppose an application to set the execution aside:—*Held*: in the absence of evidence to negative the authority & to show that debt. did not receive the proceeds of the execution, it might be inferred that the attorney had authority to issue the execution.—*WILSON v. STREET* (1855), 3 All. 251.—**CAN.**

**k.** — — — **After judgment in an action for a money demand, the solr. for pltf. has implied authority to issue execution on the judgment, without any further or express instructions from his client, who is bound by & liable for the proceeding though tortious.**—*SANDFORD v. PORTER &*

*WAINE*, [1912] 2 I. R. 551.—**IR.**

**l. Liability for wrongful acts of bailiff—Bailiff acting under colour of writ.**—Defts. entrusted the execution of a writ of *fi. fa.* which they had obtained against pltf. to a special bailiff. The bailiff went to pltf.'s selection near N. & leaving a man in possession returned to N. with pltf. Pltf. then paid the bailiff £51 & obtained a receipt signed by him in these terms: "Received from M. £51 on account of G. & Co." Pltf.'s evidence was that such payment & receipt was in full discharge of the writ. Next day the bailiff said he had made a mistake & demanded £6 more, which pltf. refused to pay. The bailiff then returned to pltf.'s selection & sold his sheep. In an action to recover damages as for an overcharge & also for trespass & conversion, defts. paid money into ct. & pleaded the writ of *fi. fa.*:—*Held*: as the bailiff acted under colour of the writ, defts. were liable for his acts.—*MURPHY v. GOLDMAN* (1886), 7 N. S. W. L. R. 334; 3 N. S. W. W. N. 23.—**AUS.**

**m.** — — — **Trespass—Writ & warrant must be proved.**—The writ of *fi. fa.* & warrant to the bailiff must be proved, or its production accounted for, in order to charge pltf. in the execution with an act of trespass committed by the bailiff.—*CAMERON v. LOUNT* (1848), 4 U. C. R. 275.—**CAN.**

**n.** — — — **Adoption of sale under prior execution—Necessity for proof.**—In trespass against the sheriff & A. & B., pltfs. claiming the goods under a bill of sale, it was proved that the sheriff's bailiff, under a *fi. fa.* at the suit of another creditor, seized the goods & sold them; & after paying the amount of that execution paid the

**1245. Liability for wrongful acts of bailiff—Seizure after execution stayed.**—Bailiffs, who had served an execution in breach of an injunction, find money hid in the house, & carry it away. Party, at whose suit the execution was taken out, ordered to make satisfaction.—*CHILDRENS v. SAXBY* (1883), 1 Vern. 207; 23 E. R. 417.

**1246.** — — — **If attending seizure—Goods of third party.**—If a man employing an officer attended with the officer, who seized in his presence goods of a third person under an execution which he had sued out, he made himself responsible for the officer's acts. *Semble*: in such a case, where he was present & interfered he ought to point out to the officer what goods were to be taken, & what not; also, if in such a case an unjustifiable assault was committed by the officer, the party authorising the seizure would not be answerable for it, unless it was shown in some way to have been committed by his direction.—*MEREDITH v. FLAXMAN* (1831), 5 C. & P. 99, N. P.

**1247.** — — — **Assault by officer.**—*MEREDITH v. FLAXMAN*, No. 1246, *ante*.

**1248.** — — — **An execution was issued at the suit of A. The bailiff broke & entered the house & took away the goods of another person than the execution debtor. The owner of the house & goods, Mrs. J., gave notice to the bailiff that they did not belong to the execution debtor, & the bailiff communicated this to A. A.'s attorney wrote in reply to the bailiff: "My client has handed me yours of the 8th inst. She thinks Mrs. J.'s claim has no foundation, but declines to give you any instructions. You will please to do what is right in the matter":—*Held*: this did not render A. liable for the wrongful acts of the bailiff.—*JONES v. SMITH* (1867), 16 L. T. 609.**

balance to A. & B. on account of their execution:—*Held*: after verdict for pltf., the execution creditors, A. & B., could not be made trespassers by relation or adoption of the sale under such prior execution; & there being no proof that the sheriff himself did anything, & the writs not being produced, nor any warrant to the bailiff, the verdict was not sustained by proof, & there should be a new trial without costs.—*TILT v. JARVIS* (1856), 5 C. P. 486.—**CAN.**

**o.** — — — **Evidence of interference—Sufficiency.**—In an action against the sheriff & six others for seizing goods, the evidence as to four defts. was that they were creditors of the execution debtor, & joined in the indemnity bond to the sheriff, & that they told the bailiff to sell, & afterwards attended & bid at the sale:—*Held*: sufficient to charge them.—*GRAY v. FORTUNE* (1859), 18 U. C. R. 253.—**CAN.**

**p.** — — — **Seizure & sale of goods of stranger.**—*Held*: a pltf. in a division ct. suit who, on an execution against the goods of A., indemnified the bailiff for seizing & selling the goods of B., was not entitled to notice, or to the protection as to venue.—*DOLLERY v. WHALEY* (1862), 12 C. P. 105.—**CAN.**

**q.** — — — **Bailiff acting under creditor's orders.**—In an action against a division ct. bailiff & two execution creditors for seizing goods:—*Held*: there was evidence to show that it was one seizure & one sale under the direction & for the benefit of the two defts. holding separate executions & they were therefore jointly liable.—*LOUGH v. COLEMAN* (1869), 29 U. C. R. 367.—**CAN.**

## D. Solicitors.

**1249. Liability to sheriff—Several writs—Infringement of priorities.]**—A writ of *fi. fa.* having issued against a debtor at the suit of one creditor, & before it was executed, the attorney of another creditor having in the meantime obtained a warrant upon another *fi. fa.* from the same sheriff, directed to their clerk, & executed it before the prior execution was put in :—*Held* : the attorneys were liable to the sheriff, who had made a return that he had levied the money under a first writ, & had in fact paid the amount of the debt to the creditor, to refund the money levied under the second execution, in an action for money had & received to his use.

The contest is, who shall have the surplus of debtor's effects after the payment of the rent? I am of opinion that it must be appropriated to that writ which is first lodged with the sheriff to execute, inasmuch as it has the priority in point of law. Debtor had more than enough to pay the rent, & therefore the surplus ought to have been appropriated to the first writ (ABBOTT, C.J.).—*SAWLE v. PAYNTER* (1822), 1 Dow. & Ry. K. B. 307.

**1250. Liability to third party—Seizure of party's goods—Wrongful direction on writ.]**—G. recovered judgment in an action of debt against D. & employed his attorney, to whom he had previously assigned the debt in repayment of advances, to sue out execution. The attorney, who lived at Cheltenham, caused a *fi. fa.* to be sued out, directed to the Sheriff of Buckinghamshire, to levy on D.'s goods; & the attorney's London agent indorsed on wrot: "The defendant resides at Wolverton, & is an innkeeper. Levy," etc., D. was, at the time, residing with his mother-in-law, at an inn, of which she was the proprietor, at Wolverton, & was assisting her in the management, but had no interest in the premises or the goods upon them. The sheriff, in execution of the *fi. fa.*, seized goods of the mother-in-law at her inn. She brought trespass against the attorney, & obtained a verdict upon issues joined on pleas of not guilty & denial of her property in the house & goods. On motion to enter a verdict for debt :—*Held* : the verdict against the attorney on the issue upon not guilty was maintainable, the facts furnishing evidence that he had directed the sheriff to levy on pltf.'s goods.—*ROWLES v. SENIOR* (1846), 8 Q. B. 677; 15 L. J. Q. B. 231; 10 Jur. 354; 115 E. R. 1028.

*Annotations* :—*Distd.* Condry v. Blalberg (1891), 7 T. L. R. 424. *Refd.* Thomas v. Rowlands (1886), 3 T. L. R. 148; Lee v. Rumilly (1891), 55 J. P. 519. *Mentd.* Morris v. Salberg (1889), 22 Q. B. D. 614.

## PART III. SECT. 1, SUB-SECT. 12.—D.

**r. Liability to third party—Seizure of party's goods—By bailiff's assistant—Bailiff indemnified only.]**—The attorney for an execution creditor, who indemnified the bailiff who executed the *fi. fa.*, is not responsible to an assistant whom the bailiff employed, for damages recovered against such assistant by a person who claimed the goods seized as his property.—*EADUS v. DOUGALL* (1864), 14 C. P. 352.—*CAN.*

**s. ———.]**—Defts., who lived in H., had a claim against W. at L., & thinking he was carrying on business on his own account issued a writ therefor through their solrs. C. & B., which was served by C., who went to L. under special instructions from defts. to do so, & to take such steps as he might think best to recover the claim. A judgment was afterwards obtained, & an execution against W.'s goods issued. The sheriff sent his officer to execute the writ, who was informed by W. that he had no goods, which the officer believed to be true,

& so informed the sheriff, who accordingly notified C. & B. C. & B. refused to accept this, & wrote to the sheriff in effect that he had acted improperly in not seizing the goods, on *ex p.* statements, & that he must take such action as would enable him to test the truth of the statements he had acted on. The sheriff then seized the goods & applied for an interpleader order. The goods were proved to be pltf.'s. In an action to recover damages occasioned by the seizure :—*Held* : the sheriff must be assumed to have seized, under the circumstances, under instructions from defts.' solrs., & as the solrs. were acting under special instructions from defts. to take such proceedings as they might think best, the latter were liable to pltf.—*WILKINSON v. HARVEY* (1887), 15 O. R. 346.—*CAN.*

**—.]**—Action for wrongful seizure of goods against A., the execution creditor, & B., her attorney, jointly. The attorney, who had given the sheriff a *fi. fa.* against C., sent a

**1251. ———.]**—Deft., attorney for P., obtained judgment in a suit against W. F., & thereupon caused a *fi. fa.* to issue against the goods of deft. in that suit, & delivered the writ to the sheriff, the present pltf. The writ was indorsed, "The defendant is [a blank] & resides at Redcar, in your bailiwick." W. F., in fact, lived at Coatham, a village adjoining Redcar, at which latter place his son, of the same name, was living. The writ was handed by the sheriff to an officer, who went to Redcar, & took possession of the goods of W. F., the son, who subsequently brought an action against the sheriff, & recovered damages. Deft. believed that W. F., the son, was the person against whom the judgment had been obtained, & the sheriff & his officers had no knowledge of the person intended by the writ, except that which they derived from the indorsement upon it. In an action by the sheriff to recover damages from deft., on the ground of his having directed & required pltf. to seize the goods of W. F., of Redcar, deft. pleaded that at the time, etc., he had good & probable reason to believe, & did in good faith believe, that W. F., named in the writ, resided at Redcar, & that he so indorsed & delivered the writ, with no other intent or view than to furnish such information as he believed to be true, for assisting pltf., as sheriff, in duly ascertaining whether there were in his bailiwick goods & chattels of W. F., named in the writ :—*Held* : the action was not maintainable, as the indorsement upon the writ was nothing more than a statement by deft., for the purpose of affording information to the sheriff, leaving him to his discretion as to how he would act.—*CHILDERS v. WOOLER* (1859), 2 E. & E. 287; 29 L. J. Q. B. 129; 2 L. T. 49; 6 Jur. N. S. 444; 8 W. R. 321; 121 E. R. 109, Ex. Ch.

*Annotations* :—*Consd.* Smith v. Keal (1882), 9 Q. B. D. 340; Morris v. Salberg (1889), 22 Q. B. D. 614; Sheffield Corpn. v. Barclay, [1903] 2 K. B. 580. *Refd.* Thomas v. Rowlands (1886), 3 T. L. R. 148.

**1252. ———.]**—*SMITH v. KEAL*, No. 1231, *ante*.

**1253. ———.]**—The execution creditors' solicitor endorsed a writ of *fi. fa.* with the statement that the execution debtor resided in a certain street, & the solr.'s clerk pointed out the house to the sheriff's officer. This was his brother's house, & his goods were seized :—*Held* : it was for the jury to say whether this was a direction to levy there so as to render the solr. liable.—*THOMAS v. ROWLANDS* (1886), 3 T. L. R. 148, D. C.

**1254. Liability to execution debtor—Writ sued out after debt paid.]**—*CLISSOLD v. CRATCHLEY*, No. 393, *ante*.

man with the sheriff to point out C.'s goods; he pointed out goods which the sheriff seized & which, on an interpleader issue, were found to be the goods of D., pltf. in the present action :—*Held* : the attorney having directed the sheriff to seize the goods which the man should point out, the consequence was just the same as if he had himself pointed out the wrong goods & directed the sheriff to seize them, & he was personally liable.—*POWER v. FLEMING* (1870), 1 R. 4 C. L. 404.—*IR.*

**1254 i. Liability to execution debtor—Writ sued out after debt paid.]**—Where, after deft. had paid & satisfied a judgment recovered against him, pltf.'s attorney, acting under pltf.'s instructions, issued a *fi. fa.* under which deft.'s goods were taken in execution :—*Held* : pltf. & the attorney were jointly liable as trespassers; & the mere fact of the attorney acting under his client's instructions, without setting up want of notice or knowledge of the judgment being satisfied, afforded him no



*Sect. 1.—Writ of fieri facias: Sub-sect. 12, D., E.*

**Liability of execution creditor for acts of solicitor.]—***See Nos. 1234–1239, ante.*

**Scope of authority.]—***See Nos. 849, 1231, 1235, ante.*

#### *Of Other Persons.*

**1255. Private person seizing goods—Debtor being bankrupt—Trover—Necessity for joining officer.]—**Trover lies against taker in execution of bkpt.'s goods without joining the officer.—*RUSH v. BAKER* (1734), Cunn. 130; 2 Stra. 996; Bull. N. P. 41; 94 E. R. 1107.

*Annotations:—***Expld.** Whitmore v. Greene (1844), 2 Dow. & L. 174. **Refd.** Menham v. Edmonson (1799), 1 Bos. & P. 369; Balme v. Hutton (1833), 11 Bing. 471; Woollen v. Wright (1862), 1 H. & C. 554.

**1256. — Attachment—Necessity for notice—R. S. C., Ord. 44, r. 2.]—**Under the above Ord. a motion for an attachment for removing goods out of the custody of the sheriff can only be made on notice.—*EYNDE v. GOULD* (1882), 9 Q. B. D. 335; 31 W. R. 49; *sub nom. Re EYNDE v. GOULD, Ex p. YORKSHIRE SHERIFF*, 51 L. J. Q. B. 425, D. C.

*—See, generally, CONTEMPT OF COURT, Vol. XVI., p. 62, Nos. 703–709.*

**1257. Persons assisting bailiff.]—**To trespass for entering a house & taking goods, deft. may plead that he entered in aid of a bailiff & took the goods of another.—*TEMPLEMAN v. CASE* (1711), 10 Mod. Rep. 24; 88 E. R. 608.

**1258. — Constable.]—**Where a constable of a parish accompanied a sheriff's officer, who was about to seize goods under a *fi. fa.*, for the purpose of keeping the peace, but interfered in aid of the officer & assisted in removing some of the goods:—*Held*: he was liable in trespass for so doing.—*BLUIKLEY v. LORD, HULTON & TICKEL* (1838), 2 J. P. 777.

**1259. Auctioneer—Action against sheriff, auctioneer & others—Right of indemnity from co-defendants.]—**There is no implied promise on the part of a sheriff to indemnify an auctioneer who sells goods seized under a *fi. fa.* when employed to do so by the sheriff's officer to whom the warrant was directed & pltf.'s attorney in the original cause, although the sheriff certified to the excise office that he himself had seized & sold the goods, & he in fact received his poundage from the produce of the sale. If an action of trespass is brought by the owner of the goods against the auctioneer, the sheriff & others, all the damages awarded in which are levied upon the auctioneer alone, he has no action for a contribution against any of his co-defts.

*Qu.*: whether if the sheriff had himself actually employed & directed the auctioneer to sell the

goods, there would have been an implied promise of indemnity.—*FAREBROTHER v. ANSLEY* (1808), 1 Camp. 343, N. P.

*Annotations:—***Consd.** Shackell v. Rosier (1836), 2 Bing. N. C. 634. **Refd.** Betts v. Gibbins (1834), 2 Ad. & El. 57. **Mentd.** Burrows v. Rhodes, [1899] 1 Q. B. 816.

#### *F. Rights of Third Parties.*

**1260. Right of action—Malicious seizure of goods.]—***SANDERS v. POWELL* (1664), 1 Lev. 129; 83 E. R. 332; *sub nom. SAUNDERS v. POWELL*, 1 Sid. 183; 1 Keb. 693.

*Annotations:—***Mentd.** R. v. Lawly (1731), 1 Barn. K. B. 459; Adamson v. Jarvis (1827), 4 Bing. 66.

**1261. — Party estopped from disputing seizure—Acquiescence in seizure & sale.]—**In an action of trover, it appeared that, pltf. being the legal owner of the goods in question, they were seized while in the actual possession of a third party, under an execution against such third party, & sold to deft.:—*Held*: under a plea denying pltf.'s possession, deft. might show that pltf. authorised the sale; & a jury might infer such authority from pltf. consulting with the execution creditor as to the disposal of the property, without mentioning his own claim, after he knew of the seizure & of the intention to sell.—*PICKARD v. SEARS* (1837), 6 Ad. & El. 469; 2 Nev. & P. K. B. 488; Will. Woll. & Dav. 678; 112 E. R. 179.

*Annotations:—***Expld. & Distd.** Fletcher v. Manning (1844), 12 M. & W. 571. **Consd.** Ringham v. Clements (1848), 12 Q. B. 260; Richards v. Johnson (1859), 5 Jur. N. S. 520. **Refd.** Banks v. Newton (1847), 16 L. J. Q. B. 142; Dunston v. Paterson (1857), 2 C. B. N. S. 495; Harding v. Hall (1866), 14 L. T. 410. **Mentd.** *Ex p.* Branson (1837), 3 Hodg. 132; Gregg v. Wells (1839), 10 Ad. & El. 90; Sandys v. Hodgson (1839), 10 Ad. & El. 472; Brown v. Thorpe (1841), 11 L. J. Ch. 73; Cheltenham & Grand Junction Western Union Ry. v. Daniel, Cheltenham & Grand Junction Western Union Ry. v. De Medina (1841), 6 Jur. 577; Doe d. Muston v. Gladwin (1845), 6 Q. B. 953; Boydell v. Eckstein (1846), 7 L. T. O. S. 261; Nickells v. Atherstone (1847), 10 Q. B. 944; Freeman v. Cooke (1848), 2 Exch. 654; Machu v. L. & S. W. Ry. (1848), 2 Exch. 415; Price v. Groom (1848), 2 Exch. 542; Doe v. Challis (1851), 17 Q. B. 166; West & Green v. Elmore (1851), 18 L. T. O. S. 207; Howard v. Hudson (1853), 2 E. & B. 1; R. v. Ambergate, etc. Ry. (1853), 20 L. T. O. S. 246; Foster v. Mentor Life Assce. (1854), 3 E. & B. 48; Jordan v. Money (1854), 5 H. L. Cas. 185; Hawker v. Hallewell (1856), 3 Sm. & G. 194; Tyerman v. Smith (1856), 6 E. & B. 719; Bill v. Richards (1857), 26 L. J. Ex. 409; Simpson v. Accident Death Insce. (1857), 2 C. B. N. S. 257; Clarke & Chapman v. Hart (1858), 6 H. L. Cas. 633; Cornish v. Abington (1859), 4 H. & N. 549; Levy v. Hale (1859), 29 L. J. C. P. 127; *Re* North British Australasian Co., *Ex p.* Swan (1859), 7 C. B. N. S. 400; Piggett v. Stratton (1859), 1 De G. F. & J. 33; Cairncross v. Lorimer (1860), 3 L. T. 130; Broadbent v. Barlow (1861), 3 De G. F. & J. 570; Cave v. Mills (1861), 8 Jur. N. S. 363; White v. Greenish (1861), 11 C. B. N. S. 209; Loffus v. Maw (1862), 3 Giff. 592; Palmer v. Met. Ry. (1862), 31 L. J. Q. B. 259; Ashpitel v. Bryan (1863), 3 B. & S. 474; Metters v. Brown (1863), 7 L. T. 795; Swan v. North British Australasian Co. (1863), 2 H. & C. 175; McCance v. L. & N. W. Ry. (1864), 11 L. T. 426; Phillips v. Im Thurn (1866), L. R. 1 C. P. 463; McEvoy v. Drogheda Harbour Comrs. (1867), 16 W. R. 34; *Re* Bahia & San Francisco Ry. (1868), L. R. 3 Q. B. 584;

protection.—*MOONEY v. MAUGHAN* (1875), 25 C. P. 244.—**CAN.**

**a. — Countermand of instructions to sheriff.]—**Pltf.'s attorney had directed the sheriff not to sell the goods of L., but to levy upon another deft. in the suit. That deft. having remonstrated & urged him to sell, he telegraphed to the attorney to know if he should do so, & in answer was told that he must act as he thought fit according to his own judgment. He thereupon sold L.'s goods:—*Held*: this answer was an abandonment of the first direction.—*BOULTON v. SMITH* (1859), 17 U. C. R. 400.—**CAN.**

**b. — Enforcing three executions—Though on client's instructions.]—**Under the facts of this case, there being no ground for apprehension of losing the debt, that the conduct of

the attorney in issuing & enforcing three executions to different counties was improper, & that his client's instructions could form no justification. The ct., therefore, ordered him at once to refund to defts. the poundage retained by two of the sheriffs, & to pay the costs of the executions directed to them, & of this application.—*HENRY v. COMMERCIAL BANK OF CANADA* (1859), 17 U. C. R. 104.—**CAN.**

**c. —.]—**An attorney indorsing a writ of possession & *fi. fa.* in ejectment, the proceedings on which were ultimately set aside for irregularity:—*Held*: liable for the trespass committed by the sheriff in executing the same.—*BENSON v. CONNOR* (1857), 6 C. P. 356.—**CAN.**

**d. —.]—**Deft., a divisional ct. bailiff, refused on demand to give up

the goods to pltf. until he should consult the attorney who told him to use his own judgment:—*Held*: this did not make the attorney a wrongdoer, & answerable for the bailiff's conduct.—*STEWART v. COWAN* (1877), 40 U. C. R. 346.—**CAN.**

**e. — Judgment signed a day too soon.]—***WARD v. GRUT, Mac.* 560.—**N.Z.**

#### **PART III. SECT. 1, SUB-SECT. 12.—F.**

**1. Decree authorising sale of defendant's interest in estate—Whole estate sold—Including interests of third parties—Refusal of court to confirm sale.]—**Pltf. made application to confirm a sale of certain land to M., purporting to have been made under a judgment of the ct. in this action. The judgment provided that upon

*Knights v. Wiffen* (1870), L. R. 5 Q. B. 660; *Webb v. Herne Bay Comrs.* (1870), L. R. 5 Q. B. 642; *Stimson v. Farnham* (1871), L. R. 7 Q. B. 175; *Goddard v. Smith* (1872), L. R. 3 P. & D. 7; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 6 H. L. 352; *Le Clerc v. Greene* (1873), 22 W. R. 428; *Morrison v. Universal Marine Insco.* (1873), L. R. 8 Exch. 197; *Shropshire Union Rys. & Canal Co. v. R.* (1875), L. R. 7 H. L. 496; *Wadling v. Oliphant* (1875), 1 Q. B. D. 145; *Walrond v. Hawkins* (1875), L. R. 10 C. P. 342; *Goodwin v. Roberts* (1876), 1 App. Cas. 476; *Polak v. Everett* (1876), 1 Q. B. D. 689; *Angus v. Dalton* (1877), 3 Q. B. D. 85; *Johnson v. Credit Lyonnais Co.* (1877), 3 C. P. D. 32; *Rumball v. Metropolitan Bank* (1877), 2 Q. B. D. 194; *Re Church & Empire Fire Insce. Fund, Andress' Case* (1878), 8 Ch. D. 126; *Simm v. Anglo-American Telegraph Co., Anglo-American Telegraph Co. v. Spurling* (1879), 5 Q. B. D. 188; *Alderson v. Maddison* (1880), 5 Ex. D. 293; *Joseph v. Webb, Joseph v. Lyons, Joseph v. Pidcock, Joseph v. Jones* (1883), Cab. & El. 262; *Manchester & Oldham Bank v. Cook* (1883), 49 L. T. 674; *Ashby v. Day* (1885), 54 L. J. Ch. 935; *Roe v. Mutual Loan Fund* (1887), 19 Q. B. D. 347; *Colonial Bank v. Cady & Williams, London Chartered Bank of Australia v. Cady & Williams* (1890), 15 App. Cas. 267; *Low v. Bouverie*, [1891] 3 Ch. 82; *Tomkinson v. Balkis (Consolidated Co.* (1891), 64 L. T. 816; *Flatau v. Sawyer* (1892), 8 T. L. R. 656; *Sarat Chunder Dey v. Gopal Chunder Lal* (1892), 8 T. L. R. 732; *Re Bentley & Yorkshire Breweries, Ex p. Harrison* (1893), 69 L. T. 204; *Henderson v. Williams*, [1895] 1 Q. B. 521; *Scholfeld v. Londesborough* (1895), 14 R. 151; *Hunt v. Fripp* (1897), 77 L. T. 516; *Bechuana-land Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; *Re National Bank of Wales*, [1899] 2 Ch. 629; *Palmer v. Moore*, [1900] A. C. 293; *Farquharson v. King*, [1901] 2 K. B. 697; *Morison v. London County & Westminster Bank* (1913), 108 L. T. 379; *Coleman v. London County & Westminster Bank*, [1916] 2 Ch. 353; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777; *Pearl Mill Co. v. Ivy Tannery Co.*, [1919] 1 K. B. 78; *Colley v. Overseas Exporters*, [1921] 3 K. B. 302; *MacLaine v. Gatty*, [1921] 1 A. C. 376; *Bradford v. Price* (1923), 92 L. J. K. B. 871; *Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117.

**1262. — Right to goods arising in futuro—Mortgage.**—In Mar. 1838, A. demised to B., by way of mtge., a house, to hold thenceforth for the remainder of an unexpired term, wanting one day; & by the same deed he assigned & transferred to B. all the fixtures, & other chattels & effects, in & about the house, to hold to B. for his absolute use & benefit, subject to two provisions in the deed; first, that B. should reconvey the house, if A. should pay the principal money, with interest, on June 24 following; secondly, that if default should be made at the day & time, it should be lawful for B. to enter & take the rents, etc. A. continued in possession of the premises, & upon June 10 the sheriff entered & levied upon the goods on the premises under a *fi. fa.*, at the suit of a creditor of A.:—*Held*: B. had no right of possession under the demise prior to June 24, & not having entered, could not maintain trespass against the sheriff.—*WHEELER v. MONTEFIORE* (1841), 2 Q. B. 133; 1 Gal. & Dav. 493; 11 L. J. Q. B. 34; 6 Jur. 299; 114 E. R. 53.

*Annotations*:—*Expld.* *Doe d. Parsley v. Day* (1842), 2 Q. B. 147. *Refd.* *White v. Morris* (1852), 11 C. B. 1015; *Barker v. Furlong*, [1891] 2 Ch. 172. *Mentd.* *Rogers v. Grazebrook* (1846), 8 Q. B. 895; *Evans v. Wright* (1857), 27 L. J. Ex. 50.

**1263. — Effect of interpleader proceedings.**—A judge's order, made under Interpleader Act, 1831 (c. 58), s. 6, directed that the goods should be sold by the sheriff, & the money paid into ct. to abide the event of an issue to be tried between the claimant & the execution creditor. The issue was tried, & a verdict found for the claimant, who thereupon brought an action of trespass against the sheriff, for breaking & entering his dwelling-house, & seizing his goods & converting them to his own use. The ct. made absolute a rule for striking out so much of the declaration as charged the seizure & conversion of the goods. *Semble*: the

proceedings ought in such a case to be stayed altogether.—*ABBOTT v. RICHARDS* (1846), 15 M. & W. 194; 3 Dow. & L. 487; 15 L. J. Ex. 330; 6 L. T. O. S. 395; 153 E. R. 819.

*Annotations*:—*Refd.* *Jessop v. Crawley* (1850), 19 L. J. Q. B. 319; *Mercer v. Stanberry* (1856), 20 J. P. 407; *Jones v. Williams* (1859), 28 L. J. Ex. 324; *Cramer v. Matthews* (1881), 7 Q. B. D. 425. *Mentd.* *Jousiffe v. Bayley* (1866), 15 L. T. 219.

**1264. — On action for unlawful entry.**—Goods seized by the sheriff under a *fi. fa.* against A., out of the ct. of Exch., were claimed by B., to whom they were restored upon the establishment of her right upon an issue directed, at the sheriff's instance, under the interpleader Act, 1831 (c. 58). B. afterwards brought trespass against the sheriff for breaking & entering her house, on the occasion of the seizure. The ct. refused to stay the proceedings, holding the relief & protection afforded to the sheriff by Interpleader Act, 1831 (c. 58), s. 6, to be confined to disputed claims to the goods seized, or to their proceeds. *Semble*: if the proceeding in this ct. were a violation of the interpleader order, the application for relief should have been made to the ct. in which the interpleader took place.—*HOLLIER v. LAURIE* (1846), 3 C. B. 334; 4 Dow. & L. 205; 15 L. J. C. P. 294; 10 Jur. 860; 136 E. R. 134.

*Annotations*:—*Distd.* *Jessop v. Crawley* (1850), 15 Q. B. 212; *Winter v. Bartholomew* (1856), 11 Exch. 704. *Consd.* *Smith v. Critchfield* (1885), 14 Q. B. D. 873.

**1265. —**—Goods were seized in the house of J., under a warrant of execution from a county ct. in an action against M. J. claimed the goods. The judge of the county ct., on interpleader summons, adjudicated that they belonged to M. J. then sued the officer who had seized, in Queen's Bench, in trespass for entering his premises & seizing the goods:—*Held*: under 9 & 10 Vict. c. 95, s. 118, a judge might stay the action in Queen's Bench, it not being shown that there was any cause of complaint besides that of entering the premises to seize the goods. *Semble*: it would have been otherwise if the adjudication in the county ct. as to the goods had been in favour of J., the claimant.—*JESSOP v. CRAWLEY* (1850), 15 Q. B. 212; *Rob. L. & W.* 357; *Cox, M. & H.* 296; 19 L. J. Q. B. 319; 15 L. T. O. S. 135; 14 Jur. 697; 117 E. R. 438.

*Annotations*:—*Distd.* *Cater v. Chignell* (1850), 15 Q. B. 217. *Consd.* *Jousiffe v. Bayley* (1866), 15 L. T. 219.

**1266. —**—Where an interpleader summons under 9 & 10 Vict. c. 95, s. 118, in respect of goods taken in execution, has been decided in favour of the claimant, an action of trespass may afterwards be brought for breaking & entering the premises in which the goods were seized.—*CATER v. CHIGNELL* (1850), 15 Q. B. 217; 117 E. R. 440; *sub nom.* *CHATER v. CHIGNELL*, 19 L. J. Q. B. 520; 14 Jur. 697.

*Annotations*:—*Consd.* *Jousiffe v. Bayley* (1866), 15 L. T. 219. *Refd.* *Jones v. Williams* (1859), 4 H. & N. 706.

**1267. —**—A sheriff entered the house of A., & seized therein his goods, & also goods belonging to the execution debtor. A. brought an action of trespass against the sheriff, who thereupon obtained an interpleader summons, & the judge ordered that the execution creditor be barred as to the goods of A., & that all further proceedings in the action be stayed:—*Held*: the judge had power under the Interpleader Act, 1831 (c. 58), s. 6, to stay the proceedings, & the power was properly exercised, it not appearing that the sheriff had committed any excess.—*WINTER v. BARTHOLOMEW* (1856), 11 Exch. 704;

default by deft. in the payment of a certain sum, all his estate, right, title & interest in the land should be sold:

—*Held*: as it was shown upon this application that other persons than deft. had an interest in the land, the

sale could not be confirmed.—*BUTLER v. FORBES* (1906), 4 W. L. R. 579.—*CAN.*



*Sect. 1.—Writ of fieri facias: Sub-sect. 12, F.; sub-sect. 13, A.]*

25 L. J. Ex. 62; 26 L. T. O. S. 226; 4 W. R. 264; 156 E. R. 1013.

*Annotations:—Consd. Smith v. Critchfield (1885), 14 Q. B. D. 873. Refd. Carpenter v. Pearce (1858), 27 L. J. Ex. 143.*

**1268.** ———.]—On the hearing of an interpleader summons in the county ct. under 9 & 10 Vict. c. 95, s. 118, in respect of goods which had been taken in execution under an order of the county ct., upon a judgment recovered in the said ct. at the suit of A. against B., the judge of the county ct. decided that the goods were the property of claimant, the present pltf., & thereupon made the following order: "That the goods are the property of claimant; that A. do pay the costs of the proceedings, with 1s. damages for the seizure of the goods; & that the high bailiff do pay 1s. damages for the seizure of the goods." Such damages & costs were duly paid to & received by claimant, who then brought the present action against deft., the high bailiff, for trespass to his house, & for seizing his goods, to which deft. pleaded "Not guilty by statute":—*Held*: the proceedings in the county ct. under Interpleader Act, 1831 (c. 58), & the award of damages by the judge of the county ct. in respect of the seizure of the goods, did not bar pltf.'s right of action against the high bailiff for the trespass to his house in respect of which no damages had been awarded & no adjudication had been made by the judge of the county ct.

There is no jurisdiction in the county ct. judge to entertain the question of trespass under such circumstances; his jurisdiction is limited to deciding whose is the property in the goods seized, & what may be said to arise incidentally from the seizure of those goods, in relation to the goods themselves.

*Qu.*: whether there was any power in the judge of the county ct., on the hearing of the interpleader summons, to make an order restraining claimant from bringing the present action.—*JOUSIFFE v. BAYLEY (1866), 15 L. T. 219; 30 J. P. 808.*

**1269.** ———.]—Under a writ of *fi. fa.* against a son the sheriff seized goods of his father, in whose house the son lived. The son had in fact no goods there except some wearing apparel. The writ was indorsed with a statement that the son lived at a certain address, which was in fact the father's house though the indorsement did not state this. The father gave verbal notice to the bailiff that he claimed the goods, & the next day the sheriff issued an interpleader summons. Meanwhile the father had commenced an action against the sheriff alone claiming an injunction to restrain him from remaining in possession, & the judge without requiring notice to be given to the execution creditor, granted the injunction. The sheriff appealed, & meanwhile the execution creditor on the hearing of the interpleader summons had admitted that the goods seized were the father's. No misconduct on the part of the sheriff was proved:—*Held*: (1) the action was premature, the father ought to have waited to see the result of the interpleader proceedings & he must bear his own costs of the motion for the injunction in both cts.; (2) the judge ought not to have granted the injunction without hearing the execution creditor who should have been made a party to the action or at any rate served with notice of it.—*HILLIARD v. HANSON (1882), 21 Ch. D. 69; 47 L. T. 342; 31 W. R. 151, C. A.*

**1270.** ———.]—Where the sheriff seized

goods under a *fi. fa.* & a person other than the person against whom the process issued claimed the goods & paid out the sheriff under protest:—*Held*: the money so paid to the sheriff under protest was the proceeds of goods taken in execution within the meaning of Ord. 57, r. 1 (b), & the sheriff was entitled to interplead in respect thereof.

Where the sheriff in the execution of a *fi. fa.* enters the premises of a person other than the execution debtor & there seizes goods believing erroneously that such goods belong to the execution debtor, the sheriff may, upon interpleader proceedings, be protected against an action for trespass to the land as well as against an action for seizure of the goods, if no substantial grievance has been done to the person whose premises are wrongfully entered (*per CUR.*).—*SMITH v. CRITCHFIELD (1885), 14 Q. B. D. 873; 54 L. J. Q. B. 366; 54 L. T. 122; 33 W. R. 920; 1 T. L. R. 421, C. A.*  
*Annotation:—Refd. De Coppett v. Barnett (1901), 17 T. L. R. 273.*

**1271.** ——— *Conduct of execution debtor.*]—As a general rule, where one person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, & to be reimbursed by the debtor against the money paid to redeem them, & in the event of the goods being sold to satisfy the debt the owner is entitled to recover the value of them from the debtor; & the right to indemnity exists although there may be no agreement to indemnify, & although there may be in that sense no privity between the owner of the goods & the debtor. Deft. bought the business of an ironmonger in his own name for his two sons; he paid the greater part of the purchase-money. The banking account of the business was kept by him, & he drew the cheques on that account. A society having obtained judgment in an action against deft., certain goods of his sons were seized by the sheriff: the sons claimed the goods; but upon an interpleader summons taken out by the sheriff, the claim of the sons was barred, & the goods were sold. They realised £1,300, & this sum was paid into ct. in the action by the society against deft. as a security for what might be found due to the society from deft. upon taking certain accounts. Deft.'s sons were afterwards adjudicated bkpts., & pltf. was appointed their trustee. Deft. agreed with pltf. that, in consideration of his sons' goods having been seized & sold on behalf of the society in respect of an alleged claim against him, he would pay £300 *per annum* to pltf. until he should have paid a sufficient sum to pay the trade creditors of his sons in full. Pltf. having brought the present action to recover £1,200 due by virtue of the above-mentioned agreement, or in the alternative £1,300, the value of the goods seized:—*Held*: even if deft.'s express promise to pay £1,200 was not legally binding upon him, nevertheless the action was maintainable; for although the decision upon the interpleader summons did not estop deft. from showing that the seizure by the sheriff was unlawful, nevertheless he had by his conduct led to the seizure, & the goods of his sons had been legally taken for his debt; deft., therefore, was bound to indemnify his sons, & pltf., as their trustee in bkpcy., was entitled to have judgment entered for him for the sum of £1,200, which he was willing to accept instead of £1,300, the value of the goods seized.—*EDMUNDS v. WALLINGFORD (1885), 14 Q. B. D. 811; 54 L. J. Q. B. 305; 52 L. T. 720; 49 J. P. 549; 33 W. R. 647, C. A.; previous proceedings (1884), 1 Cab. & El. 334, N. P.*

*Annotations:—Consd. The Orchis (1890), 15 P. D. 38. Re Button, Ex p. Haviside, [1907] 2 K. B. 180,*

**1272.** — Where sheriff made all reasonable & necessary inquiries.]—*MORRIS v. SALBERG*, No. 1236, *ante*.

**1273.** Goods of third party seized—Rescue by owner from sheriff—Legality of.]—By a contract of sale, the property sold was to be paid for by ready money. The vendee induced the servant of the vendor to deliver it for a cheque upon a banker, by representing it to be as good as money; in fact he had overdrawn his account for many months, & when the cheque was presented, payment was refused. On the same day that the goods were purchased, the vendee gave a warrant of attorney to a creditor under which judgment was immediately entered up, & execution issued, & the property in question seized by the bailiff of a liberty. While it was in his custody, the original owner rescued it:—*Held*: in an action brought against the latter by the bailiff of the liberty for the rescue, that the question whether the contract of sale was so vitiated by fraud as to prevent the property in the goods passing to the vendee, depended upon a question of fact, which ought to have been submitted to the jury, viz., whether the vendee had obtained possession of the goods with a preconceived design not to pay for them.—*BRISTOL (EARL) v. WILSMORE* (1823), 1 B. & C. 514; 2 Dow. & Ry. K. B. 755; 1 Dow. & Ry. M. C. 407; 1 L. J. O. S. K. B. 178; 107 E. R. 190.

*Annotations*:—*Refd.* *Stephenson v. Hart* (1828), 1 Moo. & P. 357. *Mentd.* *Peer v. Humphrey* (1835), 2 Ad. & El. 495; *Dixon v. Hewetson* (1863), 16 L. T. 295.

**1274.** — Whether larceny.]—On a trial for larceny of goods laid by the indictment in the high sheriff, the jury found that the prisoner had taken certain goods which were in the possession of the sheriff, & the goods taken were the prisoner's own property, & that the sheriff had seized them in an execution against the prisoner's wife, being under the impression that they were her goods:—*Held*: on these findings the verdict was one of not guilty.—*R. v. KNIGHT* (1908), 73 J. P. 15; 25 T. L. R. 87; 53 Sol. Jo. 101; 1 Cr. App. Rep. 186, C. C. A.

Against other parties to execution.]—*See* Subsect. 12, A.—*El.*, *ante*.

#### SUB-SECT. 13.—WRITS IN AID.

##### A. *Venditioni Exponas*.

*See* R. S. C., Ord. 43, rr. 2, 5.

**1275.** Part of writ of fieri facias.]—*HUGHES v. REES*, No. 1292, *post*.

**1276.** To compel sale by sheriff.]—*CLERK v. WITHERS*, No. 66, *ante*.

**1277.** —.]—*MILTON v. ELDRINGTON*, No. 817, *ante*.

**1278.** —.]—All actions for breach of duty of the office of sheriff must be brought against the

high sheriff, though by default of the under sheriff or bailiff. The legal & proper mode of compelling a sale by the sheriff where he makes delay or refuses is by writ of *venditioni exponas* (LORD MANSFIELD).—*CAMERON v. REYNOLDS* (1776), 1 Cowp. 403; 98 E. R. 1154.

*Annotation*:—*Mentd.* *Yorke v. Chapman* (1839), 10 Ad. & El. 207.

**1279.** Necessity for—Where sheriff out of office.]—Goods seized under a *fi. fa.* may be sold by the sheriff after he is out of his office, without a *venditioni exponas*.—*AYRE v. ADEN* (1605), Cro. Jac. 73; 79 E. R. 62; *sub nom.* *AYER v. ADEN*, Yelv. 44; *sub nom.* *ADYN v. AYRE*, Moore, K. B. 757.

*Annotations*:—*Consd.* *Wilcox & Litchey v. Pokinhorn* (1728), 1 Barn. K. B. 81. *Refd.* *Mildmay v. Smith* (1672), 2 Saund. 343; *Clerk v. Withers* (1704), 2 Ld. Raym. 1072; *Jeanes v. Wilkins* (1749), 1 Ves. Sen. 195. *Mentd.* *Langdon v. Wallis* (1698), 1 Lut. 582.

**1280.** Sale at less than value of goods—Whether sheriff concluded by previous return.]—Where the sheriff by virtue of the writ *venditioni exponas* sells the thing under the value, there he shall be discharged, but otherwise where he sells the goods *ex officio* (DODDERIDGE, J.).—*SLYE'S CASE* (1619), Godb. 276; 78 E. R. 161.

**1281.** — At best rate obtainable.]—*R. v. BIRD*, No. 584, *ante*.

**1282.** When granted—Extent in fieri facias issued on same day.]—*R. v. DEVON, SHERIFF*, No. 1051, *ante*.

**1283.** Return to writ—Want of buyers—Attachment for such return.]—The ct. refused to grant an attachment against the sheriff, because he had returned to a writ of *venditioni exponas* that part of the goods levied remained in his hands for want of purchasers.—*LEADER v. DANVERS* (1798), 1 Bos. & P. 359; 126 E. R. 952.

**1284.** — — —.]—Attachment refused against the sheriff for not selling under a *venditioni exponas*, where he had returned he could not sell for want of buyers.—*ANON.* (1815), 2 Chit. 390.

**1285.** — — — Amendment of return.]—*NEEDHAM v. BENNET*, No. 1052, *ante*.

**1286.** — Whole sum produced by sale—No deduction to be included—Application to court for allowance of extra charge.]—The sheriff selling under a *venditioni exponas* is not entitled to deduct anything, either for extra expenses or poundage or to return such a deduction. He must make a return of the whole sum produced by the sale, when the ct. order it to be paid over, deducting poundage he must move the ct. for any extra allowance to which he may be entitled.—*R. v. JONES* (1814), 1 Price, 205; 145 E. R. 1378.

**1287.** — Goods sold—Proceeds retained for other party.]—A sheriff having returned a levy under a writ of *fi. fa.*, cannot return to the

#### PART III. SECT. 1, SUB-SECT. 13.—A.

**g.** What sheriff may sell—Debtor's beneficial interest.]—The sheriff under a writ of *venditioni exponas*, has only power to sell the debtor's beneficial interest, & the rights of other beneficiaries antecedent to the registration of the writ of *fi. fa.* will be protected on proper proceedings being taken at any time before the registration of the transfer from the sheriff.—*Re BOSQUET* (1883), 17 S. A. L. R. 173.—*AUS*.

**h.** Return to writ—Time for.]—A *ven. ex.* against lands having but a few days between the *teste* & return is irregular, although the statutes respecting the *teste*, delivery, & return of the *fi. fa.* may have been complied.—*ARMOUR & DAVIS v. JACKSON* (1824), Tay. 115.—*CAN*.

**k.** — — —.]—It is no defect in a writ of *ven. ex.* against lands, that it has not three months between its *teste* & return.—*LANDRUM v. MACMARTIN* (1842), 1 U. C. R. 394.—*CAN*.

**l.** — — — "Goods on hand."]—An attachment may issue for returning "goods on hand" to a *ven. ex.*—*HARPER v. POWELL* (1839), (1823–1900), 3 Ont. Dig. 6430.—*CAN*.

**m.** Sheriff parting with goods levied—What remedy available.]—If the sheriff has parted with goods which he had levied on under an execution, he cannot be called on to sell under a *ven. ex.*; the remedy against him is by action.—*PHILIPS v. DICKENSON* (1831), (1825–1897), N. B. Dig. 713.—*CAN*.

**n.** Second writ of fieri facias

issued—Before return to *venditioni exponas*.]—A sheriff returned "goods on hand" to a *fi. fa.*, having made no seizure, & pltf. issued a *ven. ex.*, but, discovering that there had been no seizure, issued another *fi. fa.*, without a return to the *ven. ex.* The second *fi. fa.* was set aside with costs, which the sheriff was ordered to pay, & to amend his return to the first writ.—*LEMOINE v. RAYMOND* (1845), 2 U. C. R. 379.—*CAN*.

**o.** Sale by sheriff—After return day.]—The sheriff may sell the goods under a *ven. ex.* after return day.—*BANK OF UPPER CANADA v. MACFARLANE* (1848), 4 U. C. R. 396.—*CAN*.

**p.** Irregularity in issue of writ—Sheriff's deed—Validity of.]—Any irregularity in issuing the *ven. ex.* will



*Sect. 1.—Writ of fieri facias: Sub-sect. 13, A. & B.*  
*Sect. 2: Sub-sects. 1, 2, 3 & 4, A.]*

*venditioni exponas*, that he was sold the goods, but detains the money for another party, pltf. under a prior writ of execution; & the ct. will quash such a return on motion. They will not, after such a proceeding, give the sheriff leave to amend his return.—*ROWE v. TAPP* (1821), 9 Price, 317; 147 E. R. 105.

*Annotation:—Distd. R. v. Herts, Sheriff, Dod v. Coleman* (1841), 9 Dowl. 916.

**1288. ——— Amendment of return.]**—If, to a writ of *venditioni exponas* for goods already taken in execution, with a clause of *fi. fa.* for the residue, the sheriff return that he has made of the said goods £20, but omit, by mistake, to return *nulla bona* to the *fi. fa.*, the ct. will allow the sheriff to amend the return, & will set aside an attachment issued against him for not making the return.—*R. v. MONMOUTH, SHERIFF* (1814), 1 Marsh. 344.

**1289. ———.]**—*ROWE v. TAPP*, No. 1287, *ante.*

**1290. ———.]**—*NEEDHAM v. BENNET*, No. 1052, *ante.*

**1291. ——— Action for false return—Whether sheriff estopped by return—As to claim by landlord for rent.]**—*LEVY v. HALE*, No. 1140, *ante.*

**1292. ——— Failure to comply with order to make—Attachment.]**—The writ of *venditioni exponas* is a branch of the writ of *fi. fa.*, not a distinct process; & therefore a judge has power in vacation under 2 Will. 4, c. 39, s. 15, to order the sheriff to return such writ, & an attachment may be obtained for disobedience to such order, pursuant to r. 13 Michaelmas Term, 1832.—*HUGHES v. REES* (1838), 4 M. & W. 468; 7 Dowl. 56; 1 Horn & H. 347; 8 L. J. Ex. 46; 150 E. R. 1513.

*Annotation:—Folld. R. v. Berkshire, Sheriff, Anstice v. Sheppard* (1840), 4 Jur. 412.

**1293. ———.]**—If a writ of *venditioni exponas* be not returned in obedience to a judge's order made in vacation, though the writ is not mentioned in the rule, the sheriff is subject to an attachment under rule 13, Michaelmas Term, 1832.—*R. v. BERKSHIRE, SHERIFF, ANSTICE v. SHEPPARD* (1840), 4 Jur. 412.

**1294. ——— Stay of proceedings.]**—Where an attachment is issued against the sheriff for not returning a writ of *venditioni exponas*, it is no objection to an application to stay proceedings under the attachment on terms, that it is strictly regular, & the sheriff in contempt, & although the application is made after a return to the *fi. fa.* in which the value of the goods seized was not stated.—*R. v. HERTS, SHERIFF, DOD v. COLEMAN* (1841), 9 Dowl. 916; Woll. 185; 5 Jur. 893.

#### *B. Distringas nuper vicecomitem.*

*See R. S. C., Ord. 43, r. 5.*

**1295. To whom directed—To new sheriff.]**—Where an old sheriff has levied on goods & has made no return of the sale or paid the proceeds to the judgment creditor, a *distringas* may be awarded to the new sheriff to compel payment of the money levied by distress.—*HELBROKE v. BEAUMONT* (1579), Ch. Cas. in Ch. 123; 21 E. R. 75.

not affect a purchaser under the sheriff's deed.—*DOE d. HAZEN v. HAZEN* (1854), 3 All. 87.—**CAN.**

**q. ———.]**—Ejectment having been brought for land sold & conveyed by the sheriff to pltf. under a writ of *ven. ex.* issued upon a county ct. judgment, based upon a divisional ct. judgment recovered on proceedings commenced by attachment & summons

issued the same day:—*Held*: the sale under the *ven. ex.* was void, by reason of the transcript of the judgment from the division ct. not having shown that the proceedings in that ct. were commenced by attachment.—*HOPE v. GRAVES* (1864), 14 C. P. 393.—**CAN.**

**r. When sheriff can sell—On issue of writ by court or judge.]**—The sheriff cannot proceed to the sale of

**1296. For what purpose—To compel payment of money levied.]**—*HELBROKE v. BEAUMONT*, No. 1295, *ante.*

**1297. ———.]**—*CLERK v. WITHERS*, No. 66, *ante.*

**1298. ——— To compel sale & delivery of proceeds to new sheriff.]**—*CLERK v. WITHERS*, No. 66, *ante.*

**1299. When refused or quashed—Unreasonable delay by creditor—After return to writ of fieri facias.]**—Where the late Sheriffs of London, having taken deft.'s goods in execution under a writ of *fi. fa.* were ruled, on Feb. 8, 1811, to return the writ, & returned on Feb. 11 that they had the goods in hand for want of buyers; after which pltf., without issuing a writ of *venditioni exponas*, lay by till after a commission of bkpt. against deft. founded on an act of bkpey. prior to the execution, & till after the then sheriffs had delivered the goods up to the assignees of the bkpt. on Mar. 16, & had gone out of office in Sept. following; & then, in Jan. 1812, issued a writ of *distringas* to the present sheriffs to distrain the late sheriffs for not selling the goods; the ct. set aside the last-mentioned writ; leaving pltf. to his remedy by action, if the commission were fraudulent, as alleged by them.—*CLUTTERBUCK v. JONES* (1812), 15 East, 78; 104 E. R. 774.

*Annotation:—Mentd. Field v. Smith* (1837), Murp. & H. 78.

**1300. ———.]**—The sheriff, in Michaelmas term last, returned to a writ of *fi. fa.* "goods in hand, for want of buyers, value known," & no further steps were taken by pltf. till Trinity term following. In the interim, the goods were seized under an extent by the Crown:—*Held*: the ct. would not compel the sheriff to make good the loss to pltf., & they would quash a writ of *distringas* which had been issued for that purpose, although pltf. had given all the indulgence with the advice, desire, & concurrence of the sheriff's officer.—*RUSTON v. HATFIELD* (1819), 3 B. & Ald. 204; 106 E. R. 636.

**1301. Issues of distress—Sale for costs.]**—*RABAN v. PLAISTOW* (1771), 5 Burr. 2726; 98 E. R. 430.

**1302. ——— Increase of—Delay—Further costs incurred.]**—*PHILIPS v. MORGAN* (1821), 4 B. & Ald. 652; 106 E. R. 1075.

**1303. ——— Rule nisi in first instance—If increase of large amount.]**—The ct. will grant a rule nisi only, in the first instance, to increase the issues on a *distringas* to compel a sheriff to sell goods seized under an execution, if it is desired to increase them to a very large sum.—*MONINS v. SMITH* (1841), 5 Jur. 294.

#### SECT. 2.—WRIT OF ELEGIT.

##### SUB-SECT. 1.—IN GENERAL.

*See Statute of Westminster II., 1285 (c. 18); Bankruptcy Act, 1883 (c. 52), s. 146; R. S. C., Ord. 43, r. 1.*

**Whether a bar to other remedies.]**—*See Part II., Sect. 12, sub-sect. 2, O., ante.*

property under a writ of *ven. ex.* unless such writ is issued by an order of the ct. or a judge.—*LEFEUNTUN v. VÉRON-NEAU* (1893), 22 S. C. R. 203.—**CAN.**

**s. ——— Goods in coroner's hands—Nullity.]**—Return to a *ven. ex.*, that the goods still remained in the coroner's hands for want of buyers, set aside as a nullity.—*MAHONY v. BLAKE* (1832), Alc. & N. 115.—**IR.**

## SUB-SECT. 2.—WHEN APPLICABLE.

**1304. To recover costs—In testamentary suit.]—**In a testamentary suit deft., who was the unsuccessful party, was condemned in the costs, but did not obey the order. On affidavit that he was possessed of realty, but of no personal property, the ct. ordered a writ of *elegit* to issue for the recovery of the costs.—HEATH v. HEATH (1874), 29 L. T. 931 ; 38 J. P. 168 ; 22 W. R. 266.

**1305. — From respondent husband in divorce suit.]—**The husband, resp. in divorce proceedings, obtained in the Q. B. Div. a *mandamus*, directing his wife to deliver up certain title deeds. The property comprised in these deeds constituted, practically, his whole means. Upon the husband failing to comply with an order of this ct. for costs of the divorce suit, the wife sued out a writ of *elegit*, & the sheriff took possession of the property in virtue thereof. Upon motion by the husband to set aside the writ of *elegit* until the wife should comply with the *mandamus* & deliver up the deeds of the property which he had, meanwhile, agreed to sell, the ct. refused to set aside the writ of *elegit*, but put the wife upon terms as to the receipts arising from the property.—KIPPAX v. KIPPAX (1891), 67 L. T. 382.

**After issue of other writs—Fieri facias.]—**See Part II., Sect. 12, sub-sect. 2, A., *ante*.

**— Capias ad satisfaciendum.]—**See Part II., Sect. 12, sub-sect. 2, B., *ante*.

## SUB-SECT. 3.—ISSUE AND DELIVERY OF WRIT.

*See, generally, Part. II., Sects. 2-11, 15, ante.*

**1306. Issue of several writs—Into separate counties.]—**ANON. (1561), Dal. 29 (6) ; 123 E. R. 248.

**1307. — — —.]—**GOODYERE v. INCE (1610), Cro. Jac. 246 ; Yelv. 179 ; 79 E. R. 211.

**counties—One writ sufficient.]—**DILLON (LORD) v. PLASKETT, No. 1413, *post*.

**1309. Issue of consecutive writs—Where goods taken under first.]—**GLASCOCK v. MORGAN, No. 219, *ante*.

**— Where lands taken under first.]—**GLASCOCK v. MORGAN, No. 219, *ante*.

## SUB-SECT. 4.—PROCEEDINGS UNDER WRIT.

## A. In General.

**1311. Notice to debtor—Necessity for—Effect of omission.]—**HARWOOD v. PHILLIPS, No. 1315, *post*.

**1312. — — —.]—**Notice need not be given of the execution of *elegit*.—STEED v. LAYNER (1725), 2 Ld. Raym. 1382 ; 92 E. R. 400.

**1313. Extensors obliged to take land—At value extended—& pay debt.]—**The conusee in an execution by *elegit*, on a recognisance in Chancery, may, on the return of the writ, oblige the extensors to take the land at the value extended, & pay the debt.—MOLINEUX v. LACON (1604), Cro. Jac. 12 ; 79 E. R. 11 ; *sub nom.* MOLINEUX v. RIGGES, Yelv. 55.

**1314. Death of one of parties—Execution creditor—Being executor—Rights of personal repre-**

**sentative.]—**HARRISON v. BOWDEN (1661), 1 Sid. 29 ; 82 E. R. 950.

*Annotations:—*Reid. Clerk v. Withers (1704), 2 Ld. Raym. 1072 ; Giles v. Grover (1832), 9 Bing. 128.

**1315. — Execution debtor—Process does not abate.]—**Writ of *elegit* was sued out upon a judgment obtained by *sci. fa.* against the conusee of a recognisance ; & the conusee died before execution, yet the execution was good. As the statute creating the *elegit* has not made any provision concerning the abatement of it by the death of deft., it ought to be construed as other process of execution ; which does not abate by death, where deft. has no day in ct. ; (2) the cause in the writ of *elegit* commanding the extent to be upon warning of deft., & in his presence, is but a recommendation to the sheriff, not a precept to make the writ void if disobeyed ; (3) if the execution had not been well made by reason of the decease of deft., it is absolutely void, not voidable only.—HARWOOD v. PHILLIPS (1663), O. Bridg. 464 ; 124 E. R. 691.

*Annotation:—*As to (2) *Consd.* Keate v. Clopton (1666) O. Bridg. 475.

**1316. — — — Irregular proceedings in consequence of—Execution void.]—**HARWOOD v. PHILLIPS, No. 1315, *ante*.

**1317. — — — — —.]—**Where C., seized of certain lands in fee, acknowledged a statute staple to A. & H. ; & the conusees, after his decease, sue out an extent on the statute during the minority of his heir ; & in the writ of *extendi facias*, there are these words : "*Nisi alieni heredi infra actatem existenti jure hereditario descenderunt,*" the execution of this extent being had during the minority of the heir, is absolutely void, although the heir consented to it, & not voidable only.—KEATE v. CLOPTON (1666), O' Bridg. 475 ; 124 E. R. 697.

*— See, also, Part II., Sect. 8, sub-sect. 1, C. (a), ante.*

**1318. Amendment of writ—When permissible.]—***Elegit* stating the judgment to have been given on the day the writ was signed, cannot be amended.—DUMMER v. — (1711), 10 Mod. Rep. 67 ; 88 E. R. 629.

**1319. — — —.]—***Elegit* amended which recited the judgment to be *Georgii nuper Regis* whereas it should be *anno regni nostri*.—BLUNKET v. FREEMAN (1729), 1 Barn. K. B. 276 ; 94 E. R. 188.

**1320. No proceedings taken—Presumption of satisfaction of debt—Revival of writ.]—***Elegit* must be revived by *sci. fa.* If not proceeded upon within the year the writs must be without discontinuance, otherwise the ct. will presume satisfaction.—ANON. (1774), Loft, 651 ; 98 E. R. 847.

**1321. Indorsement of amount to be levied—Less than judgment debt—Irregular—Unless variance accounted for on writ.]—**(1) A writ of *elegit*, whereby the sheriff is directed to extend the lands of the debtor for an amount less than that mentioned in the judgment is irregular, unless the reason of the variance is shown on the face of the writ ; (2) Judgments Act, 1838 (c. 110), s. 11, which enables an execution creditor to obtain possession of the whole of the lands of his debtor under *elegit*, has operated to do away with the necessity of the sheriff setting out in his inquisition the lands extended by metes & bounds.—SHERWOOD v. CLARK (1846), 15 M. & W. 764 ; 8 L. T. O. S. 254 ; 153 E. R. 1059.

**PART III. SECT. 2, SUB-SECT. 2.**  
t. Judgment against executor.]—A judgment against an exor. to recover *de bonis testatoris*, will warrant an execution against testator's lands, on the

return of *nulla bona*.—DOE d. JESSUP v. BARTLET (1833), 3 O. S. 206.—CAN.

**PART III. SECT. 2, SUB-SECT. 3.**

a. Writ tested after death of

defendant.]—A *fi. fa.* against lands tested after the death of deft. is void.—MC CARTHY v. LOW (1832), 2 O. S. 353.—CAN.



*Sect. 2.—Writ of elegit: Sub-sect. 4, A., B. & C.; sub-sect. 5, A.]*

**1322. Where more than one writ—Duty of sheriff.]—HELE v. BEXLEY (LORD), No. 1521, post.**

**1323. — Priority of creditors—Writ first delivered has priority.]—GUEST v. COWBRIDGE RY. Co., No. 1446, post.**

#### *B. The Inquisition.*

**1324. Duty of sheriff to hold.]—HELE v. BEXLEY (LORD), No. 1521, post.**

**1325. Must be returned.]—The sheriff to elegit must return an inquisition.—ANON. (1553), 1 Dyer, 100 a, pl. 71; 73 E. R. 220.**

*Annotations:—*Refd. Palmer v. Humphrey (1597), Cro. Ellz. 584; Cowley v. Lydeot (1613), 2 Bulst. 97.

**1326. — Unless debtor has no lands.]—**If it be returned to an *elegit* that there are no lands the sheriff need not return an inquisition, for the use of that is only to deliver a moiety of the lands by, if there are any.—STONEHOUSE v. EWEN (1730), 2 Stra. 874; 93 E. R. 908; *sub nom.* SOUTHOUSE v. NEWEN, 1 Barn. K. B. 356.

**1327. —.]—HELE v. BEXLEY (LORD), No. 1521, post.**

**1328. Held on oath.]—PALMER v. HUMPHREY, No. 1525, post.**

**1329. Necessary preliminary to seizure.]—The sheriff cannot justify the seizing before inquisition (ATKINS, J.).—FOREST v. CHAPMAN (1671), Cart. 223; 124 E. R. 928.**

**1330. Amendment of—Mistake as to day of signing judgment.]—HAYCOCK v. YEATES (1732), 2 Barn. K. B. 171; 94 E. R. 428.**

**1331. Inquisition as to lands already extended—Void—No application to set aside necessary.]**

(1) An application was made to set aside the inquisition taken on an *elegit*, because it appeared that all the debt.'s lands were extended:—*Held*: the inquisition was altogether void, & the application to set it aside being unnecessary, the rule for that purpose must be discharged.

(2) Copyhold lands cannot be extended under *elegit*, but if the inquisition comprehends both freehold & copyhold, it may be good as to the former & bad as to the latter.—MORRIS v. JONES (1823), 2 B. & C. 232; 3 Dow. & Ry. K. B. 603; 107 E. R. 370.

*Annotations:—*As to (1) Refd. Heath v. Brindley (1834), 2 Ad. & El. 365. Generally, Mentd. Holland v. Pelham (1831), 1 Cr. & J. 575; Faircloth v. Gurney (1833), 9 Bing. 622; Moody v. Hebbard (1848), 7 Hare, 182.

**1332. Must state value of lands.]—HELE v. BEXLEY (LORD), No. 1521, post.**

**1333. Evidence of title—What is—Proof of possession—Or receipt of rent.]—Upon an inquisition on a writ of *elegit*, proof of possession or receipt of the rent of the land by the party, is**

*prima facie* evidence of title. Where a jury, notwithstanding such evidence, found that the party had no lands, the ct. set aside the finding, & directed the sheriff to take a new inquisition.—BARNES v. HARDING (1857), 1 C. B. N. S. 568; 29 L. T. O. S. 81; 5 W. R. 570; 140 E. R. 233.

**1334. Verdict on inquisition—Against weight of evidence—Court will set aside—Order new inquisition.]—BARNES v. HARDING, No. 1333, ante.**

**Return as to metes & bounds—Of land seized.]—See Nos. 1337–1339, post.**

#### *C. The Return.*

**1335. Return must be made.]—Though the liberate be not returned, yet the execution is well made; but when inquisition is to be taken, there the writ ought to be returned.**

This case is not like the case of *elegit*, wherein an inquisition is to be taken, for there the writ ought to be returned, to the intent that the ct. shall judge upon the sufficiency or insufficiency of that inquisition (*per CUR.*).—FULWOOD'S CASE (1591), 4 Co. Rep. 64 b; 76 E. R. 1031.

*Annotations:—*Refd. Hoe's Case (1600), 5 Co. Rep. 89 b. Mentd. Lampet's Case (1612), 10 Co. Rep. 46 b; Foster v. Jackson (1615), Hob. 52; Duncombe v. Wingfield (1617), Hob. 254; Child v. Baylye (1619), 2 Roll. Rep. 129; Kent v. Steward & Scott (1634), Cro. Car. 358; Baker v. Willis (1637), Cro. Car. 476; Lyn v. Wyn (1665), O. Bridg. 122; Seaman v. Warman (1675), Freem. K. B. 306; Plummer v. Whitehot (1676), 2 Mod. Rep. 119; Dighton v. Greenvil (1690), 2 Vent. 321; Goodtitle d. Gurnall v. Wood (1740), Willes, 211; Gurnett v. Wood (1740), 7 Mod. Rep. 302; Ryall v. Rowles (1750), 1 Ves. Sen. 348; Mirchouse v. Rennell (1832), 8 Bing. 490; Graves v. Colby (1838), 9 Ad. & El. 356; Colonial Bank v. Whinney (1885), 30 Ch. D. 261; Power v. Banks, [1901] 2 Ch. 487.

**1336. —.]—HOE'S CASE, No. 369, ante.**

**1337. Contents of return—Setting out metes & bounds.]—The sheriff's return to *elegit* stated that he had delivered an equal moiety of a house:—*Held*: this return was void for not setting out the moiety by metes & bounds, & the objection might be taken at *Nisi Prius* to an ejectment brought upon the *elegit*.—FENNY v. DURRANT (1817), 1 B. & Ald. 40; 106 E. R. 15.**

*Annotations:—*Consd. Sherwood v. Clark (1846), 15 M. & W. 764. Refd. Morris v. Jones (1823), 2 B. & C. 232.

**1338. — Necessity for—Judgments Act, 1838 (c. 110), s. 11.]—In an inquisition on *elegit* taken since the above sect., it is not necessary to set out the land by metes & bounds; it is sufficient to describe it in such a manner as would be sufficient to identify it in a conveyance.—DOE d. ROBERTS v. PARRY (1844), 13 M. & W. 356; 2 Dow. & L. 430; 14 L. J. Ex. 20; 4 L. T. O. S. 97; 153 E. R. 147; *sub nom.* DOE d. ROBERTS v. BARRY, 8 Jur. 963.**

**1339. —.]—SHERWOOD v. CLARK, No. 1321, ante.**

#### **PART III. SECT. 2, SUB-SECT. 4.—A.**

**1323 i. Where more than one writ—Priority of creditors—Writ first delivered has priority.]—It is the duty of the sheriff to sell the debtor's land under all writs in his hands, & to apply the proceeds to their satisfaction, in the order in which he receives them.—BEATH v. ANDERSON (1883), 9 V. L. R. 41.—AUS.**

**b. Inception of proceedings—No seizure made by sheriff.]—A *fi. fa.* against lands was returnable Sept. 15, 1863; the advertisement of sale was first published after that date; while the writ was current, the sheriff had told debt. that he had the execution & that the land would be sold unless he paid; the sheriff was also on the lands more than once before the writ expired, but he did not go to make a seizure:—*Held*: there had been no inception of**

the execution during its currency.—BRADBURN v. HALL (1869), 16 Gr. 518.—CAN.

**c. Ordinary writ issued instead of alias—Proceedings advertised as initiatory.]—Lands were sold under a *fi. fa.* lands after the expiry of the year, & a deed executed to the grantor of pltf. by the sheriff which recited that the writ had been duly renewed, but no renewal was proved, & the sale was invalid. Subsequently, an ordinary writ of *fi. fa.* lands was issued on the judgment, a sale was made & a deed to pltf. executed by the sheriff:—*Held*: the fact of an ordinary *fi. fa.* lands being issued instead of an *alias fi. fa.* & the advertisement being as if the proceedings were initiatory proceedings towards effecting a sale of debt.'s lands, would not of itself invalidate the sale.—DABY v. GEHL (1889), 18 O. R. 132.—CAN.**

**d. Payment by defendant—Before sheriff enforces writ.]—On the return of *nulla bona* to an execution, pltf. issued an execution against lands to the sheriff of another county, but before the sheriff had taken any steps to enforce it, debt. paid to him the amount thereof, with the request that it should be applied on pltf.'s execution. At the time of such payment there other executions in the hands of the sheriff against the goods & lands of debt.:—*Held*: Creditor's Relief Act applied to the moneys so received by the sheriff.—*Re* YOUNG v. WARD (1896), 27 O. R. 588.—CAN.**

**e. Right of execution creditor—Under writ—Is a lien.]—The right of an execution creditor under a *fi. fa.* lands in the hands of the sheriff of the county in which the lands of the debtor are situate is a lien.—NEIL v. ALMOND (1897), 29 O. R. 63.—CAN.**

**1340. False return—Delivery of goods to creditor—Action of debt against sheriff.]—**An action of debt will not lie against a sheriff for falsely returning to *elegit*, that he had appraised the goods & extended the land named, & delivered them to pltf.—**CORITON v. THOMAS** (1620), Cro. Jac. 566; 79 E. R. 484.

**Annotation:—Mentd.** Mildmay v. Smith (1672), 2 Saund. 343.

**1341. ———.]—****HOLLAND v. LEY** (1620), as reported in Palm. 123; 81 E. R. 1008.

**Annotations:—Mentd.** Stone v. Newman (1635), Cro. Car. 427; Foxwith v. Tremain (1670), 1 Mod. Rep. 296; Adams v. Savage (1704), 2 Salk. 601; Swaine v. Stevens (1705), 11 Mod. Rep. 65; Wynne v. Wynne (1743), 1 Wils. 42; Fowler v. Rickerby (1841), 9 Dowl. 682.

**1342. Persons prejudiced—Parties—Not third persons.]—**The return of the sheriff does not prejudice a third person although it concludes the parties.—**MIDDLETON v. SHELLY** (1628), Het. 123; 124 E. R. 393.

**1343. Enlargement of time for making—Not at instance of sheriff—Without creditor's consent.]—**The ct. cannot enlarge the time to return a writ of *elegit* after the return day at the instance of the sheriff, except with pltf.'s consent. *Qu.*: if then.—**HILDYARD v. BAKER** (1833), 1 Cr. & M. 611; 2 Dowl. 16; 2 L. J. Ex. 218; 149 E. R. 544.

**1344. Responsibility for return & filing—Judgment creditor.]—****HELE v. BEXLEY** (LORD), No. 1521, *post*.

**1345. ——— Sheriff.]—****HELE v. BEXLEY** (LORD), No. 1521, *post*.

**1346. ———.]—****JOHNS v. PINK**, No. 1500, *post*.

#### SUB-SECT. 5.—WHAT MAY BE TAKEN UNDER WRIT OF ELEGIT.

##### A. Lands in Possession.

See Judgments Act, 1838 (c. 110), s. 11.

**1347. Lands possessed at time of judgment—Since alienated.]—****DE MOLEYNS' CASE** (1356), Y. B. 30 Edw. 3, fo. 24.

**1348. ———.]—****W. v. J.** (1368), Y. B. 42 Edw. 3, fo. 11, pl. 13.

**Annotations:—Mentd.** Foster v. Jackson (1615), Hob. 52; Richmond v. Smith (1828), 2 Man. & Ry. K. B. 235.

**1349. ——— In lands of jointress—Debt of settlor.]—****STREET v. ROBERTS** (1658), 2 Sid. 86; 82 E. R. 1271.

**1350. Land purchased after judgment.]—****DE MOLEYNS' CASE** (1356), Y. B. 30 Edw. 3, fo. 24.

**1351. Not lands possessed at commencement of suit.]—****W. v. J.** (1368), Y. B. 42 Edw. 3, fo. 11, pl. 13.

**Annotations:—Mentd.** Foster v. Jackson (1615), Hob. 52; Richmond v. Smith (1828), 2 Man. & Ry. K. B. 235.

**1352. Land extended under prior writ—Not seizable under later writ.]—***Qu.*: whether, upon a second writ of *elegit*, the sheriff shall deliver only the moiety of the remaining moiety of debt's

—**HUIT v. COGAN** (1596), Cro. Eliz. 483; 78 E. R. 734.

**Annotations:—Consd.** Carter v. Hughes (1858), 2 H. & N. 714. **Refd.** Doe d. Cheese v. Creed (1829), 2 Moo. & P. 648; Johns v. Pink, [1900] 1 Ch. 296.

**1353. ———.]—****CARTER v. HUGHES**, No. 1986, *post*.

**1354. Tenancy in tail—Not after death of tenant in tail in possession.]—**If tenant in tail acknowledge a statute & die, & the conusee sue execution against the heir, he may avoid it either by assize or by an *audita querela*.—**ASHBURNHAM v. ST. JOHN** (LORD) (1605), Cro. Jac. 85; 79 E. R. 73.

**Annotation:—Refd.** Keate v. Clopton (1666), O. Bridg. 475.

**1355. ———.]—**Lands of which a testator was actual tenant in tail in possession were in his lifetime delivered in execution under a writ of *elegit* to his judgment creditors. After the death of testator without issue the lands descended to A. under the original entail. It was admitted that by Judgment Act, 1838 (c. 110), s. 13, the writ of *elegit* was binding against the entailed lands in the hands of A.; but the question was raised whether testator's residuary personal estate or the entailed lands in the hands of A. were primarily liable to satisfy the judgment debt:—**Held**: as between testator's estate & A., testator's estate was primarily liable.—**Re ANTHONY, ANTHONY v. ANTHONY**, [1893] 3 Ch. 498; 62 L. J. Ch. 1004; 69 L. T. 300; 41 W. R. 667; 37 Sol. Jo. 632; 3 R. 671.

**1356. Land held under joint tenancy—Death of joint tenant before execution.]—**(1) When judgment is given against one of two joint tenants for life, in an action of debt, & afterwards that one releases to the other before execution, such release shall not bar the execution of pltf. (2) If such joint tenant had died before execution, the survivor should hold the land discharged of any execution.—**ABERGAVERNNEY'S (LORD) CASE** (1607), 6 Co. Rep. 78 b; 77 E. R. 373.

**Annotations:—Generally, Mentd.** Lillingston's Case (1608), 7 Co. Rep. 38 a; Daniel v. Waddington (1615), 3 Bulst. 130.

**1357. ——— Release by one tenant to other.]—****ABERGAVERNNEY'S (LORD) CASE**, No. 1356, *ante*.

**1358. Copyhold land.]—**Statute of Westminster II., 1285 (c. 18), which gives *elegit*, does not extend to copyholds.—**HEYDON'S CASE** (1584), 3 Co. Rep. 7 a; Moore, K. B. 128; 76 E. R. 637.

**Annotations:—Mentd.** Worcester's Case (1606), 6 Co. Rep. 37 a; Bicknel v. Tucker (1612), 2 Brownl. 153; Lee v. Brown (1617), Poph. 128; Rowdon v. Maltster (1625), Cro. Car. 42; Fawkeners v. Bollingham (1627), Cro. Car. 80; James v. Tutney (1639), Cro. Car. 532; A.-G. v. Andrew (1656), Hard. 23; Harrington v. Smith (1658), 2 Sid. 73; Beckman v. Maplesden (1662), O. Bridg. 60; Wolferstan v. Lincoln (Bp.) & Whitehead (1763), 2 Wils. 174; Doe d. Wightwick v. Truby (1774), 2 Wm. Bl. 944; Warburton v. Loveland (1832), 6 Bl. N. S. 1; Doe d. Tunstill v. Bottrill (1833), 5 B. & Ad. 131; A.-G. v. Walker (1849), 3 Exch. 242; Miller v. Salomons (1852), 7 Exch. 475; Crofts v. Middleton (1856), 3 De G. M. & G. 192; A.-G. v. Sillem (1863), 2 H. & C. 431; Peek v. North Staffordshire Ry. (1863), 10 H. L. Cas. 473; Easton v. Richmond Highway Board (1871), L. R. 7 Q. B. 69; R. v. Castro (1874), L. R. 9 Q. B. 350; River Wear Comrs. v. Adamson (1877), 2 App. Cas. 743; R. v. Holbrook (1878), 4 Q. B. D. 42; Harding v. Preece (1882), 9 Q. B. D. 281; Bradlaugh v. Clarke (1883), 8 App. Cas. 354; Re Leavesley, [1891] 2 Ch. 1; Pelton v. Harrison, [1891] 2 Q. B. 422; Bruce v. Ailesbury, [1892] A. C. 356; Eastman Photographic Materials Co. v. Comptroller General of Patents, Design & Trade Mks., [1898] A. C. 571; Re Mayfair Property Co., Bartlett v. Mayfair Property Co., [1898] 2 Ch. 28; A.-G. v. Metropolitan Electric Supply Co., [1905] 1 Ch. 24; Conway v. Wade, [1908] 2 K. B. 844; Sadler v. Whiteman, [1910] 1 K. B.

#### PART III. SECT. 2, SUB-SECT. 5.—A.

**f. Lands in possession of devisee.]—**Testator's real property was devised by the same will to R. R.'s interest in the land was sold under a *fi. fa.* & conveyed by the registrar of the district ct.:—**Held**: the registrar could make a good title without the concurrence of the extrix.—**Ex p. POLLARD** (1877), Knox, 501.—**AUS**

**g. Land sold—Before fieri facias**

**lodge—Whether anything passes by sheriff's transfer.]—**B. obtained a judgment against W. & issued a *fi. fa.* which was afterwards withdrawn. Subsequently to the issuing of that writ W. transferred a selection to G., debt. This transfer was not registered. Afterwards B. issued a second writ of *fi. fa.* against W. under which the sheriff sold to B. all W.'s right, title & interest, if any, in this selection. The transfer was registered. B. brought ejectment

against G.:—**Held**: the first writ having been withdrawn, did not bind the land so as to invalidate the transfer by W. to debt., & that as W. had sold the land before the second writ was issued, there was no right, title, or interest left in him for the sheriff to convey, & therefore no transfer to register. If anything had passed at the sheriff's sale, the registration of that transfer would have given it priority over the unregistered transfer



*Sect. 2.—Writ of elegit: Sub-sect. 5, A. & B.]*

868; *Hunting v. Matthews* (1913), 11 L. G. R. 723; *O'Grady v. Wilmot*, [1916] 2 A. C. 231; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Dobb v. Dobb* (1918), 87 B. J. Ch. 321; *A.-G. v. Brown*, [1920] 1 K. B. 773; *Nicolle v. Nicolle*, [1922] 1 A. C. 284.

**1359.** —.—.]—Copyhold lands are not liable to execution upon a judgment. — *CANNON v. PACK* (1714), 2 Eq. Cas. Abr. 226; 22 E. R. 192, L. C.

**1360.** —.—.]—*MORRIS v. JONES*, No. 1331, *ante*.

**1361. Ancient demesne.**—*MARTIN v. WILKS* (1583), Moore, K. B. 211; 72 E. R. 536.

**1362.** —.—.]—Ancient demesne bars not execution by *elegit*.—*COX v. BARNSLY* (1613), Hob. 47; 80 E. R. 197.

*Annotations*:—*Refd.* *Keate v. Clopton* (1666), O. Bridg. 475. *Mentd.* *Hunt v. Bourne* (1702), 1 Com. 124.

**1363. Lands in possession of heir—Debts of ancestor—Heir an infant.**—*STREET v. ROBERTS* (1658), 2 Sid. 86; 82 E. R. 1271.

**1364.** —.—.]—Only land descending to heir.]—In an action against an heir on the bond of his ancestor, debt. pleaded *riens per descent*, & plffs. replied that debt. had assets, etc., before the action commenced, concluding with a verification; the jury assessed the damages under the condition in the bond, at a larger amount than the amount of the lands descended:—*Held*: the execution for debt & costs must be confined to the value of the lands descended.—*BROWN v. SHUKER* (1832), 2 Cr. & J. 311; 2 Tyr. 320; 1 L. J. Ex. 82; 149 E. R. 133.

**1365.** —.—.]—Debts of heir—Priority of creditors.]—*Held*: debts contracted by an heir-at-law in the lifetime of his father, & also after his decease, though secured by judgments, some of which were entered up in the lifetime of the father, who died intestate, & others after his decease, were not to be charged upon descended estates so as to give them priority to the simple contract creditors of the father.—*KINDERLEY v. JERVIS* (1856), 22 Beav. 1; 25 L. J. Ch. 538; 27 L. T. O. S. 245; 2 Jur. N. S. 602; 4 W. R. 579; 52 E. R. 1007.

*Annotations*:—*Refd.* *Price v. Price* (1887), 35 Ch. D. 297. *Mentd.* *Nicholls v. Rosewarne* (1859), 6 C. B. N. S. 480; *Baker v. Tynte* (1860), 6 Jur. N. S. 1192; *Eyre v. M'Dowell* (1861), 9 H. L. Cas. 620; *Crow v. Robinson* (1868), L. R. 3 C. P. 264; *Pickering v. Ilfracombe Ry.* (1868), L. R. 3 C. P. 235; *Gill v. Continental Gas Union* (1872), 41 L. J. Ex. 176; *Re Leavesley*, [1891] 2 Ch. 1.

*B. Leases, Remainders and Reversions.*

See Judgments Act, 1838 (c. 110), s. 11.

**1366. Leaseholds.**—A. leased land to B. for years rendering rent with clause of re-entry, & afterwards debt was recovered against him:—*Held*: the moiety of the rent & the reversion were extended by *elegit*, & upon such extent the con-

dition was suspended during the extent as well in the lessor as in the party who had the extent.—*ANON.* (*temp.* 1558–1603), 4 Leon. 201; 74 E. R. 821.

**1367.** —.—.]—*Bona fide sale to third party—Subsequent extent of Crown—Title of purchaser good.*—A sale by a debtor to the King of a lease for years is good; such lease shall not be extended in the hands of the purchaser for the King's debt.—*FLEETWOOD'S CASE* (1610), 8 Co. Rep. 171 a; 77 E. R. 731.

*Annotations*:—*Refd.* *Westbrook v. Blythe* (1854), 3 E. & B. 737. *Mentd.* *Audley v. Halsey* (1629), Cro. Car. 148; *Harwood v. Phillips* (1663), O. Bridg. 464; *Manby v. Scot* (1663), 1 Keb. 361; *R. v. Baden* (1694), Show. Parl. Cas. 72; *R. v. Curtis* (1750), Park. 95; *R. v. Smith* (1810), Wight. 34; *Giles v. Grover* (1832), 9 Bing. 128; *Carter v. Hughes* (1858), 27 L. J. Ex. 225.

**1368.** —.—.]—Bound from delivery of writ.]—*BURDON v. KENNEDY*, No. 686, *ante*.

**1369.** —.—.]—*Bankruptcy Act, 1883* (c. 52), s. 146—*Effect of.*—*Held*: notwithstanding the above sect., a writ of *elegit* still extends to leaseholds.

The sheriff has doubtless been misled by the use of the word "goods." The expression is not an artistic one. But in sect. 168, sub-sect. 1, the interpretation clause of the Act, "goods" are defined as including "all chattels personal." Leaseholds are not chattels personal, but chattels real. I am of opinion, therefore, that they do not come within the definition (*DENMAN, J.*).—*RICHARDSON v. WEBB* (1884), 1 Morr. 40.

**1370.** —.—.]—*JOHNS v. PINK*, No. 1500, *post*. —.—.]—*Position of creditor as eligi tenant.*—*See* Sub-sect. 9, C., *post*.

—.—.]—*Right of sheriff to sell.*—*See* Sub-sect. 10, A., *post*.

**1371. Remainder — Not seizable — Infant.**—Pltf., who had recovered judgment with damages in an action in tort against an infant, sued out an *elegit* against the infant's land on the judgment. The infant's only interest in land was a remainder in fee expectant on the death of a tenant for life, which produced no present income to the infant. The sheriff returned that the infant was seized of the reversion of the land in fee simple, & that it was of the annual value of £124, & that he had delivered the premises to the creditor. The creditor then presented a petition under Judgments Act, 1864 (c. 112), s. 4, for a sale of the infant's interest in the land:—*Held*: the sheriff had no power to seize an estate in remainder belonging to an infant, & therefore the judgment creditor had acquired no charge on the infant's interest.—*Re SOUTH* (1874), 9 Ch. App. 369; 43 L. J. Ch. 441; 30 L. T. 347; 22 W. R. 460, L. JJ.

*Annotations*:—*Consd.* *Re Harrison & Bottomley*, [1899] 1 Ch. 465. *Refd.* *Johns v. Pink*, [1900] 1 Ch. 296.

to debt.—*BLAXLAND v. GRATTAN* (1887), 8 N. S. W. L. R. 287; 4 N. S. W. N. 47.—*AUS.*

*h. Gift of land—Accompanied by possession.*—A gift of land by a father to his son accompanied by actual delivery of possession, & followed by a continuous & exclusive possession by the son extending over the period of twenty years, confers a title upon the son under Stat. Limitations, which will be bound by a judgment recovered against him, & will pass to the purchaser at a sheriff's sale.—*KAULBACH v. COOK* (1906), 39 N. S. R. 500.—*CAN.*

**PART III. SECT. 2, SUB-SECT. 5.—B.**

**1366 i. Leaseholds.**—A term for years cannot be sold under an execution against lands.—*DORR v. COURT v. TUPPER* (1837), 5 O. S. 640.—*CAN.*

**k** —.—.]—*Lessee's interest ceased*—

*Avoided for non-payment of rent—No execution leviable.*—Deft. on Oct. 13, 1852, granted the land in question to one S., to hold "to S., & the heirs of his body, for 21 years, or the term of his natural life, from Apr. 1, 1853, fully to be complete & ended," but not to be underlet to any person, except to the family of S., for any period during the term. A yearly rent was reserved, which S. covenanted to pay, & it was provided that on failure to perform the covenants, the lease & the term thereby granted, should cease & be void. The lessee entered, & on Apr. 1, 1859, a year's rent being in arrear, debt. distrained & sold the goods of S., who remained for some time on the premises as debt.'s servant; & the sheriff afterwards, under executions which had been in his hands since Nov. 2, 1858, sold the unexpired term of S. in the premises, describing it as

a term with fifteen years to run, at a rent of \$100 a year. Pltf. became the purchaser & brought ejectment against debt. on the sheriff's deed:—*Held*: pltf.'s title failed, on the ground that the lease being void by the non-payment of rent, & S. having given up possession by arrangement with debt., his interest was gone.—*DALY v. ROBERTSON* (1860), 19 U. C. R. 411.—*CAN.*

**l.** —.—.]—*Before expiry of term—No execution leviable.*—Deft. leased to his father lands for life, to work & enjoy the same, but that should the father in his later years become incapable of taking charge of the place as it should be by good husbandry, then & in such case debt. was to be at liberty to govern the lands as seemed best to him; & in the event of the father becoming incapable of

**1372.** — — — — —.]—Two infants were entitled to successive estates tail in remainder after the life estate of their father, which life estate had been sold under his bkpcy.:—*Held*: a judgment would not charge the estates of the infants, inasmuch as those estates were so circumstanced that they could not be delivered in execution.—*Re HAMILTON* (1885), 31 Ch. D. 291; 55 L. J. Ch. 282; 53 L. T. 840; 34 W. R. 203, C. A.

*Annotations*:—**Consd.** *Re Harrison & Bottomley*, [1899] 1 Ch. 465. **Refd.** *Cadman v. Cadman* (1886), 33 Ch. D. 397; *Re Jones & Judgments Act*, 1864 (1895), 39 Sol. Jo. 671; *Woods v. Harrison* (No. 2) (1899), 43 Sol. Jo. 242; *Re Hambrough's Estate*, *Hambrough v. Hambrough*, [1909] 2 Ch. 620; *Re Badger*, *Badger v. Badger*, [1913] 1 Ch. 385. **Mentd.** *Re De Teissier's Trusts*, *De Teissier v. De Teissier* (1892), 37 Sol. Jo. 47.

**1373.** — — — — —.]—*Judgments Act*, 1864 (c. 112), applies to an interest in land which is incapable of being taken in execution, & a judgment does not operate as a charge upon the lands of the debtor until the requirements contained in the statute have been complied with.

A judgment creditor is not entitled to a charge on his debtor's estate in remainder, inasmuch as it cannot be actually or constructively delivered in execution.—*HOOD BARRS v. CATHCART*, [1895] 2 Ch. 411; 64 L. J. Ch. 461; 72 L. T. 583; 43 W. R. 586; 39 Sol. Jo. 428; 13 R. 489.

*Annotations*:—**Refd.** *Re Jones & Judgments Act*, 1864 (1895), 39 Sol. Jo. 671; *Re Harrison & Bottomley*, [1899] 1 Ch. 465.

**1374.** — — — — —.]—(1) A judgment debt is not enforceable as a charge against the judgment debtor's legal remainder in real estate; nor does an order obtained by the judgment creditor appointing a receiver constitute an "actual delivery in execution" within *Judgments Act*, 1864 (c. 112), s. 1, entitling the creditor to a sale of the remainder under sect. 4.

(2) An application by a judgment creditor for a sale under sect. 4 of the Act, for the recovery of his debt, is now more properly made by summons & not by petition; R. S. C., Ord. 55, r. 9, B.—*Re HARRISON & BOTTOMLEY*, [1899] 1 Ch. 465; 68 L. J. Ch. 208; 80 L. T. 29; 47 W. R. 307, C. A.

*Annotations*:—*As to* (1) **Refd.** *Johns v. Pink*, [1900] 1 Ch. 296; *Re Badger*, *Badger v. Badger*, [1913] 1 Ch. 385; *Ashburton v. Nocton*, [1915] 1 Ch. 274. **Generally, Mentd.** *Ex p. Tweed* (1899), 68 L. J. Q. B. 794.

**1375. Reversion—Descended to heir—Judgment quando acciderit.**—In debt on bond against the heir, who confesses it, but shows that a reversion only descended, judgment shall be of that *quando acciderit*, & a special writ to extend the whole

manual labour he was to be supported by the son, & subject to the son's rights, the father was entitled to peaceable & quiet possession. The father became incapable of taking proper care of the place, & in consequence deft. re-entered & worked the farm. Subsequently thereto the interest of the father was sold by the sheriff to pltf., who brought ejectment:—*Held*: deft. had, according to the terms of the lease, the right to possession, & pltf. must therefore fail in his action.—*TURLEY v. BENEDICT* (1882), 7 A. R. 300.—CAN.

**m.** — — — — —.]—*No merger between purchaser & lessee.*—An *elegit* creditor in possession leased the extended lands for 21 years, provided his estate should last so long. Before the debt was paid off, or the years had expired, lands were sold under a decree in a creditor's suit, & conveyed to a purchaser. The conveyance was executed by the administrator of the *elegit* creditor:—*Held*: though the estate by *elegit* was merged by the conveyance, as between the creditor & the purchaser, it had continuance

J.—VOL. XXI.

land.—ANON. (1580), 3 Dyer, 373 b; 73 E. R. 838.

*Annotation*:—**Refd.** *Smith v. Angell* (1702), 1 Ld. Raym. 783.

**1376.** — — — — —.]—*STREET v. ROBERTS* (1658), 2 Sid. 86; 82 E. R. 1271.

**1377.** — — — — —.]—In case of judgment recovered against an heir, who has a reversion in fee, which is only assets *cum acciderit*, the ct. will not decree a sale of the reversion, but the creditor must wait till it falls.—*FORTREY v. FORTREY* (1690), 2 Vern. 134; 23 E. R. 694.

**1378.** — — — — —.]—**Equitable reversionary interest—In personalty.**—Equitable execution of a judgment may be enforced by the appointment of a receiver of the judgment debtor's reversionary interest in the proceeds of sale of land held under a will upon trust to sell.

What he takes is an equitable reversionary interest in a sum of money; & such an interest cannot be taken by *elegit* (LINDLEY, J.J.).—*TYRRELL v. PAINTON*, [1895] 1 Q. B. 202; 64 L. J. P. 33; 71 L. T. 687; 43 W. R. 163; 39 Sol. Jo. 79; 11 R. 589, C. A.

*Annotations*:—**Apld.** *Re Jones & Judgments Act*, 1864 (1895), 39 Sol. Jo. 671. **Consd.** *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157. **Refd.** *Re Anglesea*, *De Galve v. Gardner*, [1903] 2 Ch. 727; *Bullus v. Bullus* (1910), 102 L. T. 399; *Singer v. Fry* (1915), 84 L. J. K. B. 2025. **Mentd.** *Re A Debtor*, *Ex p. Peak Hill Goldfield*, [1909] 1 K. B. 430.

**1379. Land subject to lease.**—If a lease be made for years rendering rent with a clause of distress & afterwards the rent & reversion are extended upon a statute or seized into the King's hands for debt, if the lessee pays the rent according to the extent, the same is not in any danger of the condition, for the lessee is compellable to pay it according to the extent.—*BRISTOW'S (BP.) CASE* (1584), 3 Leon. 113; 74 E. R. 575.

*Annotation*:—**Mentd.** *Lloyd v. Davies* (1848), 2 Exch. 103.

**1380.** — — — — —.]—**By way of mortgage.**—Covenant for rent on a lease. Plea, that, before the lease was made, P. impleaded pltf., & had judgment of *elegit* against their lands, etc.; that the inquisition found pltf. seised of the demised premises then leased to B., subject to two mtges. for years; that the sheriff delivered the demised premises to P., to hold, etc., till his damages & costs should be levied thereout; that, before the rent became due, deft. was evicted by P., who entered, & then ejected deft. therefrom, & kept & continued him so ejected; that £1,000 was still due to P. which was not levied. Replication traversed the eviction in the words of the plea. At the trial the

as between the purchaser & the lessee, to support the lease which still existed at law; but that the lease in equity was at an end.—*WILLIAMS v. MORRIS* (1849), 13 I. Eq. R. 147.—IR.

**n. Remainder—Whether seizable.**—Real estate in remainder or reversion may be taken in execution & sold at sheriff's sale, under Act 26, Geo. 3, c. 12.—*DOE d. HAZEN v. HAZEN* (1854), 3 All. 87.—CAN.

**o.** — — — — —.]—C. died seised in fee of land, having devised the same to his wife for life, & after her death to his son, demandant's husband, in fee. Testator's widow, the devisee for life, died before demandant's husband, & during her life his interest was sold under a *fi. fa.* against lands, & conveyed to one J., who having recovered possession sold to the tenant, who mortgaged back again to J., but continued in possession. It was not shown whether all the mtge. money had been paid or not; but the time for payment of several of the instalments had not arrived:—*Held*: demandant could not succeed, for the husband was

never so seised as to entitle his widow to dower, his reversionary interest having been sold during his lifetime.—*CUMMING v. ALGUIRE* (1855), 12 U. C. R. 330.—CAN.

**p.** — — — — —.]—Testator, after giving certain lands to his children, C., W., & M., devised to his wife all the residue of his lands for life, & after her death the same to be equally divided among all his surviving children, except C., W., & M., share & share alike. A patent was afterwards granted for the land in question, with other lands, to the exors. of his will, to hold upon the trusts contained in it. Before any division, while the wife was alive, a *fi. fa.* issued against one of the residuary devisees:—*Held*: deft. in the writ had no interest which could be sold.—*MCLEAN v. FISHER* 14 U. C. R. 617.—CAN.

**q.** — — — — —.]—Pltf. sued to have it declared that a house was liable to be seized & sold in execution of a decree obtained by him against deft.'s son. Deft., who was 80 years of age, claimed the house as her absolute



*Sect. 2.—Writ of elegit: Sub-sect. 5, B. & C.]*

lease, *elegit*, & inquisition, were put in, & it was proved that P. had called on deft. to pay him rent, or he, P., would turn him out, on which deft. attorned to him, without privity of pltf's., his lessors:—*Held*: pltf's. were entitled to recover, as P.'s *elegit* only entitled him to the reversion expectant on the mtges. by the lessors.—*POOLE CORPN. v. WHITT* (1846), 15 M. & W. 571; 16 L. J. Ex. 229; 7 L. T. O. S. 232; 10 J. P. 742; 153 E. R. 976.

*Annotations*:—*Mentd.* Delaney v. Fox (1857), 2 C. B. N. S. 768; Underhay v. Read (1887), 58 L. T. 457.

**Equitable interest in land.**—*See* Sub-sect. 5, C., *post*.

*C. Equitable Interests in Land.*

*See* Stat. Frauds, s. 10, Judgments Act, 1838 (c. 110), s. 11.

**1381. Lands held by trustee—For debt of testator.**—Where judgment is obtained against testator, the sheriff may take the trust case in execution.—*KING v. BALLETT* (1691), 2 Vern. 248; 23 E. R. 760.

**1382. — In trust for debtor.**—If a trustee has conveyed lands before execution sued, though he was seised in trust for deft. at the time of the judgment, the lands cannot be taken in execution.—*HUNT v. COLES* (1715), 1 Com. 226; 92 E. R. 1045.

*Annotations*:—*Folld.* Harris v. Pugh (1827), 4 Bing. 335. *Refd.* Doe d. Putland v. Hilder (1819), 2 B. & Ald. 782.

**1383. — Sale by debtor before judgment—Trustee for purchaser—Land ineffectually conveyed.**—Demurrer by a judgment creditor to a bill, for an injunction to restrain him from taking out execution on his judgment, against an estate sold before he obtained judgment and ineffectually conveyed to the purchaser, pltf., whereby the legal estate descended since the date of his judgment to the heir-at-law, was overruled.—*PRIOR v. PENPRAZE* (1817), 4 Price, 99; 146 E. R. 406.

*Annotation*:—*Refd.* Whitworth v. Gaugain (1846), 1 Ph. 728.

**1384. Debtor cestui que trust—Must have sole beneficial interest.**—A judgment creditor has at law by Stat. Frauds, execution against the equitable freehold estate of the debtor in the hands of his trustee provided the debtor has the whole beneficial interest, but if he has left a partial interest only in his equitable freehold estate the judgment creditor has no execution at law, though he may come into a ct. of equity & claim there the same satisfaction out of the equitable interest as he would be entitled to at law if it were legal (*LEACH, V.-C.*).—*FORTH v. NORFOLK (DUKE)* (1820), 4 Madd. 503; 56 E. R. 791.

*Annotation*:—*Mentd.* Lodge v. Lyseley (1832), 4 Sim. 70.

**1385. — — — — —**—A trust created by deft. in favour of himself & another person is not a trust

within Stat. Frauds, s. 10, that clause being confined to cases where the trustees are seized or possessed in trust for deft. alone & not jointly with another person.—*DOE d. HULL v. GREENHILL* (1821), 4 B. & Ald. 684; 106 E. R. 1087.

*Annotations*:—*Apld.* Harris v. Booker (1827), 4 Bing. 96. *Distd.* Hulkes v. Day (1840), 10 Sim. 41. *Refd.* Gore v. Bowser (1855), 3 Eq. Rep. 319. *Mentd.* Fuller v. Earle (1852), 7 Exch. 796.

**1386. — — — — —**—Pltf. obtained judgment against C., whereupon *elegit* was issued, to which the sheriff returned an inquisition finding that C. was seised for life of a certain farm, which the jury found to be a true moiety of the lands of C. in his bailiwick. In an action for use & occupation brought by the tenant by *elegit* against the occupier of the farm, the latter proved that the legal estate was in trustees for an outstanding term, though C. was by the sufferance of the trustees, in receipt of the rents & profits, he having a joint equitable interest:—*Held*: the action was not maintainable.—*HARRIS v. BOOKER* (1827), 4 Bing. 96; 12 Moore, C. P. 283; 5 L. J. O. S. C. P. 92; 130 E. R. 705.

*Annotation*:—*Consd.* Lloyd v. Davies (1849), 13 J. P. 182.

**1387. — — — — —**—Devise to & to the use of J. for life; then to & to the use of D. & E. & their heirs, in trust for C. for life, with a declaration that the estates were so limited, & the legal estates vested in the trustees to support contingent estates & limitations, subsequent to the estate to J. The trustees, prior to an *elegit* sued out against C. & executed on the property, but subsequently to the judgment, conveyed the property to another trustee, in trust for C. & certain of his creditors:—*Held*: C.'s interest could not be taken under this *elegit*, as the legal estate was in the trustees at the time of the judgment, & C. had not a sole equitable estate at the time of the execution.—*HARRIS v. PUGH* (1827), 4 Bing. 335; 12 Moore, C. P. 577; 5 L. J. O. S. C. P. 189; 130 E. R. 797.

**1388. — — — — — Trust to attend inheritance.**—*Semble*: an outstanding term vested in a trustee to attend the inheritance, can be seized, by Stat. Frauds, s. 10, under an execution against the *cestui que trust*, who is also owner of the inheritance.—*DOE d. PHILLIPS v. EVANS* (1833), 1 Cr. & M. 450; 3 Tyr. 339; 2 L. J. Ex. 179; 149 E. R. 476.

*Annotations*:—*Mentd.* Doe d. Threlfall v. Sellers (1837), 6 Ad. & El. 328; Sturgis v. Evans (1864), 3 New Rep. 650.

**1389. Mortgaged property—Mortgage after judgment—Before issue of elegit.**—In 1822 an estate was conveyed to such uses as A. should by deed, etc., appoint, & in the meantime to the use of himself for life, etc. In 1826 a judgment was obtained against him, & in 1827 he mortgaged this estate, & appointed the use to C. for 500 years. After the execution of this deed, the judgment creditor issued an *elegit*:—*Held*: his lien upon the land was defeated by the execution of the power.—*DOE d. WIGAN v. JONES* (1830), 10 B. & C. 459;

property alleging that her son by a deed had given it to her as a provision for her maintenance. The deed stated that she had been made the owner of the house, that the donor had no right to it, & that it wholly belonged to her:—*Held*: pltf. was entitled to the declaration prayed for; he had a vested remainder on her death, & therefore a saleable interest during her life, which could be seized & sold.—*ANNAJI DATTATRAYA v. CHANDRABAI* (1892), 1 L. R. 17 Bom. 503.—*IND.*

**r. Expectancy of succession by survivorship—Not seizable.**—*ANANDIBAI v. RAJARAM* (1897), 1 L. R. 22 Bom. 984.—*IND.*

**PART III. SECT. 2, SUB-SECT. 5.—C.**

**s. Lands held by trustee—For sale to pay debts.**—Where real property is conveyed to trustees for sale for the satisfaction of debts, so as the sale be made within a certain period, & the sale be not made within that time, no use results back to the grantor which can be taken in execution for his debts under the Statute of Frauds.—*DOE d. LAURASON v. CANADA CO.* (1842), 6 O. S. 428.—*CAN.*

**t. Mortgaged property—Mortgage after judgment—Before issue of writ.**—The owner of lands created two mtges. thereon, after which his interest therein

was sold under a *fl. fa.* issued on a judgment registered prior to both mtges., all parties being under the impression that the lands were sold subject to the two mtges. Subsequently the purchaser at sheriff's sale bought up the first mtge., whereupon the holders of the second mtge. filed a bill against him, praying redemption or foreclosure, on the ground that the purchase of the equity of redemption at sheriff's sale bound him to discharge both mtges. The ct. refused this relief, & dismissed the bill.—*BANK OF MONTREAL v. THOMPSON* (1862), 9 Gr. 51; 3 E. & A. 239.—*CAN.*

—*G.* obtained

5 Man. & Ry. K. B. 563; 8 L. J. O. S. K. B. 214; 109 E. R. 521.

*Annotations*.—**Refd.** Skeeles v. Shearly (1837), 3 My. & Cr. 112; Langton v. Horton (1842), 6 Jur. 910. **Mentd.** Doe d. Egremont v. Hellings (1842), 6 Jur. 821; Ellis v. R. (1851), 11 Exch. 921.

**1390.** — Only rights of mortgagor seizable — **Priority of claim of mortgagee—Equitable mortgage.**—A. deposited the title deeds of two estates with W. & Co., as a security for past & future advances, & accompanied the same with a memorandum. Subsequently to the date of the deposit, B. & C. recovered judgment against A., & obtained possession of the estates by writ of *elegit*. Upon a bill by W. & Co. praying relief as equitable mtgees.:—**Held**: W. & Co. were entitled to payment of their debt, in preference & priority to the subsequent *elegit* creditors, notwithstanding Judgments Act, 1838 (c. 110), ss. 11, 13.

The right of a judgment creditor in possession under *elegit* is not analogous to that of a purchaser for value without notice, so as to give him a preference over a prior equitable claimant; the judgment only affecting that which was properly the estate of his debtor.—**WHITWORTH v. GAUGAIN** (1846), 1 Ph. 728; 15 L. J. Ch. 433; 9 L. T. O. S. 213; 10 Jur. 531; 41 E. R. 809, L. C.; *affg.* (1844), 3 Hare, 416.

*Annotations*.—**Distd.** Brunton v. Neale (1844), 14 L. J. Ch. 8. **Apld.** Anderson v. Kemshead (1852), 16 Beav. 329. **Consd.** Watts v. Porter (1854), 3 E. & B. 743; Beavan v. Oxford (1856), 6 De G. M. & G. 507. **Apld.** Kinderloy v. Jervis (1856), 22 Beav. 1. **Consd.** Holroyd v. Marshall (1862), 10 H. L. Cas. 191; *Re* Blakely Ordnance Co., Coates's Case (1876), 46 L. J. Ch. 367. **Refd.** Adams v. Paynter, Adams v. Lloyd, Adams v. Paynter (1844), 8 Jur. 1063; Ames v. Birkenhead Docks Trustees (1855), 20 Beav. 332; Bonham v. Keane (1861), 1 John. & H. 685; Eyre v. McDowell (1861), 9 H. L. Cas. 620; Arden v. Arden (1885), 29 Ch. D. 702; Badeley v. Consolidated Bank (1886), 34 Ch. D. 536; *Re* Bell, Carter v. Stadden (1886), 54 L. T. 370; Ross v. Army & Navy Hotel Co. (1886), 2 T. L. R. 834; *Re* Leavesley, [1891] 2 Ch. 1; Jones v. Barnett, [1899] 1 Ch. 611.

**1391.** — — — — —.]—A canal co. was incorporated by a special Act of Parliament, which authorised them to purchase lands for the purposes of the Act, & for no other purpose, & empowered them to levy rates, tolls, & dues, & to borrow money on mtge. thereof; & contained a provision, that all persons whatsoever might navigate upon the canal, upon payment of the rates & dues thereby authorised to be taken. The co. made several mtges. of the rates, tolls, & dues under the Act; one of the mtgees., on behalf of himself & all others, obtained the appointment of a receiver of the co.'s rates, tolls, & dues, who was ordered to pay thereout the expenses of carrying on the co.'s business, & then the interest on the mtges., & to pay the balance into ct. in the cause. A judgment creditor of the co. presented a petition in the cause before the hearing, praying that he might be at liberty to sue out & execute a

*fi. fa.* & *elegit* against the goods & lands respectively of the co.:—**Held**: he might execute *fi. fa.*, but all he could take under the *elegit* would be such right in the lands as the co. had, namely, subject to the mtges. & to the right of user of the canal by the public, & subject also to the powers of management of the co.—**POTTS v. WARWICK & BIRMINGHAM CANAL NAVIGATION CO.** (1853), Kay, 142; 69 E. R. 61.

*Annotations*.—**Apld.** Ames v. Birkenhead Docks Trustees (1855), 20 Beav. 332. **Refd.** Blaker v. Horts & Essex Waterworks Co. (1889), 41 Ch. D. 399. **Mentd.** Gardner v. L. C. & D. Ry. (No. 1), Drawbridge v. Same, Gardner v. Same (No. 2), Imperial Mercantile Credit Assocn. v. Same (1867), 2 Ch. App. 201; *Re* Manchester & Milford Ry. *Ex p.* Cambrian Ry. (1880), 14 Ch. D. 645.

**1392.** — — — — —.]—A judgment creditor of a railway co., who had obtained an *elegit*, was restrained from taking possession of the land & chattels belonging to the co. as against prior mtgees. to whom were assigned the undertaking, calls on shareholders & tolls.—**LEGG v. MATHIESON** (1860), 2 Giff. 76; 29 L. J. Ch. 385; 2 L. T. 112; 6 Jur. N. S. 1010; 66 E. R. 31.

*Annotations*.—**Refd.** Wildy v. Mid-Hants Ry. (1868), 18 L. T. 73. **Mentd.** Edwards v. Standard Rolling Stock Syndicate, [1893] 1 Ch. 574; *Re* London Pressed Hinge Co., Campbell v. London Pressed Hinge Co., [1905] 1 Ch. 576.

**1393.** — — — — —.]—**DINO BUNDHU SHAW CHOWDHRY v. JOGMAYA DAS** (1901), 18 T. L. R. 138, P. C.

— — — — —.]—*See, also*, Sub-sect. 9, B., *post*.

**1394.** — — — — —.]—**Property of railway company—Priority of unpaid vendors & debenture holders.**—**WICKHAM v. NEW BRUNSWICK & CANADA RY. CO.**, No. 915, *ante*.

**1395.** — — — — —.]—**Whether scheme of arrangement binding on execution creditor.**—An outside creditor is not bound by a scheme of arrangement filed by a railway co. under Railway Companies Act, 1867 (c. 127), & cannot derive any indirect benefit from it; his rights are entirely unaffected by it. Unpaid vendors of land sold to the co., & debenture holders of the co., do not, by accepting debenture stock under the provisions of a scheme, lose any priority which they previously had over an *elegit* creditor, who is not bound by the scheme.—**STEVENS v. MID-HANTS RY. CO., LONDON FINANCIAL ASSOCN. v. STEVENS** (1873), 8 Ch. App. 1064; 42 L. J. Ch. 694; 29 L. T. 318; 21 W. R. 858, L. JJ.

*Annotations*.—**Consd.** *Re* East & West India Dock Co. (1890), 44 Ch. D. 38. **Mentd.** Adams v. Angell (1877), 5 Ch. D. 634; Thorne v. Cann, [1895] A. C. 11; Capital & Counties Bank v. Rhodes (1902), 71 L. J. Ch. 573; Whiteley v. Delaney, [1914] A. C. 132.

**1396.** — — — — —.]—**HATTON v. HAYWOOD**, No. 1466, *post*.

**1397.** — — — — —.]—Where land is subject to a mtge. & incapable of being delivered in execution under a writ of *elegit*, the registration by a judgment

a loan of \$3,700 through R., from plffs., upon the security of 220 acres of land, by falsely representing that R. had purchased the 220 acres from W. for \$7,500, & had paid \$4,000 cash, & wanted the loan to pay the balance with, & on receipt of the loan paid W. the \$3,000 which was the total purchase money for the 220 acres, & another parcel of about 50 acres, & was the full value of both parcels. G. got the conveyance from W. of both parcels, & conveyed the 220 acres to R. to carry out the scheme, & retained the 50 acres himself. In an action by plffs.:—**Held**: the land was not subject to the claims of execution creditors of G., whose *fi. fas.* were in the sheriff's hands.—**HAMILTON PROVIDENT & LOAN SOCIETY v. GILBERT** (1884), 6 O. R. 434.—**CAN.**

b. — — — — —.]—**Estate of mortgagee not in possession—Whether seizable.**—The estate of a mtgee. in fee who has not taken possession of the land is not seizable in execution on a judgment against him. The fact of there being no bond or covenant to pay the money does not affect the question.—**DOE d. VERNON v. WHITE** (1859), 4 All. 314.—**CAN.**

c. — — — — —.]—**CICERI v. BURINO** (1919), 45 D. L. R. 340.—**CAN.**

d. — — — — —.]—**Equity of redemption.**—Before equities of redemption were by statute made saleable under execution, a sheriff might sell a debtor's reversionary interest in the fee, subject to a lease for one thousand years.—**WIGHTMAN v. FIELDS** (1872), 19 Gr. 559.—**CAN.**

e. — — — — —.]—An estate subject to mtgo. was devised to several parties, & after the death of testator the party entitled to the mtge. money procured the land to be sold under execution at law:—**Held**: the Act authorising the sale of equities of redemption did not apply; the sale under execution was inoperative, & the parties entitled to the equity of redemption had a right to redeem; but, under the circumstances, the person representing the mtgee. was entitled to be allowed for improvements.—**SHAW v. TIMS** (1872), 19 Gr. 496.—**CAN.**

*When seizable.*—12 Vict. c. 73, making equities of redemption saleable under legal process, does not apply where the mtge. is created by a deed absolute in form.—



*Sect. 2—Writ of elegit: Sub-sect. 5, C., D., E., F.*

creditor of a writ of *elegit*, is a registration of "a writ or order for the purpose of enforcing" the judgment within Land Charges Act, 1900 (c. 26), s. 2, & operates to create a charge on the land under Judgments Act, 1838 (c. 110), s. 13.

A judgment creditor issued & duly registered writs of *elegit* against the judgment debtor & subsequently obtained & duly registered an order appointing a receiver of the rents & profits of the judgment debtor's land which was subject to a mtge. & incapable of being delivered in execution under a writ of *elegit*. After the registration of the writs of *elegit* but before the appointment of the receiver, the tenant of the land, having no notice of the judgment creditor's claim, paid rent in advance to the judgment debtor:—*Held*: the payment was not a good payment of rent as between the tenant & the judgment creditor.—*ASHBURTON (LORD) v. NOCTON*, [1915] 1 Ch. 274; 84 L. J. Ch. 193; 111 L. T. 895; 31 T. L. R. 122; 59 Sol. Jo. 145, C. A.

**1398. Property subject to joint power of appointment—Judgment against joint appointors—Execution against one limited to separate estate only.**—Real property over which a married woman & her husband have a joint general power of appointment by deed cannot be taken in execution under a writ of *elegit* issued under an order for payment of costs by the married woman & her husband by which execution against the married woman is limited to her separate estate.—*GOATLEY v. JONES* (No. 1), *GOATLEY v. JONES* (No. 2), [1909] 1 Ch. 557; 78 L. J. Ch. 420; 100 L. T. 512.

#### D. Goods and Chattels.

*See, now, Bkpcy. Act, 1883 (c. 52), ss. 146, 149.*

**1399. Former law.**—An owner of coal & iron mines demised them to lessees, who afterwards sub-demised them to deft., with full & free liberty & license to make & use such roads & ways in, over, & upon the premises "as should be found necessary or expedient for carrying & conveying the coals & iron ore" to be raised & landed, & "for the commodious carrying on of the business of an ironmaster." The lease also contained a covenant on the part of the lessees, at the end, expiration, or sooner determination of the term, to yield up "all ways & roads in, upon, or under" the premises "in such good repair, order, state, & condition as that the said coal & iron works might be continued & carried on by the lessor, his heirs or assigns." A creditor of the sub-lessee, who had sued out an *elegit*, claimed, under the sheriff's inquisition, the right to take up & remove certain iron rails & tramways which had been put down upon iron tram plates & wooden sleepers by the sub-lessee:—*Held*: the iron rails & tramways were trade personal chattels of the sub-lessee, not affixed to the freehold, & therefore liable to be taken by the execution creditor.—*BEAUFORT (DUKE) v. BATES* (1862), 3 De G. F. & J. 381; 31 L. J. Ch. 481; 6 L. T. 82; 10 W. R. 200; 45

E. R. 926; *sub nom. BATES v. BEAUFORT (DUKE)*, 8 Jur. N. S. 270, L. JJ.

*Annotations*:—*Mentd. Re Richards, Ex p. Astbury, Ex p. Lloyd's Banking Co.* (1869), 4 Ch. App. 630; *Turner v. Cameron* (1870), L. R. 5 Q. B. 306; *Re Armytage, Ex p. Moore & Robinson's Banking Co.* (1880), 28 W. R. 924.

**1400.** —.]—(1) Under a writ of *elegit* the sheriff is entitled to seize the debtor's goods at once, before the holding of the inquisition, & from the time of the seizure the creditor becomes a secured creditor within Bkpcy. Act, 1869 (c. 71), s. 16 (5).

(2) Sect. 87 has no application to a seizure of goods under an *elegit*.—*Re GOURLAY, Ex p. ABBOTT* (1880), 15 Ch. D. 447; 50 L. J. Ch. 80; 43 L. T. 417; 29 W. R. 143.

*Annotations*:—*As to (1) Consd. Hough v. Windus* (1884), 12 Q. B. D. 224. *As to (2) Consd. Re Bannister, Ex p. Vale* (1881), 18 Ch. D. 137. *Reid. Re Chinn, Ex p. Sulger* (1881), 17 Ch. D. 839; *Re Curtoys, Ex p. Pillers* (1881), 17 Ch. D. 653; *Re Hutchinson, Ex p. Hutchinson* (1885), 16 Q. B. D. 515.

**1401. Intervention of Bankruptcy Act, 1883 (c. 52)—Between seizure & delivery—Execution valid.**—By sect. 146 of the above Act, "the sheriff shall not under a writ of *elegit* deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods," & by sect. 169, which repeals amongst other enactments so much of 13 Edw. 1, c. 18, as relates to the chattels of the debtor save only his oxen & beasts of the plough, it is enacted that "the repeal effected by this Act shall not affect anything done before the commencement of this Act under any enactment repealed by this Act, nor any right or privilege acquired or duty imposed, or liability or disqualification incurred under any enactment so repealed." Some days before Jan. 1, 1884, when the above Act came into operation, the sheriff entered into possession & seized goods of deft., under a writ of *elegit* issued under 13 Edw. 1, c. 18, at the suit of pltf., a judgment creditor of deft., but no delivery of such goods had been made to pltf. before Jan. 1, 1884:—*Held*: the above Act had not deprived pltf. of his right to the delivery of such goods.—*HOUGH v. WINDUS* (1884), 12 Q. B. D. 224; 53 L. J. Q. B. 165; 50 L. T. 312; 32 W. R. 452; 1 Morr. 1, C. A.

*Annotations*:—*Reid. Re Athlumney, Ex p. Wilson*, [1898] 2 Q. B. 547. *Mentd. Re Home, Ex p. Edwards* (1885), 54 L. J. Q. B. 447; *Re Mills' Trusts* (1888), 40 Ch. D. 14; *A.-G. v. Theobald* (1890), 24 Q. B. D. 557; *Re Raison, Ex p. Raison* (1891), 8 Morr. 11; *Garbutt v. Durham Joint Committee*, [1906] A. C. 291; *A.-G. v. Harrison* (1920), 84 J. P. 141; *Bowling v. Camp* (1922), 128 L. T. 342.

**Chattels real—Leaseholds.**—*See Sub-sect. 5, B., ante.*

#### E. Ecclesiastical Property.

**1402. Advowson.**—An advowson descending to an heir is real assets, & (as it seems) extendible on an *elegit*.—*ROBINSON v. TONGE* (1735), 3 P. Wms. 398; 2 Eq. Cas. Abr. 259; 24 E. R. 1117, L. C.

*Annotations*:—*Reid. Kinaston v. Clark* (1741), 2 Atk. 204. *Mentd. Waghorne v. Langmead* (1796), 1 Bos. & P. 571; *Heath v. Brindley* (1834), 2 Ad. & El. 365.

**1403. Profits of benefice.**—At common law no process ever issued to a sheriff to levy an ecclesiastical property the debt due in an action

*MCCABE v. THOMPSON* (1857), 11 Gr. 175.—CAN.

**g. — Interest of mortgagee—How far seizable.**—Where a conveyance absolute in form was executed as a security only, upon an oral undertaking of the grantee to reconvey upon payment of his demand:—*Held*: a judgment creditor of such grantee could not enforce his judgment beyond the amount of principal & interest due the

grantee.—*GLASS v. FRECKLETON* (1864), 10 Gr. 470.—CAN.

**h. Property subject to lien for unpaid purchase-money.**—The equitable lien of a vendor of lands for unpaid purchase money, cannot be seized under a common law *fi. fa.*—*TRAUNWEISER v. JOHNSON, Re MUCKLOW & JOHNSON'S CONTRACT* (1915), 31 W. L. R. 712; 8 W. W. R. 1028.—CAN.

**k. Purchaser under agreement for**

*sale—Sale before acquisition of legal title.*—*Held*: an execution was binding on land in which the execution debtors had at the time of registration of the execution only an equitable interest as purchasers under agreement of sale, & which land they sold to another before getting the legal title.—*RUTTLE v. ROWE*, [1919] 3 W. W. R. 1120; 50 D. L. R. 346; 13 Sask. L. R. 79.—CAN.

& . . . no *elegit* lies (*per* CUR.).—**ARBuckle v. COWTAN** (1803), 3 Bos. & P. 321; 127 E. R. 177.

*Annotations*:—**Consd.** Bishop v. Hatch (1834), 1 Ad. & El. 171. **Refd.** Hawkins v. Gathercole (1855), 6 De G. M. & G. 1; Parry v. Jones (1856), 1 C. B. N. S. 339; Hopkins v. (1864), 4 B. & S. 836. **Mentd.** Palmer v. Bate 2 Brod. & Bing. 673.

**1404.** —.]—A judgment entered up in 1851 against a beneficed clergyman for a debt was duly registered:—**Held**: under Judgments Act, 1838 (c. 110), s. 13, it was not a charge upon his benefice.—**BATES v. BROTHERS** (1854), 2 Sm. & G. 509; 2 Eq. Rep. 803; 23 L. J. Ch. 782; 23 L. T. O. S. 305; 18 J. P. 661; 18 Jur. 715; 2 W. R. 636; 65 E. R. 503.

**1405. Lay rectories—Lay tithes.**]—Judgments Act, 1838 (c. 110), s. 13, does not operate to charge the fruits of an ecclesiastical benefice with a debt due upon a judgment entered up in any of her Majesty's superior courts of record at Westminster against the incumbent of the benefice.

It must be taken as settled that the word rectories & tithes in sect. 11 of the Act means only lay rectories & lay tithes (**TURNER, L.J.**).—**HAWKINS v. GATHERCOLE** (1855), 6 De G. M. & G. 1; 3 Eq. Rep. 348; 24 L. J. Ch. 332; 24 L. T. O. S. 281; 19 J. P. 115; 1 Jur. N. S. 481; 3 W. R. 194; 43 E. R. 1129, L. JJ.

**Refd.** Arnold v. Gravesend Corp., Pallister (1856), 25 L. J. Ch. 776; Parry v. Jones (1856), 1 C. B. N. S. 339; Winter v. Homan (1856), 28 L. T. O. S. 23; **Re** Poland (1866), 35 L. J. Bcy. 19; Garnett v. Bradley (1878), 3 App. Cas. 944; McBean v. Deane (1885), 30 Ch. D. 520. **Mentd.** Cope v. Doherty (1858), 2 De G. & J. 614; Burder v. O'Neill (1863), 2 New Rep. 551; Cambrian Rys. Scheme (1868), 3 Ch. App. 278; Norwich (Bp.) v. Pearse (1868), L. R. 2 A. & E. 281; Beioley v. Carter (1869), 4 Ch. App. 230; **Re** Meredith, *Ex p.* Chick (1879), 11 Ch. D. 731; Bradlaugh v. Clarke (1883), 8 App. Cas. 354; Seward v. Vera Cruz (1884), 10 App. Cas. 59; **Re** Leavesley, [1891] 2 Ch. 1; Baird v. Tunbridge Wells Corp., [1894] 2 Q. B. 867; Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs & Trade-mks., [1898] A. C. 571; Birmingham Corp. v. Birmingham Canal Navigations (1905), 21 T. L. R. 548; R. v. West Riding of Yorkshire County Council, [1906] 2 K. B. 676; Porthcawl U. C. v. Brogden, [1917] 1 Ch. 534; Banbury v. Bank of Montreal, [1918] A. C. 626; **Re** Plymouth Corp. & Walter, [1918] 2 Ch. 354; A.-G. v. Brown, [1920] 1 K. B. 773; Nicolle v. Nicolle, [1922] 1 A. C. 284; Rhondda's Claim, [1922] 2 A. C. 339; Woodfield v. Bond, [1922] 2 Ch. 40.

*See, further*, ECCLESIASTICAL LAW, p. 416, No. 2508.

#### F. Land held by Public Authorities.

**1406. Municipal Corporation—Municipal Corporations Act, 1835 (c. 76).**]—**Semble**: corporate property is not protected by the above Act, though directed to be applied to public purposes, from the claims of persons having demands on the corp.,—**DOE d. PARR v. ROE** (1841), 1 Q. B. 700; 1 Gal. & Dav. 220; 10 L. J. Q. B. 317; 5 J. P. 626; 6 Jur. 101; 113 E. R. 1299.

**1407.** —.]—**ARNOLD v. GRAVESEND CORPN.**, No. 51, *ante*.

**1408. Urban sanitary authority—Land for reservoir.**]—Land which had been conveyed to a local board of health for the purposes of Public Health Acts, was used as a reservoir for the supply of water to the district of the local board. Judgment having been obtained against the local Board in the name of their clerk:—**Held**: the land was liable to be taken under a writ of *elegit*.—**WORRAL WATERWORKS CO. v. LLOYD** (1866), L. R. 1 C. P. 719.

*Annotation*:—**Consd.** Jersey v. Uxbridge R. S. A., [1891] 3 Ch. 183.

**1409. Rural sanitary authority—Land held in trust for parish—Debt not chargeable exclusively against parish.**]—In 1885 pltf. obtained an injunction against defts., restraining them from fouling a stream, & defts. were ordered to pay the costs. Pltf. did not tax his costs until 1890. In 1891 he sued out a writ of *elegit* to recover them, & after an inquisition the sheriff delivered in execution to pltf. certain lands which had been acquired by defts. for the purpose of sewage works for the parish of N., a contributory place within their district. These lands were purchased out of the moneys raised on the security of the separate rates of N. Defts. moved to set aside the *elegit*:—**Held**: the lands were held by defts. in trust for the parish of N., & could not be taken in execution for a judgment debt not chargeable exclusively against that parish.—**JERSEY (EARL) v. UXBRIDGE RURAL SANITARY AUTHORITY**, [1891] 3 Ch. 183; 60 L. J. Ch. 833; 64 L. T. 858; *sub nom.* **Re UXBRIDGE RURAL SANITARY AUTHORITY, JERSEY (EARL) v. UXBRIDGE UNION RURAL SANITARY AUTHORITY**, 7 T. L. R. 568.

*Annotations*:—**Mentd.** Croydon Corp. v. Croydon R. C., [1908] 2 Ch. 321; Wakefield R. C. v. Hall, [1912] 2 K. B. 265.

*See* Judgments Act, 1838 (c. 110), s. 11.

**1410. Profits of office.**]—The profits of the office of "Filazer" cannot be taken in execution upon a statute.

A man can never have a thing extended on an execution unless he may grant & assign it, & the office of Filazer cannot be granted inasmuch as he is an officer of the ct. (**SHELLEY, J.**).—**ANON.** (1536), 1 Dyer, 7 b; 73 E. R. 17.

*Annotations*:—**Refd.** Webb's Case (1608), 8 Co. Rep. 45 b; Manning's Case (1609), 8 Co. Rep. 94 b.

**1411. Rentcharge.**]—**ANON.** (1561), Moore, K. B. 32; 72 E. R. 421.

**1412.** —.] **Two-thirds thereof.**]—Upon an *elegit* two-thirds of a rent may be extended though deft. has the whole.—**WOTTON v. SHIRT** (1600), Cro. Eliz. 742; 78 E. R. 974.

**1413.** —.]—In 1824 P. & B. filed a supplemental bill against D., & the surviving trustee, stating the deed of assignment & trust; that under it D. was entitled to a rentcharge issuing out of the lands held in trust by the surviving trustee, & that they had sued out an *elegit* against D. for the sum of £1,027, directed to the sheriff of R., who returned that D. or his trustee was seised of a freehold rent issuing out of lands in the county of R.; one moiety of which he had delivered to P. & B. to hold, etc., till they had levied the damages marked on the writ. They claimed by the bill to be entitled either to a moiety of the lands or of the rentcharge, or to have satisfaction of their judgment out of the annuity payable to D. under the trusts of the deed. Upon these grounds they prayed by their bill a receiver either of a moiety of the lands comprised in the sheriff's return to the writ, to the extent of one moiety of the £5,000 *per annum*, or of the lands comprised in the deeds of assignment & trust; & after satisfaction of the charges having priority according to the trusts of the deed, that a moiety or a competent part of the £5,000 *per annum* might be applied in payment of their demands, & that the trustees might be

#### PART III. SECT. 2, SUB-SECT. 5.—G.

**1. Right to dower.**]—A right to dower is not saleable under execution

against the lands of a dowress. Till dower is assigned she has no estate in the land, nor even a right of entry; neither does her interest come within

C. S. U. C., c. 90, s. 5.—**MCANNANY v. TURNBULL** (1863), 10 Gr. 298.—**CAN.** **m. Interest in oil leases.**]—Interests in oil leases are interests in lands, & as



**Sect. 2.—Writ of *elegit*: Sub-sect. 5, G.; sub-sects. 6 & 7.]**

restrained from paying the annuity to D. till the demand was satisfied:—*Held*: (1) the defects in the sheriff's return to the *elegit* were immaterial, as no return is necessary, & the suing out an *elegit* is sufficient to ground the equity; (2) one *elegit* was sufficient, although the rent was payable out of the lands in three counties.—*DILLON* (LORD) v. *PLASKETT* (1828), 2 Bli. N. S. 239; 1 Dow. & Cl. 320; 4 E. R. 1121, H. L.

*Annotations*:—*Generally*, *Refd.* *Neate v. Marlborough* (1838), 2 Jur. 76; *Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275. *Mentd.* *Lodge v. Lyseley* (1832), 4 Sim. 70.

**1414.** —.]—A. was entitled to an annuity, which was secured by a covenant & by an assignment of leaseholds to her, in trust to sell:—*Held*: her interest under the deed might be made available under Judgments Act, 1838 (c. 110), s. 3, for payment of a judgment debt due from her.—*HARRIS v. DAVISON* (1846), 15 Sim. 128; 15 L. J. Ch. 255; 7 L. T. O. S. 201; 10 Jur. 257; 60 E. R. 566.

*Annotation*:—*Refd.* *Avison v. Holmes*, *Penny v. Avison* (1861), 1 John. & H. 530.

**1415. Mansion house—Excepted from leasing power—Of tenant for life.]—**A mansion house excepted from the leasing power of a tenant for life, is subject to execution at the suit of his creditors, during his life.—*DAVIS v. MARLBOROUGH (DUKE)* (1819), 2 Swan. 108; 2 Wils. Ch. 130; 36 E. R. 555, L. C.

*Annotations*:—*Mentd.* *Cooper v. Reilly* (1829), 2 Sim. 560; *Portmore v. Taylor* (1831), 4 Sim. 182; *Westmeath v. Westmeath* (1834), 3 Knapp. 42; *Hamlet* (1835), 1 Bli. N. S. 239.

*Refd.* *Paul* (1841), 8 Cl. & Fin. 295; *Pelly v. Wathen* (1849), 7 Hare, 351; *Paynter v. Carew* (1854), *Kay v. Mansfield v. Oglo*

*v. Cook* (1867), 36 L. J. Ch. 753; *O'Rourke v. Bollingbroke* (1877), 2 App. Cas. 814; *Fry v. Lane*, *Re Fry*, *Whittet v. Bush* (1888), 40 Ch. D. 312; *Re Marlborough's Parliamentary Estates* (1891), 8 T. L. R. 179; *Re Marlborough's Blenheim Estates & Settled Land Acts* (1892), 8 T. L. R. 582; *Cadogan v. Lyric Theatre* (1894), 63 L. J. Ch. 775.

**Equitable interest in land.]—**See Sub-sect. 5, C., *ante*.

**SUB-SECT. 6.—WHAT QUANTUM OF LAND TO BE SEIZED.**

See, now, Judgments Act, 1838 (c. 110), s. 11.

**1416. Moiety of land only—Statute of Westminster II., 1285 (c. 18).]**—By the above statute the *elegit* is given of the moiety of the land.—*HARBERT'S CASE* (1584), 3 Co. Rep. 11 b; 76 E. R. 647.

*Annotations*:—*Refd.* *Cecil's Case* (1597), 7 Co. Rep. 18 b; *Waldron v. Vicars* (1622), Palm. 283; *Coke's Case* (1623), Godb. 289; *Fowle v. Dogle* (1674), Freem. K. B. 157; *R. v. Baden* (1694), Show. Parl. Cas. 72; *Lane v. Cotton* (1701), 12 Mod. Rep. 472; *Galton v. Hancock* (1743), 2 Atk. 427; *Stilleman v. Ashdown* (1743), Amb. 13; *Giles v. Grover* (1832), 9 Bing. 128. *Mentd.* *Garnon's Case* (1598), 5 Co. Rep. 88 a; *Rooke's Case* (1598), 5 Co. Rep. 99 b; *Drury's Case* (1610), 8 Co. Rep. 141 b; *R. v. Hampden* (1637), 1 State Tr. 826; *The Banker's Case* (1695), Skin. 601; *Gore v. Gore* (1733), Kel. W. 254; *Kent v. Kent* (1734), Kel. W. 194; *Dyke v. Sweeting* (1745), Willes, 585; *Gorton v. Hancock* (1745), Ridg. temp. H. 301; *R. v. Curtis* (1750), Park. 95; *R. v. Cotton* (1751), Park. 112; *Deering v. Winchelsea* (1800), 2 Bos. & P. 270; *Cassidy v. Steuart* (1841), 2

such are not seizable as goods under execution, but must be sold as interests in lands.—*CANADIAN RAILWAY ACCIDENT CO. v. WILLIAMS* (1910), 16 O. W. R. 574; 21 O. L. R. 472; 1 O. W. N. 991.—CAN.

**PART III. SECT. 2, SUB-SECT. 7.**  
**n. Registration of writ—Operates**

**to create charge on land.]—**Under Transfer of Land Act, 1890, s. 130, the service of a copy writ of *fi. fa.* binds the land specified in such writ for three months from the date of such service, unless in the meantime the property specified is sold under the writ.—*Re SHEARS & ALDER* (1891), 17 V. L. R. 316.—AUS.

*Scott, N. R.* 432; *Hunter v. Hunt* (1845), 1 C. B. 300; *Wolmershausen v. Gullock*, [1893] 1 Ch. 514; *Ruabon S.S. Co. v. London Assce.*, [1900] A. C. 6; *Re Darby's Estate*, *Rendall v. Darby*, [1907] 2 Ch. 465.

**1417.** —.]—On judgment against a person as an heir & terre-tenant in "*riens per descent*," execution shall be only of a moiety of the land.—*EYRES v. TAUNTON* (1633), Cro. Car. 295; 79 E. R. 859.

**1418.** — Property possessed only half of amount returned.]—*STAMFORD (EARL) v. HOBART* (1665), 1 Sid. 239; 82 E. R. 1081.

**1419.** — Execution void if more taken—*Fresh execution.]—*If, to a writ of *elegit*, the sheriff return that deft. was seized of two farms, the one of £40 a year, the other of £60 a year, & that he had delivered to pltf. the farm of £60 a year, the execution is absolutely void, for the sheriff cannot deliver more than a moiety of deft.'s lands; & therefore pltf. may, in such case, sue out a fresh writ of execution.

If on *elegit* return be made, that he has no lands, he may have a new execution; but if any lands are found, he is concluded.

The estate of tenant by *elegit* determines without more ado, upon levying of the money by effluxion of time, if eviction or expulsion appear not (*HOLT, C.J.*).—*PULLEN v. PURBECK* (1701), 1 Mod. Rep. 355; 88 E. R. 1376; *sub nom.*

*Refd.* *BIRBECK*, 1 Id. Raym. 718; *Carth.* 453; *sub nom.* *PUTTEN v. PURBECK*, 2 Salk. 563. *Annotations*:—*Consd.* *Den v. Abingdon* (1780), 2 Doug. K. B. 473. *Appl.* *Fenny v. Durrant* (1817), 1 B. & Ald. 40. *Refd.* *Garland v. Carlisle* (1837), 11 Bli. N. S. 421.

**1420.** —.]—Sale of a moiety of a debtor's real estate, decreed for satisfaction of a judgment, & costs.—*ROWE v. BANT* (1751), 1 Dick. 150; 21 E. R. 226, L. C.

*Annotation*:—*Mentd.* *Burroughs v. Elton* (1805), 11 Ves. 29.

**1421.** — Of total value—Not of particular tenements.]—Upon an *elegit* the sheriff is not bound to deliver a moiety of each particular tenement & farm, but only certain tenements, etc., making in value a moiety of the whole.—*DEN v. ABINGDON (LORD)* (1780), 2 Doug. K. B. 473; 99 E. R. 302.

*Annotations*:—*Consd.* *Sherwood v. Clark* (1846), 15 M. & W. 764. *Refd.* *Fenny v. Durrant* (1817), 1 B. & Ald. 40.

**1422.** — Although several writs.]—Where two writs of *elegit* are issued the same day upon judgments signed in the same term, the sheriff may extend on each an entire moiety of deft.'s land, although the judgments are at the suit of different pltf's., & the inquisition on the second *elegit* recites, that a moiety has been extended on the first.—*DOE d. DAVIES v. CREED* (1829), 5 Bing. 327; 130 E. R. 1087; *sub nom.* *DOE d. CHEESE v. CREED*, 2 Moo. & P. 648; 7 L. J. O. S. C. P. 138.

*ions*:—*Refd.* *Clarke v. Arden* (1855), 16 C. B. 227. *Refd.* *Doe d. Wawn v. Horn* (1838), 3 M. & W. 333.

**SUB-SECT. 7.—REGISTRATION.**

—*See Judgments Acts*, 1838 (c. 110), 1839 (c. 11), 1840 (c. 82), 1855 (c. 15), 1864 (c. 112); *Law of Property Amendment Act*, 1860 (c. 38); *Crown Suits, etc. Act*, 1865 (c. 104); *Land Charges*

**o.** —.]—The registration of a certificate of judgment, under County Cts. Act, R. S. M., c. 33, ss. 196, 197, as amended by 55 Vict. c. 7, s. 5, binds & charges the land of the judgment-debtor, though it may be his actual residence or home, & the creditor may take proceedings to realise whenever deft. ceases to be entitled to

Registration & Searches Act, 1888 (c. 51); Land Charges Act, 1900 (c. 26); Middlesex Registry Act, 1708 (c. 20); Yorkshire Registries Act, 1884 (c. 54).

**1423. Registration of writ—Operates to create charge on land—Land Charges Act, 1900 (c. 26), s. 2.]—ASHBURTON (LORD) v. NOCTON, No. 1397, ante.**

**1424. Registration of judgments—Under Judgments Act, 1838 (c. 110), ss. 13, 19—Unregistered judgment—Effect on vendor's title.]—An outstanding docketed judgment not registered pursuant to sect. 19 of the above Act, & Judgments Act, 1839 (c. 11), ss. 2, 3, is not a valid objection to the title of a vendor on the sale of realty.—BEDFORD v. FORBES (1843), 1 Car. & Kir. 33; 2 L. T. O. S. 192, N. P.**

**1425. ——— Effect as against purchasers.]—Ejectment for lands in Middlesex. On a case stated it appeared that A., being possessed of a term of 99 years in the lands, conveyed it by way of mtge. to pltf. on June 19, 1852. The mtge. was registered in Middlesex on June 28. Deft., on June 5, 1852, obtained a judgment in the Queen's Bench against A. On the same day the judgment was registered in the Common Pleas; it never was registered in Middlesex. On Sept. 8, 1852, a writ of *elegit* issued; & the lands were delivered to deft.:—*Held*: the judgment was a charge on lands in general, under sect. 13 of the above Act, from the time it was registered in the Common Pleas, but by Judgments Act, 1839 (c. 10), s. 5, it had no further effect against a *bonâ fide* purchaser, for value & without notice, than a docketed judgment before Judgments Act, 1838. A docketed judgment would not, before that Act, have bound a term for years until execution; & consequently pltf., being a *bonâ fide* purchaser of this term of years before the execution, was entitled to the lands as against deft., the judgment creditor; & these lands being in Middlesex, the judgment, though registered in the Common Pleas, did not bind the lands till a memorial was registered in Middlesex under Middlesex Registry Act, 1708 (c. 20), s. 18.—WESTBROOK v. BLYTHE (1854), 3 E. & B. 737; 2 C. L. R. 1660; 23 L. J. Q. B. 386; 1 Jur. N. S. 85; 2 W. R. 490; 118 E. R. 1317.**

*Annotations*:—*Apld.* Hughes v. Lumley (1854), 4 E. & B. 274. *Consd.* Neve v. Flood (1864), 33 Beav. 666. *Refd.* Benham v. Keane (1861), 1 John. & H. 685.

**1426. ——— Order for payment of costs.]—Under the above Act, an order for payment of costs operates only as against purchasers, etc., from the registration of the certificate of**

claim the property as his exemption.—ROBERTS v. HARTLEY (1902), 14 Man. L. R. 284.—CAN.

**p. ———.]—The effect of Land Titles Act (Sask.), ss. 118 (2), 70, is to give an execution, a copy of which is filed in the proper office, priority over an unregistered equitable mtge.—UNION BANK OF CANADA v. LUMSDEN MILLING CO. (1915), 31 W. L. R. 801.—CAN.**

*operating to create charge on land.]—Real Property Act, 1861, s. 91, does not give the execution creditor by virtue of the entry on the register book of the memorial of the writ of execution any right of property in or any proprietary charge upon the land itself.—BOND v. MCCLAY, [1903] S. R. Q. 1.—AUS.*

**r. ———.]—The act of the registrar of the land titles in indorsing on a certificate of title a memorandum of a writ of execution is not in itself a "proceeding" in respect of the execution within Land Titles Act, s. 62 (2);**

registration related back to the moments of filing, & the entry of the memorandum on the certificate is merely an administrative act which does not in any way alter the situation between the debtor & the creditor in respect to the lands within the registration district. A writ of execution received by the registrar of land titles before the passing of the amendment of 1916 (c. 3), s. 15 (4) to Land Titles Act, s. 62, but not noted on a certificate of title until after the passing of said amendment, will not be removed from such certificate because of such amendment, or the later amendment of 1917 (c. 3), s. 40 (3).—LEE v. HARRISON, [1917] 3 W. W. R. 570.—CAN.

**s. ———.]—The execution of one creditor was registered after the registration of the notice of exercising the power of sale, but before the date of sale:—*Held*: this execution attached. Two executions were lodged after the sale took place:—*Held*: these executions did not attach.—**

taxation.—HARGRAVE v. HARGRAVE (1857), 23 Beav. 484; 53 E. R. 191.

**1427. ——— Effect as against voluntary settlement.]—In a suit to settle the priorities of incumbrancers on a testator's estate, the chief clerk by his certificate found a voluntary settlement ranking 1, & A. & B. judgment creditors ranking 2 & 3, but he also found that B.'s judgment which was before Judgments Act, 1838 (c. 110), was of prior date to the voluntary settlement:—*Held*: although as between A. & B. the former upon a question of registration was entitled to priority yet that independently of such question & having regard to the date of the voluntary settlement & to the provisions of Judgments Act, 1839 (c. 11), s. 6, B. was prior both to the voluntary settlement & to A.**

A judgment creditor is not a purchaser within the meaning of 27 Eliz. c. 4, & has therefore no title on that ground to set aside a prior voluntary settlement.

Judgments Act, 1838 (c. 110), s. 13, does not confer on the judgment creditor any right against a person claiming under a voluntary settlement previously made by the judgment debtor.—BEAVAN v. OXFORD (EARL) (1856), 6 De G. M. & G. 507; 25 L. J. Ch. 299; 26 L. T. O. S. 277; 2 Jur. N. S. 121; 4 W. R. 274; 43 E. R. 1331, L. C. & L. J.J.

*Annotations*:—*Consd.* Kinderley v. Jervis (1856), 22 Beav. 1; Eyre v. M'Dowell (1861), 9 H. L. Cas. 620. *Apld.* Gill v. Continental Gas Union Co. (1872), 41 L. J. Ex. 176. *Refd.* Hirsch v. Coates (1856), 18 C. B. 757; Croft v. Lumley (1858), 6 H. L. Cas. 672; Scott v. Hastings (1858), 4 K. & J. 633; Nicholls v. Rosewarne (1859), 6 C. B. N. S. 480; Baker v. Tynte (1860), 2 E. & E. 897; Punchard v. Toinkins (1882), 31 W. R. 286; Dallow v. Garrold (1884), 14 Q. B. D. 543; *Re* Bell, Carter v. Stadden (1886), 54 L. T. 370; Vacuum Oil Co. v. Ellis, [1914] 1 K. B. 693.

**1428. ——— Decree for alimony.]—A wife, having obtained against her husband a decree for dissolution of marriage, & being also adjudged permanent alimony at the rate of £100 a year, payable by monthly instalments, registered the decree, under the above Act, in the Ct. of C. P., the effect being to prevent the husband from mortgaging or selling any part of his real estate. On motion to expunge the entry from the register, the ct. refused to interfere, remitting the husband for remedy, if any, to the Ct. of Ch.—*Ex p.* HOLDEN (1863), 13 C. B. N. S. 641; 32 L. J. C. P. 111; 9 Jur. N. S. 948; 143 E. R. 254; *sub nom.* *Re* HOLDEN, 1 New Rep. 361; 7 L. T. 791.**

—*See, now*, Land Charges Act, 1900 (c. 26), s. 5, sched.

**1429. ——— Registration under Middlesex**

THOMPSON v. BERGLAND (1910), 16 W. L. R. 154; 3 Sask. L. R. 470.—CAN.

**t. ———.]—Long before the recording in the Land Titles Office against certain land of defts.' execution, the execution-debtor had bound himself by agreement in writing to transfer the land to S., & this agreement was in full force & effect when the execution was recorded. A transfer of the land was executed, pursuant to the agreement, in favour of pltf. bank, as the nominee of S. contemporaneously with the making of the agreement, which was soon afterwards left at the Land Titles Office; but, for some unexplained reason, it was not actually recorded until about eight months thereafter; & in the meantime defts.' execution had come in & been recorded against the land:—*Held*: pltf. bank was entitled to have defts.' execution removed from its certificate of title & to hold the land freed therefrom. The mere fact that, when the execution was recorded, the bank's interest in the**



*Sect. 2.—Writ of elegit: Sub-sect. 7.]***Registry Act, 1708 (c. 20)—Land in Middlesex.]—**

A judgment has the effect of a charge on lands in Middlesex only from the time when it has been registered in the registry of Middlesex; & as between several judgments registered in the Common Pleas the judgment first registered in the Registry of Middlesex is entitled to priority.

S. had recovered a judgment against L., which he had registered in the Common Pleas under Judgments Act, 1838 (c. 110), s. 19. Afterwards, H. registered his judgment in the Common Pleas; & the land being in Middlesex, he registered it also in Middlesex under Middlesex Registry Act, 1708 (c. 20), s. 18. Afterwards S. registered his judgment in Middlesex:—*Held*: H.'s judgment had priority before S.'s judgment.—**HUGHES v. LUMLEY** (1854), 4 E. & B. 274; 3 C. L. R. 242; 24 L. J. Q. B. 57; 24 L. T. O. S. 144; 1 Jur. N. S. 422; 3 W. R. 109; 119 E. R. 105; *subsequent proceedings*, 4 E. & B. 358, Ex. Ch.

*Annotations*:—**Consd.** Neve v. Flood (1864), 33 Beav. 666. **Refd.** Benham v. Keane (1861), 1 John. & H. 685.

**1430.** ————.]—**WESTBROOK v. BLYTHE**, No. 1425, *ante*.

**1431.** ————.]—The equitable principles flowing from the doctrine of notice, which affect purchasers & mtgees. in relation to incumbrances, do not apply as between judgment creditors; & a judgment registered in the Common Pleas is no charge against land in Middlesex until entered on the Middlesex register, under Middlesex Registry Act, 1708 (c. 20). Where, therefore, a judgment creditor, having notice of a prior judgment registered in the Common Pleas, but not in Middlesex, registered his judgment in Middlesex before the earlier judgment was so registered:—*Held*: he was entitled to priority in respect of his judgment.—**BENHAM v. KEANE** (1861), 3 De G. F. & J. 318; 31 L. J. Ch. 129; 5 L. T. 439; 8 Jur. N. S. 604; 10 W. R. 67; 45 E. R. 901, L. J.J.

*Annotations*:—**Consd.** Neve v. Flood (1864), 33 Beav. 666. **Refd.** Holland v. Hart (1871), 6 Ch. App. 678; *Re* Wyatt, White v. Ellis, [1892] 1 Ch. 188; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231.

—.]—*See, now*, Land Charges Act, 1900 (c. 26), s. 4.

**1432.** ———— **Under Judgments Act, 1839 (c. 11)—Failure to re-register—Effect as against purchasers & incumbrancers.]—**Under above Act if A. has a judgment registered under Judgments Act, 1838 (c. 110), such registration will protect him

land, under the agreement & transfer, had not ripened into a registered or registrable interest, could not avail to deprive the bank of its rights.—**MERCHANTS BANK OF CANADA v. PRICE** (1914), 27 W. L. R. 48; 16 D. L. R. 104; 7 Alta. L. R. 344.—**CAN.**

u. ————.]—Where a registered owner of lands sells the same by unregistered agreement for sale, the purchase price being payable by instalments, & before all the instalments are paid creditors register executions against the lands, a transfer from the vendor to his purchaser in pursuance of the agreement can only be registered subject to the rights of the execution.—**ADANAC OIL Co. v.**

W. R. 1521; 11 Alta.

y. *Registration of judgment—Effect as against purchaser.]—*B., the registered proprietor of two allotments of land, deposited the certificates of title with a bank to secure advances & executed a memorandum of mtge. to the same bank of one of the allotments, which mtge. was not registered.

Subsequently a writ of execution against B. was registered, & the sheriff sold to E. all B.'s right, title, & interest in the allotments. At the time of the writ being registered no encumbrances on the land appeared on the register. E. having made application to have the transfer to him from the sheriff registered, the bank lodged a caveat. E. then moved to have the caveat removed from the file:—*Held*: all that E. obtained by his purchase from the sheriff was B.'s right, title, & interest. The transfer not being from a registered proprietor, Real Property Act, s. 111, did not apply, & the application should be refused.—**RE ELLIOT** (1886), 7 N. S. W. L. R. 271; 3 N. S. W. W. N. 59.—**AUS.**

z. ————.]—Where a judgment has been registered for the period of one year, & no levy has been made on the real estate bound thereby, any judgment creditor whose judgment has been subsequently registered, may, by a written notice, require the prior judgment creditor to levy on the real estate within three months. The sheriff shall deliver to the purchaser

against all who become mtgees. or purchasers during the currency of the five years, & such protection will continue as to them under a re-registration, even though he should have omitted to re-register within five years; but as to persons becoming mtgees. or purchasers between the period when his first registration ceases & when his re-registration began, he will not be protected, but they will have priority over them.—**SHAW v. NEALE** (1858), 6 H. L. Cas. 581; 27 L. J. Ch. 444; 31 L. T. O. S. 190; 4 Jur. N. S. 695; 6 W. R. 635; 10 E. R. 1422, H. L.; *revsq.* (1855), 20 Beav.

*Annotations*:—**Refd.** Beavan v. Oxford (1855), 6 De G. M. & G. 492. **Mentd.** Turner v. Letts (1855), 20 Beav. 185; Hopkinson v. Rolt (1861), 9 H. L. Cas. 514; Menzies v. Lightfoot (1871), L. R. 11 Eq. 459; North v. Stewart (1890), 15 App. Cas. 452; Briscoe v. Briscoe, [1892] 3 Ch. 543; *Re* Knight, Knight v. Gardner, [1892] 2 Ch. 368; Meguerditchian v. Lightbound, [1917] 2 K. B. 298.

—.]—A., B., & C. were judgment creditors of D., A. & B. having priority to C.; A. & B. subsequently omitted to re-register their judgments within five years from their previous registration; C. duly registered within the five years:—*Held*: A. & B. did not thereby lose their priority to C.

The effect of the provisions of sect. 4 of the above Act is to deprive the judgment creditor who omits to re-register within five years of protection against subsequent purchasers, mtgees. & creditors but not to alter his position as to previous purchasers, mtgees. & creditors. The circumstance that a re-registration is not within five years from the previous registration does not make it ineffectual as against subsequent purchasers, mtgees. & creditors.—**BEAVAN v. OXFORD (EARL)** (1855), 6 De G. M. & G. 492; 26 L. T. O. S. 114; 1 Jur. N. S. 1121; 4 W. R. 112; 43 E. R. 1325, L. C. & L. J.J.

*Annotations*:—**Apprvd. & Apld.** Shaw v. Neale (1858), 6 H. L. Cas. 581. **Apld.** Neve v. Flood (1864), 10 Jur. N. S. 607. **Consd.** Pickering v. Ilfracombe Ry. (1868), L. R. 3 C. P. 235. **Apld.** *Re* Kensington, Bacon v. Ford (1885), 29 Ch. D. 527. **Refd.** Simpson v. Morley (1855), 26 L. T. O. S. 135; Benham v. Keane (1861), 1 John. & H. 685; Robinson v. Nesbitt (1868), L. R. 3 C. P. 264; Punched v. Tomkins (1882), 31 W. R. 286; *Re* Leavesley, [1891] 2 Ch. 1.

**1434.** ———— **Effect as against other creditors.]—**A., B., & C. were judgment creditors of D. A. registered his judgment on Mar. 12, 1840, but never re-registered; B. registered his judgment in Apr. 1842, & re-registered in Mar. 1848; C. registered his judgment on Mar. 18, 1845, & re-registered on Mar. 16, 1850. Questions

a deed of such lands, which shall be sufficient to convey to the purchaser all the interest of the debt, in the lands therein described, subject to prior incumbrances.—**SMITH v. SMITH** (1866), 6 N. S. R. (2 Old.) 303.—**CAN.**

a. ———— *Omission of part of land in trust deed—Effect of.]—*A deed of trust was executed by a debtor, & by a mistake in setting out the notes & bounds a portion of the property intended to be conveyed was omitted; subsequently to which a creditor obtained & registered a judgment against the debtor:—*Held*: the assignees in trust were entitled to have the mistake rectified & the lien of the judgment creditor did not attach upon the land.—**McMASTER v. PHIPPS** (1855), 5 Gr. 253.—**CAN.**

b. ———— *Whether superseded by giving security.]—*The registration of a certificate of judgment against the lands of a judgment debtor is not an execution within Supreme Ct. of Canada Act, s. 47 (c), & the giving security to the satisfaction of a judge of the Supreme Ct. of British Columbia for the whole amount of the debt &

having arisen as to the priorities of the several judgment creditors, the fund in ct. being insufficient for payment in full:—*Held*: on the construction of Judgments Acts, 1838 (c. 110), s. 19, 1839 (c. 11), s. 4, & 1840 (c. 82), s. 2, & upon the principle laid down in *Beavan v. Oxford (Earl)*, No. 1433, *ante*, C. was first entitled to take out of the fund the sum found due on A.'s judgment, & then B. was entitled to be paid the full amount of his judgment before C. took anything more in respect of his judgment.—*Re KENSINGTON (LORD)*, *BACON v. FORD* (1885), 29 Ch. D. 527; 54 L. J. Ch. 1085; 53 L. T. 19; 33 W. R. 689.

— **Against banking co-partnership—Operating against estate of shareholder.**—See *BANKERS*, Vol. III., p. 151, No. 202.

**1435. Judgments operating as charge on land—Judgments Act, 1838 (c. 110), s. 13—Creditor must first take out execution.**—Under the above sect., which, after enacting that a judgment shall operate as a charge on the debtor's lands, provides that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, the ct., upon a bill filed by a creditor to enforce his judgment under the statute, declined to appoint a receiver of the real estate of the debtor within the year limited by the statute.

A judgment creditor who desires to enforce his security against his debtor's equitable interest in freehold estate by a bill in equity not founded on the statute must previously sue out *elegit*.—*SMITH v. HURST* (1845), 1 Coll. 705; 5 L. T. O. S. 20; 9 Jur. 343; 63 E. R. 607.

*Annotations*:—*Apld.* *Partridge v. Foster* (1864), 34 Beav. 484.

1. *Refd.* *Ashburton v. Nocton* [1915] 1 Ch. 274.

**1436.** ————.]—The ct. only interferes in aid of the legal right when the party has proceeded at law to the extent necessary to give him a complete title; & therefore where pltf. had obtained judgment, but had not sued out an *elegit*:—*Held*: (1) he was not entitled to the aid of the ct. as against the freehold estate of debtor; (2) he did not under above sect. become entitled to such aid until the expiration of one year from the time of entering up his judgment & this being an objection that pltf.'s title was incomplete, was not removed by a resort to the jurisdiction of the ct. to relieve against fraud in respect to the freehold estate.—*SMITH v. HURST* (1852), 10 Hare, 30; 22 L. J. Ch. 289; 20 L. T. O. S. 303; 17 Jur. 30; 68 E. R. 826.

*Annotations*:—*Refd.* *Neale v. Day* (1858), 32 L. T. O. S.

costs does not supersede the registration of such certificate.—*FOLEY v. WEBSTER* (1892), 2 B. C. R. 251.—*CAN.*

c. — *Effect on mortgage previously registered.*—A mtge. on land registered prior to the registration of an execution against the mtgor. has priority for the amount advanced under the mtge. even subsequently to the registration of the execution where the advance was made without express notice of the execution.—*MARSHALL WELLS ALBERTA CO., LTD. v. ALLIANCE TRUST CO.*, [1920] 1 W. W. R. 907; 52 D. L. R. 600.—*CAN.*

d. — *Extent of writ.*—A writ of execution extends to any lands in the land registration district wherein the writ is filed of which the debtor becomes the owner at any time during the life of the writ & while it remains filed in the land titles office of such district.—*ROBIN HOOD MILLS, LTD. v. HARRISON*, [1918] 2 W. W. R. 58; 40 D. L. R. 328.—*CAN.*

e. — *Effect of unregistered conveyance—Execution Act, 1911 (c. 79),*

s. 28.]—Where an unregistered conveyance is by way of security only, the land is liable for sale, under above sect. under a subsequent registered certificate of judgment.—*Re EXECUTION ACT*, *SCHMIT v. ERICKSON*, [1922] 1 W. W. R. 232.—*CAN.*

f. *Judgment operating as charge on land.*—A registered memorial of a judgment has a priority, as a charge on the land of the debtor, over a subsequent judgment & execution; & a sale by the sheriff under such execution is subject to the charge of the prior registered judgment.—*MILLS v. MILLS* (1858), 4 All. 45.—*CAN.*

g. —.]—Where lands are conveyed to a purchaser against whom judgments are then registered, & executions against lands in the sheriff's hands, & a mtge. is taken back on the same day for a balance of purchase money, the judgments & executions attach before the mtge.—*RUTTAN v. LEVISCONTE* (1858), 16 U. C. R. 495.—*CAN.*

h. — *Only on beneficial interest*

143; *Coventry v. Gladstone* (No. 2) (1868), 37 L. J. Ch. 492; *Re Cowbridge Ry.* (1868), L. R. 5 Eq. 413. *Mentd.* *New, Prance & Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19.

**1437.** ———— **Law of Property Amendment Act, 1860 (c. 38).**—It is true that Judgments Act, 1838 (c. 110), gives a judgment creditor an equitable charge upon the land of his debtor. He may, after one year, file a bill to redeem the mtgee. & foreclose the mtgor; & in some cases I have myself held, that a judgment creditor may institute proceedings before the expiration of the year. But the recent Act [Law of Property Amendment Act, 1860 (c. 38)] does not allow him to keep his judgment hanging over the heads of other people. He must issue execution, or his charge will not affect the purchaser; the Act expressly states that, & it applies whether the interest be legal or equitable (*ROMILLY, M.R.*).—*WALLIS v. MORRIS* (1864), 10 L. T. 709; 10 Jur. N. S. 741; 12 W. R. 997.

**1438.** ———— **Not until expiry of one year.**—*SMITH v. HURST*, No. 1436, *ante*.

**1439.** ———— **Enforcement against equitable interest.**—*DERBYSHIRE & STAFFORDSHIRE, ETC. RY. CO. v. BAINBRIGGE* (1852), 15 Beav. 146; 51 E. R. 492.

*Annotation*:—*Refd.* *Hargrave v. Hargrave* (1857), 23 Beav. 484.

**1440.** ————.]—The above Act declares that a judgment at law shall not be enforced for a given period, but a ct. of equity will in the meantime restrain trustees from paying to the debtor, a tenant for life, the income arising from the property affected until the charge can be enforced.

A judgment creditor of a tenant for life of real estate sued out an *elegit*, but was unable to obtain payment of his demand, as the estates were vested in trustees. Upon a bill by the judgment creditor, asking for the aid of this ct. to obtain satisfaction of his demand:—*Held*: he was entitled to an injunction to restrain the trustees from paying the rents & profits of the estates to the tenant for life until pltf. were in a position to obtain the benefit of the judgment.—*YESCOMBE v. LANDOR* (1859), 28 Beav. 80; 28 L. J. Ch. 876; 33 L. T. O. S. 376; 5 Jur. N. S. 780; 7 W. R. 534; 54 E. R. 296.

*Annotations*:—*Consd.* *Partridge v. Foster* (1864), 34 Beav. 484.

1. *Refd.* *Wallis v. Morris* (1864), 12 W. R. 997; *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547; *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157.

**1441.** ————.]—A judgment creditor, who has sued out an *elegit* without

of debtor.]—A memorial of judgment when registered, or a writ of execution when filed with the sheriff, only affects such interest in land as the debtor then has, & therefore does not postpone the title of a trustee thereto under a creditor's deed previously executed by a number of the creditors, though not registered.—*TRUEMAN v. WOODWORTH* (1894), 1 N. B. Eq. Rep. 83.—*CAN.*

k. ————.]—The registration of a certificate of judgment, under County Courts Act (c. 33), ss. 196, 197, as amended by 55 Vict. c. 7, s. 5, binds & charges the land of the judgment debtor, though it may be his actual residence or home, & the creditor may take proceedings to realise whenever debt ceases to be entitled to claim the property as his exemption.—*ROBERTS v. HARTLEY* (1902), 14 Man. L. R. 284; 23 C. L. T. Occ. N. 53.—*CAN.*

l. ————.]—Defts. recovered judgments against B. in 1901, & registered them so as to bind his lands. At that time 2,000 acres of land



**Sect. 2.—Writ of *elegit*: Sub-sects. 7 & 8, A. & B.]**

effect, is entitled, independently of the above Act, to equitable relief, though the year from entering up the judgment has not expired. *Qu.*: whether he is entitled to relief under the statute as regards the leaseholds of the judgment debtor which are wearing out. But the ct. will, within the twelve months, interfere & protect the property charged by a judgment from destruction.—**PARTRIDGE v. FOSTER** (1864), 34 Beav. 1; 4 New Rep. 473; 10 L. T. 808; 10 Jur. N. S. 741; 12 W. R. 1127; 55 E. R. 531.

**1442.** ——— **Enforcement against leaseholds running out.]—PARTRIDGE v. FOSTER**, No. 1441, *ante*.

**1443.** ——— **Only on beneficial interest of debtor.]—Before Judgments Act, 1838 (c. 110), equitable interests prevailed over an *elegit*, & since that Act, a judgment entered up operates as a charge on the beneficial interest only of the judgment debtor. The judgment creditor takes subject to all the equities by which the debtor was bound (LORD WENSLEYDALE).—**EYRE v. M'DOWELL** (1861), 9 H. L. Cas. 619; 11 E. R. 871, H. L.**

*Annotation*:—**Consd.** **Badeley v. Consolidated Bank** (1886), 34 Ch. D. 536.

**1444.** ——— **Registration of writ—Land Charges Act, 1900 (c. 26), s. 2.]—ASHBURTON (LORD) v. NOCTON**, No. 1397, *ante*.

**1445.** ——— **Law of Property Amendment Act, 1860 (c. 38)—Applicable to legal & equitable interests.]—WALLIS v. MORRIS**, No. 1437, *ante*.

**1446.** ——— **Judgments Act, 1864 (c. 112)—Only after return from sheriff.]—(1) By above Act, a judgment creditor has no lien upon the land of his debtor until he has got a return from the sheriff, though he may, after putting the writ in the hands of the sheriff & before the return, have a right to file a bill to remove a legal impediment. (2) Priorities of judgment creditors against lands are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff. Therefore, where a judgment creditor, subsequent in point of date, was the first to place his writ in the hands of the sheriff, & get the lands of the debtor extended under such writ:—*Held*: he was entitled in priority to a prior judgment creditor whose writ was subsequently placed in the sheriff's hands before the lands were extended.—**GUEST v. Cow-****

belonging to pliffs. & conveyed to pliffs. by B. stood in the name of B. owing to the conveyances not being registered:—*Held*: as the lands were not the lands of the judgment debtor, & there was no laches on the part of pliffs., there should be a declaration that these judgments did not bind the lands. When a person registers a judgment which, like a drag-net, is to catch everything, he cannot complain if he only gets the interest which the debtor had in any thing he encloses.—**SISSIBOO PULP CO. v. CARRIER LANE CO.** (1905), 40 N. S. R. 546.—**CAN.**

**m.** ——— **—Z., the owner of the lands in question, having died intestate, his widow, A., took out letters of administration of his estate. B., the only child of Z. & A., subsequently married deft., & then died childless & intestate. Pltf., having recovered judgment in K. B. against deft., registered in the proper land titles office a certificate of the judgment, & then brought this action for a sale of deft.'s interest in the lands to realise his judgment. A. had not disposed of the land in any way under her letters of administration, nor had letters of administration of the estate of B. been**

taken out:—*Held*: deft. had no interest in the land in question, which was bound by, or could be sold under, the registered judgment.—**McDOUGALL v. GAGNON** (1906), 16 Man. L. R. 232; 4 W. L. R. 425.—**CAN.**

**n.** ——— **Partial release of lands under execution.]—Where judgment debtor in his lifetime & his personal representatives after his death alienate portions of land found by a judgment, & the judgment creditor released a portion of the land sold from any claim under the judgment, the full amount of the judgment cannot be enforced against owners of the unsold portions of the land, who are only liable to be called upon to pay *pro rata* according to the value of lands released.—*Re BANK OF LIVERPOOL* (1908), 43 N. S. R. 205; 6 E. L. R. 321.—**CAN.****

**o.** **Prior registered judgment creditor refusing to assign judgment.]—An execution at law against the lands of M., at the suit of K., was in the sheriff's hands, under which certain lands in the county of O. were advertised for sale. The B. Bank, who were registered judgment creditors of M., but subsequent to K., offered R., the assignee of K.'s judgment, to pay the same if he would**

**BRIDGE RY. CO.** (1868), L. R. 6 Eq. 619; 37 L. J. Ch. 909; 18 L. T. 871; 17 W. R. 7.

*Annotations*:—**As to (1) Consd.** **Re Newcastle** (1869), L. R. 8 Eq. 700. **Reid.** **Anglo-Italian Bank v. Davies** (1878), 9 Ch. D. 275.

**1447.** ——— **Writ of execution must first issue.]—The mere registration of a judgment upon which no writ of execution has issued, constitutes no lien upon the debtor's land. The above Act has in effect repealed Judgments Act, 1838 (c. 110).—*Re BAILEY'S TRUSTS* (1869), 38 L. J. Ch. 237; 20 L. T. 168; 17 W. R. 393.**

*Annotations*:—**Consd.** **Cork v. Russell** (1871), L. R. 13 Eq. 210. **Appld.** **Hatton v. Haywood** (1873), 22 W. R. 53. **Reid.** **Mildred v. Austin** (1869), L. R. 8 Eq. 220.

**1448.** ——— **Only if land actually delivered in execution.]—Land is not affected by a registered judgment against the owner, executed in part by a writ of *fi. fa.* unless it has been actually delivered in execution. Where such land is out on mtge. at the time of the judgment, an order of the Ch. Div. for sale or appraisal should be obtained in order to bind the land by the judgment.**

A judgment debtor, after a writ of *fi. fa.* had been partially executed against his goods & chattels, gave a second charge on certain mortgaged leasehold property to another creditor. The judgment had been duly registered, but no further steps had been taken to obtain delivery or of to bind the land. The mtgees. sold the property, & after satisfying their debt there remained a balance in their hands, to attach which balance a garnishee summons was taken out by the judgment creditor:—*Held*: the holder of the charge on the mortgaged property was entitled to satisfy his claim out of this balance, in priority to the judgment creditor.—**BACKHOUSE v. SIDDLE** (1878), 38 L. T. 487, D. C.

**1449.** ——— **Only if statutory provisions complied with.]—HOOD BARRS v. CATHCART**, No. 1373, *ante*.

—*See, now*, Land Charges Act, 1900 (c. 26), s. 5, sched.

**1450.** ——— **Registration of writ—Necessity for—Only to enforce sale.]—Since Judgments Act, 1864 (c. 112), where land has been actually delivered in execution by writ of *elegit* or other lawful authority it is unnecessary to register the judgment, writ, or other process of execution except for the purpose of obtaining under sect. 4 of the Act a summary order for sale; but before any creditor to whom any land of his debtor shall**

assign it, but the assignee refused to do more than discharge the judgment. The bank then filed their bill against M. & R., praying to redeem R. & foreclose M., & moved for an injunction to restrain the sale by the sheriff:—*Held*: a prior judgment creditor was bound to submit to be redeemed by a subsequent judgment creditor, & to assign the judgment, & upon payment to R., if he would receive & assign K.'s judgment, of the amount of that judgment & subsequent costs, & if not, then upon payment into ct. of the same amount, an injunction should issue to restrain the sale by the sheriff.—**BANK OF BRITISH NORTH AMERICA v. MOORE** (1860), 8 Gr. 461.—**CAN.**

**p.** **Unregistered transfer of land—Registered execution—Subsequent registration of transfer—Priority.]—A registered owner of lands gave a transfer & his duplicate certificate of title to an intended transferee. The transferee did not register the transfer for a considerable time. Prior to such registration, a writ of execution was registered against the lands:—*Held*: the transferee was entitled to have the execution removed as a cloud upon his title.—**SCHLOSSER v. COLONIAL INVESTMENT****

have been actually delivered in execution can obtain such summary order, his writ or other process of execution must be duly registered pursuant to sect. 3 of the Act. An order for the appointment of a receiver is a "process of execution" within the Act.—*Re POPE* (1886), 17 Q. B. D. 743; 55 L. J. Q. B. 522; 55 L. T. 369; 34 W. R. 693; 2 T. L. R. 826, C. A.

*Annotations*:—*Consd.* *Re Whiteley*, *Whiteley v. Learoyd* (1887), 56 L. T. 846. *Refd.* *Blackman v. Fysh*, [1892] 3 Ch. 209; *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338; *Ashburton v. Nocton*, [1915] 1 Ch. 274.

—.]—*See* Land Charges Act, 1900

(c. 26), s. 2.

**1451.** ——— **Vacation of registered writ—Power of court.**—*COOK v. COOK*, No. 1787, *post*.

**1452.** ——— **Not on debtor's legal remainder.**—*Re HARRISON & BOTTOMLEY*, No. 1374, *ante*.

**Delivery in execution—What amounts to.**—*See* Sub-sect. 8, B., *post*.

**Sale — Under Judgments Act, 1864 (c. 112), s. 4.**—*See* Sub-sect. 10, B., *post*.

#### SUB-SECT. 8.—POSSESSION.

##### A. In General.

**1453. Actual possession not given—Legal possession only—Sufficient to sustain ejectment by creditor.**—*JEFFERSON v. DAWSON* (1673), 3 Keb. 243; 84 E. R. 700.

**1454.** ——— ——— ———.]—This is the case of a demurrer by deft. to the replication to deft.'s plea to the sci. fa., founded on Companies Clauses Consolidation Act, 1845 (c. 16), s. 36. The objection to the replication is, that the refusal of pltf. to take actual possession is wholly immaterial, if the land having been duly extended under the *elegit* & the legal possession delivered to pltf. by the sheriff, prevents his having any further execution against deft. in the action; & the question on which the judgment of the ct. is to be given is, whether a writ of *elegit* against a co., under which land has been taken, & the rent of which is 10s. a year, is a bar to any other remedy or any other execution against the members of the co., which is given by the statute already referred to. Formerly actual possession was delivered, but now legal possession only is delivered, which gives pltf. a title to sue in ejectment (*POLLOCK, C.B.*).—*ADDISON v. TATE* (1855), 11 Exch. 250; 3 C. L. R. 1075; 24 L. J. Ex. 249; 25 L. T. O. S. 182; 3 W. R. 487; 156 E. R. 823.

**1455.** ——— ———.]—*HATTON v. HAYWOOD*, No. 1466, *post*.

**1456.** ———.]—*TAYLOR v. COLE*, No. 693, *ante*.

**1457. At what value to be delivered—Value as found by jury.**—*COMYRRS v. BRANDLING* (1612), 1 Brownl. 38; *Moore*, K. B. 873; 123 E. R. 651.

**1458. Elegit tenant held out of possession—By debtor or stranger—Remedies.**—If the party himself hold out the tenant by *elegit* from the tenements extended, the tenant by *elegit* may hold over, but if a stranger holds out the tenant by *elegit*, he cannot hold over, but is put to his action of trespass against the stranger.—*UNDER-*

*HILL v. DEVEREUX* (1669), 2 Wms. Saund. 68; 85 E. R. 698.

*Annotations*:—*Mentd.* *Baylis v. Hayward* (1835), 4 Ad. & El. 256; *Hiscocks v. Kemp* (1835), 3 Ad. & El. 676; *Fowler v. Rickerby* (1841), 10 L. J. C. P. 149; *Wright v. Madocks* (1845), 8 Q. B. 119; *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856; *Heathcote v. Wing* (1855), 25 L. J. Ex. 23; *Carter v. Hughes* (1858), 27 L. J. Ex. 225; *Frewen v. Lethbridge* (1859), 28 L. J. Ex. 243; *Clay v. Ray* (1864), 17 C. B. N. S. 188.

**1459. Right to possession—As against third parties in possession—Under demise prior to judgment—Possessor's interest interesse termini.**—A., in 1819, demised lands to B. for 100 years, & subject thereto he in 1820, demised for 200 years to C., who entered. In 1822 D. recovered judgment against A. D. issued & executed an *elegit* under which the lands were delivered in execution:—*Held*: C. was entitled to the possession as against D., it not appearing that B. had entered under the demise to him.—*CHATFIELD v. PARKER* (1828), 8 B. & C. 543; 2 Man. & Ry. K. B. 540; 7 L. J. O. S. K. B. 13; 108 E. R. 1144.

*Annotation*:—*Mentd.* *Doe d. Agar v. Brown* (1853), 1 C. L. R. 1048.

**1460.** ——— ——— **Jointly with debtor—Third parties to prove title.**—If, at the time of the judgment, the *elegit* debtor is entitled to the whole property sought to be recovered in ejectment by the *elegit* creditor, other parties, who, with the *elegit* debtor, are in possession when the ejectment is brought, must prove their title; & if they do not, the *elegit* creditor is entitled to judgment against all.—*DOE d. EVANS v. OWEN* (1831), 2 Cr. & J. 71; 2 Tyr. 149; 1 L. J. Ex. 43; 149 E. R. 30.

**1461.** ——— ——— **Under sale prior to judgment.**—An *elegit* creditor, who, at the time of obtaining judgment, has notice that the land of his debtor is in possession of a third party, such party having been let into possession under a contract for sale entered into before the date of the judgment, is not entitled to priority over such purchaser, & will be restrained in equity from proceeding at law for the recovery of the land.—*BRUNTON v. NEALE* (1844), 14 L. J. Ch. 8; 9 Jur. 338, L. C.

**1462.** ——— **Sufficient evidence of title—Conclusiveness of writ & return.**—In ejectment by a judgment creditor on a writ of *elegit*, the writ, with the inquisition & the return thereupon, stating that deft., the judgment debtor, was possessed of the property, constitute sufficient evidence of pltf.'s title to recover; & as between the *elegit* creditor & the judgment debtor, the return to the inquisition is conclusive, at all events down to the date of the return, so that deft. cannot set up a title in a third party arising prior to that date.—*MARTIN v. SMITH* (1858), 27 L. J. Ex. 317.

**Delivery of possession.**—*See* Sub-sect. 8, B., *post*.

**Position of creditor as elegit tenant.**—*See* Sub-sect. 9, *post*.

##### B. Delivery of Possession.

**1463. Duty of sheriff to deliver.**—*HELE v. BEXLEY (LORD)*, No. 1521, *post*.

**1464. What amounts to—Return of sheriff—**

& *LOAN CO.*, [1917] 1 W. W. R. 1045.—*AUS.*

**q. Execution registered in debtor's lifetime—Execution registered after death—Priority.**—A registered execution is a "lien" on the debtor's land, & registered executions existing in the debtor's lifetime have priority over an execution in a suit brought after the debtor's death against his administrators.—*MERCHANTS BANK OF CANADA*

*v. AMUNDSEN, Re AMUNDSEN ESTATE & MERCHANTS BANK OF CANADA*, [1920] 2 W. W. R. 202.—*CAN.*

**r. Priorities.**—It is the duty of the registrar to treat an execution against lands as a charge upon the execution-debtor's land with priority according to the date of its registration.—*Re LOVE & BILODEAU* (1912), 22 W. L. R. 689; 5 Alta. L. R. 348; 7 D. L. R. 175.—*CAN.*

**s. ———.]**—The transferee of land purchased by the transferor as a pre-emption from the Crown takes title subject to an execution against the transferor registered before the making of the transfer although the patent was issued subsequent to the making of the transfer.—*CANADIAN BANK OF COMMERCE v. HOLISKI* (1920), 1 W. W. R. 677.—*CAN.*



*Sect. 2.—Writ of elegit: Sub-sect. 8, B.; sub-sect. 9, A., B. & C.]*

**Writ registered prior to return.]**—The return of the sheriff to a writ of *elegit* constitutes actual delivery of the land in execution within Judgments Act, 1864 (c. 112). The registration of the writ prior to the date of the return of the sheriff is not in disaccordance with the terms of sect. 3 of the Act.

On the sheriff making his return & the registration of the writ, the mtgor.'s interest became the property of the tenant until the debt is paid off, & no subsequent incumbrancer could oust him (STUART, V.-C.).—CHAMPNEYS v. BURLAND (1870), 23 L. T. 584; 19 W. R. 148; *subsequent proceedings* (1871), 19 W. R. 913, L. JJ.

**1465.** ———.]—HATTON v. HAYWOOD, No. 1466, *post*.

**1466.** ——— **Equitable interest—Order of court.]**—Equitable interests in land are within Judgments Act, 1864 (c. 112), s. 1. Therefore, if a judgment creditor who has sued out an *elegit* is unable to obtain delivery by the sheriff of his debtor's lands by reason of the legal estate being outstanding, he must apply to the Ct. of Ch. to remove the impediment, & the order of the ct. will be a delivery in execution within the statute.

A judgment creditor sued out an *elegit* against his debtor, who had no other interest in land than an equity of redemption, & the sheriff accordingly returned *nil*. Soon afterwards the debtor became bkpt. The creditor then filed a bill asking for a declaration that he had a charge on the debtor's equity of redemption at the time of the bkpcy. :—*Held*: the creditor had no charge on the land.

The sheriff does not give the creditor actual possession of the land itself, but the effect of his return is that it vests the legal estate in the creditor. The creditor can then bring ejectment, if it is an estate in possession, or he can sue for the rent if it is a reversion (MELLISH, L.J.).—HATTON v. HAYWOOD (1874), 9 Ch. App. 229; 43 L. J. Ch. 372; 30 L. T. 279; 22 W. R. 356, L. C. & L. JJ.

*Annotations:—Apld. Re South* (1874), 9 Ch. App. 369.

*Folld. Backhouse v. Siddle* (1878), 38 L. T. 487. **Consd.** *Re Watkins, Ex p. Evans* (1879), 13 Ch. D. 252; *Re Hastings, Ex p. Brown* (1892), 61 L. J. Q. B. 654. **Refd.** *Beckett v. Buckley* (1874), L. R. 17 Eq. 435; *Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275; *Smith v. Cowell* (1880), 50 L. J. Q. B. 38; *Re Pope* (1886), 17 Q. B. D. 743; *Re Anthony, Anthony v. Anthony*, [1892] 1 Ch. 450; *Blackman v. Fysh*, [1892] 3 Ch. 209; *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338; *Re Jones* (1895), 39 Sol. Jo. 671; *Thompson v. Gill*, [1903] 1 K. B. 760; *R. v. Selfe* (1908), 77 L. J. K. B. 697; *Ashburton v. Nocton*, [1915] 1 Ch. 274.

**1467.** ——— **Appointment of receiver.]**—ANGLO-ITALIAN BANK v. DAVIES, No. 2454, *post*.

**1468.** ———.]—*Re WATKINS, Ex p. EVANS*, No. 2465, *post*.

**1469.** ———.]—*Re POPE*, No. 1450, *ite*.

**1470.** ———.]—*Re HARRISON & BOT-TOMLEY*, No. 1374, *ante*.

#### SUB-SECT. 9.—TENANCY BY WRIT OF ELEGIT.

##### A. In General.

**1471. Nature of tenancy—A redeemable estate.]**—After an estate has been held under an extent for a long time & has gone through several hands, whether upon a bill to redeem, debt. shall account otherwise than at the extended value.—POOLE v. GUISE (1687), 1 Vern. 468; 23 E. R. 593.

**1472.** ——— **Estate in land—With properties & incidents thereof.]**—DIGHTON v. GREENVIL (1693),

2 Vent. 321; 86 E. R. 464; *sub nom.* DEIGHTON v. GREENVILL, Comb. 77; 1 Show. 35; *sub nom.* GREENVIL v. DIGHTON, Comb. 229; *sub nom.* GRANDVILL v. DIGHTON, Holt, K. B. 197; Skin. 388, Ex. Ch.; *affd.* (1699), Colles, 64, H. L.

*Annotation:—Refd. Johns v. Pink*, [1900] 1 Ch. 296.

**1473.** ——— **Not merely charge upon land.]**—DIGHTON v. GREENVIL (1693), 2 Vent. 321; 86 E. R. 464; *sub nom.* DEIGHTON v. GREENVILL, Comb. 77; 1 Show. 35; *sub nom.* GREENVIL v. DIGHTON, Comb. 229; *sub nom.* GRANDVILL v. DIGHTON, Holt, K. B. 197; Skin. 388, Ex. Ch.; *affd.* (1699), Colles, 64, H. L.

*Annotation:—Refd. Johns v. Pink*, [1900] 1 Ch. 296.

**1474.** ——— **Chattel interest—Where land seized freehold.]**—JOHNS v. PINK, No. 1500, *post*.

**1475. Assignment of tenancy—Right of assignee to rent.]**—JACKSON v. BARROW (1626), Nels. 2; 21 E. R. 774.

**1476.** ——— **Assignor must first enter.]**—TYSON v. PASKE, No. 2018, *post*.

**1477. Extension of tenancy—Debt not satisfied.]**—An *elegit* returned & filed, being out & thereby without remedy, renewed by the ct. to be executed.—PALMER v. BOLLS (1626), Toth. 82; 21 E. R. 130.

**1478. Position of elegit tenant—Takes precise interest of debtor.]**—WICKHAM v. NEW BRUNSWICK & CANADA RY. CO., No. 915, *ante*.

**1479.** ——— **Analogous to landlord—Power to lease—Reserving full rent.]**—A judgment creditor having extended a moiety of lands, made a lease thereof for seven years, reserving the full rent :—*Held*: the lease should not be impeached in equity.—DOUGHTY v. STILES (1673), Cas. temp. Finch, 115; 23 E. R. 62.

**1480.** ——— **Notice to tenants to quit.]**—BULL v. FAULKNER, No. 1514, *post*.

**1481.** ——— **Not a purchaser.]**—If a creditor by judgment, statute, or recognisance, buys in the first mtge., he shall not tack it to his judgment, etc. because he did not lend his money on the credit of the land, has no present right therein, nor can be called a purchaser.—BRACE v. MARLBOROUGH (DUCHESS) (1728), 2 P. Wms. 491; Mos. 50; 24 E. R. 829.

*Annotations:—Consd. Ex p. Knott* (1806), 11 Ves. 609; *Whitworth v. Gaugain* (1846), 1 Ph. 728. **Refd.** *Titley v. Davies* (1743), 2 Y. & C. Ch. Cas. 399; *Simmons v. Pettit* (1844), 8 Jur. 209; *Lacey v. Ingle* (1847), 2 Ph. 413; *Beavan v. Oxford* (1856), 6 De G. M. & G. 507; *Bailey v. Barnes*, [1894] 1 Ch. 25. **Mentd.** *Pomfret v. Windsor* (1752), 2 Ves. Sen. 472; *Willoughby v. Willoughby* (1756), 1 Term Rep. 763; *White v. Peterborough (Bp.)* (1821), Jac. 402; *Peacock v. Burt* (1834), 4 L. J. Ch. 33; *Langton v. Horton* (1842), 1 Hare, 549; *Tipping v. Power* (1842), 1 Hare, 405; *Bugden v. Bignold* (1843), 2 Y. & C. Ch. Cas. 377; *Armstrong v. Storer* (1852), 14 Beav. 535; *Macrae v. Ellerton* (1858), 27 L. J. Ch. 777; *Prosser v. Rice* (1859), 28 Beav. 68; *Phillips v. Phillips* (1861), 4 De G. F. & J. 208; *Wyllie v. Pollen* (1863), 3 De G. J. & Sm. 596; *Thorpe v. Holdsworth* (1868), L. R. 7 Eq. 139; *Jennings v. Jordon* (1881), 6 App. Cas. 698; *Atherley v. Barnett* (1885), 52 L. T. 736.

**1482.** ——— **May maintain ejectment.]**—TYSON v. PASKE, No. 2018, *post*.

**1483.** ———.]—Tenant for life of certain lands granted an annuity to B. secured by a warrant of attorney & afterwards granted annuities & rentcharges, secured by warrants of attorney & demises to other persons. B.'s annuity was paid for some time & then remained unpaid for eighteen or nineteen years when the payment ceased. B., subsequent to the grant of the other annuities, sued out an *elegit* on which he was unable to succeed in an ejectment against A. because of outstanding terms; two of the other annuitants brought their bills & succeeded in establishing their claims, which as well as the others, B. excepted, were provided for; the assignee of B.

then brought his bill for relief & an issue was directed.

Pltf. might have a right to relief but he should first establish his claim at law. He would therefore retain the bill for a year & give him an opportunity to bring an ejectment (LORD LANGDALE, M.R.).—SMITH v. EFFINGHAM (EARL) (1844), 7 Beav. 857; 3 L. T. O. S. 119; 8 Jur. 479; 49 E. R. 1103; *subsequent proceedings* (1848), 11 Beav. 82.

— — —.]—If a tenant by *elegit* is compelled to bring ejectments in order to obtain the rents of the land extended, he is entitled to the costs of such actions.

The tenant by *elegit* defended an action brought by one of the tenants for an excessive distress. £10 was paid into ct., which the tenant received as sufficient to cover the claim for the excessive distress, but further prosecuted the action on the ground that pltf. had no right to distrain before attornment, in consequence of a mistake on the part of deft.'s attorney in not sending down a document in sufficient time, pltf. obtained a verdict, but a new trial was had on payment of costs, this ct. subsequently holding that pltf. had a right to distrain even before attornment:—*Held*: pltf. was not responsible for the mere mistake of the attorney without any special directions from him; & if the costs could not be recovered from the party so bringing the action, the tenant by *elegit* was entitled to them as against the debtor.—THOMAS v. JONES (1848), 12 L. T. O. S. 129, 151.

1485. — — —.]—ADDISON v. TATE, No. 1454, *ante*.

1486. — — —.]—HATTON v. HAYWOOD, No. 1466, *ante*.

1487. — — — Action for rent—Declaration must state inquisition returned.]—In debt for rent on a lease taken by extent upon a statute, the declaration must state the inquisition returned by the sheriff.—GARRAWAY v. HARRINGTON (1620), Cro. Jac. 569; 79 E. R. 487, Ex. Ch.; *previous proceedings, sub nom.* HARRINGTON v. GARRAWAY (1617), Cro. Jac. 424; (1618), Cro. Jac. 477.

1488. — — —.]—HATTON v. HAYWOOD, No. 1466, *ante*.

1489. — — — Action for use & occupation—Whether maintainable.]—In an action by pltf. claiming under *elegit* for use & occupation, an examined copy of the judgment roll, containing the award of *elegit* & return of the inquisition, is evidence of pltf.'s title, without proving a copy of the writ of *elegit* & of the inquisition.—RAMSBOTTOM v. BUCKHURST (1814), 2 M. & S. 565; 105 E. R. 492.

*Annotations*:—*Refd.* Magrath v. Hardy (1838), 4 Bing. N. C. 782; Pack v. Tarpley (1839), 9 Ad. & El. 468.

1490. — — —.]—HARRIS v. BOOKER, No. 1386, *ante*.

— — — Bankruptcy of debtor.]—See BANKRUPTCY, Vol. IV., p. 358, No. 3347, Vol. V., pp. 812–814, Nos. 6922, 6923, 6929, 6930.

#### B. Relation to Incumbrancers.

1491. Prior incumbrances—Right to buy in—& tack to judgment.]—BRACE v. MARLBOROUGH (DUCHESS), No. 1481, *ante*.

1492. — — — Equitable mortgagee.]—WHITWORTH v. GAUGAIN, No. 1390, *ante*.

1493. Subsequent incumbrances.]—CHAMPNEYS v. BURLAND, No. 1464, *ante*.

1494. Mortgaged term of years—Appointment of receiver by mortgagees.]—JOHNS v. PINK, No. 1500, *post*.

#### C. Where Term of Years Seized.

1495. Liability of *elegit* tenant—For rent & covenants.]—Tenant by *elegit* of a term shall have an action of covenant as a thing annexed to the land.—SPENCER'S CASE (1583), 5 Co. Rep. 16 a; 77 E. R. 72; *sub nom.* ANON., Moore, K. B. 159.

*Annotations*:—*Consd.* Canham v. Rust (1818), 8 Taunt. 227; Johns v. Pink, [1900] 1 Ch. 296. *Refd.* Attoe v. Hemmings (1614), 2 Bulst. 281; Brewster v. Kitchell (1697), 1 Salk. 198; Bally v. Wells (1769), Wilm. 341; Flight v. Glossopp (1835), 2 Bing. N. C. 125; Cooke v. Chilcott (1876), 3 Ch. D. 694; Dewar v. Goodman (1908), 78 L. J. K. B. 209. *Mentd.* Pomfret v. Ricroft (1669), 2 Keb. 569; Bouls v. Horton (1672), Freem. K. B. 56; London City v. Richmond (1701), 2 Vern. 421; Uxbridge v. Staveland (1747), 1 Ves. Sen. 56; Ryall v. Rolle (1749), 1 Atk. 165; Knipe v. Palmer (1760), 2 Wills. 130; Grey v. Cuthbertson (1785), 4 Doug. K. B. 351; Tatem v. Chaplin (1793), 2 Hy. Bl. 133; Newman v. Anderton (1806), 2 Bos. & P. N. R. 224; Vernon v. Smith (1821), 5 B. & Ald. 1; Vyvyan v. Arthur (1823), 2 Dow. & Ry. K. B. 670; Easterby v. Sampson (1830), 5 Bing. 644; Keppell v. Bailey (1834), Coop. temp. Brough. 298; Wollaston v. Hakewill (1841), 3 Man. & G. 297; Hemmingway v. Fernandez (1842), 12 L. J. Ch. 130; Davies v. Lowndes (1843), 5 Man. & G. 471; Williams v. Burrell (1845), 1 C. B. 402; Doughty v. Bowman (1848), 11 Q. B. 444; Cottee v. Richardson (1851), 7 Exch. 143; Martyn v. Clue (1852), 18 Q. B. 661; Magnay v. Edwards (1853), 1 W. R. 331; West London Ry. v. L. & N. W. Ry. (1853), 22 L. J. C. P. 117; Weld v. Baxter (1856), 5 W. R. 113; Martyn v. Williams (1857), 1 H. & N. 817; Minshall v. Oakes (1858), 2 H. & N. 793; Cuthbertson v. Irving, (1860), 6 H. & N. 135; Hill v. Tupper (1863), 11 W. R. 784; Wilkinson v. Rogers (1863), 3 New Rep. 145; Wilson v. Hart (1865), 2 Hem. & M. 551; Hooper v. Clark (1867), 8 B. & S. 150; Morland v. Cook (1868), L. R. 4 Exch. 252; Stevens v. Copp (1868), L. R. 4 Exch. 20; Williams v. Earle (1868), L. R. 3 Q. B. 739; Bally v. De Crespigny (1869), L. R. 4 Q. B. 180; Thomas v. Hayward (1869), L. R. 4 Exch. 311; West v. Dobb (1869), 38 L. J. Q. B. 289; Haywood v. Brunswick Permanent Benefit Bldg. Soc. (1881), 8 Q. B. D. 403; Werderman v. Soc. Générale d'Electricité (1881), 19 Ch. D. 246; Andrew v. Aitken (1882), 22 Ch. D. 218; L. & S. W. Ry. v. Gomm (1882), 20 Ch. D. 562; Lybbe v. Hart (1885), 20 Ch. D. 8; Gower v. Postmaster General (1887), 57 L. T. 527; David v. Sabin (1893), 62 L. J. Ch. 347; Rogers v. Hosegood, [1900] 2 Ch. 388; G. N. Ry. v. I. R. Comrs., [1901] 1 K. B. 416; Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608; Davis v. Town Properties Investment Corp., [1903] 1 Ch. 797; Formby v. Barker, [1903] 2 Ch. 539; *Re* Nisbet & Potts' Contract, [1906] 1 Ch. 386; Ricketts v. Enfield, Churchwardens, [1909] 1 Ch. 544; Wilkes v. Spooner, [1911] 2 K. B. 473; Long v. Gray (1913), 58 Sol. Jo. 46; L. C. C. v. Allen, [1914] 3 K. B. 642; *Re* Stephenson & Co., Ltd., Poole v. The Co., [1915] 1 Ch. 802; Barker v. Stickney, [1919] 1 K. B. 121; Kelly v. Barrett, [1924] 2 Ch. 379.

1496. — — —.]—JOHNS v. PINK, No. 1500, *post*.

1497. Condition of re-entry—For non-payment of rent—Not enforceable.]—ANON. (temp. 1558–1603), No. 1366, *ante*.

1498. *Elegit* tenant not in possession—Ejectment by lessor against debtor—*Elegit* tenant may not defend.]—An *elegit* creditor of a lessee who had executed the writ of *elegit*, but not had actual possession delivered under a writ of possession, is not entitled to appear & defend an ejectment by the lessor against the lessee for forfeiture.—CROFT v. LUMLEY (1855), 4 E. & B. 608; 24 L. J. Q. B. 78; 24 L. T. O. S. 254; 1 Jur. N. S. 424; 3 W. R. 234; 119 E. R. 223; *subsequent proceedings* (1858), 6 H. L. Cas. 672, H. L.

1499. Interest of execution debtor—Right to possession—After satisfaction.]—CARTER v. HUGHES, No. 1986, *post*.

1500. Quantum of estate taken.]—(1) The tenant by *elegit* takes the whole interest of his judgment debtor in a term of years in land. The right of the judgment debtor to restitution after satisfaction of the judgment debt is in the nature of an executory interest.

(2) Although the execution creditor takes the whole interest in a term of years extended, he is not so far an assignee of the judgment debtor as to be liable for rent & covenants upon the



*Sect. 2.—Writ of elegit: Sub-sect. 9, C., D., E. & F.; sub-sect. 10, A.]*

principles of *Moule v. Garrett* (1872), L. R. 7 Ex. 101.

(3) The judgment debtor, being entitled to terms of years in eight houses, mortgaged the same by sub-demise to pltf., & covenanted to pay the rent & observe the covenants. The judgment creditor, who was seised of the freehold reversion, sued the judgment debtor for arrears of rent & issued a writ of *elegit*. The jury found that the judgment debtor was possessed, as of her own lands & tenements, of the houses, which the jurors found to be of the annual value of £200:—*Held*: the interest extended was the interest of the judgment debtor as mtgor. in possession, & was put an end to or suspended by the appointment by pltf. of a receiver.

(4) It is the duty of the sheriff, after executing a writ of *elegit*, to have the writ & inquisition filed in the central office. It is not sufficient to deliver such documents to pltf.'s solr.

(5) Where the land delivered in execution is of freehold tenure, it seems clear that the judgment creditor has only a chattel interest, the duration of which is measured by the satisfaction of the debt (*STIRLING, J.*).—*JOHNS v. PINK*, [1900] 1 Ch. 296; 69 L. J. Ch. 98; 81 L. T. 712; 48 W. R. 247; 16 T. L. R. 70.

#### D. Rent.

**1501. Right to distrain—Before attornment.]**—*THOMAS v. JONES*, No. 1484, *ante*.

—.]—*See, further*, DISTRESS, Vol. XVIII., p. 287, Nos. 225–229.

**1502. Payment by tenant of debtor—To debtor—Without notice of creditor's claim.]**—*ASHBURTON (LORD) v. NOCTON*, No. 1397, *ante*.

#### E. Accountability by Creditor to Debtor.

**1503. Accountable at extended value.]**—*MARSH v. LEE* (1670), 2 Vent. 337; Hard. 173, n.; 86 E. R. 473; *sub nom.* *MARCH v. LEE*, 1 Cas. in Ch. 162.

*Annotations*:—*Refd.* *Titley v. Davies* (1743), 2 Y. & C. Ch. Cas. 399; *Bugden v. Bignold* (1843), 2 Y. & C. Ch. Cas. 377. *Mentd.* *Brace v. Marlborough* (1728), Mos. 50; *Wortley v. Birkhead* (1754), 2 Ves. Sen. 571; *Peacock v. Burt* (1834), 4 L. J. Ch. 33; *Hopkinson v. Bolt* (1861), 9 H. L. Cas. 514; *Jennings v. Jordan* (1881), 6 App. Cas. 698; *Edmunds v. Povey* (1683), 1 Vern. 187; *Atherley v. Barnett* (1885), 52 L. T. 736.

**1504. — Extent of long standing—Estate passed through several hands.]**—After an estate has been held under an extent for a long time, & has gone through several hands. *Qu.*: whether, upon a bill to redeem, deft. shall account otherwise than at the extended value.—*POOLE v. GUISE* (1687), 1 Vern. 468; 23 E. R. 593.

**1505. —.]**—*YATES v. HAMBLY*, No. 1518, *post*.

**1506. Accountable at real value—Rents & profits received—Not for costs.]**—Where tenant by *elegit* has received rents & profits beyond the debt, though he shall account to the debtor, yet he shall not pay costs. In such case, appeal may be for the costs only, where deft. decreed to pay them.—*OWEN v. GRIFFITH* (1749), Amb. 520; 1 Ves. Sen. 250; 27 E. R. 336, L. C.

*Annotations*:—*Consd.* *Angell v. Davis* (1839), 4 My. & Cr. 360. *Refd.* *Cowper v. Scott* (1757), 1 Eden, 17; *Chappell v. Purday* (1847), 16 L. J. Ch. 261. *Mentd.* *Wirdman v. Kent* (1782), 1 Bro. C. C. 140; *Willis v. Yates* (1834), Coop. temp. Brough. 498; *Menzies v. Connor* (1851), 3 Mac. & G. 648.

**1507. —.]**—The ct. referred it to the master to take an account of the rents & profits of an estate received by pltf., who was in possession by virtue of *elegit* & ordered that pltf. should give up possession if it appeared that all the moneys due to him had been received.—*PRICE v. VARNEY* (1825), 3 B. & C. 733; 5 Dow. & Ry. K. B. 612; 3 L. J. O. S. K. B. 107; 107 E. R. 905.

*Annotation*:—*Consd.* *Mahon v. Miles* (1881), 45 L. T. 540.

**1508. —.]**—*BROCKBANK v. MYERS*, No. 1558, *post*.

**1509. — With credit for interest—Debtor claiming account in equity.]**—Where a creditor by judgment extends lands by *elegit*, he holds *quousque debitum satisfactum fuerit*, & at law the debtor cannot on a writ *ad computandum* insist on the creditor's doing more than account for the extended value; but if the debtor comes here for relief, the ct. will give it him, by obliging the creditor to account for the whole he has received; but as he who comes for equity must do equity, will direct the debtor to pay interest to the creditor though it should exceed the principal.—*GODFREY v. WATSON* (1747), 3 Atk. 517; 26 E. R. 1098, L. C.

*Annotations*:—*Refd.* *Leith v. Irvine* (1833), 1 My. & K. 277; *Booth v. Leycester* (1836), Donnelly, 65. *Mentd.* *Barrett v. Hartley* (1866), 14 W. R. 684.

—.]—*BATH (EARL) v. BRADFORD (EARL)* (1754), 2 Ves. Sen. 587; 5 Hare, 85, n.; 28 E. R. 374, L. C.

*Annotations*:—*Consd.* *Morse v. Tucker* (1846), 5 Hare, 79. *Mentd.* *Armstrong v. Storer* (1846), 9 Beav. 277.

**1511. —.]**—Interest is not allowed on a judgment, except under special circumstances, & where there is no imputation on the creditor; & therefore, interest was refused on a judgment, where the creditor, being also mtgee., had been in the receipt of the rents & profits of the mortgaged estates; & the propriety of his conduct was questioned with respect to the manner in which he had become such mtgee., & with respect to his accounts, both as such mtgee., & also as solr., agent, & steward, to the mtgor.

If the debtor comes into a ct. of equity for relief, the ct. will give it him by obliging the creditor to account for the whole that he has received; & as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor even though it should exceed the principal (*ALEXANDER, C.B.*).—*LEWES v. MORGAN* (1829), 3 Y. & J. 394; 148 E. R. 1233.

**1512. — Amounts receivable but for wilful default or neglect.]**—Where a creditor takes from his debtor an assignment of a debt due from a third person as a security for his demand, & by his wilful default, the debt becomes irrecoverable, he must bear the loss.

Here the creditor, by suing out execution, assumed the possession or control of the judgment in exclusion of the assignor, & is within the principle which changes a creditor in possession of property held by him as a security, not only with what he actually received, but with what he might have received but for his wilful default or neglect (*LEACH, V.-C.*).—*WILLIAMS v. PRICE* (1824), 1 Sim. & St. 581; 2 L. J. O. S. Ch. 105; 57 E. R. 229.

*Annotation*:—*Refd.* *Mayer v. Murray* (1878), 8 Ch. D. 424.

**1513. Surplus to be paid to debtor.]**—*YATES v. HAMBLY*, No. 1518, *post*.

**1514. Accountability similar to mortgagee in possession.]**—In a suit by a judgment creditor,

#### PART III. SECT. 2, SUB-SECT. 9.—E.

**1514i. Accountability similar to mortgagee in possession.]**—A prior *elegit* creditor, who gains precedence &

executes his *habere*, shall be charged as if he were a mtgee. in possession, from the day of the demise in his ejectment.—*SHAW v. MURTAGH* (1832), Hayes, 586.—*IR.*

t. *Accountability for wilful default.*]—Bill filed by a judgment-creditor against the heir & assignee of the conusor, the latter having been discharged as an insolvent prior to his

who had been in possession under an *elegit*, to have the real estates of the debtor sold, under Judgments Act, 1838 (c. 110), *pltf.* must account in the same manner as a *mtgee.* in possession.

I have always understood that an *elegit* creditor in possession becomes the landlord & may give tenants notice to quit (KNIGHT BRUCE, V.-C.).—BULL v. FAULKNER (1847), 1 De G. & Sm. 685; 17 L. J. Ch. 23; 10 L. T. O. S. 302; 12 Jur. 33; 63 E. R. 1251; *subsequent proceedings* (1848), 2 De G. & Sm. 772.

#### F. Determination of Tenancy.

**1515. Release of debt.**—An extent is an execution given by the statute law & therefore the release of the debt must determine the estate by extent, because the foundation of it is removed (VENTRIS, J.).—DIGHTON v. GREENVIL (1693), 2 Vent. 321; 86 E. R. 464; *sub nom.* DEIGHTON v. GREENVILL, Comb. 77; 1 Show. 35; *sub nom.* GREENVIL v. DIGHTON, Comb. 229; *sub nom.* GRANDVILL v. DIGHTON, Holt, K. B. 197; Skin. 388, Ex. Ch.; *affd.* (1699), Colles, 64, H. L. Annotation:—*Mentd.* Johns v. Pink. [1900] 1 Ch. 296.

**1516. Levying money—Effluxion of time.**—PULLEN v. PURBECK, No. 1419, *ante*.

**1517. On satisfaction of debt.**—POOLE v. GUISE (1687), 1 Vern. 468; 23 E. R. 593.

**1518. —.**—(1) The *mtgee.* was only in the nature of a tenant by *elegit*, & as soon as his principal & interest was satisfied the estate ceased in the *mtgee.*, & the *mtgor.* or his representatives might have maintained an ejectment.

(2) In *elegit* the conuser has a right to see if the conusee upon the extended value has received a satisfaction for his whole debt, & to have any surplus paid over to him.—YATES v. HAMBLY (1742), 2 Atk. 360; cited 1 Madd. at p. 14; 26 E. R. 618, L. C.

Annotations:—*As to* (1) *Refd.* Walters v. Webb (1870), 5 Ch. App. 531. *Generally, Mentd.* Webber v. Hunt (1815), 1 Madd. 13; Osbourn v. Fallows (1830), 1 Russ. & M. 741.

**1519. —.**—GODFREY v. WATSON, No. 1509, *ante*.

**1520. —.**—JOHNS v. PINK, No. 1500, *ante*.

**1521. Conveyance to tenant of part of land—Tenancy over all lands extinguished—Three elegits for three several judgments—Issued by one creditor.**—(1) A tenant by *elegit* took a conveyance of part of the lands extended, in satisfaction of part of his debt:—*Held*: his tenancy by *elegit* on the rest of the lands was extinguished & his judgment was satisfied.

A creditor issued three writs of *elegit* on three

several judgments, & extended the lands of his debtor; he afterwards took a conveyance of part of them. On a question whether the tenancy by *elegit* had been wholly extinguished & the judgment satisfied, the creditor insisted, that it had not been shown that the writs of *elegit* had been duly returned, & that no evidence had been given, to show in respect of which *elegit* the lands conveyed had been extended:—*Held*: (2) the *onus* of proof was on the creditor, he being bound to make out that he was a subsisting incumbrancer; (3) as it was his duty to have caused a proper return to be made & filed, he could not take advantage of his own omission.

(4) The duty of the sheriff, when the writ of *elegit* is delivered to him, does not appear to be the subject of much doubt. It is his duty to take an inquisition by a jury, & by them to value & extend one-half of the lands of the *elegit* debtor, & the inquisition ought to state the lands extended, & the value thereof. When this is done, the sheriff should deliver to the *elegit* creditor legal possession of the moiety, by metes & bounds; & thereupon, the sheriff should return the *elegit* & inquisition into the ct. from whence it issued, which should thereupon be filed in that ct. It does not, I apprehend, make any difference in the duty of the sheriff, that, in truth, two [writs of] *elegits*, issued on judgments signed in the same term, were delivered to him together; & that the effect of that proceeding was, that both moieties of the entire land might be extended, one on each writ; he was equally bound to ascertain by inquisition, & return what lands were extended under each writ, with the values thereof (ROMILLY, M.R.).—HELE v. BEXLEY (LORD) (1853), 17 Beav. 14; 22 L. J. Ch. 1007; 22 L. T. O. S. 161; 51 E. R.

Annotation:—*Generally, Mentd.* Hele v. Bexley, Whitfield v. Bowyer, Whitfield v. Knight (1855), 20 Beav. 127.

**1522. —.**—**Judgment satisfied.**—HELE v. BEXLEY (LORD), No. 1521, *ante*.

#### SUB-SECT. 10.—SALE.

##### A. In General.

**1523. Sale of leasehold—By sheriff.**—COMYRRS v. BRANDLING (1612), 1 Brownl. 38; Moore, K. B. 873; 123 E. R. 651.

**1524. —.**—A. gave by will his tenant right which he held by lease to I. but not to dispose of or sell it, & if he refused to dwell there or keep it in his own possession then that J. should have

death, & also against an *elegit* creditor of the conuser, who had been in possession for many years:—*Held*: *pltf.* was only entitled to an account for wilful default against the *elegit* creditor, from the time of the filing of the bill.—M'DONNELL v. WALSH (1842), 2 Dr. & War. 252.—IR.

a. —.]—An *elegit* creditor, in possession, is bound to account as for wilful default, upon the application of the debtor himself.—O'BRIEN v. MAHON (1842), 2 Dr. & War. 306.—IR.

b. *Whether accountable for rents—Received by inheritor—Before notice of proceedings—By another creditor.*—*Elegit* creditor in possession not to account for rents permitted to be received by the inheritor before notice of proceedings by another creditor.—HOLTON v. LLOYD (1827), 1 Mol. 30.—IR.

#### PART III. SECT. 2, SUB-SECT. 9.—F.

c. *On death of debtor.*—A judgment creditor having sued out an *elegit*, & having obtained possession &

continued in receipt of the issues of a moiety of the lands until the death of his debtor, & being then evicted:—*Held*: his judgment was not extinguished, & he was entitled to come into equity, after the death of the conuser for satisfaction of so much of his demand as remained unpaid.—LEAHY v. DANCER (1828), 1 Mol. 313.—IR.

#### PART III. SECT. 2, SUB-SECT. 10.—A.

d. *What may be sold—Precise interest of debtor.*—Sale of land by sheriff under a *fl. fa.* passes only the interest of owner.—HUNNIFORD v. HORWOOD (1879), 5 V. L. R. 250.—AUS.

e. —.]—The interest which the sheriff can sell is still, as it was before the passing of Real Property Act, the beneficial interest that was in the owner at the time of the entry of the writ.—COLEMAN v. DE LISSA (1885), 11 N. S. W. Eq. 104.—AUS.

f. —.]—*Re* ELLIOT (1886), 7 N. S. W. L. R. 271; 3 N. S. W. W. N. 59.—AUS.

g. —.]—UNION BANK OF AUSTRALIA v. HARRISON, JONES & DEVLIN, LTD. (1910), 11 C. L. R. 492.—AUS.

h. —.]—Deft., being the owner of certain property, *mtgd.* it to a building society. *Pltf.* with two others having recovered a judgment against deft., sold under a *fl. fa.* lands the premises in question which *pltf.* purchased. Default having been made in the *mtge.* to the building society, they advertised & sold. Upon ejectment brought it was contended that the *mtge.* to, & sale by the building society prevented the sale under the *fl. fa.* from operating:—*Held*: the sale under the *fl. fa.* passed all the interest, both legal & equitable, of the *mtgor.*, & as against him *pltf.* was entitled to recover.—FISKEN v. McMULLEN (1862), 12 C. P. 85.—CAN.

k. —.]—An execution creditor can only sell the real estate of his debtor subject to the charges, liens & equities to which the same was subject in the hands of the execution



Sect. 2.—*Writ of elegit*: Sub-sect. 10, A

his tenant right of the farm. I., having borrowed money, left the title deeds with his creditor as a security & confessed a judgment to secure the money; & having also given a judgment to another creditor who issued an execution against him, the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of pltf. in the execution; & I. having left the premises & ceased to dwell there on the day of the execution, before the sheriff entered:—*Held*: J., the remainderman, was entitled to enter, the estate of I. having determined by such his acts.—*DOE d.*

debtor & do not give the execution creditor any superiority of title over prior unregistered transferees, but merely protects the lands from intermediate dispositions by the execution debtor.—*JELLETT v. WILKIE, JELLETT v. SCOTTISH ONTARIO & MANITOBA LAND CO., JELLETT v. POWELL, JELLETT v. ERRATT* (1896), 26 S. C. R. 282.—*CAN.*

l. ———.—*PARVATI v. KISANSING* (1882), 1 L. R. 6 Bom. 567.—*IND.*

m. ———.—*PRAYAG RAJ v. SIDHU PRASAD TEWARI* (1903), 1 L. R. 35 Calc. 877.—*IND.*

n. ———.—*On judgment against one—Of several executors.*—Lands may be sold on a judgment against one of several executors in the same manner as if it had been against all.—*DOE d. SMITH v. SHUTER* (1837), 5 O. S. 655.—*CAN.*

o. ———.—*Real estate—In remainder or reversion.*—Real estate in remainder or reversion may be taken in execution & sold at the sheriff's sale.—*DOE d. HAZEN v. HAZEN* (1854), 3 All. 87.—*CAN.*

p. ———.—*Execution against executor de son tort.*—Real estate cannot be sold under an execution obtained against an exor. *de son tort.*—*GRAHAM v. NELSON* (1857), 6 C. P. 280.—*CAN.*

q. ———.—*MCDADDE d. O'CONNOR v. DAFOE* (1858), 15 U. C. R. 386.—*CAN.*

r. ———.—*WRATHWELL v. BATES* (1858), 15 U. C. R. 391.—*CAN.*

s. ———.—*Land conveyed to school trustees—For building of school.*—Land conveyed to school trustees for a school cannot be sold under execution against them for the money due for building the school house.—*SCOTT v. BURGESS & BATHURST SCHOOL TRUSTEES* (1859), 19 U. C. R. 28.—*CAN.*

t. ———.—*Locatee's interest—Locatee joining in conveyance—Order of court.*—The ct. will, at the instance of a judgment creditor of a locatee, with execution against lands in the hands of the sheriff, direct the interest of the locatee to be sold, & order him to join in the necessary conveyance to enable the purchaser, under the decree, to apply to the Crown lands department for a patent, as vendee or assignee of the locatee.—*YALE v. TOLLERTON* (1867), 13 Gr. 302.—*CAN.*

a. ———.—*Land subject to mortgage.*—Where a first mtgee. acquired, as he contended, a title through a purchaser at sheriff's sale of the equity of redemption of the mtged. premises, there being mesne incumbrances:—*Held*: he did not acquire the fee in the lands, the sheriff not having power to sell.—*Re KEENAN* (1871), 3 Ch. Ch. 285.—*CAN.*

b. *Duty of sheriff—To sell debtor's lands—Under all writs in his hands.*—It is the duty of the sheriff to sell the debtor's land under all writs in his hands, & to apply the proceeds to their satisfaction, in the order in which he

receives them.—*BEATH v. ANDERSON* (1883), 9 V. L. R. 41.—*AUS.*

c. ———.—*To declare metes & bounds.*—The locus was sold by the sheriff & bought by Y. for a trifling sum. It appeared that notice of sale had not been duly given by the sheriff, & also that the land was not described at the sale by metes & bounds. Y. brought ejectment & obtained a verdict. In the argument on a rule to set the verdict aside & for a new trial the question was raised that the land had not been described at the sale by metes & bounds & the sale was, therefore, void:—*Held*: the want of description by metes & bounds at the sale was a defect & rendered the sale invalid.—*YEO v. BETTS* (1856), 1 P. E. I. 116.—*CAN.*

d. *Necessity for deed.*—It seems that a conveyance from the sheriff by deed under seal is necessary to complete a vendee's title to lands sold.—*DOE d. MOFFAT v. HALL* (1827), Tay. 510.—*CAN.*

e. ———.—*Whether estate vested in purchaser.*—A., a judgment creditor, pointed out land to the sheriff as the property of B. his debtor, which the sheriff levied upon & sold, & A. became the purchaser, with knowledge that a third person claimed the title. A. afterwards finding that B. had no title, refused to complete the purchase, & no return was made upon the execution:—*Held*: the mere purchase, without any conveyance from the sheriff, vested no estate in A., & was no satisfaction of the judgment.—*STEWART v. BRUNDAGE* (1848), 1 All. 205.—*CAN.*

f. *Sale subsequent to mortgage—Mortgagee in possession—Whether purchaser can recover from mortgagee.*—A purchaser at sheriff's sale of lands sold under a judgment & execution subsequent to a mtge. in fee by the debtor, cannot recover against the mtgee. in possession.—*DOE d. RICHARDSON v. DICKSON* (1832), 2 O. S. 292.—*CAN.*

g. *Priority of purchase from devisee—In preference to purchaser on subsequent execution—Though prior judgment.*—A purchaser at sheriff's sale of lands sold on an execution against a devisee, takes in preference to a purchaser on a subsequent execution, though prior judgment, against the exor. of testator.—*DOE d. AULDJO v. HOLLISTER* (1838), 5 O. S. 739.—*CAN.*

h. *When court will restrain transfer by sheriff—Good cause.*—The ct. will, after a sale of lands under an execution, prevent an assignment by the sheriff to the purchaser, where good cause is shown for requiring their interference.—*BANK OF UPPER CANADA v. MILLER* (1840), (1823–1900), 2 Ont. Dig. 2661.—*CAN.*

k. *Transfer of property—After death of sheriff—To whom writ directed.*—A deed, executed by a deputy sheriff, of lands sold under an execution after the death of the sheriff to whom the writ was directed, & after the appointment of a new sheriff, is void.—*DOE d. CAMPBELL v. HAMILTON* (1841), 6 O. S. 88.—*CAN.*

*NORFOLK (DUKE) v. HAWKE* (1802), 2 East, 481; 102 E. R. 453.

*Annotation*:—*Mentd. Croft v. Lumley* (1855), 5 E. & B. 648.

1525. ———.—*When void—Sale under erroneous description of term.*—If the inquisition upon *elegit* find a lease of one date when it is in fact of a different date, & the sheriff sell it according to their appraisement & not generally, the sale is void.

There is a difference between a sales upon a *fi. fa.*, & upon an *elegit*; for the *elegit* is "*quod per sacramentum duodecim proborum hominum per rationabile pretium et extent*," they appraise the goods & chattels of the debtor, & extend his land;

aa. *Long delay in selling—After seizure in execution.*—A party whose lands have been sold under a *fi. fa.* cannot object to the sale on the ground of long delay in selling after the seizure, where such sale took place at his own instance or with his assent & he has received the benefit of the proceeds of such sale; neither can his heir after his death.—*DOE d. HARLEY v. MC MANUS* (1844), 1 U. C. R. 141.—*CAN.*

bb. *Title of purchaser—Prima facie good.*—The purchaser's title to land under a sheriff's sale is *prima facie* good when the sale is made upon a legal writ.—*DOE d. BOULTON v. FERGUSON* (1849), 5 U. C. R. 515.—*CAN.*

cc. ———.—*Whether obliged to inquire—Into validity of decree.*—The purchaser at a sale under a decree is under no obligation to look behind the decree to see whether the decree has been rightly made.—*KAUNSILLA v. CHANDAR SEN* (1900), 1 L. R. 22 All. 377.—*IND.*

dd. *Whether sale must be public—Effect of statutes.*—43 Geo. 3, c. 1, & 2 Geo. 4, c. 1, s. 20, clearly contemplate a public sale in regard to lands, & that has always been the course both with respect to lands & goods.—*DOE d. MILLER v. TIFFANY* (1848), 5 U. C. R. 79.—*CAN.*

ee. *Advertisements of sale—Portion of land seized remaining unsold—No postponement—Subsequent sale without new advertisement.*—The sheriff in 1835 received a *fi. fa.* lands, & in 1836 sold some of deft.'s lands under it; but other portions of the land, though included in the advertisement, were not sold. There being no adjournment nor postponement of the sale nor any new advertisement, the sheriff, in Dec. 1838, proceeded to sell under the same writ the lands unsold in 1836:—*Held*: the seizure under the writ of 1835, must be considered as abandoned.—*DOE d. CAMERON v. ROBINSON* (1850), 7 U. C. R. 335.—*CAN.*

ff. ———.—*Defect in—Whether court will compel sheriff—To execute conveyance to purchaser.*—The ct. refused to interfere summarily to compel the sheriff to make a deed of a lot sold by him under execution, where it appeared that he had been advised not to complete the sale on account of an irregularity in the advertisement; & that the same land, on being again advertised & exposed to sale under a subsequent writ, brought a price far exceeding that for which it had been purchased by appct.—*Re CAMPBELL & RUTTAN* (1853), 10 U. C. R. 641.—*CAN.*

gg. ———.—*Whether purchaser's title affected.*—Errors or defects in the advertisements, either in the Gazette or local paper, of a sale of land under execution, will not affect the purchaser's title even if he be one of the execution creditors.—*PATERSON v. TODD* (1865), 24 U. C. R. 296.—*CAN.*

hh. ———.—*Local newspaper.*—Lands seized by the sheriff under execution must be advertised at the Ct. House; at the office of the Registrar of Deeds; & in the other places mentioned in the 1 Rev. Stat. c. 113, s. 8; as well as in the local newspaper.—*DOE d.*

& therefore without an inquisition, he cannot sell them (POPHAM, C.J.).—PALMER v. HUMPHREY (1597), Cro. Eliz. 584; Gouldsb. 172; 78 E. R. 827.

*Annotation*:—*Refd.* Bealy v. Sampson (1689), 2 Vent. 93.

**1526.** ——— Judgment afterwards reversed.]—GOODYERE v. INCE (1610), Cro. Jac. 246; Yelv. 179; 79 E. R. 211.

*Annotation*:—*Refd.* Bealy v. Sampson (1689), 2 Vent. 93.

**1527.** ——— Sale at undervalue—Liability of purchaser to account.]—A lease sold by the sheriff, upon execution of a judgment, the vendee must account for the overvalue.—GASCOIGNE v. STUT (1670), 3 Rep. Ch. 57; Nels. 143; 21 E. R. 727.

KERR v. JAMIESON (1869), (1825–1897), N. B. Dig. 717.—CAN.

t. ———.]—SAWYER MASSEY CO., LTD. v. ETHIER, [1920] 1 W. W. R. 869.—CAN.

a. ——— *Re-advertisement of land for sale.*]—Some time after debt. had returned to the land & again taken up his residence thereon the sheriff re-advertised the land for sale on the date to which the sale had been ultimately postponed:—*Held*: the sale really took place under the adjourned sale proceedings, & therefore even though debt. may have made the land his homestead before the re-advertisement, that fact did not avail to prevent the sale.—SASKATCHEWAN ELEVATOR CO. v. AREND, [1923] 3 W. W. R. 1258; 4 D. L. R. 1207.—CAN.

b. *Expiry of writ—Whether sale valid.*]—A sale of lands under a *fi. fa.* which has expired, is void.—DOE d. BURNHAM v. SIMMONDS (1850), 9 U. C. R. 436.—CAN.

c. *Writ amended by rule of court—Sale of land by sheriff—Before amendment.*]—On a judgment in *assumpsit* a *fi. fa.* was issued in debt & afterwards amended by rule of ct. Before the amendment the sheriff had sold the land & given a deed, under which pltf. claimed. It was objected that the sale was void, having been made under an erroneous writ:—*Held*: the objection could not be entertained.—DOE d. ELSLEY v. MCKENZIE (1852), 9 U. C. R. 559.—CAN.

d. *Purchaser in possession—Illegal entry by heir—Of execution debtor.*]—Pltf., a purchaser at sheriff's sale, produced the sheriff's deed, under which he had held possession by his tenants for several years. Debt., being the heir of debt. in the original suit, entered, & on action brought, objected that there were goods of his ancestor which might have been seized, & that pltf. had not proved a *fi. fa.* goods returned *nulla bona*:—*Held*: these objections were properly overruled.—DOE d. MEYERS v. MEYERS (1852), 9 U. C. R. 465.—CAN.

e. *Sale under alias—Writ in sheriff's hands for twelve months.*]—Where a *fi. fa.* against lands had been in the sheriff's hands for twelve months, & returned, nothing having been done upon it:—*Held*: the sheriff might sell under an *alias* issued thereon without waiting for a year from its receipt.—RUTAN v. LEVISCONTE (1858), 16 U. C. R. 495.—CAN.

f. ———.]—CAMPBELL v. DELIHANTY (1865), 24 U. C. R. 236.—CAN.

g. *Sale by sheriff—Trust land—Purchaser's knowledge of trust.*]—A judgment was recovered against trustees of land held under a conveyance absolute in form, of which no trust had been actually declared. Execution issued on the judgment, under which the sheriff sold the trust land, but the purchaser knew that the execution debts. were trustees only. Upon a bill filed by the *cestui que trust* against the trustees & the purchaser, the sale

by the sheriff was declared void, & pltf. decreed to be entitled to the land.

—BLACKBURN v. GUMMERSON (1860), 8 Gr. 331.—CAN.

h. ——— *Validity of.*]—The sale of a road, owned by a co., by a sheriff under a *fi. fa.* lands, is a valid sale, & a conveyance made by him to the purchaser is sufficient to enable the vendee to bring ejectment.—TOTTEN v. HALLIGAN (1863), 13 C. P. 567.—CAN.

k. *Uncertainty of interest sold.*]—Where a sheriff offered for sale the interest of the debtor in certain lands, not stating what it was, although the means of ascertaining it were convenient, & the interest itself was actually known to the judgment creditor, & partially known to the sheriff, but not mentioned to the audience, the sale was set aside, because of the uncertainty of the interest or estate put up for sale.—FITZGIBBON v. DUGGAN (1865), 11 Gr. 188.—CAN.

l. *Sale under first writ not proceeded with—Priority of first execution-creditor lost.*]—Two executions against lands were in the hands of the sheriff, & the sheriff had advertised a sale under the first writ. On the morning of the intended sale the sheriff was directed not to proceed with it, & accordingly the sale did not take place:—*Held*: the first execution was thereby postponed to the second; the direction to the sheriff being peremptory, although it was given for no fraudulent purpose, & although in giving it there was no intention of abandoning the seizure.—TRUST & LOAN CO. v. CUTHBERT (1867), 13 Gr. 412.—CAN.

m. *Inadequacy of price—Whether sale valid.*]—Inadequacy of price, sufficient to set aside a conveyance as between private individuals will not serve as a ground for setting aside a sale by a sheriff under execution.—LAING v. MATTHEWS (1867), 14 Gr. 36.—CAN.

n. ———.]—A sale under process of law cannot be successfully attacked for mere inadequacy of price, unless, perhaps, it is so grave & extreme as to compel a conclusion of fraud or malversation.—MCNICHOL v. MCPHERSON (1907), 15 O. L. R. 393; 10 O. W. R. 844.—CAN.

o. ———.]—*Fraud of execution creditor's agent.*]—SUBBAJI RAU v. SRINIVASA RAU & PULLIAH (1880), I. L. R. 2 Mad. 264.—IND.

p. ———.]—When property is sold in execution of a decree fraudulently obtained, mere inadequacy of price, apart from participation in or knowledge of the fraud, is not in itself a circumstance sufficient to justify the setting aside of the sale.—CHITAMBAR v. KRISHNAPPA (1902), I. L. R. 26 Bom. 543.—IND.

q. *Land comprised in two mortgages—Held by different mortgagees—Sale of whole interest.*]—A debtor executed two mtges., which were in different hands, a portion of the land comprised in one of them being comprised in the other, & his interest in

**1528.** ——— By Crown debtor.]—FLEETWOOD'S CASE, No. 1367, *ante*.

**1529.** Under Judgments Act, 1838 (c. 110)—After order for payment—Not complied with—Foreclosure not permissible.]—A judgment is made a charge upon lands by the above Act, but to obtain the benefit of it, there must be an order for payment within a given time, & if not, then a sale; a foreclosure is not the course.—CARLON v. FARLAR (1845), 8 Beav. 525; 5 L. T. O. S. 142; 50 E. R. 206.

**1530.** ——— Not treated as eviction of creditor—To enable revivor of judgment.]—MACKLEY v. SMITH, No. 222, *ante*.

**1531.** ——— Sale only—Not foreclosure.]—A

all the land was sold under execution:—*Held*: the sale was invalid.—WOOD v. WOOD (1869), 16 Gr. 471.—CAN.

r. *Writ against lands of testator—Delivery of subsequent mortgagee by devisees—To sheriff—Whether sheriff may sell.*]—A mtge. by devisees subsequent to a writ against testator's lands in his exor.'s hands, being delivered to the sheriff, does not prevent the sheriff selling.—JOHNSTON v. SOWDEN (1872), 19 Gr. 221.—CAN.

s. *Execution issued against testator's lands—Part only liable to execution—Whether sale invalid.*]—S., at the time of his death, owned a farm of 98 acres, 25 of which he had mtged. After his death his mtgee. recovered against his exor. two judgments, viz., one in the county ct. for the mtge. debt, & one in the division ct. for a debt not due by S. in his lifetime, & for which, therefore, his lands were not liable to be sold. The judgment pltf., having transferred his division ct. judgment to the county ct. issued executions on both judgments, under which the sheriff offered for sale the interest of S., testator, in the 98 acres. The judgment pltf. became the purchaser, bidding just enough to cover the amount of his two judgments & the costs, but not paying or intending to pay any money except the amount of the sheriff's fees:—*Held*: by a sale of testator's interest in the 98 acres, the equity of redemption in the 25 acres would have passed along with the legal estate in the 73 acres, but that no real sale had taken place, & therefore the sheriff's deed, made to the judgment pltf. in pursuance of his bid, was void.—SAMIS v. IRELAND (1879), 4 A. R. 118; 28 C. P. 478.—CAN.

aa. *Land sold by execution creditors—Not creditors of deceased.*]—The land of testator or intestate is liable to be sold only for his debt, & where it is shown that the judgment was not in fact recovered in respect of such a debt, but that the execution-creditors never were creditors of deceased, a sale of the land under it cannot be supported.—FREED v. ORR (1881), 6 A. R. 690.—CAN.

bb. *Land subdivided into lots—Whether sheriff bound to sell lots separately.*]—Although a block of land may have been subdivided on the official plan, the sheriff is not bound to sell the official subdivisional lots separately, if they have not been defined on the ground & if the land is used as a whole, & the sheriff may be ordered by a judge in chambers to seize & sell the land as a whole.—GALE v. CANADIAN IRON & STEEL CO. (1884), M. L. R. 1 S. C. 441; 8 L. N. 341.—CAN.

cc. *Assignee of creditors—Not able to sign memorandum—To bind purchaser at sale—Assignee not agent for vendor & purchaser.*]—MCINTYRE v. FAUBERT (1895), 26 O. R. 427.—CAN.

dd. *Lands sold subject to mortgage—Crops sown by mortgagee lessee—Crops seized under subsequent execution.*]—Mtgees. of land took possession &



*Sect. 2.—Writ of elegit: Sub-sect. 10, A. & B.; sub-sect. 11.]*

judgment creditor having registered his judgment under the above Act, is not entitled to a decree for foreclosure, but only to one for sale.—*FOOTNER v. STURGIS* (1852), 5 De G. & Sm. 736; 21 L. J. Ch. 741; 19 L. T. O. S. 324; 64 E. R. 1322.

*Annotation:—Mentd. Tuckley v. Thompson*, (1860), 1 John. & H. 126.

**1532.** ———— *—The relief to which a judgment creditor is entitled under the above Act is a foreclosure, & not a sale.—JONES v. BAILEY* (1853), 17 Beav. 582; 51 E. R. 1161.

*Annotation:—Mentd. Tuckley v. Thompson* (1860), 1 John. & H. 126.

#### *B. Under Judgments Act, 1864.*

See Judgments Act, 1864 (c. 112), ss. 4, 5, 6; Land Charges Registration & Searches Act, 1888 (c. 51), s. 5; Land Charges Act, 1900 (c. 26), s. 2 (1); R. S. C., Ord. 55, r. 9, B.

**1533. Right of creditor to apply for sale—Judgments Act, 1864 (c. 112), s. 4—Act not retrospective.]—**The power provided by the above sect. which enables a creditor to whom land has been delivered in execution, to apply to the Ct. of Ch. for a sale, does not extend to cases where the judgment has been entered up before the passing of the Act, July 26, 1864, but only to those since that time.—*Re ISLE OF WIGHT FERRY Co.* (1865), 34 L. J. Ch. 194; 11 Jur. N. S. 279; *sub nom. Re LANDS OF ISLE OF WIGHT FERRY Co.*, 12 L. T. 263.

**1534. ———— Where lands already extended.]—**A judgment creditor who has caused a writ of *elegit* to be issued, is not entitled to apply to the ct. upon petition in a summary way for a sale of his debtor's lands under the above sect. where his debtor's lands have been already extended & delivered to another judgment creditor under a prior *elegit*, although he is not prevented by the Act from filing a bill to assert his equitable rights.—*Re COWBRIDGE RY. Co.* (1868), L. R. 5 Eq. 413; 37 L. J. Ch. 306; 18 L. T. 102; 16 W. R. 506; *subsequent proceedings, sub nom. GUEST v. COWBRIDGE RY. Co.*, L. R. 6 Eq. 619.

*Annotations:—Refd. Guest v. Cowbridge Ry.* (1868), L. R. 6 Eq. 619; *Re Newcastle* (1869), L. R. 8 Eq. 700; *Hutton v. Haywood* (1874), 9 Ch. App. 229; *Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275. **Mentd. Re Anthony, Anthony v. Anthony, [1892] 1 Ch. 450.**

**1535. ———— Land of railway company—Distinct from undertaking giving rise to debt.]—**A railway co., incorporated by an Act passed in 1859, employed a contractor to construct their line of railway, & became indebted to him in a large amount. In 1869 the contractor recovered judgment in an action for the sum remaining due to him, & in the following year he issued a writ of *elegit*, under which he seized certain superfluous lands belonging to the co. These lands had been acquired by the co. under an Act passed in 1863, whereby they were empowered to extend their line of railway, & whereby it was provided that the works thereby authorised to be constructed, should, for financial purposes, form a separate undertaking, & that the capital & new shares created under the powers thereof, should constitute a separate capital. On a petition presented by the contractor under the above sect., praying for a sale of the lands seized under the writ, & for pay-

ment of the judgment debt out of the proceeds of sale:—*Held*: the objection that the lands seized under the writ had been acquired by the co. under their Act relating to an undertaking of the co. distinct from that in respect of which the debt was incurred, was no defence to the petition.

Order of WICKENS, V.-C., directing the usual inquiries, accordingly affirmed.—*Re OGILVIE* (1871), 7 Ch. App. 174; 41 L. J. Ch. 336; 25 L. T. 860; 20 W. R. 226, L. JJ.

*Annotations:—Refd. Stagg v. Medway* (Upper) Navigation Co., [1903] 1 Ch. 169; *Pearson v. Dublin & South Eastern Ry.*, [1909] A. C. 217.

**1536. ———— Writ must first be registered.]—***Re POPE*, No. 1450, *ante*.

**1537. What amount to be sold—Sufficient to satisfy claim.]—**Upon petition by a judgment creditor of a railway co. who had extended the lands, including superfluous lands, of the co. under a writ of *elegit*, for a sale under the Judgments Act, 1864 (c. 112), the ct. directed inquiries; & in default of payment of the debt & costs within a month of the date of the certificate, a sale under the direction of the ct. of the interest of the co. in the lands, or so much thereof as might be necessary to satisfy petitioner's claim.

The ct. will before directing a sale of lands under the Act, taken under *elegit* sued out by a judgment creditor against a railway co., & extended by the sheriff, direct certain previous inquiries as to the amount of the debt due, the particulars of the lands required to realise the debt; & as to any other & what incumbrances.—*Re HULL & HORNSEA RY. Co.* (1866), L. R. 2 Eq. 262; 35 L. J. Ch. 838; 14 L. T. 855; *sub nom. Re HULL & HORNSEA RY. Co., Ex p. ROBINSON & YOUNG*, 14 W. R. 758.

*Annotations:—Refd. Re Bishops Waltham Ry.* (1866), 14 W. R. 1008; *Gardner v. L. C. & D. Ry.*, *Drawbridge v. Same*, *Ex p. Grissell* (1867), 15 L. T. 644.

**1538. What interest saleable—Interest of railway company in railway.]—***Re BISHOP'S WALTHAM RY. Co.*, No. 1541, *post*.

**1539. ———— Annuity charged on land.]—***Re COOPER*, No. 1554, *post*.

**1540. Immediate or postponed sale—Preliminary inquiry—To ascertain debtor's interest.]—**In this matter a contributory was indebted to the co. for calls, & an order was made for the payment of them. A writ of *elegit* was afterwards duly sued out under Judgments Act, 1864 (c. 112), & lands belonging to the contributory were delivered in execution to the official liquidator of the co. The official liquidator then presented a petition praying an order for the sale of the lands, & payment out of the proceeds of such sale of the calls due from the contributory, & for other relief:—*Held*: there must be an inquiry what interest the contributory had in the lands when they were delivered in execution to the official liquidator of the co., & what other parties, if any, were interested in the lands, further consideration of the petition being reserved.—*Re KIRBY, Ex p. LEEDS BANKING Co.* (OFFICIAL LIQUIDATOR) (1866), 14 L. T. 615.

**1541. ———— Saleable interest not clear.]—**Where it is not clear that a debtor has any saleable interest in land taken in execution by his judgment creditor, the ct. will not order an immediate sale, under Judgments Act, 1864 (c. 112), s. 4, but will direct inquiries as to the nature of the debtor's interest. *Semble*: the interest of

leased to the mtgor. who sowed a crop. Subsequently & before any of the crop was cut the land was sold under execution & a transfer given subject to the mtge. Subsequently the sheriff under an execution against the mtgor.

seized the crop, some of which was then cut & some not cut:—*Held*: the crop passed with the land to the purchaser of the land at the execution sale.—*NICHOL v. PEDLAR & JOHNSTON*, [1919] 3 W. W. R. 713.—**CAN.**

*d. Conveyance in name of deputy sheriff—Whether valid.]—*A conveyance made by & in the name of the deputy sheriff, of land taken in execution is valid.—*WILLIAMS v. MUDGE* (1850), 3 Nfld. L. R. 163.—**NFLD.**

a railway co. in its railway is not saleable under that sect.—*Re* BISHOP'S WALTHAM RY. CO. (1866), 2 Ch. App. 382; 15 W. R. 96, L. J.J.

*Annotations*:—*Re*ld. *Gardner v. L. C. & D. Ry., Drawbridge v. Same, Ex p. Grissell* (1867), 15 L. T. 644; *Redfield v. Wickham Corpn.* (1888), 13 App. Cas. 467; *Stagg v. Medway (Upper) Navigation Co.* (1902), 50 W. R. 446.

**1542.** ———. ———.]—Before the ct. orders a sale of lands under Judgments Act, 1861 (c. 112), it must be absolutely satisfied that they are saleable.

Therefore, where a judgment creditor petitioned under the Act for an immediate sale of lands of the co. comprised in the return to a writ of *elegit*, & the co., although it had shortly before advertised them for sale expressly as "surplus lands," suggested that possibly they were not surplus land, & there was no further evidence of their character, the ct. refused an immediate sale, & directed inquiries in chambers.—*GARDNER v. LONDON, CHATHAM & DOVER RY. CO., Ex p. GRISSELL* (1867), 2 Ch. App. 385; *sub nom. GARDNER v. LONDON, CHATHAM & DOVER RY. CO., DRAWBRIDGE v. SAME, Ex p. GRISSELL*, 15 L. T. 641; 15 W. R. 321, L. J.J.

*Annotations*:—*Apld. Re Bristol & North Somerset Ry.* (1869), 20 L. T. 70. *Re*ld. *Kingston v. Cowbridge Ry.* (1871), 41 L. J. Ch. 152; *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169.

**1543.** ———. ———.]—*Re HULL & HORNSEA RY. CO.*, No. 1537, *ante*.

**1544.** ———. ———.]—**Form of order.**—*GARDNER v. LONDON, CHATHAM & DOVER RY. CO., Ex p. GRISSELL*, No. 1542, *ante*.

**1545.** ———. ———.]—A judgment dated in Apr. 1867, was obtained for £30,000 against the B. & N. S. Railway Co., & a writ of *elegit* issued in June. In Nov. the co. filed a scheme of arrangement, & in Jan. 1868, an order for sale was made under the writ. In June, 1868, the scheme was dismissed & a petition presented by the creditors for an inquiry whether the lands in respect of which the *elegit* had been issued were surplus lands, upon which the co. opposed the claim. Order made for the inquiry in the same form as in *Gardner v. London, Chatham & Dover Rail. Co., Ex p. Grissell*, No. 1542, *ante*.—*Re* BRISTOL & NORTH-SOMERSET RY. CO. (1869), 20 L. T. 70.

**1546.** ———. ———.]—*Re* OGILVIE, No. 1535, *ante*.

**1547.** ———. ———.]—*HOWSON v. TRANT* (1873), 42 L. J. Ch. 808; 21 W. R. 781, L. C.

**1548.** ———. ———.]—**Immediate sale.**—Upon the petition of a judgment creditor of a railway co., an order was made, without directing inquiries, for a sale of surplus land of the co., not required for the undertaking & not used for building purposes, which had been delivered in execution to the petitioner under a writ of *elegit*, the registry of which was still in force. The co. were ordered to execute a proper conveyance.—*Re* CALNE RY. CO. (1870), L. R. 9 Eq. 658.

*Annotations*:—*Folld. Re Bithray* (1889), 61 L. T. 383. *Consd. Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169.

**1549.** ———. ———.]—**Land subject to mortgage—Consent of mortgagee.**—Petition for sale under the Judgments Act, 1861 (c. 112), of the debtor's interest in freehold lands by a creditor who had recovered & registered a judgment & obtained an order appointing a receiver over the land in question, which was subject to a mtge. for £1,000. Evidence was produced that the mtgee. had received no notice of any charge subject to his own, & that a search of the registries showed that no process of execution had been registered against the judgment debtor or his land; that the judgment debtor had not been bkpt. or had a receiving

order made or a bkpey. petition presented against him for the last nine years:—*Held*: upon this evidence, the order for sale would be made without requiring any inquiry as to the incumbrances on the land.—*Re* BITHRAY (1889), 59 L. J. Ch. 66; 61 L. T. 383; 38 W. R. 60.

**1550.** **Application for sale—Joined with application for receiver—Appointment of receiver refused.**—*Re* NIXON, [1886] W. N. 191.

**1551.** ———. ———.]—**By summons—Not petition—Effect of proceeding by petition.**—Where under the Judgments Act, 1861 (c. 112), the procedure under which has been altered by R. S. C., Ord. 55, r. 9, B., an application has been made by a judgment creditor by petition instead of by originating summons for the sale of the debtor's interest in certain houses in respect of which a receiver has been appointed, the ct. has power under R. S. C., Ord. 70, r. 1, to allow the petition, but petitioner, if successful, will only be entitled to the costs of an originating summons.—*Re* MARTIN & VARLOW (1894), 43 W. R. 247; 39 Sol. Jo. 151; 13 R. 189.

**1552.** ———. ———.]—*Re* HARRISON & BOTTOMLEY, No. 1374, *ante*.

**1553.** **Form of order.**—*HOWSON v. TRANT* (1873), 42 L. J. Ch. 808; 21 W. R. 781, L. C.

**1554.** ———. ———.]—Where one person is entitled to land in the event of his surviving another person, an annuity to be raised out of the rents & profits of such land can be sold under Judgments Act, 1861 (c. 112).

No order for payment should be contained in the order for sale made upon a petition under the Act, & the inquiry as to liens, charges, & incumbrances should contain a direction to the chief clerk to distinguish which, if any, of the same liens, charges, & incumbrances have been created by any means prior, & which, if any, subsequent to the date of the lands & property being delivered in execution, & which, if any, have arisen under or by virtue of any judgment, statute, or recognisance; & the order for sale should direct the sale of the lands & property free from all liens, charges, or incumbrances which have been created by any means subsequent to the delivery in execution, or which have arisen (whether before or after the delivery in execution) under or by virtue of any judgment, statute, or recognisance, & also free from the incumbrances of such of the other incumbrancers as shall consent to the sale, but subject to the incumbrances of the other incumbrancers as shall not consent.—*Re* COOPER (1889), 60 L. T. 95; 37 W. R. 330.

*Annotations*:—*Re* Martin & Varlow (1894), 43 W. R. 247; *Re* Harrison & Bottomley, [1899] 1 Ch. 465.

**1555.** ———. ———.]—*Re* HOLDER, [1890] W. N. 55.

#### SUB-SECT. 11.—RECOVERY OF POSSESSION BY DEBTOR.

**1556.** **Ejectment—By debtor—Or representatives.**—*YATES v. HAMBLY*, No. 1518, *ante*.

**1557.** **Order of court—On payment of debt & costs.**—*PRICE v. VARNEY*, No. 1507, *ante*.

**1558.** ———. ———.]—**Ejectment or scire facias unnecessary.**—It will be referred to the master to take an account of the rents & profits of land received by pltf. under *elegit*, & to make such allowances as a ct. of equity would do, so as to let deft. into possession if the debt & costs should have been paid without bringing ejectment or *sci. fa. ad computandum et rehavendum terram*.—*BROCKBANK v. MYERS* (1836), Tyr. & Gr. 988.



## SECT. 3.—WRIT OF CAPIAS AD SATISFACIENDUM.

*TE.—Arrest or imprisonment for default in payment of a debt is now provided for by Debtors Act, 1869 (c. 62). The names of cases are given for reference to former practice. For application of the Debtors Act generally, see BANKRUPTCY & INSOLVENCY, Vol. V., p. 1021. For attachment & committal, see CONTEMPT OF COURT, Vol. XVI., p. 46.*

## SUB-SECT. 1.—ISSUE OF THE WRIT.

**1559. In what cases issued.]**—BARKER v. BOURN (1599), Cro. Eliz. 692; ANON. (1704), 6 Mod. Rep. 223.

**1560. Against whom issued.]**—THORPE v. ARGLES (1844), 1 Dow. & L. 831.

**1561. Service of writ.]**—ARMITAGE v. RIGBYE (1836), 5 Ad. & El. 76.

**1562. After discharge under Irish Insolvent Debtors Act, 1840 (c. 107).]**—EWART v. JONES (1845), 14 M. & W. 774.

**1563. Time for issue.]**—ANON. (1853), 20 L. T. O. S. 212.

**1564. Issue for less than £20.]**—BROOKS v. HODGKINSON (1859), 4 H. & N. 712.

## PART III. SECT. 3, SUB-SECT. 1.

**e. In what cases issued—Judgment for malicious prosecution.]**—A judgment recovered in an action of malicious prosecution may be enforced by a writ of *ca. sa.*, malicious prosecution being included in the term "any malicious injury" in 10 Vict., No. 7, s. 3.—NORTON v. CRICK (1894), 15 N. S. W. L. R. 172; 10 N. S. W. W. N. 197.—AUS.

**f. ——— To recover costs.]**—A debt., in whose favour a verdict is rendered, is entitled to a *ca. sa.* for the costs of his defence.—THOMSON v. LEONARD (1833), 3 O. S. 151, 610.—CAN.

**g. ——— Judgment for nominal damages.]**—Pltf. is entitled to issue a *ca. sa.* for the costs of an ejectment, when they exceed £10, although nominal damages are included in the judgment.—CARROLL v. DEVELIN (1848), 1 Ir. Jur. 22.—IR.

**h. ——— Necessity for personal demand.]**—Re GREAN'S GOODS (1865), 17 Ir. Jur. 181.—IR.

**k. ——— Whether now granted.]**—Attachment for non-payment of costs being a civil proceeding in the nature of an execution, it will not be granted since 37 Vict. c. 7, abolishing imprisonment for debt.—DOE d. DE VEBER v. DE VEBER (1874), 15 N. B. R. (2 Pug.) 417.—CAN.

**l. ——— Not in action in High Court—By judge of inferior court.]**—The judge of a county ct. has no power either as such judge or as a local judge of the High Ct. to order the issue of a *ca. sa.* in an action in the High Ct.—WATERHOUSE v. McVEIGH (1888), 12 P. R. 676.—CAN.

**m. ——— Trespass—Necessity for judge's order.]**—A *ca. sa.* cannot issue upon a verdict in trespass without a judge's order.—McLEOD v. BELLARS (1826), Tay. 273.—CAN.

**n. ——— Decree against mortgaged property—No execution against person of debtor.]**—Where a decree merely provided for the satisfaction of the judgment debt out of property mtgd.:—*Held*: the decree could not be executed against the person of the judgment debtor.—SHEIK BUDAN v. RAMCHANDRA BHUN JGAYA (1887), 1 L. R. 11 Bom. 537.—IND.

**o. Time for issue—Within one year of judgment.]**—It is irregular to

issue a *ca. sa.* upon a judgment more than a year old, even though a *fi. fa.* has been issued within the year, but not returned, without a *sci. fa.*—SEWELL v. THOMPSON (1840), 3 Ont. Dig. 6308.—CAN.

**p. Who may issue.]**—An *alias ca. sa.* may be issued by a deputy clerk of the Crown in an outer district; & it is no ground for setting aside such writ that the deputy has not transmitted the affidavit & *præcipe*, within one month after they were filed, to the principal office.—SCOTT v. MACDONALD (1843), (1823–1900), 1 Ont. Dig. 225.—CAN.

**q. Second arrest after judgment.]**—Where an arrest on mesne process was set aside for irregularity, & pltf. afterwards proceeded to judgment:—*Held*: he might again arrest debt. on a *ca. sa.* issued on a new affidavit.—GORDON v. SOMMERVILLE (1843), (1823–1900), 1 Ont. Dig. 226.—CAN.

**r. Issue for less than £10.]**—BAKER v. MCKAY (1846), 1 C. L. Ch. 73.—CAN.

**s. Consolidation of costs—To amount to over £10—Whether permissible.]**—A pltf. in a cause having obtained the costs of two interlocutory motions, each under the sum of £10, will not be allowed to consolidate the two sums, & thereby entitle him to issue a *ca. sa.*, as such would be an evasion of 11 & 12 Vict. c. 28.—WALDRON v. JONES (1853), 3 I. C. L. R. 34.—IR.

## PART III. SECT. 3, SUB-SECT. 2.

**1566 i. Form of writ.]**—The want of an original *ca. sa.* in the county where the venue is laid, if not amended, is a valid objection to arrest under a *testatum ca. sa.*—SEWELL v. BURPE (1847), 3 Kerr. 363.—CAN.

**1566 ii. ———.]**—A *ca. sa.* omitting to state any sum for which judgment has been recovered is void, & cannot be amended after execution.—HENDERSON v. PERRY (1847), 3 U. C. R. 252.—CAN.

**t. Affidavit—As to plaintiff's belief—Necessity for.]**—*Ca. sa.* issued by magistrates set aside on the ground that it was issued, & debt. arrested under it, without an affidavit of the grounds of pltf.'s belief.—MCLEAN v. MCKAY (1880), 13 N. S. R. (1 R. & G.) 383.—CAN.

**a. ——— Time for making.]**—A *ca.*

## SUB-SECT. 2.—FORMALITIES OF WRIT AND WARRANT.

**1565. Amendment.]**—HUNT v. KENDRICK (1772), 2 Wm. Bl. 836; SLATER v. THOMAS, COOPER v. WALLER (1834), 4 L. J. Ex. 1; COBBETT v. WHEELER (1861), 5 L. T. 285.

**1566. Form of writ.]**—ROSE v. TOMBLINSON (1834), 3 Dowl. 49; ASTLEY v. GOODYER (1834), 2 Cr. & M. 682; COPPELO v. BROWN (1834), 1 Cr. M. & R. 575; SUTTON v. BURGESS (1835), 1 Cr. M. & R. 770; BETTYES v. THOMPSON (1838), 1 Will. Woll. & H. 329; KNOWBRIDGE v. CHITTLEBOROUGH (1849), 13 L. T. O. S. 237; GELDING v. EYRE (1861), 9 W. R. 946.

## SUB-SECT. 3.—EXECUTION OF WRIT.

## A. In General.

**1567. Duty of sheriff generally.]**—RUTLAND'S (COUNTESS) CASE (1605), 6 Co. Rep. 52 b; WITHERS v. HENLY (1615), 3 Bulst. 96; HARDING v. FRANCIS (1831), 5 Moo. & P. 627; CLIFTON v. HOOPER (1844), 6 Q. B. 468.

**1568. Time for execution.]**—ELLIS v. JACKSON (1664), 1 Sid. 229; SIMPSON v. HEATH (1839), 5

*sa.* cannot be issued since Insolvent Act, 8 Vict. c. 48, on an affidavit filed before.—SEWELL v. DRAY (1846), 2 U. C. R. 179.—CAN.

**b. ——— Form of.]**—An affidavit for a *ca. sa.* that debt. has made some secret & fraudulent conveyance, etc., & not some secret or fraudulent conveyance, is good.—EWING v. LOCKHART (1847), 3 U. C. R. 248.—CAN.

**c. ———.]**—SLIGH v. CAMPBELL (1848), 4 U. C. R. 255.—CAN.

**d. ———.]**—Deft. was arrested under a writ of *ca. sa.* In the writ & in the affidavits to hold to bail, the debt. was called Daniel F. Freeman. His true name was Daniel Foster Freeman:—*Held*: sufficient.—BRYAN v. FREEMAN (1890), 7 Man. L. R. 57.—CAN.

**aa. ———.]**—The affidavit upon which a *ca. sa.* is founded must indicate the place where the debt was contracted, & in the absence of such indication the *ca. sa.* will be quashed on petition.—SHERIDAN v. PINGREE (1900), Q. R. 17 S. C. 310.—CAN.

**bb. Testatum—Amendment.]**—*Held*: a writ of *ca. sa.* tested in the name of a retired chief justice after his successor has been gazetted, but before acceptance of office, by taking the necessary oaths of office, was wrong; it should be tested in the name of his successor. A *ca. sa.* tested in the name of a retired chief justice is an irregularity only, which may be amended upon payment of costs.—NELSON v. ROY (1863), 3 P. R. 226.—CAN.

**cc. Misnomer of defendant—Without objection.]**—A debt. to an action in the circuit ct. whose name is improperly described & who fails to take exception to the misnomer cannot afterwards set it up as a ground of contestation of a *ca. sa.*—GIROUX v. PLAMONDON (1888), 14 Q. L. R. 222.—CAN.

**dd. Two defendants.]**—Where one debt. had been arrested, & the other served on mesne process, the ct., after judgment, allowed a *ca. sa.* to issue against both, but to be executed only against the one arrested.—MCINTYRE v. SUTHERLAND (1836), 5 O. S. 153.—CAN.

**ee. ———.]**—When a judgment is against two, a *ca. sa.* upon it must include both, or show some reason for the omission.—TURNER v. WILLIAMS & COTTON (1850), 1 P. R. 360.—CAN.

M. & W. 631; GREENSHIELDS *v.* HARRIS (1842), 9 M. & W. 774.

**1569. Escape of debtor.]—**JAKES *v.* CEASAR (1670), 2 Saund. 100; FERMOR *v.* PHILLIPS (1817), Holt, N. P. 537; DOE *v.* TRYE (1839), 5 Bing. N. C. 573; R. *v.* LEICESTERSHIRE, SHERIFF (1850), 9 C. B. 659.

**1570. Failure of sheriff to arrest.]—**BECKFORD *v.* MONTAGUE (1796), 2 Esp. 475; BROWN *v.* JARVIS (1836), 1 M. & W. 704.

**1571. What amounts to arrest.]—**BERRY *v.* ADAMSON (1827), 5 B. & C. 528; FORD *v.* LECHIE (1837), 6 Ad. & El. 699.

**1572. Arrest of wrong person.]—**COLLINS *v.* EVANS (1844), 5 Q. B. 820.

**1573. Effect of arrest where several writs.]—**BARRATT *v.* PRICE (1833), 9 Bing. 566; BARSTON *v.* TRUTCH (1835), 4 Dowl. 6; COLLINS *v.* YEWENS (1839), 10 Ad. & El. 570; BARRACK *v.* NEWTON (1841), 1 Q. B. 525; BATEMAN *v.* PRESTON (1861), 3 E. & E. 578.

**1574. Place of arrest.]—**LOVEITT *v.* HILL (1836), 4 Dowl. 579; GREENSHIELD *v.* PRITCHARD (1841), 8 M. & W. 148.

**1575. Negligence in execution.]—**ALDERSON *v.* DAVENPORT (1844), 13 M. & W. 42.

**1576. Withdrawal of writ.]—**FUTCHER *v.* HINDER (1858), 3 H. & N. 757.

*See, also,* CONTEMPT OF COURT, Vol. XVI., pp. 38-41, 77-80, Nos. 400-426, 945, 946, 950-970, 976-987; CRIMINAL LAW, Vol. XV., pp. 784-787, Nos. 8436-8465.

#### B. Right of Sheriff to Enter.

**1577. Effect of unlawful entry.]—**KING & COKE'S CASE (1639), March, 3; 82 E. R. 385.

*Annotation:—*Mentd. How *v.* Prinn (1702), 2 Salk. 694.

**1578. Presence of debtor in house—Demand**

**for admittance.]—**HUTCHISON *v.* BIRCH, No. 587, *ante*.

**1579. Outer door open.]—**In a plea of justification by the sheriff to an action for breaking pltf.'s house, & breaking open the inner doors, it is not sufficient to allege that he entered under a *capias* against A., the outer door being open, & that the rooms in the house being fastened, & having reasonable suspicion that A. was therein, deft. broke open the same, without averring that A. was actually in the house, or that there was any previous demand of admittance, the sheriff being justified or not, in entering the house of a stranger, by the event.—JOHNSON *v.* LEIGH (1815), 1 Marsh. 565; 6 Taunt. 246; 128 E. R. 1029.

*Annotation:—*Appld. Morrish *v.* Murray (1844), 2 Dow. & L. 199.

**1580. — Condition precedent to right of entry.]—**KERBEY *v.* DENBY, No. 591, *ante*.

**1581. — Forcible re-entry after expulsion.]—**A sheriff's officer, in execution of bailable writ, peaceably obtained entrance by the outer door, but before he could make an actual arrest, was forcibly expelled from the house, & the outer door fastened against him. The officer obtained assistance, broke open the outer door, & made the arrest:—*Held*: (1) the officer was justified in so doing; (2) demand of re-entry, under such circumstances, was not requisite to justify his breaking open the outer door.—AGA KURBOOLIE MAHOMED *v.* R. (1843), 4 Moo. P. C. C. 239; 3 Moo. Ind. App. 164; 13 E. R. 293.

*Annotation:—*As to (1) Appld. Sandon *v.* Jervis (1859), E. B. & E. 942.

**1582. Trespass ab initio—Damages.]—**KERBEY *v.* DENBY, No. 591, *ante*.

**1583. House of stranger.]—**A sheriff's officer is not justified in entering & searching the house of a stranger for the purpose of arresting a deft.

#### PART III. SECT. 3, SUB-SECT. 3.—A.

**1571 i. What amounts to arrest.]—**The deputy sheriff, having a *ca. sa.* to arrest a party, went to the house with the writ in his possession for that purpose; he told him of the process, & being assured that a friend of his, debtor's, who was then from home, would go his bail, he returned home & did not insist on debtor coming with him. Afterwards the sheriff went again to debtor's house & told him, without laying his hands on him, that he must come to his, the sheriff's, house, which he did, & remained there till discharged, but not under actual constraint:—*Held*: under these facts there had been no legal arrest of the debtor on the first visit of the sheriff; & the merely insisting on debtor going to the sheriff's house on the second visit, did not of itself constitute an arrest; but debtor, in having gone to the sheriff's house as desired, & having remained there till discharged, though without constraint, had been duly arrested.—MCINTOSH *v.* DEMERAY (1849), 5 U. C. R. 343.—CAN.

**1571 ii. —.]—**The apprehension of a judgment-debtor in execution of a decree without the officer making the apprehension having the warrant of the ct. executing the decree in his possession at the time of making the apprehension is illegal; & therefore in such case the judgment-debtor does not render himself liable to punishment if he escapes from the custody of the officer making the apprehension.—INDIA (EMPRESS) *v.* AMAR NATH (1883), 1 L. R. 5 All. 318.—IND.

**1571 iii. —.]—**When deft. swore that he was arrested on a Sunday & the bailiffs swore that it was on a Monday, the ct. refused summarily, to decide upon the legality of the arrest; nor would they, on motion, discharge him, but would leave him to his remedy at

law, either by indictment for perjury of the bailiffs, or by an action for false imprisonment.—WHITE *v.* BURROW (1810), Rowe, 431.—IR.

**1. What objections may be raised—***Several terms elapsing—After return of execution against goods.]—*There is no objection to an arrest on a *ca. sa.* that several terms had elapsed after the return of the execution against goods before the *ca. sa.* issued.—GLYNN *v.* DUNLOP (1835), 4 O. S. 111.—CAN.

**m. Whether defendant must be kept in close custody.]—***Scoble*: a constable may legally allow debtor, whom he has arrested, to go at large so long as before the return of the writ he deliver him to the sheriff.—ROSS *v.* WEBSTER (1849), 5 U. C. R. 570.—CAN.

**n. —.]—**A deft. arrested & imprisoned under a *ca. sa.* is a debtor in close custody in execution.—HAY *v.* PATERSON (1885), 11 P. R. 114.—CAN.

**o. In judgment against two debtors—[Writ must be against both.]—**When a judgment is against two, a *ca. sa.* upon it must include both, or show some reason for the omission.—TURNER *v.* WILLIAMS & COTTON (1850), 1 P. R. 360.—CAN.

**p. Defendant in custody—On return of writ—Must be kept in custody—Until legally discharged.]—**SAVAGE *v.* JARVIS (1852), 8 U. C. R. 331.—CAN.

**1574 i. Place of arrest.]—**Pltf. recovered a verdict against deft., but before judgment was signed he left the province & went to Nova Scotia. Pltf. afterwards made complaint before a justice of the peace that the deft. had committed perjury in giving evidence on the action in which the verdict was obtained; upon which a

warrant was issued against him, & delivered to a constable, who took it to Nova Scotia, & it having been indorsed there by a justice of the peace, deft. was arrested on it & brought into this province, & taken before a justice of the peace, who discharged him; he was then arrested on an execution issued on pltf.'s judgment:—*Held*: unless pltf. had fraudulently made use of the criminal process for the purpose of bringing deft. within the jurisdiction of this ct., deft. was not privileged from arrest on the execution; & this being denied by pltf. the ct. refused to discharge deft. from custody.—OULTON *v.* HEWSON (1866), 6 All. 480.—CAN.

**q. Maintenance money not paid by creditor—Whether debtor entitled to discharge.]—**JENSEN *v.* SHEPPARD (1893), 3 B. C. R. 126.—CAN.

**r. Satisfaction of judgment by arrest.]—**Pltfs. having recovered judgment in an action against deft., C., brought this action on behalf of themselves, & his other creditors against him, C., J. & H., to set aside prior judgments recovered by the two latter against him upon the ground that they were fraudulent & collusive as against pltf.'s judgment. Pending this action pltfs. arrested C. on a *ca. sa.* under their judgment, & defts. herein pleaded such arrest, & that C. remained in custody thereunder, as a satisfaction of that judgment & bar to this action. Upon issue in law & argument of the point:—*Held*: though the arrest & detention of C. on the *ca. sa.* did not extinguish the debt, it operated meanwhile as a satisfaction of the judgment, & was a good defence to the present action, the object of which was to establish a remedy by *fi. fa.*, which was suspended.—WARD *v.* CLARK (1895), 4 B. C. R. 71.—CAN.



*Sect. 3.—Writ of capias ad satisfaciendum: Subsect. 3, B.; sub-sects. 4 & 5, A. & B. Sect. 4:*

under a *ca. sa.*, although such debt. may have resided there immediately before the entry, & although the officer have reasonable cause to suspect that debt. is in the house, if it turns out that she was not in the house at the time.—*MORRISH v. MURREY* (1844), 13 M. & W. 52; 2 Dow. & L. 199; 1 New Pract. Cas. 27; 13 L. J. Ex. 261; 3 L. T. O. S. 184; 153 E. R. 22.

*Annotations:—Mentd. Davis v. Falk* (1847), 9 L. T. O. S. 50; *Booth v. Clive* (1851), 10 C. B. 827.

**1584. Arrest effected through open window—Outer door broken to take into custody.]—**A sheriff's officer, in execution of a *ca. sa.*, put his hand into debtor's dwelling house, by an opening in a window caused by a pane having been broken in the scuffle, but not by the officer, touched the debtor who was inside the house, & said, "You are my prisoner." He was unable then to secure the person of the debtor, but he thereupon broke open the outer door of the house, & seized the debtor:—*Held*: the officer had acted legally, the arrest having been effected by touching the debtor, & the subsequent breaking of the outer door being justifiable for the purpose of taking into custody the debtor so arrested.—*SANDON v. JERVIS* (1859), E. B. & E. 935; 28 L. J. Ex. 156; 32 L. T. O. S. 375; 5 Jur. N. S. 860; 7 W. R. 290; 120 E. R. 758, Ex. Ch.

*Annotations:—Consd. Nash v. Lucas* (1867), L. R. 2 Q. B. 590. *Refd. Thomas v. Rawlings* (1859), 28 L. J. Ex. 347.

*See, further, CONTEMPT OF COURT, Vol. XVI, pp. 77, 78, Nos. 947-949.*

#### SUB-SECT. 4.—RETURN TO THE WRIT.

**1585. Necessity for return.]—***ROWLAND v. VEALE* (1774), 1 Cowp. 18.

#### PART III. SECT. 3, SUB-SECT. 4.

**s. Writ issued against two defendants—Return of sheriff "cepi corpus."]**—Where a *capias* is issued against two, if the sheriff returns "*cepi corpus*" it shall be taken to apply equally to both debts.—*R. v. GLOUCESTER (SHERIFF)* (1836), Ber. 306.—CAN.

**1586 i. Time for return.]—**Where a *ca. sa.* has been issued upon the judgment within the year it is not necessary to return & file the same within the year.—*BENINGER v. THRASHER* (1882), 1 O. R. 313.—CAN.

#### PART III. SECT. 3, SUB-SECT. 5.—A.

**1594 i. By consent of plaintiff.]—**In debt on a judgment of a district ct. it is a good plea in bar that pltf. arrested debt. on a *ca. sa.* & afterwards consented to his discharge.—*FRASER v. BACON* (1846), 2 U. C. R. 132.—CAN.

**1594 ii. —.]—**M. having been arrested under a writ of *capias* issued at the instance of pltf. out of the magistrate's ct., gave a confession of judgment for the amount claimed & costs, upon which judgment was entered & execution issued. After the giving of the confession & entry of the judgment, but before the issue of the execution, M. was released from arrest by pltf. Certain goods of M. under lease for an unexpired term, were sold under the execution after having been levied upon & returned to the lessees. On the same day that M. was released from arrest, he gave a bill of sale of the goods to C., who sold to debt., pltf. having claimed the goods, after the expiring of the lease under the levy & sale:—*Held*: the voluntary discharge of M. by pltf. operated as a discharge

of the judgment, & that no execution could issue subsequently.—*FRASER v. JENKINS* (1888), 20 N. S. R. (8 R. & G.) 494.—CAN.

**1595 i. By tender of payment.]—**On a motion to discharge debt. from arrest under a writ of *ca. sa.* for non-payment by pltf. of the weekly sum of \$3.50 in advance to the sheriff for debt.'s maintenance money under Rule 976, it appeared that pltf. had offered to pay the amount to the sheriff who refused to accept it on the ground that he had money of pltf.'s in his hands sufficient to cover it:—*Held*: a sufficient answer to the application.—*WARD v. CLARK* (1895), 3 B. C. R. 609.—CAN.

**1597 i. Irregularity of writ.]—**The ct. refused to set aside upon motion a *ca. sa.* issued upon a judgment more than a year old without a *sci. fa.* to revive it. The *ca. sa.* was clearly irregular, yet not void, but voidable, & the proper remedy would seem to be a writ of error.—*M McNALLY v. STEPHENS* (1825), Tay. 263.—CAN.

**1597 ii. —.]—**The ct. will not set aside an arrest for irregularity in the affidavit, after prisoner has escaped.—*KEEFER v. MERRILL* (1827), Tay. 490.—CAN.

**1597 iii. —.]—***McMARTIN v. McKINNON* (1836), 5 O. S. 72.—CAN.

**1597 iv. —.]—**A judge in chambers has no power to set aside an order to arrest, though he may, on hearing both parties, discharge prisoner, or, by virtue of his general jurisdiction over procedure, may set aside proceedings subsequent to the order, for irregularity.—*DAMER v. BUSBY* (1871), 5 P. R. 356.—CAN.

**t. Debtor discharged from arrest—By foreign authority—Re-arrest on same**

**1586. Time for return.]—***SHIRLEY v. WRIGHT* (1702), 2 Ld. Raym. 775.

**1587. Loss of writ.]—***R. v. KENT, SHERIFF* (1814), 1 Marsh. 289.

**1588. False return.]—***PORTER v. VINER* (1815), 1 Chit. 613, n.

**1589. After discharge under Insolvent Debtors Act.]—***HEPWORTH v. SANDERSON* (1831), 8 Bing. 19.

**1590. After order for protection.]—***WYLLIE v. GREEN* (1857), 1 De G. & J. 410.

**1591. Setting aside return.]—***GOUBOT v. DE CROUY* (1833), 1 Cr. & M. 772; *COLUMBINE v. BRIGHT* (1847), 9 L. T. O. S. 104, 128.

**1592. Who may compel return.]—***HEDGES v. JORDAN* (1836), 2 Har. & W. 92; *DANIELS v. GOMPERTZ* (1842), 3 Q. B. 322; *WILLIAMS v. WEBB* (1843), 2 Dowl. N. S. 904.

#### SUB-SECT. 5.—DISCHARGE OF THE WRIT.

##### A. In General.

**1593. By payment.]—***TAYLOR v. BEKON* (1677), 2 Lev. 203; *STAMFORD v. DAVIES* (1680), 1 Freem. K. B. 482; *ANON.* (1698), 12 Mod. Rep. 230; *ANON.* (1700), 12 Mod. Rep. 385; *WOODS v. FINNIS* (1852), 7 Exch. 363.

**1594. By consent of plaintiff.]—***GOODMAN v. CHASE* (1818), 1 B. & Ald. 297.

**1595. By tender of payment.]—***CROZER v. PILLING* (1825), 4 B. & C. 26.

**1596. Under 48 Geo. 3, c. 123.]—***WINTER v. ELLIOTT* (1834), 1 Ad. & El. 24;

**1597. Irregularity of writ.]—***COLLINS v. BEAUMONT* (1839), 10 Ad. & El. 225.

**1598. Abatement of action.]—***TODD v. WRIGHT* (1847), 16 L. J. Q. B. 311.

**1599. Effect of discharge of writ.]—***Re GOODING*

*cause of action—Under process of Canadian court.]—*Where the person of an insolvent debtor is discharged from arrest by a foreign authority, this ct. will not set aside an arrest made under the process of this ct. for the same cause of action, it not being bound to model or restrain its course of proceeding by that of other countries.—*BROWN v. HUDSON* (1826), Tay. 390.—CAN.

**a. ———.]—**The ct. refused to discharge debt. upon filing common bail, on the ground of his person having been discharged from arrest by an insolvent law of New York.—*DASCOMB v. HEACOCKS* (1827), Tay. 438.—CAN.

**b. Power of attorney to discharge debtor—Liability of sheriff for escape.]—**An attorney, merely as such, cannot discharge debt. in execution, certainly not without receiving the debt; & the sheriff so acting on his authority will be liable as for an escape.—*BROCK v. McLEAN* (1826), Tay. 310.—CAN.

**c. Second writ issued—Upon affidavit sworn—When defendant in custody—Under first writ.]—**Debt. discharged cannot be detained by the same pltf., upon a second writ issued upon an affidavit sworn while he was in custody upon the first writ.—*BARRY v. ECCLES* (1846), 3 U. C. R. 112.—CAN.

**d. Unsatisfied execution—Right to issue for balance.]—**Where a sheriff, having a *ca. sa.* against debt., received from him a horse in full satisfaction of the execution, without any authority from pltf.; & several months afterwards sent the horse to pltf., who sold it to the best advantage, though for much less than the value agreed upon between the sheriff & debt.:—*Held*:

(1851), 17 L. T. O. S. 278; *CATTLIN v. KERNOT* (1858), 3 C. B. N. S. 796

**1600. Under Bankruptcy Act, 1860 (c. 147).—***Ex p. WORMAN* (1862), 1 New Rep. 29.

*B. Where Joint Debtors.*

**1601. Effect of discharge of one joint debtor.]—***NADIN v. BATTIE & WARDLE* (1804), 5 East, 147; *BALLAM v. PRICE & PAYNE* (1818), 2 Moore, C. P. 235; *HERRING v. DORELL* (1840), 8 Dowl. 604; *PHILLIPS v. JONES, DAVIS, ETC.* (1846), 6 L. T. O. S. 414; *DENTON v. GODFREY* (1847), 9 L. T. O. S. 125; *BATCHELLOR v. LAWRENCE* (1861), 9 C. B. N. S. 543.

**SECT. 4.—WRIT OF DELIVERY AND WRIT OF ASSISTANCE.**

**SUB-SECT. 1.—WRIT OF DELIVERY.**

*See R. S. C., Ord. 42, r. 6; Ord. 48, rr. 1, 2.*

**1602. Delivery of goods—Or money value in lieu—Option of defendant.]—***ANON.* (1505), Keil. 61 b, 64 b; 72 E. R. 221, 224.

*Annotations:—*Refd. *Phillips v. Jones* (1850), 15 Q. B. 859; *Taylor v. Addyman* (1853), 13 C. B. 309.

**1603. ————.]—***PALER v. HARDMAN* (1605), 1 Brownl. 87; *Yelv.* 71; 123 E. R. 683.

*Annotation:—*Refd. *Phillips v. Jones* (1850), 15 Q. B. 859.

**1604. In respect of what goods—Goods liable to damage—Deposit of security.]—***GATEHOUSE v. REITH* (1721), Bunb. 74; 145 E. R. 600.

**1605. ———— Ship.]—**Upon granting these writs, there is always a recognisance given; & in that recognisance there is always a special provision in case the ship shall be subject to be burned (*per CUR.*).—*ANON.* (1731), 1 Barn. K. B. 464; 94 E. R. 312.

**1606. ————.]—***A.-G. v. RICHARDS* (1796), 3 Anst. 753; 145 E. R. 1028.

the sheriff had no authority by law to receive the horse, & it was no satisfaction of the judgment, although the horse might have produced enough to pay the amount due if the sheriff had sold it at that time; but that, after crediting the amount produced by the sale, *pltf.* could issue an execution for the balance.—*CARMAN v. MOTT* (1816), 3 Kerr, 131.—**CAN.**

**e. Delay of one month—In applying for discharge.]—**Motion on Sept. 2, to set aside a *ca. sa.* on which a party was arrested on Aug. 6:—*Held:* not too late.—*KEEFER v. HAWLEY* (1850), 1 P. R. 1.—**CAN.**

**f. Defendant undertaking to bring no action—Leave of court—For defendant to set aside process.]—**Deft. arrested on a *ca. sa.* was discharged from custody with costs, he undertaking to bring no action; & in the order leave was reserved to him to move the ct. to set aside the writ & arrest. The ct. discharged a rule for this purpose; for deft. being released, & precluded from an action, there could be no object served by setting aside the process.—*BROWN v. BROWN* (1853), 10 U. C. R. 393.—**CAN.**

**g. ———— Decision in his favour for costs.]—**Where deft. in his notice of motion to set aside an order for his arrest, & for his discharge, asked for costs, & an order was made in his favour with costs:—*Held:* the judge making the order had power to impose the term that deft. should be restrained from bringing any action.—*ADAMS v. ANNETT* (1894), 16 P. R. 356.—**CAN.**

**h. ————.]—***Re OMRITOLALL DEY* (1875), 1 L. R. 1 Calc. 78.—**IND.**

**k. Right of judge—To inquire into particular form of action.]—**On an application to set aside an arrest the judge should not inquire into the

particular form of the action, if satisfied that a cause of action exists.—*BUTLER v. ROSENFELDT* (1879), 8 P. R. 175.—**CAN.**

**l. ———— To rescind his own order.]—**A judge in chambers has no power to rescind his own order for a writ of *ca. sa.* or to discharge deft. from custody after the order has been acted upon.—*MENABE v. OPPENHEIMER* (1885), 11 P. R. 214.—**CAN.**

**m. ————.]—**A county ct. judge has no jurisdiction to set aside his own order for arrest.—*JURY v. JURY* (1895), 16 P. R. 375.—**CAN.**

**n. ———— Of local court—To discharge writ—Issued out of High Court of Justice.]—**A local judge of the high ct. has no power to order the discharge of deft. held in custody under a *ca. sa.* issued out of the High Ct. of Justice.—*COCHRANE MANUFACTURING CO. v. LAMON* (1886), 11 P. R. 351.—**CAN.**

**o. Delay in charging defendant in execution.]—**Deft. was arrested under a *ca. sa.* & afterwards admitted to bail. The trial was in the vacation before Michaelmas term, & the render in the vacation after that term. *Pltf.* having omitted to charge deft. in execution during Hilary term. On an application for a *supersedeas*:—*Held:* the render in Michaelmas vacation related back to the preceding term, which should count as one of the two terms within which *pltf.* must charge deft. in execution. Deft. was therefore discharged.—*GOLDING v. MACKIE* (1880), 8 P. R. 237.—**CAN.**

**p. Time for declaring.]—**R. G. 100 is imperative that prisoner arrested & in close custody must be declared against before the end of the term after his arrest, & it is no excuse that a summons was pending during the last week of the term to set aside the

**1607. Writ of delivery absolute—Assessment of value—Necessity for—Agreement by parties to dispense with.]—**The power which a ct. or judge has under C. L. P. Act, 1854 (c. 125), s. 78, to order execution in an action of detinue to issue for the return of the chattel detained, without giving deft. the option of retaining it upon paying the value, exists only where the jury have assessed the value.

Where, in an action for the detention of a lease, the parties had agreed at the trial on a verdict with damages for the detention, & on the jury being discharged from finding the value of the lease:—*Held:* a judge had no power under the sect. to order the delivery up of the lease to *pltf.*—*CHILTON v. CARRINGTON* (1855), 15 C. B. 730; 3 C. L. R. 392; 24 L. J. C. P. 78; 24 L. T. O. S. 258; 1 Jur. N. S. 477; 3 W. R. 248; 139 E. R. 735; *subsequent proceedings*, 16 C. B. 206.

*Annotations:—*Folld. *Corbett v. Lewin*, [1884] W. N. 62. *Consd.* *Winfield v. Boothroyd* (1886), 54 L. T. 574. *Refd.* *Bank of New South Wales v. O'Connor* (1889), 14 App. Cas. 273; *Peruvian Guano Co. v. Dreyfus*, [1892] A. C. 170, n.; *Hymas v. Ogden* (1904), 74 L. J. K. B. 101.

**1608. ———— Agreement by parties as to value.]—**(1) The county ct., in actions for detinue, has, by Jud. Act, 1873 (c. 66), s. 89, the same power of ordering absolutely the return of the chattel detained, without leaving to deft. the option of making satisfaction by payment of its assessed value, as the superior cts. possessed under C. L. P. Act, 1854 (c. 125), s. 78, & as the High Ct. now possesses under R. S. C., Ord. 48, r. 1.

(2) An agreement between the parties as to the value of the chattel is a sufficient assessment upon which the ct. can exercise its discretionary power of ordering its return within the ruling in *Chilton v. Carrington*, No. 1607, *ante.*—*WINFIELD v. BOOTHROYD* (1886), 54 L. T. 574; 34 W. R. 501; 2 T. L. R. 472.

*capias* & arrest.—*HOUTALING v. CUTTLE* (1875), 6 P. R. 251.—**CAN.**

**q. Allegation that writ issued—On insufficient material—Whether new material can be used.]—**Upon an application to set aside an order for a *ca. sa.* upon the ground that it is based upon insufficient material, as distinguished from a motion to discharge deft. from custody upon the merits, no new material can be used.—*GILBERT v. STILES* (1889), 13 P. R. 121.—**CAN.**

**r. Under Indigent Debtors' Act.]—**Where a debtor is in custody under a writ of *ca. sa.*, the ct. cannot make an order for his discharge except under Indigent Debtors' Act.—*GOSLING v. MCBRIDE* (1897), 17 P. R. 585.—**CAN.**

**s. Order of county court judge—Whether final.]—**An order of the judge of a county ct. discharging deft. from arrest under a *ca. sa.* is not in its nature final within County Cts. Act, R. S. O. 1897, c. 55, s. 52, & an appeal does not lie therefrom.—*GALLAGHER v. GALLAGHER* (1899), 31 O. R. 172.—**CAN.**

**PART III. SECT. 3, SUB-SECT. 5.—B.**

**1601 i. Effect of discharge of one joint debtor.]—**The discharge of one of two debts in execution under a *ca. sa.* on a joint judgment, operates as a discharge of both.—*FISHER v. PATTON* (1838), 5 O. S. 741.—**CAN.**

**1601 ii. ————.]—***FISHER v. DANIELS* (1839), (1823–1900), 1 Ont. Dig. 219.—**CAN.**

**1601 iii. ————.]—***Pltf.* having arrested A. & B. on a *ca. sa.* took a mtge. from B. & discharged him; but it was taken only as collateral security, & B. did not desire A. discharged:—*Held:* A. was nevertheless entitled to it.—*BENJAMIN v. FOOT* (1856), 2 P. R. 47.—**CAN.**





**1620. ——— Defendant keeping out of the way.]**—CAZET DE LA BORDE *v.* OTHON (1874), 23 W. R. 110.

*Annotation*:—**Folld.** Wyman *v.* Knight (1888), 39 Ch. D. 165.

**1621. ——— Absconding.]**—The old Chancery remedy by writ of assistance, although, so far as the possession of land is concerned, abolished by R. S. C., 1875, & R. S. C., 1883, Ord. 47, r. 2, & although, so far as the delivery of chattels is concerned, in great measure superseded by R. S. C., 1883, Ord. 48, is still issuable in cases not met by R. S. C., Ord. 48, *e.g.* where chattels, such as documents, are in peril, & a receiver appointed by the ct. is unable to serve resp. or obtain possession, resp. having absconded & his clerks declining to give up the custody of the documents.—WYMAN *v.* KNIGHT (1888), 39 Ch. D. 165; 57 L. J. Ch. 886; 59 L. T. 164; 37 W. R. 76.

*Annotation*:—**Mentd.** *Re* Maudslay & Field, Maudslay *v.* Maudslay & Field, [1900] 1 Ch. 602.

**1622. ——— Not in respect of land—Superseded by writ of possession.]**—WYMAN *v.* KNIGHT, No. 1621, *ante*.

**1623. ——— Documents in peril.]**—WYMAN *v.* KNIGHT, No. 1621, *ante*.

**1624. ——— Mortgage security.]**—*Re* TAYLOR, TAYLOR *v.* RAWSON, [1913] W. N. 212.

**1625. After what proceedings granted—Service of order—Attachment for disobedience thereto.]**—After a writ of execution of a decree, & an attachment served on deft., pltf. may have an injunction to deft. to deliver possession, & next a writ of assistance to the sheriff, commanding him to be aiding in putting pltf. in possession.—STRIBLEY *v.* (1744), 3 Atk. 275; 26 E. R. 961, L. C.

*Annotation*:—**Consd.** Green *v.* Green (1828), 2 Sim. 394.

**1626. ———.]**—DOVE *v.* DOVE (1784), 4 My. & Cr. 585; 2 Dick. 617; 1 Bro. C. C. 375; 1 Cox, Eq. Cas. 101; 21 E. R. 411.

*Annotations*:—**Consd.** Green *v.* Green (1829), 2 Sim. 394, 430. **Mentd.** Aston *v.* Heron (1834), 3 L. J. Ch. 194.

**1627. ———.]**—*Re* TAYLOR, TAYLOR *v.* RAWSON, [1913] W. N. 212.

**1628. Procedure—Service of order—Indorsement.]**—A party is entitled to a writ of assistance, under Ord. 13 of Aug. 1841, to enforce obedience to a decree, although the memorandum, in the form prescribed by Ord. 12 of Aug. 1841, indorsed upon the copy of the decree served, intimated that the party neglecting to obey it would be liable to process by attachment, serjeant-at-arms, or sequestration.—BOWER *v.* COOPER (1843), 2 Hare, 408; 67 E. R. 168.

**1629. ——— Application—By motion—Contents of affidavit in support.]**—The affidavits in support of a motion for a writ of assistance need not show an existing non-compliance, but only non-compliance with the terms of the order sought to be enforced.—WEBSTER *v.* TAYLOR (1854), 18 Jur. 869.

**1630. ——— Ex parte.]**—CAZET DE LA BORDE *v.* OTHON (1874), 23 W. R. 110.

*Annotation*:—**Folld.** Wyman *v.* Knight (1888), 39 Ch. D. 165.

**1631. Costs of writ—Incurred by purchaser—**

*Who claims title by possession.]*—The Ct. of Ch. will not grant to the purchaser under foreclosure a writ of assistance to turn out a party who has been long in possession of the premises, & claims title by possession, & who has not been deft. in the foreclosure suit, but will remit the purchaser to his action of ejectment at common law.—WOODEN *v.* BUSHEN (1849), James, 429.—**CAN.**

**b. ——— To effect execution of attachment—Against a party who rescues himself.]**—A writ of assistance will be

granted to effect the execution of an attachment, against a party who rescued himself, & also a conditional order for an attachment against him & another party who prevented the bailiff from following up the arrest.—ANON. (1830), 3 L. R. Ir. 190.—**IR.**

**c. ——— To aid receiver.]**—A writ of assistance will not be awarded in aid of a receiver when acting under a general order for liberty to distrain.—ANON. (1824), 1 Hog. 207.—**IR.**

**d. ———.]**—A writ of assistance

**To obtain possession of land—Deductable from purchase-money.]**—A purchaser of real estate upon a sale by the ct. was kept out of possession for a year through the opposition of pltf. in the cause, who was himself in occupation of the estate & was ultimately let into possession by virtue of a writ of assistance issued by the ct.:—*Held*: the purchaser was entitled to have paid to him out of the purchase-money in ct. sums in respect of the following items: the costs of obtaining the orders under which he succeeded in getting possession; an occupation rent for the time during which he was kept out of possession; compensation for deterioration of the property during the same period; arrears of tithes which he had been compelled to pay.—THOMAS *v.* BUXTON (1869), L. R. 8 Eq. 120; 38 L. J. Ch. 709.

## SECT. 5.—WRIT OF POSSESSION.

### SUB-SECT. 1.—IN GENERAL.

*See* R. S. C., Ord. 42, r. 5, Ord. 47.

**1632. Substituted for writ of assistance.]**—Under R. S. C., Ord. 48, a writ of possession is now substituted for the writ of assistance, whether between parties or as against strangers to the action.—HALL *v.* HALL (1878), 47 L. J. Ch. 680.

**1633. ———.]**—WYMAN *v.* KNIGHT, No. 1621, *ante*.

**1634. When issuable—Enforcing judgment for recovery of land.]**—SCRIVEN *v.* PRINCE (1591), Cro. Eliz. 265; 78 E. R. 520.

**1635. ——— Foreclosure order not such judgment.]**—An order for foreclosure absolute is not a judgment for the recovery of the possession of land within R. S. C., 1875, Ord. 42, r. 3. Hence after foreclosure absolute pltf. is not entitled to a writ of possession.—WOOD *v.* WHEATER (1882), 22 Ch. D. 281; 52 L. J. Ch. 144; 47 L. T. 440; 31 W. R. 117.

**1636. ——— Forfeiture of lease by tenant.]**—WEST *v.* ROGERS (1888), 4 T. L. R. 229, D. C.

**1637. ——— Tenant holding over.]**—Where a notice to quit, given by a rector to the tenant of his glebe land expired on Dec. 25, & on Jan. 17 following a sequestration was read in the church, & the rector afterwards by order of the sequestrator, received from the tenant, who held over, a weekly allowance, which he described in a receipt as issuing out of the tithe & glebe:—*Held*: (1) the rector might still maintain an ejectment, laying the demise on Jan. 1, as between Dec. 25 & Jan. 17 the tenant was a trespasser

(2) I think the rector is not now entitled to the possession of the glebe lands & that he cannot sue out a writ of *habere facias possessionem* in this action (DAMPIER, J.).—DOE d. MORGAN *v.* BLUCK (1813), 3 Camp. 447, N. P.

*Annotations*:—*As to* (2) **Refd.** Bennett *v.* Apperley (1827), 11 B. & C. 630; Knight *v.* Clarke (1885), 15 Q. B. D. 294. *Generally, Mentd.* Harding *v.* Hall (1842), 10 M. & W. 42; Doe d. Gardner *v.* Kennard (1848), 12 Jur. 821; Bunter *v.* Cresswell (1850), 14 Q. B. 825; Powell *v.* Hibbert (1850), 15 Q. B. 129.

will not be granted to aid a receiver in distraining for rent, although the distress has been previously rescued.—WHITE *v.* PHIBBS (1837), 1 Sau. & Sc. 88.—**IR.**

**e. Not in force—After one year from teste—Unless renewed.]**—A writ of assistance in execution of a decree of the Ct. of Ch., for the recovery of land, is a writ of execution, & is not in force after one year from the *teste*, if unexecuted, unless renewed.—ADAMSON *v.* ADAMSON (1887), 12 P. R. 21.—**CAN.**



*Sect. 5.—Writ of possession: Sub-sects. 1 & 2,*

**1638. ——— Distress by landlord after judgment.]**—The landlord of premises, after notice to quit, brought an action of ejectment against the tenant, & obtained a verdict. The latter still continuing in possession, the landlord afterwards distrained on him for rent, which became due after the verdict, & which he paid:—*Held*: the execution in the ejectment could not be stayed, as the tenant should have disputed the distress.—*DOE d. HOLMES v. DAVIES* (1818), 2 Moore, C. P. 581.

**1639. ——— Ten years after judgment—Judgment not revived.]**—(1) Where a pltf., after an interval of ten years, sued out execution in ejectment, without reviving the judgment by *sci. fa.*:—*Held*: the defect was so material that the ct. would set aside the execution.

(2) The tenant in possession on whom the declaration was served, can make this application to set aside the execution, though he does not appear to the declaration, & though judgment is signed against the casual ejector; but, as regards the lessor of pltf., the ct. cannot set aside the execution with costs, unless by consent.—*GOOD-TITLE d. MURRELL v. BADTITLE* (1841), 9 Dowl 1009; 5 Jur. 990.

*Annotation*:—*Reid*. *Spencer v. Payne* (1817), 17 L. J. Q. B. 68.

**1640. ——— Prior action of ejectment referred to arbitration.]**—An action of ejectment for land taken possession of by defts., a railway co., for the purposes of the railway, under incomplete proceedings, pursuant to Lands Clauses Consolidation Act, 1845 (c. 18), was referred to arbitration, the order of reference providing that the cause & all matters in difference between the parties should be referred, & that the arbitrator should decide what sum should be paid by defts. to pltf., as the price of, or compensation for, the lands of pltf. which defts. had taken for the purpose of their railway; pltf. agreeing to execute such a conveyance as the arbitrator might direct, & that the money paid into the Bank of England should be disposed of as the arbitrator should direct. The arbitrator directed that the verdict entered for pltf. should stand, & awarded a sum to be paid to pltf., as the price of & compensation for the land of pltf. which the co. had at the time of the making of the order of reference taken for the purposes of their railway, & directed the amount to be paid to pltf. out of the money in the Bank of England, & the residue to be paid to defts.; & he further awarded that there were no other matters in difference between the parties, & that the above payments were to be made & taken in full satisfaction & discharge of all matters in difference between them. It appeared that the money in the Bank included the purchase-money of other land of pltf. of which defts. had lawful possession, & pltf., treating the sum awarded as applicable to that, issued a writ of *habere facias possessionem*, & was put in possession:—*Semble*: pltf. had no right to sue out the writ of *habere facias possessionem*.—*SMALLEY v. BLACKBURN RY.*

*Co.* (1857), 2 H. & N. 158; 27 L. J. Ex. 65; 5 W. R. 521; 157 E. R. 67.

**1641. ——— After title of claimant expired—Unless issue would prove nugatory—Onus of proof on defendant.]**—Where sub-lessee holds over, he may be ejected by the lessee under a writ of possession, although at the time of the trial the lessee's title may have expired as against his lessor, provided the lessor has not demanded possession from the lessee.

It should have affirmatively appeared that pltf. was without any title. To show the expiration of the old title without negating the existence of a new one is not sufficient.—*GIBBINS v. BUCKLAND* (1863), 1 H. & C. 736; 1 New Rep. 370; 32 L. J. Ex. 156; 8 L. T. 87; 9 Jur. N. S. 207; 11 W. R. 380; *subsequent proceedings, sub nom.* *BUCKLAND v. GIBBINS*, 1 New Rep. 541, L. C.

*Annotation*:—*Folld.* *Knight v. Clarke* (1885), 15 Q. B. D. 294.

**1642. ——— ——— ———.]**—Where a landlord has recovered judgment in an action against his tenant for the possession of premises which had been held over after the expiration of the tenancy, he will be allowed to issue the writ of possession notwithstanding that his estate in the premises terminated after the commencement of the action & before the trial, unless it be unjust & futile to issue such writ, & it is for debt. to show affirmatively that this will be the result of issuing such writ.—*KNIGHT v. CLARKE* (1885), 15 Q. B. D. 294; 54 L. J. Q. B. 509; 50 J. P. 84, C. A.

— *By county court.*—*See* COUNTY COURTS, Vol. XIII., p. 517, No. 666.

**1643. Sufficient description of property—House & orchard.]**—Ejectment lies for a "house & orchard." The words are known well enough & contain sufficient certainty so that the sheriff can make execution.—*ROYSTON v. ECCLESTON* (1623), Cro. Jac. 654; Palm. 337; 79 E. R. 565.

**1644. ——— Whether precise extent to be specified.]**—In an ejectment for fifty acres of furze & heath, it is sufficient without specifying how much of such.—*CONNOR v. WEST* (1770), 5 Burr. 2672; 98 E. R. 403.

**1645. ——— ———.]**—After pltf. in ejectment has proved his title to a verdict the ct. will not try the question of the precise extent of pltf.'s claim as defined by particular metes & bounds.—*DOE d. DRAPERS' CO. v. WILSON* (1819), 2 Stark. 477.

**1646. ——— Sufficient to ensure identification.]**—An order for the delivery of possession of mortgaged property by the mtgor. to the mtgee., forming part of a judgment for foreclosure absolute, ought to contain a description of the property as set forth in the mortgage deed, in order that the writ of possession may be filled up in such a way as to enable the sheriff to identify the property of which he is directed to deliver possession.—*THYNNE v. SARL*, [1891] 2 Ch. 79; 60 L. J. Ch. 590; 64 L. T. 781.

**1647. Costs—Defendant may call upon plaintiff—To deliver bill of costs.]**—Pltf. having obtained judgment in ejectment, & executed a writ of possession:—*Held*: debt. was entitled to call upon him to deliver a bill of costs.—*BAKER v.*

#### PART III. SECT. 5, SUB-SECT. 1.

**1642 I. When issuable—After title of claimant expired—Unless issue would prove nugatory.]**—If a person, having title to the possession of land, bring an ejectment, & lose his title by some occurrence subsequent to action brought, he is entitled to judgment & costs, but not to a *habere*.—*TOWIN v. CLEARY* (1872), 1 R. 7 C. L. 17.—*IR.*

**1. ——— Mortgagor holding over after sale of property—Under alleged contract to purchase.]**—On appeal from the refusal of a judge of the Supreme Ct. to grant a writ of possession it appeared that pltf. held a mtge. on debt.'s property, & that the property was sold under foreclosure proceedings, & bought in by pltf., who received a deed from the sheriff, but that debt. continued in possession subsequently

under an alleged contract to purchase:—*Held*: the writ was properly refused.—*KAULBACH v. SPIDLE* (1888), 20 N. S. R. (8 R. & G.) 334; 9 C. L. T. 56.—*CAN.*

*After dismissal of In suit for redemption of mortgage.]*—A decree dismissing a bill on default of payment of the amount found due in a suit for redemption of a mtge. is equivalent to a decree of absolute

SAUNDERS (1860), 7 C. B. N. S. 858 ; 29 L. J. C. P. 158 ; 1 L. T. 403 ; 6 Jur. N. S. 637 ; 8 W. R. 190 ; 141 E. R. 1053.

**1648. — Discretion of court—Judicature Act, 1890 (c. 44), s. 5.]—**The issue of a writ of possession, in pursuance of a judgment for possession of premises is a proceeding in the Supreme Ct., & the costs of & incident thereto are in the discretion of the ct. or judge under above sect.—**DARTFORD BREWERY CO., LTD. v. MOSELEY**, [1906] 1 K. B. 462 ; 75 L. J. K. B. 279 ; 94 L. T. 263 ; 54 W. R. 333 ; 22 T. L. R. 304 ; 50 Sol. Jo. 270, C. A.

*Annotation:—Mentd.* Paddington B. C. v. Kensington Royal B. C. (1911), 105 L. T. 35.

—.] —*See, generally, Part IV., post.*

#### SUB-SECT. 2.—EXECUTION OF WRIT.

##### A. In General.

*See* R. S. C., Ord. 42, r. 5 ; Ord. 47.

**1649. Preliminaries to execution—Leave of court—Recovery of mortgaged lands—Receiver in possession.]—**Where a mtgee. of leaseholds has obtained the appointment by the ct. of a receiver, the lessor who by leave of the ct. brings an action for recovery of the land against the lessee, & recovers judgment, cannot proceed to enforce the judgment as against the receiver in possession by writ of possession without the leave of the ct.—**MORRIS v. BAKER** (1903), 73 L. J. Ch. 143 ; 52 W. R. 207 ; 48 Sol. Jo. 101.

**1650. — Proof of service of order—With proper indorsement—R. S. C., Ord. 41, r. 5.]—**Where an order was made directing delivery of certain premises into the possession of a receiver appointed by the order, but no time within which delivery of possession was to be made was specified in the order:—*Held*: a writ of possession could not issue because R. S. C., Ord. 51, r. 5, had not been complied with.—**SAVAGE v. BENTLEY** (1904), 90 L. T. 641 ; 48 Sol. Jo. 507.

**1651. Immediate execution—Before return.]—****GOODRIGHT d. BAKER v. STURDY** (1729), 1 Barn. K. B. 193 ; 94 E. R. 133.

**1652. Execution unnecessary—Claimant admitted to possession.]—**To entitle a party to maintain trespass for the mesne profits, it is not necessary to execute an *habere*, if pltf. has been let into possession by deft.—**CALVART v. HORSEFALL** (1803), 4 Esp. 167, N. P.

**1653. Delivery of possession—Claimant to show what land recovered—Mistake at his own peril.]—****SCRIVEN v. PRINCE** (1591), Cro. Eliz. 265 ; 78 E. R. 520.

or unconditional foreclosure, & the Ct. of Equity has jurisdiction under it to order a writ of possession to be issued under C. S. N. B. 1903, c. 112, s. 141.—**PATCHELL v. COLONIAL INVESTMENT & LOAN CO.** (1907), 38 N. B. R. 339 ; 4 E. L. R. 182.—**CAN.**

*until costs taxed—*  
*Or waived.]—*Where in an ejectment after defence taken pltf. obtains a verdict for possession mesne rates & costs execution cannot issue until the judgment is complete & pltf. is therefore not entitled to a writ of possession until the costs are taxed & added to the judgment or are waived by him.—**BEASLEY v. CHAPMAN** (1880), 6 L. R. Ir. 393.—**IR.**

#### PART III. SECT. 5, SUB-SECT. 2.—A.

**k. Delivery of possession—Effect of claimant's non-appearance.]—**Where the sheriff returned to the first writ of *habeas* that "none came to receive

possession" the presumption of release of the judgment did not arise in the same manner as if nothing had been done upon the judgment.—**JOHNSTON v. MCKENNA** (1863), 3 P. R. 229.—**CAN.**

**l. — Power of sheriff—Only amount described in deed.]—**W. obtained an order for a writ of possession of lands & premises purchased by him at a foreclosure sale. An appeal from the order was taken on behalf of J. B., widow of T. B., the mtgor., on the ground that the lands in question were held by her under lease from the Crown, & that, a question of title having been raised, such question could not be decided in a summary way, but that possession must be sought by action at law:—*Held*: the sheriff could only put W. in possession of the lands actually described in his deed, & J. B. having shown that the land she occupied & claimed under lease from the Crown was outside of that

**1654. — Claimant must receive from sheriff—Effect of claimant's non-appearance.]—****FLOYD v. BETHILL** (1617), 2 Roll. Abr. 459.

*Annotation:—Mentd.* Wray v. Thorn (1744), Willes, 488.

**1655. — Part in name of whole—Whether sufficient.]—****MOLINEUX v. FULGAM** (1622), Palm. 289 ; 81 E. R. 1086.

*Annotation:—Mentd.* Tippet v. Eyres (1690), 5 Mod. Rep. 457.

**1656. — More than contained in writ—Liability of sheriff.]—**If the writ of *habere facias possessionem* contains more acres of land than are expressed in the declaration, it is error. But if the sheriff gives possession of more land than is contained in the writ of *habere facias possessionem*, an action of the case lies against the sheriff, or an assize lies for the land (ROLL, C.J.).—**LUMLEY v. NEVIL** (1650), Sty. 238 ; 82 E. R. 676.

**1657. — Redelivery of surplus.]—**Ejectment for five-eighths of a cottage. Sheriff gives possession of the whole ; the tenant shall be restored to his possession of three-eighths of the premises.—**ROE d. SAUL v. DAWSON** (1770), 3 Wils. 49 ; 95 E. R. 927.

*Annotations:—Refd.* Doe d. Stephen v. Lord (1837), 1 Jur. 921 ; Doe d. Hellyer v. King (1851), 6 Exch. 791.

**1658. — Liability of claimant.]—**In ejectment for a house & land, it appeared at the trial that the house was held for a term which was unexpired at the time of the demise laid in the declaration. Deft. had entered into the common consent rule, & a general verdict was found for pltf.:—*Held*: he was entitled to retain the verdict, but the execution should be confined to such part as the lessor of pltf. had a right to enter.

It has been an established rule in actions of ejectment that when pltf. recovers a verdict, if he proves a title to a part, he may take his verdict generally, unless it is otherwise consented to or arranged at the trial ; but it is at his peril what he takes possession of under the execution (LORD ABINGER, C.B.).—**DOE d. DAVENPORT v. RHODES** (1843), 11 M. & W. 600 ; 1 Dow. & L. 292 ; 12 L. J. Ex. 382 ; 1 L. T. O. S. 289 ; 152 E. R. 945.  
*Annotations:—Consd.* Doe d. Bowman v. Lewis (1844), 13 M. & W. 241. *Refd.* Alcock v. Wilshaw (1860), 6 Jur. N. S. 628.

**1659. — Subject to easement—Right of way.]—**Trespass would undoubtedly lie ; why then should not an ejectment ? It is said the sheriff cannot deliver full possession. But why not ? Indeed, it must be subject to the easement, but there is no other difficulty in the matter (*per* CUR.).—**GOODTITLE d. CHESTER v. ALKER & ELMES** (1757), 1 Burr. 133 ; 1 Keny. 427 ; 97 E. R. 231.

*Annotations:—Mentd.* Thompson v. West Somerset Mineral Ry. (1857), 29 L. T. O. S. 7 ; Harrison v. Rutland, [1893] 1 Q. B. 142 ; London Land Tax Comrs. v. C. L. Ry., [1913] A. C. 364.

description, she had no ground for opposing the issue of the writ.—**RE STUART** (1886), 19 N. S. R. (7 R. & G.) 444 ; 7 C. L. T. 437.—**CAN.**

**m. — Duty of sheriff.]—**Upon an attempt to execute a writ of possession under a judgment against G., who was in actual possession, he was served with a notice by B. claiming the land mentioned in the writ, & informing the sheriff that the house standing thereon was locked & that he, B., had the key:—*Held*: the sheriff's duty, as soon as he received the writ, was to break open the door & give pltf. possession.—**HALL v. BOWERMAN** (1900), 19 P. R. 268 ; 20 C. L. T. 441.—**CAN.**

**n. Ineffective execution—Absolute title in defendant.]—**Pltfs. & deft. in ejectment derived title from the same original grantor, but deft. & those under whom he claimed, in addition, relied upon title by possession extending over a period of upwards of twenty



*Sect. 5.—Writ of possession: Sub-sect. 2, A., B. & C.]*

**1660.** ———.]—In ejectment for lands which had been used as the bed of a canal, the ct. held that the canal proprietors had only an easement entitling them to exclusive possession of the land so long as it was used for the purposes of the canal, & that they had abandoned the use of some portion of the lands for that purpose. Upon an application to enter the verdict distributively, the ct. refused to do so, on the ground that the proper course was for the lessor of pltf. to direct the sheriff to execute the writ of possession by delivering possession only of those parts with regard to which the easement had ceased, & that if any attempt was made to interfere with the easement of the canal proprietors, application should then be made to the ct.—*DOE d. R. v. YORK (ARCHBP.)* (1849), 14 Q. B. 81; 19 L. J. Q. B. 242; 14 L. T. O. S. 347; 117 E. R. 32.

*Annotations:—***Refd.** *Badger v. South Yorkshire Ry. & River Dun Co.* (1858), 1 E. & E. 359. **Mentd.** *Medway Navigation Co. v. Roinney* (1861), 7 Jur. N. S. 846.

**1661.** ——— **By whom to be delivered—Order must state—Disobedience to irregular order.]**—Where a rule of ct. in an action of ejectment, required possession of certain premises to be delivered up, but did not mention by whom, the ct. refused to make a rule absolute for an attachment against the tenant in possession for not delivering them up; & as he was a stranger to the ejectment, also refused to grant a rule requiring him to deliver up possession.—*DOE d. LEWIS v. ELLIS* (1841), 9 Dowl. 944.

**1662.** ——— **Tenant in possession—Stranger to ejectment.]**—*DOE d. LEWIS v. ELLIS*, No. 1661, *ante*.

**1663.** ——— **Turning out persons in possession—Where entirety recovered.]**—The mode of executing the writ of possession when the lessor of pltf. recovers the entirety of the estate is different from what it is when he recovers an undivided portion only. In the one case it is the duty of the sheriff to put the lessor in possession of the whole estate by turning out all the persons there; but in the other case the duty of the sheriff is, not to turn out the persons in possession, but only to put the lessor of pltf. in possession of the particular portion to which he is entitled (*PARKE, B.*).—*DOE d. HELLYER v. KING* (1851), 6 Exch. 791; 2 L. M. & P. 493; 20 L. J. Ex. 301; 155 E. R. 765.

**1664.** ——— **Where only portion recovered.]**—*DOE d. HELLYER v. KING*, No. 1663, *ante*.

**1665.** ——— **Neglect of sheriff to deliver—Liability to action—Although judgment afterwards set aside.]**—*MASON v. PAYNTER*, No. 1666, *post*.

years. Stat. Limitations began to run against pltf. in 1862, at which time pltf. were infants under the age of twenty-one years. The disability was removed in 1870, & the period of ten years after removal of the disability, within which, under the statute, proceedings must be commenced, expired in 1880. No action of any kind was taken until 1884, at which time deft. & those under whom he claimed had been in undisputed possession for upwards of twenty years.—**Held:** the entry by the sheriff in 1884, for the purpose of putting pltf. in possession under a writ of *habere facias*, & the attornment to pltf. of the person then in possession, were ineffective as against deft., whose title was then absolute, & who could have maintained ejectment against pltf.—*SHEA v. BURCHELL* (1894), 27 N. S. R. (15 R. & G.) 235.—**CAN.**

**PART III. SECT. 5, SUB-SECT. 2.—B.**

**1668 i. Whether new writ may issue—**

**1666.** ——— **Claimant's costs of attempted execution.]**—The lessor of pltf. in ejectment, having recovered judgment against the casual ejector, obtained a writ of *habere facias possessionem*, & delivered the warrant to the sheriff's officer to be executed. The sheriff, having received notice that the landlord intended to apply to set aside the proceedings for irregularity, his officer did not execute the possession; & the proceedings were afterwards set aside by a judge's order, but not for irregularity, the landlord being let in to plead on payment of costs. The sheriff had not been ruled to return the writ. The lessor of pltf. had incurred expense before the judgment was set aside in endeavouring to get the writ executed, which expense the master refused to allow on taxation.—**Held:** the lessor of pltf. was entitled to recover this expense in an action against the sheriff for delaying to execute the possession.—*MASON v. PAYNTER* (1841), 1 Q. B. 974; 1 Gal. & Dav. 381; 10 L. J. Q. B. 299; 6 Jur. 214; 113 E. R. 1406.

**1667. Judgment for possession under review—Part of claimant's title undisputed—Execution confined to that part only.]**—*DOE d. FORSTER v. WANDLASS* (1797), 7 Term Rep. 117; 101 E. R. 885.

*Annotations:—***Refd.** *Smith v. Jersey* (1821), 3 Bl. 290. **Mentd.** *Smith v. Spooner* (1810), 3 Taunt. 246.

#### *B. Dispossession of Party Recovering.*

**1668. Whether new writ may issue—Dispossession by former possessor.]**—*UPTON & WELLS CASE* (1589), 1 Leon. 145; 74 E. R. 135.

**1669.** ———.]—*PIERSON v. TAVERNOR* (1616), 1 Roll. Rep. 353; 81 E. R. 529.

**1670.** ———.]—*RATCLIFF v. TATE* (1664), 1 Keb. 779; 83 E. R. 1239.

*Annotation:—***N.F.** *Doc d. Pate v. Roe* (1807), 1 Taunt. 55.

**1671.** ——— **No return to writ.]**—After possession once given under a writ, pltf. cannot sue out another writ of possession, though he be disturbed by the same deft., & though the sheriff have not yet returned the former writ.—*DOE d. PATE v. ROE* (1807), 1 Taunt. 55; 127 E. R. 751.

**1672.** ———.]—Where a sheriff's officer taking possession under a *habere facias possessionem* is dispossessed before he delivers possession to the lessor of pltf., it is necessary that it should appear that the persons dispossessing are acting in concert with deft.—*DOE d. THOMPSON v. MIREHOUSE* (1833), 2 Dowl. 200.

**1673.** ——— **Rule nisi in first instance.]**—*DOE d. LLOYD v. ROE*, No. 505, *ante*.

**1674.** ——— **Dispossession by third party—After**

**Dispossession by former possessor.]**—Where pltf. had been put in possession of land under a writ of possession, which was thereupon returned by the sheriff as executed, & deft., less than a year afterwards, regained possession & kept pltf. out, no change having occurred in the title in the meantime.—**Held:** pltf. was entitled to a new writ of possession.—*PROCTOR v. WELLER*, 3 C. L. T. 551.—**CAN.**

**1668 ii.** ———.]—A writ of *hab. fac. poss.* was completely executed, & possession given to pltf. Three weeks after, deft. (claiming to be equitably entitled, & who was informed & found that the premises were vacant, & the door of the house unfastened, & who denied knowledge of who opened it) retook possession. A rule to redeliver possession to pltf. or to attach deft. as for contempt, was refused.—*MCDERMOTT v. MCDERMOTT* (1863), 4 P. R. 252.—**CAN.**

**1668 iii.** ———.]—Where, after a writ of possession executed, deft. forcibly retook possession, Q. B. Div. made an order renewing the writ.—*STACPOOLE v. WALSH* (1880), 6 L. R. Ir. 444.—**IR.**

**1671 i.** ——— **No return to writ.]**—Where a pltf. in ejectment for a house & lands, had been in Jan. put in possession, under an *habere* of all the lands, but had left deft. in possession of the house, & three weeks afterwards, pltf.'s cattle were driven off the land by a body of people acting for deft., who, on a subsequent day, put his own cattle on it, & twice expelled pltf. from the land in the May following, the return of the writ not being filed, the ct. granted a renewal of the *habere*, there being no ground to presume that the rights of the parties had been changed since the execution of the *habere*.—*LINEHAN'S LESSEE v. ANTHONY* (1826), Batt. 453.—**IR.**

quiet possession.]—RATCLIFF v. TATE (1664), 1 Keb. 779; 83 E. R. 1239.

Annotation:—N.F. Doe d. Pate v. Roe (1807), 1 Taunt. 55.

1675. ———.]—On forcible entry, restitution granted after three years set aside.

If possession be delivered upon *habere facias possessionem* or grant of restitution & it is avoided immediately by a new force, there the party may have a new *habere facias possessionem* or grant of restitution; but if after the restitution awarded, the party enjoys quiet possession, & he be removed by a new force, there he ought to resort to a new remedy (HOLT, C.J.).—R. v. HARRIS (1699), Carth. 496; 1 Com. 61; 1 Ld. Raym. 482; 12 Mod. Rep. 268; 3 Salk. 313; 90 E. R. 885; *sub nom.* R. v. HARNISSE, Holt, K. B. 324; 5 Mod. Rep. 443.

1676. ———.]—DEVEREUX v. UNDERHILL (1667), 2 Keb. 245; 84 E. R. 152.

1677. ——— Repossession after writ returned—Court will not interfere summarily.]—Although, when an execution is in progress the ct. will enforce obedience, & punish resistance, to its process, by attachment for contempt, & when possession is forcibly retaken before the writ is returned, will allow a fresh writ to be issued; yet, when possession is retaken, after the writ is returned, it will not interfere summarily by rule or order to enforce redelivery of possession.—WILSON v. CHARTIER (1862), 10 W. R. 546.

1678. Power of sheriff to restore possession. MOLINEUX v. FULGAM (1622), Palm. 289; 81 E. R. 1086.

Annotation:—Refd. Tippet v. Eyres (1690), 5 Mod. Rep. 457.

1679. Issue of writ of restitution—Defendant paying costs of application.]—DOE d. PITCHER v. ROE, No. 499, *ante*.

1680. Attachment against dispossessor.]—UPTON & WELLS CASE (1589), 1 Leon. 145; 74 E. R. 135.

1681. ———.]—FORTUNE v. JOHNSON (1651), Sty. 82 E. R. 742.

1682. ———.]—SMITH v. DORSET (EARL) (1651), Sty. 277; 82 E. R. 708.

1683. ———.]—RATCLIFF v. TATE (1664), 1 Keb. 779; 83 E. R. 1239.

Annotation:—N.F. Doe d. Pate v. Roe (1807), 1 Taunt. 55.

1684. ———.]—DOGGET v. ROE (1688), Comb. 150; 90 E. R. 398.

1685. ——— Dispossession not immediate—After interval.]—KINGSDALE v. MANN, No. 1688, *post*.

1686. ———.]—WILSON v. CHARTIER, No. 1677, *ante*.

1687. ———.]—LACON v. DE GROAT (1893), 10 T. L. R. 24.

#### C. Completion of Execution.

1688. When execution completed—Delivery of possession—Withdrawal of officers.]—(1) Execution upon *habere facias possessionem* is not complete till actual possession given.

Upon an *habere facias possessionem*, the execution is not complete until the bailiff deliver the possession, & is gone (HOLT, C.J.).

(2) A recent ouster after possession given is a contempt, but if nine hours have intervened the attachment shall not go in the first instance.

(3) A new *habere facias possessionem* cannot issue if the former be returned, though not filed.

The ct. might grant a new *habere facias possessionem* if the first was not returned (*per CUR.*).—

1677 i. ——— Repossession after writ returned—Court will not act summarily.]—After possession of premises recovered in ejectment has been delivered to the owner by the sheriff, & the writ of possession is returned, the power

of the ct. in the suit is at an end, & an attachment will not be granted against party re-entering.—DOE d. COGSWELL v. SMITH (1874), 15 N. B. R. (2 Pug.) 141.—CAN.

KINGSDALE v. MANN (1703), 6 Mod. Rep. 27, 115; 1 Salk. 321; Holt, K. B. 154; 87 E. R. 791.

Annotation:—As to (3) Refd. Goodright d. Baker v. Sturdy (1729), 1 Barn. K. B. 177.

1689. Whether new writ may issue—Not after writ returned.]—MOLINEUX v. FULGAM (1622), Palm. 289; 81 E. R. 1086.

Annotation:—Mentd. Tippet v. Eyres (1690), 5 Mod. Rep. 457.

1690. ——— Before writ returned.]—MOLINEUX v. FULGAM (1622), Palm. 289; 81 E. R. 1086.

Annotation:—Mentd. Tippet v. Eyres (1690), 5 Mod. Rep. 457.

——— No return made.]—MOLINEUX v. FULGAM (1622), Palm. 289; 81 E. R. 1086.

Annotation:—Mentd. Tippet v. Eyres (1690), 5 Mod. Rep. 457.

1692. ———.]—DOGGET v. ROE (1688), Comb. 150; 90 E. R. 398.

1693. ———.]—KINGSDALE v. MANN, No. 1688, *ante*.

1694. ——— After possession had—By agreement of parties.]—Had actual possession been had by agreement of parties or by delivery of the sheriff, the party can never after have any new *hab. fac. possessionem*; but if there be agreement to deliver possession *in futuro*, if it be denied, a new writ may be had.—LOVELESS (CHAPMAN'S EXECUTOR, v. RATCLIFF (1664), 1 Keb. 785; 83 E. R. 1242.

1695. ——— By delivery of sheriff.]—LOVELESS (CHAPMAN'S EXECUTOR) v. RATCLIFF, No. 1694, *ante*.

1696. ——— Agreement to give possession in futuro—Not fulfilled.]—LOVELESS (CHAPMAN'S EXECUTOR) v. RATCLIFF, No. 1694, *ante*.

1697. ——— Until effectual execution obtained—Delivery of only part of land.]—Application that debt. might file an *hab. fac. possessionem*, to the intent that no new one might be taken out, or that which was taken out should not be filed after the return of it, refused, for the party hath election to return it or not, & may renew it at pleasure, till an effectual execution be had, albeit the party had actual execution; yet if there were any sudden expulsion of him, he shall not be estopped; also if the sheriff give seisin but of part, he may have new *hab. fac.* for the rest.—DEVEREUX v. UNDERHILL (1667), 2 Keb. 245; 84 E. R. 152.

1698. ——— Only if first writ frustrated.]—Pltf. had got judgment & taken out a writ of possession; when the sheriff came to execute it, the tenants offered to attorn voluntarily; upon which the sheriff did not execute his process; the time of the return of the writ ran out, & then the tenants refused to attorn. Upon motion for a new writ of possession, the ct. said they never granted a new writ of possession, but where it appeared upon record that the first writ was prevented from being executed by entering a *non misit breve*, or some other evidence given that the effect of the writ was immediately frustrated as soon as it was executed; & the writ was refused till such an entry should be made.—GOODRIGHT d. BAKER v. STURDY (1729), 1 Barn. K. B. 177; 94 E. R. 121.

——— Dispossession of party recovering.]—See Sub-sect. 2, B., *ante*.

1699. Return to writ—Necessity for.]—MOLINEUX v. FULGAM (1622), Palm. 289; 81 E. R. 1086.

Annotation:—Mentd. Tippet v. Eyres (1690), 5 Mod. Rep. 457.

#### PART III. SECT. 5, SUB-SECT. 2.—C.

o. When execution completed—Delivery of possession.]—Until the party gets the quiet & peaceable possession of the premises the writ is not executed.



Sect. 5.—Writ of possession: Sub-sect. 2, C.;  
sect. 3. Sect. 6: Sub-sect. 1.]

**1700. — Immediately after execution.]**—Writs of *habere facias possessionem* in ejectment are within 3 & 4 Will. 4, c. 67, s. 2, & are properly made returnable immediately after the execution thereof.—DOE d. HUDSON v. ROE (1852), 18 Q. B. 806; 21 L. J. Q. B. 359; 118 E. R. 304; *sub nom.* DOE d. HOWSON v. ROE, 19 L. T. O. S. 202; 16 Jur. 725.

SUB-SECT. 3.—REVERSAL OF JUDGMENT AND  
SETTING ASIDE EXECUTION.

**1701. Setting aside judgment—To enable landlord to defend — Judgment obtained without collusion.]**—In the absence of any suggestion of collusion between the lessor of *pltf.* & the tenant, the *ct.* will not set aside a regular judgment in ejectment after execution, in order to let in the landlord to defend.—DOE d. THOMSON v. ROE (1835), 4 Dowl. 115; 2 Scott, 181.

**1702. — — —.]**—After judgment in ejectment, & possession delivered, the landlord of premises had been let in to defend the action, on the ground that he had received no notice of the proceedings; & the judgment signed against the casual ejector had been set aside on payment of costs, the lessor of *pltf.* undertaking to try at the next assizes; & in case of his failure to do so, possession to be restored to the landlord. He failed, however, to do so, & judgment of nonsuit was entered up against him. The *ct.* afterwards granted a writ of restitution at the suit of the landlord.—DOE d. STRATFORD v. SHAIL (1844), 2 Dowl. & L. 161; 13 L. J. Q. B. 321; 3 L. T. O. S. 185; 8 Jur. 538.

**1703. — To let in tenant to defend — Such party not previously represented—Order in chambers.]**—After judgment signed against the casual ejector, & writ of possession executed, a judge at chambers may, if satisfied as to facts, direct the judgment & subsequent proceedings to be set aside on payment of costs, & a party let in to defend as tenant, as where the attorney for such party was duly instructed to appear, but through inadvertence, suffered the time to expire without appearing, although the case set up by such party is that he has been in possession throughout.—DOE d. MULLARKY v. ROE (1840), 11 Ad. & El. 333; 3 Per. & Dav. 316; 113 E. R. 442; *sub nom.* DOE d. MALARCHY v. ROE, 9 L. J. Q. B. 53; 4 Jur. 314.

**1704. — To let in third party injuriously affected—Application by summons—R. S. C., Ord. 27, r. 15.]**—If a person, who is not a party to the record, seeks to set aside a judgment by which he is injuriously affected, which *deft.* in the action has allowed to go by default, he ought by summons, taken out in the name of *deft.*, or if not entitled to use *deft.*'s name, then taken out in his own name, but in that case served on both *pltf.* & *deft.*, apply for leave to have the judgment set aside, & to be allowed either to defend the action on such terms of indemnifying *deft.* as the judge may consider right, or to intervene in the action in the manner pointed out by Jud. Act, 1873 (c. 66), s. 24 (5).

—MASSEY'S LESSEE v. EJECTOR (1835), 1 Jo. Ex. Lr. 457.—IR.

PART III. SECT. 5, SUB-SECT. 3.

**p. Setting aside judgment—Motion of one defendant—To have name struck out of proceedings.]**—An ejectment summons having been served on A. & B., A. only defended, & B. allowed judgment to go by default. *Pltf.* obtained a verdict, & issued a *hab. fac.*

against both, whereupon B. moved to set it aside as against himself, or to have his name struck out of the proceedings:—*Held:* *pltf.* was right, for if B. claimed no interest in the land, & was not in possession, he should have applied on receiving the summons to have his name struck out.—D'ARCY v. WHITE & WILSON (1865), 24 U. C. R. 570.—CAN.

**q. — Irregularity.]**—An order

The above rule is designed to enable judgments by default to be set aside by those who have or who can acquire a *locus standi*, & does not give a *locus standi* to those who have none.—JACQUES v. HARRISON (1884), 12 Q. B. D. 165; 53 L. J. Q. B. 137; 50 L. T. 246; 32 W. R. 470, C. A.  
*Annotation:*—*Mentd.* Lock v. Pearce, [1892] 2 Ch. 328.

**1705. Execution set aside—Cause to be shown in time.]**—Cause for setting aside execution in ejectment must be shown in time.—GEORGE d. BRADLEY v. WISDOM (1759), 2 Burr. 756; 97 E. R. 549.

**1706. — Execution against tenant—Payment of rent & costs offered—Other grounds of forfeiture.]**—After execution executed in an action of ejectment, the *ct.* will not set the proceedings aside on payment of the rent due & costs of the action, if there are other grounds of forfeiture besides the nonpayment of rent; & if such an application be made, the *ct.* will dismiss it with costs.—DOE d. LAMBERT v. ROE (1835), 3 Dowl. 557.

**1707. — At instance of landlord—Not a party to proceedings.]**—Where judgment & execution in ejectment was regularly obtained without collusion with the tenants in possession, the *ct.* refused to set it aside at the instance of a party who stated that he was landlord of the premises, & had not received any notice of the declaration in ejectment.—DOE d. MARTIN v. ROE (1835), 1 Har. & W. 46; 1 Hodg. 223.

**1708. — To let in tenant to defend—Payment of costs.]**—DOE d. MULLARKY v. ROE, No. 1703, *ante.*

**1709. Writ of restitution—Supersedeas to sheriff—Delivery before or after execution executed—Effect.]**—THOMAS v. OWEN (1614), 2 Bulst. 194; 80 E. R. 1062.

**1710. — Judgment set aside—Order to restore possession ineffectual.]**—A judgment irregularly obtained set aside, & possession ordered to be restored; but the lessor of *pltf.*, who held the possession, absconding, the rule was ineffectual. An application on behalf of the late tenants in possession, for a writ of restitution granted.—GOODRIGHT d. RUSSELL v. NORRIS (1738), Barnes, 179; 94 E. R. 865.

*Annotations:*—*Consd.* Doe d. Whittington v. Hards (1851), 20 L. J. Q. B. 406. *Refd.* Doe d. Stevens v. Lord (1837), 2 Nev. & P. K. B. 604.

**1711. — — —.]**—(1) If a judgment in ejectment be irregularly obtained, & possession delivered under it, & then the judgment be set aside, the *ct.* will, in the first instance, grant a rule requiring possession to be restored; but if such rule become ineffectual by reason of the party on whom it is to be served having absconded, a writ of restitution will be awarded.

(2) *Semble:* it is not necessary that a writ of restitution should be founded upon matter of record.—DOE d. WHITTINGTON v. HARDS (1851), 20 L. J. Q. B. 406; *sub nom.* WHITTINGTON d. WHITTINGTON v. HARDS, 17 L. T. O. S. 49.

**1712. — Although title not determined.]**—DOE d. STRATFORD v. SHAIL, No. 1702, *ante.*

**1713. — Writs sealed not signed—No præcipe issued—Whether irregular.]**—(1) In ejectment judgment was signed by *pltf.* as for want of a plea,

for a writ of possession made under R. S. C. 124, s. 23, omitted to specify the number of days after which the writ should issue as directed in said sect.:—*Held:* the order was made without jurisdiction & must be quashed.—RE BROAD COVE COAL CO. (1896), 29 N. S. R. (17 R. & G.) 1.—CAN.

**r. Writ of restitution—Possession delivered under irregular writ.]**—Where in ejectment for non-payment of rent,

& writs of possession were sued out & executed. Deft. had left a plea at the judge's chambers. Deft. obtained a judge's order to set aside the judgment & writs of possession, & commanding the sheriff to restore the possession:—*Held*: the order ought not to have been made on the sheriff, & writs of restitution issued upon the order were irregular.

(2) *Qu.*: whether it is a valid objection to a writ of restitution, that no *præcipe* had been issued, or that the writs themselves were only sealed & not signed.—*DOE d. WILLIAMS v. WILLIAMS* (1834), 2 Ad. & El. 381; 4 Nev. & M. K. B. 259; 4 L. J. K. B. 39; 111 E. R. 148.

*Annotation*:—*Consd.* *Doe d. Whittington v. Hards* (1851), 20 L. J. Q. B. 406.

1714. ——— Need not be founded in matter of record.]—*DOE d. WHITTINGTON v. HARDS*, No. 1711, *ante*.

1715. Order to restore possession.—To whom directed.—To party.—Not sheriff.]—*DOE d. WILLIAMS v. WILLIAMS*, No. 1713, *ante*.

1716. ——— Precedes writ of restitution.]—*DOE d. WHITTINGTON v. HARDS*, No. 1711, *ante*.

1717. ——— To joint tenants.—Demand by one—Without authority of others.]—(1) Where a rule of ct. ordered possession of lands to be restored to A., B., & C., or to D., their tenant, a demand by A. alone, without any special authority from B. & C.:—*Held*: sufficient.

(2) Upon a refusal to comply with that demand, the ct. granted an attachment, although the affidavits in support of the rule *nisi* did not negative that possession had been delivered to B. & C., or to D.

(3) *Semble*: such omission would be fatal, where the rule is a rule absolute in the first instance.—*CORBETT d. CLYMER v. NICHOLLS* (1851), 2 L. M. & P. 87; 16 L. T. O. S. 414.

1718. ——— Attachment for disobedience thereto—Absolute in first instance.]—Attachment absolute in the first instance for non-delivery of possession pursuant to a rule of ct.—*DAVIES d. POVEY v. DOE* (1773), 2 Wm. Bl. 892; 96 E. R.

——— Delivery to joint tenants—Denial of possession by all.]—*CORBETT d. CLYMER v. NICHOLLS*, No. 1717, *ante*.

## SECT. 6.—WRIT OF SEQUESTRATION.

### SUB-SECT. 1.—NATURE OF WRIT.

1720. Founded on contempt—Existing—Not probable.]—Upon a judgment for the recovery of money with costs, the master made an order for the payment of the amount recovered with taxed costs within a limited time & in default for a writ of sequestration to issue:—*Held*: the master had no jurisdiction derived from the Ch. practice as alleged to make an order limiting the time for payment upon which alone a writ of sequestration could issue, on the ground that a judgment at common law to recover money is not analogous to a decree in Ch. ordering the payment of money. Moreover a writ of sequestration is a proceeding founded upon contempt, & it was contrary to principle to found an order upon future possible contempt.—*HULBERT & CROWE v. CATHCART*, [1894] 1 Q. B.

244; 63 L. J. Q. B. 121; 70 L. T. 558, D. C.; *on appeal*, [1896] A. C. 470, H. L.

*Annotation*:—*Mentd.* *Re Oddy, Major v. Harness*, [1906] 1 Ch. 93.

1721. ——— Wilful—Not accidental.]—Pltfs. are here seeking to sequester the property & effects of deft. co. The ground of that application is that defts. have committed a contempt of ct. by wilful disobedience of an order of the ct. The case is as if it were sought to commit a private individual to prison for contempt. We desire to make it clear that in such case no casual or accidental & unintentional disobedience of an order would justify either commitment or sequestration . . . To justify so serious a proceeding the ct. must be satisfied that a contempt of ct. has been committed, in other words, that its order has been contumaciously disregarded (*LORD RUSSELL, C.J.*).—*FAIRCLOUGH & SONS v. MANCHESTER SHIP CANAL CO. (No. 2)* (1897), 41 Sol. Jo. 225, C. A.

*Annotation*:—*Consd.* *Stancomb v. Trowbridge U. C.*, [1910] 2 Ch. 190.

1722. ——— ———.]—Upon an application for sequestration the question for the ct. is whether a contempt has been committed. The ct. has no jurisdiction otherwise to declare the rights of the parties *inter se* as regards any of the facts alleged in support of the application.

There is no wilful disobedience to an order of the ct., & as this has not been proved the motion is refused (*JOYCE, J.*).—*METERS, LTD. v. METROPOLITAN GAS METERS, LTD.* (1907), 51 Sol. Jo. 499.

1723. ——— ———.]—(1) An order is "wilfully disobeyed" within R. S. C., Ord. 42, r. 31, if it is disobeyed, though without direct intent to disobey, & though by a servant through carelessness, neglect, or in dereliction of duty; except only when the disobedience is casual or accidental & unintentional within *Fairclough v. Manchester Ship Canal Co. (No. 2)*, No. 1721, *ante*.

(2) Defts. having broken an injunction, restraining them from passing sewage into a stream, & failed to perform an undertaking, to cleanse the stream, a writ of sequestration was directed to issue but to lie in the office for a period, & not to issue therefrom if the undertaking should be performed; with costs as between solr. & client.—*STANCOMB v. TROWBRIDGE URBAN COUNCIL*, [1910] 2 Ch. 190; 79 L. J. Ch. 519; 102 L. T. 647; 74 J. P. 210; 26 T. L. R. 407; 54 Sol. Jo. 458; 8 L. G. R. 631.

1724. ———.]—(1) The issue of a writ of sequestration to enforce an order for the payment of a debt into ct. coupled with the receipt of money of the debtor by the sequestrator, does not of itself make the creditor a secured creditor within Bankruptcy Act, 1883 (c. 52).

An exor., who at the date of the death of his testatrix was indebted to her, was made deft. to an action in the Ch. Div. brought by his co-exors. for the administration of her estate. On the further consideration of the action an order was made that deft. should pay into ct. to the credit of the action the amount which had been found due from him. He failed to obey the order, & on the application of pltfs. a writ of sequestration was issued against him. The order was served upon a bank with which he had an account, & an order was afterwards made directing the bank to pay

& judgment against the casual ejector, the *habere* was executed before the affidavit ascertaining the rent was filed, the ct. awarded restitution.—*TOWNSHEND v. CASUAL EJECTOR* (1832), Ale. & N. 228.—*IR.*

### PART III. SECT. 6, SUB-SECT. 1.

1724 i. Founded on contempt.]—Sequestration is neither in form nor substance an execution; it is founded on default of performance of the decree

of the ct.—*BURNE v. ROBINSON* (1844), 7 I. Eq. R. 188.—*IR.*

s. Means of compelling obedience to order of court.]—A writ of sequestration, whether upon mesne or final process, is not in any sense an execution



*Sect. 6.—Writ of sequestration: Sub-sects. 1 & 2, A. & B.]*

into ct. to the credit of the action, "the sequestrator's account," the balance standing in their books to the credit of debt. This payment was accordingly made on Aug. 6, & the same day a receiving order in bkpey. was made against debt. upon a creditor's petition presented on the previous July 13. He was afterwards adjudicated bkpt.:—*Held*: plffs. did not by virtue of the sequestration, or by the subsequent payment into ct. become secured creditors of bkpt. but the money in ct. had passed to the trustee as part of the property of bkpt. divisible among his creditors.

(2) As a rule sequestration is only issued as a process against some person who has been guilty of contempt in order that he may purge his contempt (ROMER, L.J.).—*Re POLLARD, Ex p. POLLARD*, [1903] 2 K. B. 41; 72 L. J. K. B. 509; 51 W. R. 483; 47 Sol. Jo. 492; 10 Mans. 152; *sub nom. Re POLLARD, Ex p. THE TRUSTEE*, 88 L. T. 652, C. A.

#### SUB-SECT. 2.—IN WHAT CASES WRIT MAY ISSUE.

##### A. In General.

*See R. S. C., Ord. 42, rr. 4, 6; Ord. 43, r. 6.*

**1725. To compel answer—Order nisi in first instance—Answer before order absolute—Insufficiency of answer.]**—A sequestration *nisi* is the first process against a peer or member of the House of Commons though this is some hardship; but if there be a sequestration *nisi* against a peer for want of an answer, & the peer puts in an answer which is insufficient yet the order for sequestration shall not be absolute, but a new sequestration *nisi*.—CLIFFORD'S (LORD) CASE (1726), 2 P. Wms. 385; 24 E. R. 778.

*Annotations:—Refd. Gregor v. Arundel* (1802), 8 Ves. 87. *Mentd. Wellesley v. Beaufort, Long Wellesley's Case* (1831), 2 Russ. & M. 639.

**1726. ———.]**—BUTLER v. RASHFIELD, No. 1796, *post*.

**1727. ———.]**—SMALLBROOKE v. DONNEGAL (LORD) (1795), 3 Anst. 647; 145 E. R. 994.

**1728. ———.]**—A sequestration to compel answer, may be executed, but no order will be made for the tenants to attorn till the commission is returned.—ROWLEY v. RIDLEY (1784), 3 Swan. 306, n.; 2 Dick. 622; 36 E. R. 874, L. C.

*Annotations:—Refd. Goldsmith v. Goldsmith* (1846), 5 Haro, 123. *Mentd. Walker v. Bell* (1816), 2 Madd. 21; *Pratt v. Inman* (1889), 6 T. L. R. 91.

**1729. Non-performance of decree—Failure to produce papers.]**—Sequestration *nisi* granted for not returning papers according to order.—*Re HASSENCLEVER* (1785), 1 Bro. C. C. 434; 28 E. R. 1222.

against lands, but is simply a means of compelling obedience to the order of the ct.—MEYERS v. MEYERS (1874), 21 Gr. 214.—CAN.

#### PART III. SECT. 6, SUB-SECT. 2.—A.

**1734 i. Non-payment of money.]**—Before resorting to a writ of sequestration under G. O. 291 for non-payment of money, a writ of *fi. fa.* goods should be issued; then, if that fails, an order attaching debts; & a writ of sequestration should only issue (1) where the lands are insufficient to satisfy the debt, & it therefore becomes important to realise the profits during the year that must elapse before the lands can be sold under a *fi. fa.*; or (2) where the interest of the debtor is of such a nature that it cannot be taken under a *fi. fa.*

This rule does not interfere with the power of the ct. to order a sequestration instead of a *fi. fa.*, if occasion should require.—NELSON v. NELSON (1874), 6 P. R. 194.—CAN.

**1734 ii. ———.]**—Attachment against debt. for non-payment of money, & sequestration against the debt's property for the same cause, both may be kept up; this ct. allowing the double execution, subject however to its discretion.—CRONE v. O'DELL (1821), 2 Mol. 344.—IR.

**1734 iii. ———.]**—A sequestration having issued in 1838 against a beneficed clerk on a judgment on a bond, & marked for the principal sum & interest then due, which sum was not levied & paid until 1842; the ct. gave the plff. liberty to issue a new execution for the

**1730. ———.]**—Sequestration for non-production of deeds, discharged on payment of costs, the party having been examined, & denied knowledge of them.—PELHAM (LORD) v. NEWCASTLE (DUCHESS) (1713), 3 Swan. 293, n.; 36 E. R. 869, L. C.

**1731. ———.]**—DETILLIN v. GALE (1799), 1 Sim. & St. 275, n.; 57 E. R. 111.

**1732. ——— Execution temporarily suspended—Order nisi not served.]**—An order having been made against debt. for a sequestration for non-performance of the decree, an application was made to discharge the order for irregularity, debt. by his affidavit positively denying that he had been served with the order *nisi*:—*Held*: the order would not be discharged but sequestration would be stayed for a fortnight, to give debt. an opportunity of complying with the directions of the decree by executing certain deed, etc.—SHUTTLEWORTH v. LONSDALE (EARL) (1788), 2 Cox, Eq. Cas. 47; 30 E. R. 22, L. C.

**1733. ——— Defendant in custody.]**—Sequestration for not performing the decree upon the return to an attachment, that debt. was in custody of the Warden of the Fleet.—ERRINGTON v. WARD (1803), 8 Ves. 314; 32 E. R. 375, L. C.

**1734. Non-payment of money.]**—CRAWLEY v. CLARKE (1791), 3 Bro. C. C. 373; 29 E. R. 591, L. C.

**1735. Performance of personal duty.]**—HIDE v. PETTIT (1667), 1 Cas. in Ch. 91; Freem. Ch. 125; 22 E. R. 709.

*Annotation:—Refd. Wells v. Gibbs* (1840), 3 Beav. 399.

**1736. ———.]**—GUAVERS v. FOUNTAIN (1687), Freem. Ch. 99; 2 Eq. Cas. Abr. 281; 22 E. R. 1083.

**1737. Non-payment of annuity—Execution for arrears only.]**—A beneficed clergyman granted an annuity by deed & made it chargeable on his living & gave a warrant of attorney in the common form, to confess judgment at the suit of the grantee for £3,200. By the annuity deed it was agreed that the judgment to be entered up on the warrant of attorney was to be a further security for the annuity & that no execution or sequestration should be issued thereon other than such sequestration as was therein mentioned, until the annuity should be in arrear; & the grantor then covenanted that if the grantee should at any time deem it expedient to sequester the living; it should be lawful for him to issue a sequestration by virtue of the judgment for the £3,200, or any part thereof. Judgment having been entered up on the warrant of attorney & the annuity being in arrear the grantee issued a sequestration for £3,200, which sum greatly exceeded the arrears due, & entered into possession of the living. On motion, the ct. refused to set aside the annuity deed warrant of attorney & judgment but directed that writ of sequestration

amount of the interest which had accrued between 1838 & 1842, being short of the penalty of the bond.—THACKER v. WILLIAMS (1843), 6 L. L. R. 97.—IR.

**t. To enforce obedience by corporation to decree.]**—In proceeding against a corpn. to enforce obedience to a decree or order the proper proceeding is by orders *nisi* & absolute for a sequestration.—A.-G. v. BRANTFORD (circa 1859), 1 Ch. Ch. 26.—CAN.

**a. On ordinary common law judgment—For debt recovered before Judicature Act.]**—A writ of sequestration cannot issue on an ordinary common law judgment for a debt recovered before the passing of the above Act, it not being an order for payment of a specific sum, & no day

should continue in force only for the arrears that had become due on the annuity.—*BRITTEN v. WAIT* (1832), 3 B. & Ad. 915; 1 L. J. K. B. 267; 110 E. R. 336.

*Annotation*:—*Mentd.* *Walte v. Bishop* (1834), 5 Tyr. 90.

**1738. Although partial levy under former writ.]**—A writ of sequestration may issue, notwithstanding a partial levy may have been made under a former writ, the clergyman having only a life estate in certain freehold rents, the sheriff could not make the usual return of *nulla bona*.—*RABBITS v. WOODWARD* (1869), 20 L. T. 693; *subsequent proceedings*, 20 L. T. 778.

**1739. Ordinary judgment—For recovery of debt.]**—*HULBERT & CROWE v. CATHCART*, No. 1720, *ante*.

**Willful contempt of court.]**—*See* Sub-sect. 1, *ante*.

#### *B. Disobedience to Injunctions by Corporate Bodies.*

*See* R. S. C., Ord. 42, r. 31.

**1740. Undertaking equivalent to order of court.]**—R. S. C., Ord. 42, r. 31, is not intended to alter the practice of the ct. as it existed before the promulgation of the rules, & therefore an undertaking is equivalent to an order for the purposes of that rule, & can be enforced against a corpn. by sequestration.—*MILBURN v. NEWTON COLLIERY, LTD.* (1908), 52 Sol. Jo. 317.

*Annotation*:—*Refd.* *R. v. Wigand, Re Wigand* (1913), 29 T. L. R. 509.

**1741. Public authority.]**—*SUTTON v. BARNET LOCAL BOARD*, [1877] W. N. 167.

**1742. ——— Temporary suspension of execution—Application for—Court of Appeal will not entertain.]**—(1) Where an injunction has been issued against a board of health, & an order of sequestration made to enforce it, the Ct. of Appeal will not suspend the order, but will leave the parties to make any applications for the purpose to the ct. below.

(2) *Semble*: it is immaterial that the property of the board is held under Acts of Parliament, upon specific trusts for public purposes.—*SPOKES v. BANBURY BOARD OF HEALTH* (1865), L. R. 1 Eq. 42; 35 L. J. Ch. 105; 13 L. T. 453; 30 J. P. 54; 11 Jur. N. S. 1010; 14 W. R. 169, L. J. J.

*Annotation*:—*Generally, Mentd.* *A.-G. v. Colney Hatch Lunatic Asylum Committee* (1868), 19 L. T. 708.

**1743. ———.]**—*A.-G. v. WALTHAMSTOW LOCAL BOARD*, [1878] W. N. 90.

**1744. ———.]**—The ct. had granted an injunction restraining defts. from polluting with sewage a pool belonging to pltf., but suspended the order for three months to allow them to comply with it. They had moved the ct. for a further extension of time, but had been refused. As they had taken no steps to obey the order, pltf. soon after the expiration of the three months served them with notice of motion under R. S. C., Ord. 42, r. 31, for leave to issue sequestration against the property of the corpn. Before, however, this notice was served they remedied the nuisance, so the motion now came on merely as a question of costs. Defts. submitted the following technical objections under the R. S. C., 1883: (a) no memorandum had been indorsed upon the copy of the

judgment served on them, as required by Ord. 41, r. 3; (b) no copies of the affidavits intended to be used had been served with the notice of motion, as required by Ord. 52, r. 4; (c) there was no case for sequestration at all, but if there were pltf. was entitled to, & ought to have issued his writ under Ord. 43, r. 6, without moving for leave; (d) application for leave, if necessary, ought to have been by summons in chambers, in accordance with *Snow v. Bolton*, No. 1763, *post*:—*Held*: (1) defts. had been guilty of wilful disobedience to the order of the ct.; (2) Ord. 41, r. 5, had no application to a prohibitive order like the present one; (3) copies of affidavits need only be served with the notice of motion in cases where the liberty of the subject was involved, as in attachment; (4) Ord. 43, r. 6, applied to something to be done in a limited time, & not to something which had been ordered, as in the present case, not to be done at all; (5) pltf. was right to move the ct. in the first instance instead of proceeding by summons in chambers.—*SELOUS v. CROYDON RURAL SANITARY AUTHORITY* (1885), 53 L. T. 209.

*Annotation*:—*As to* (2) *Refd.* *Hudson v. Walker* (1894), 64 L. J. Ch. 204.

**1745. ———.]**—An order for an injunction suspended for eighteen months to enable defts. to construct & carry out necessary works for diversion of sewage. The time was further extended, but as the works had not been commenced motion was made to the ct. that a commission of sequestration might issue against defts. for breach of the injunction. The ct. extended the time but intimated that it had power in such cases not only to issue, but to enforce a sequestration if its orders were not obeyed.—*A.-G. v. WALTHAMSTOW URBAN DISTRICT COUNCIL, WALTHAMSTOW SEWAGE QUESTION* (1895), 11 T. L. R. 533.

**1746. ———.]**—*LEE v. AYLESBURY URBAN DISTRICT COUNCIL* (1902), 19 T. L. R. 106.

**1747. ———.]**—*STANCOMB v. TROWBRIDGE URBAN COUNCIL*, No. 1723, *ante*.

**1748. Company—Suspension pending appeal.]**—A bill stated that a railway co. was interfering with a public road, by digging a trench & lowering the level of it, & causing a permanent & complete obstruction. The bill prayed for an injunction restraining the co. from obstructing the road or rendering the same less convenient for the passage of carriages, etc., than it had previously been, until they had made a proper substituted road. An injunction to that effect was granted. The co. then changed their plan, & instead of lowering the road, carried the railway across it on a level, with posts & gates, which were closed only during a few short & ascertained periods in the day, when trains crossed:—*Held*: the general terms of the injunction were not restricted by reference to the particular nature of the injury complained of, but that it had in spirit, as well as terms, been violated. A sequestration was ordered to issue for the contempt, & was only stayed upon appeal, upon defts. paying all the costs, & undertaking to construct a road in conformity with Railways Clauses Consolidation Act, 1845 (c. 20), & in the meantime to provide & maintain a free passage at all times.—*A.-G. v. GREAT NORTHERN RY. CO.* (1850), 4 De G.

named for payment in it.—*LONDON & CANADIAN LOAN & AGENCY CO. v. MERRITT* (1882), 32 C. P. 375.—*CAN.*

**b. On nulla bona return.]**—A judgment creditor, on whose writ a return of *nulla bona* has been made, is entitled, under Law 13 of 1895, to demand the sequestration of his debtor's estate, unless good cause is shown to

J.—VOL. XXI.

*PELUNSKY v. BEILES* (1908), T. S. 370.—*S. AF.*

#### **PART III. SECT. 6, SUB-SECT. 2.—B.**

**1748 i. Company—Suspension pending appeal.** By an order of the ct. of error & appeal a road co. were ordered to remove a bridge constructed by them against which the road co.

appealed to the Queen in council:—*Held*: the circumstance of the road co. having perfected the security required by the orders of the privy council was a sufficient answer to a motion for sequestration for non-compliance with the order requiring the removal of the bridge; & the road co. having applied to the ct. for a stay of



*Sect. 6.—Writ of sequestration: Sub-sect. 2, B., C., D. & E.; sub-sect. 3, A.]*

& Sm. 75; 17 L. T. O. S. 23; 15 Jur. 387; 64 E. R. 741, L. C.

*Annotations:—Mentd.* R. v. Wycombe Ry. (1867), L. R. 2 Q. B. 310; A.-G. v. Barry Docks & Ry. (1887), 35 Ch. D. 573.

**1749.** —. —.]—Pltf. appealed from a refusal to issue a writ of sequestration against deft. co. for an alleged breach of an injunction to restrain the infringement of pltf.'s patent. On the appeal coming on for hearing it was proposed to read certain further affidavits which had been filed on behalf of applt. since the order was made in the ct. below. Deft. co. had been duly furnished with copies of such affidavits. Deft. co. objected to the reception of the fresh evidence, as leave had not been obtained for that purpose from the ct., & no special grounds had been shown under R. S. C., Ord. 58, r. 4, the order refusing the writ being, they contended, a final order as to the matter in dispute, & not an interlocutory order:—*Held*: the order appealed from was an interlocutory order within the rule referred to; & therefore, applt. had a right to adduce fresh evidence.—*SPENCER v. ANCOATS VALE RUBBER CO., LTD.* (1888), 58 L. T. 363; 4 T. L. R. 681, C. A.

**1750.** —. —.]—*CHESTER (DEAN & CHAPTER) v. SMELTING CORPN., LTD.*, [1902] W. N. 5.

### C. Disobedience to Orders in Matrimonial Causes.

*See, generally, HUSBAND & WIFE.*

**1751. Alimony.**—*RUSSEL v. BODVIL* (1660), 1 Rep. Ch. 186; 21 E. R. 545.

*Annotation:—Mentd.* Miller v. Knox (1838), 4 Bing. N. C. 574.

**1752.** —. —. **Not after discharge from bankruptcy.**—A bkpt., who has obtained an order of discharge under Bkpcy. Act, 1861 (c. 184), is thereby protected from any proceeding to enforce the payment of alimony for the non-payment of which he has been attached before the order of discharge. A sequestration against his estate for such alimony therefore will not be granted.—*DICKENS v. DICKENS* (1862), 2 Sw. & Tr. 645; 31 L. J. P. M. & A. 183; 7 L. T. 395.

**1753.** —. —.]—The ct. had made an order on resp. for payment of permanent alimony at the rate of £110 *per annum*, so long as he was in receipt of a rentcharge of £400 *per annum*, his only source of income, the trustees of which had a discretionary power to refuse payment, in which event it enured to the benefit of the tenant for life. Resp. had prior to the date of the order become a bkpt., but the trustees had nevertheless continued to pay to him the rentcharge & he had failed to comply with the order of the ct. The ct., resp. & trustees opposing, directed a sequestration in general terms to issue against the property, etc., of resp.—*CLINTON v. CLINTON* (1866), L. R. 1 P. & D. 215; 14 L. T. 257; 14 W. R. 545.

*Annotations:—Refd.* Dent v. Dent (1867), 36 L. J. P. & M. 61; Martin v. Martin, [1919] P. 283. *Mentd.* Bonsor v. Bonsor, [1897] P. 77.

**1754.** —. —. & costs.]—Resp. in a suit for judicial separation, was a retired officer of the Ct. of Q. B., & was in receipt of a pension for past services. He was resident out of the jurisdiction, & had failed to pay petitioner's costs or the alimony which had been allotted to her:—*Held*: resp.'s pension was

liable to sequestration for the costs & alimony.—*SANSOM v. SANSOM* (1879), 4 P. D. 69; 48 L. J. P. 25; 30 L. T. 642; 27 W. R. 692.

**1755. Damages—& costs.**—Co-resp. in a divorce action was ordered to pay damages & costs, & a writ of sequestration was issued by the Probate & Divorce Division to enforce such order. He was entitled to certain trust moneys which were being administered in the Chancery action:—*Held*: the Ct. of Ch. had jurisdiction on motion of the sequestrators in the Chancery action to order the trust moneys to be paid to the sequestrators.—*Re SLADE, SLADE v. HULME* (1881), 18 Ch. D. 653; 50 L. J. Ch. 729; 45 L. T. 276; 30 W. R. 28.

*Annotation:—Consd.* Craig v. Craig & Hamp, [1896] P. 171.

**1756.** —. —.]—*CRAIG v. CRAIG*, No. 1912, *post*.

**1757. Handing over child.**—*WORRAIL v. WORRAIL & JONES* (1895), 11 T. L. R. 573.

**1758. Maintenance.**—Sums of money ordered under Divorce & Matrimonial Causes Act Amendment Act, 1866 (c. 32), s. 1, to be paid by a husband for the maintenance of his divorced wife, are a purely personal allowance, & so long as the order subsists can neither be alienated nor released.—*WATKINS v. WATKINS*, [1896] P. 222; 65 L. J. P. 75; 74 L. T. 636; 44 W. R. 677; 12 T. L. R. 456, C. A.

*Annotations:—Appld.* Paquine v. Snary, [1909] 1 K. B. 688. *Mentd.* Bishop v. Bishop (1897), 66 L. J. P. 69; Kerr v. Kerr, [1897] 2 Q. B. 439; MacLurean v. MacLurean (1897), 77 L. T. 474; Victor v. Victor, [1912] 1 K. B. 247; Campbell v. Campbell, [1922] P. 187; Smith v. Smith, [1923] P. 191.

### D. Payment of Costs.

*See R. S. C., Ord. 43, r. 7.*

**1759. Against Member of Parliament.**—The proper process against a member [of Parliament for costs] is by sequestration (*per OUR.*).—*ANON.* (1773), Lofft, 156; 98 E. R. 585.

**1760. Order nisi in first instance.**—Order for sequestration made upon the return to a single *distringas* issued under a decree for payment of costs. Such an order is only an order *nisi* in the first instance.—*LOWTEN v. COLCHESTER CORPN.* (1817), 3 Mer. 543; 36 E. R. 209, L. C.

**1761. Evidence of non-payment—Sufficiency—Affidavit of attorney to parties.**—(1) The ct. will not allow an attachment to issue against a party for non-payment of costs pursuant to an order, unless there be affidavits by all the persons to whom those costs are payable that they have not been paid. The same strictness will not be required before issuing a sequestration, notice of motion having been given.

(2) The ct. granted a writ of sequestration for non-payment of costs, on an affidavit by the attorney that he had not received them, & that the parties to the suit had informed him that they also had not received them, notice of the motion having been given.—*BAYLY v. BAYLY* (1859), 29 L. J. P. M. & A. 146; 23 J. P. 280; *subsequent proceedings*, 4 Sw. & Tr. 222.

**1762. Bankruptcy of party—Cost proved for in bankruptcy—Acceptance of composition—Sequestration irregular.**—*ROE v. DAVIES*, [1878] W. N. 147.

**1763. Discretion of court.**—(1) Where pltf. failed to comply with an order directing him to pay certain costs to deft. & had no property except an army pension, a four-day order was

proceedings under the order pending their appeal both motions were refused.—*DUNDAS v. HAMILTON & MILTON ROAD CO.* (1872), 19 Gr. 455.—*CAN.*

c. Notice of motion for writ.]—On

moving for a writ of sequestration for a breach of an injunction, two clear days' notice of motion is sufficient.—*COOK v. CREDIT VALLEY RY. CO.* (1879), 8 P. R. 167.—*CAN.*

**PART III. SECT. 6, SUB-SECT. 2.—D.**  
d. Costs due to sequestrators—*Application must be in their names.*—When costs are payable to the sequestrators the application to the ct. must be

made for the payment of those costs, & in default leave was given to deft. to issue a writ of sequestration against the pension.

(2) Where such application is made in an action which is transferred for hearing only to a judge who does not sit in chambers, it is properly made to such judge in ct. otherwise in chambers.—*SNOW v. BOLTON* (1881), 17 Ch. D. 433; 50 L. J. Ch. 743; 44 L. T. 571; 29 W. R. 583.

**1764.** — When interfered with by higher court.]—*HULBERT & CROWE v. CATHCART*, No. 1720, *ante*.

**1765.** To whom application made—When to judge in court—When in chambers.]—*SNOW v. BOLTON*, No. 1763, *ante*.

**1766.** Application must be reasonable.]—*HULBERT & CROWE v. CATHCART*, No. 1720, *ante*.

**1767.** Particular property need not be indicated.]—*HULBERT & CROWE v. CATHCART*, No. 1720, *ante*.

In matrimonial causes.]—See Sub-sect. 2, C., *ante*.

#### *E. Payment of Money into Court.*

See R. S. C., Ord. 42, r. 4; Ord. 43, r. 6.

**1768.** Against trustee—Death before sequestration effected—Estate of trustee insolvent.]—A trustee having failed to comply with an order directing him to pay money into ct., a writ of sequestration was issued against his estate & effects & subsequently the sequestrators were authorised to sell certain chattels in their possession belonging to the trustee. Before any sale was effected the trustee died, & a creditor's action was brought in which the usual judgment was made & a receiver appointed. The trustee's estate was insolvent, & the receiver & the administrator of deceased trustee commenced an action against the sequestrators to restrain them from selling the chattels & moved for an injunction:—*Held*: on the authority of *Hyde v. Greenhill*, No. 1933, *post*, sequestration to compel the performance of a duty is not determined by the death of the person against whose estate & effects sequestration has been issued; & proceedings may therefore be continued against his legal personal representative.—*PRATT v. INMAN* (1889), 43 Ch. D. 175; 59 L. J. Ch. 274; 61 L. T. 760; 38 W. R. 200; 6 T. L. R. 91.

*Annotations*:—*Refd.* *Re Hastings, Ex p. Brown* (1892), 61 L. J. Q. B. 654. *Mentd.* *Re Long, Tarn v. Emmerson*, [1895] 1 Ch. 652; *Re Whitaker, Whitaker v. Palmer* (1900), 83 L. T. 342; *Re National United Investment Corp.*, [1901] 1 Ch. 950.

**1769.** Order for payment not served on defendant—Service evaded.]—Under R. S. C., Ord. 42, rr. 4 & 24, the ct. has power to direct a sequestration to issue for non-compliance with an order for payment of money into ct. notwithstanding that the order directing payment within a fixed time has not been served on deft. pursuant to R. S. C., Ord. 43, r. 6, if the ct. is satisfied that deft. knew of the order & is evading service of it.—*Re SUAREZ, SUAREZ v. SUAREZ*, [1918] 1 Ch. 176; 87 L. J. Ch. 173; 118 L. T. 279; 34 T. L. R. 127; 62 Sol. Jo. 158, C. A.

*Annotations*:—*Mentd.* *Re Jubilee Cotton Mills*, [1922] 1 Ch. 100; *Duff Development Co. v. Kelantan Government*, [1922] 1 Ch. 385.

in their names not that of the solr. though the money be actually due to the solr.—*CRONE v. O'DELL* (1824), 2 Mol. 355.—*IR.*

#### **PART III. SECT. 6, SUB-SECT. 3.—A.**

**1770 i.** On motion—Notice—Necessity for.]—Notice of motion for liberty to issue & execute a sequestration upon a

decree is not necessary.—*MONK v. LAWLOR* (1835), 1 Jo. Ex. Ir. 554.—*IR.*

**e.** On præcipe—Whether issuable.]—A writ of sequestration cannot properly be issued on præcipe. The order for the payment of the money must be served, & an affidavit of such service & of the non-payment filed.—*FISKEN v. WRIDE* (circa 1867), 2 Ch. Ch.

#### **SUB-SECT. 3.—ISSUE OF WRIT.**

##### *A. In General.*

See R. S. C., Ord. 42, r. 31; Ord. 43, rr. 6, 7; Debtors Act, 1869 (c. 62), s. 8.

**1770.** On motion—Notice of—Necessity for.]—Under a sequestration for non-payment of money, the sequestrators may, on a motion with notice, not a motion of course, be empowered to let real estate.—*NEALE v. BEALING* (1744), 3 Swan. 304, n.; 36 E. R. 874; *sub nom.* *NEAL v. —*, *Ridg. temp. H.* 193, L. C.

**1771.** — — — — —.]—*BAYLY v. BAYLY*, No. 1761, *ante*.

**1772.** — — — — — Service of affidavits with—Only if liberty of subject involved.]—*SELOUS v. CROYDON RURAL SANITARY AUTHORITY*, No. 1744, *ante*.

**1773.** — — — — — Necessity for.]—In this ct. a writ of sequestration issues without motion.—*CAUDWELL v. COLTON* (1851), 10 C. B. 575; 138 E. R. 228.

**1774.** Leave of court—Necessity for.]—Under R. S. C., 1875, Ord. 42, rr. 2, 20, & Ord. 47, a writ of sequestration against the estate & effects of a receiver or other person for disobedience of an order of the ct. may be issued without the leave of the ct.—*SPRUNT v. PUGH* (1878), 7 Ch. D. 567; 26 W. R. 473.

*Annotations*:—*Refd.* *Harvey v. Harvey* (1884), 26 Ch. D. 644; *Mander v. Falcke*, [1891] 3 Ch. 488; *Taylor, Plinston v. Plinston* (1911), 81 L. J. Ch. 34.

**1775.** — — — — —.]—*SELOUS v. CROYDON RURAL SANITARY AUTHORITY*, No. 1744, *ante*.

**1776.** — — — — — Order for payment of costs.]—(1) Where an order has been made directing a party to pay costs without limiting any time for payment, & the costs have been taxed, an immediate sequestration to enforce payment of them can be issued by leave of a judge, & it is not necessary that there should be any previous four-day order; (2) but an order directing an attachment or sequestration on a future uncertain event, *e.g.* on default of payment within a specified time, is wrong in form.—*Re LUMLEY, Ex p. CATHCART*, [1894] 2 Ch. 271; 63 L. J. Ch. 435; 42 W. R. 401; 38 Sol. Jo. 398; 7 R. 179; *sub nom.* *Re LUMLEY, HOOD BARRS v. CATHCART*, 70 L. T. 780, C. A. *Annotation*:—*As to* (1) *Foidl. Re Deakin, Ex p. Cathcart*, [1900] 2 Q. B. 478.

**1777.** — — — — — Where application made—When in chambers—When in court.]—*SNOW v. BOLTON*, No. 1763, *ante*.

**1778.** Time for—Immediate—Or after time limit—Payment of costs.]—*Re LUMLEY, Ex p. CATHCART*, No. 1776, *ante*.

**1779.** — — — — —.]—In the case of a writ of sequestration issued by leave of a judge to enforce payment of costs under R. S. C., Ord. 43, r. 7, the provisions of Ord. 41, r. 5, & Ord. 42, r. 6, are inapplicable. Therefore in such a case it is not necessary that the order for payment of costs should limit a time for payment, or should bear the indorsement mentioned in Ord. 41, r. 5, nor is personal service of it essential.—*Re DEAKIN, Ex p. CATHCART*, [1900] 2 Q. B. 478; 69 L. J. Q. B. 797; 83 L. T. 39, C. A.

**1780.** Prior issue of writ of attachment—Necessity for—Defendant abroad.]—Where contributory under winding up was in France, the ct. ordered

212.—*CAN.*

**f.** On sheriff's return to committal warrant—Supported by affidavit.]—Upon the sheriff's return of *non est* to a warrant for the committal of a party, & on a sufficient affidavit a sequestration will issue at once.—*PRENTISS v. BRENNAN* (1850), 1 Gr. 497.—*CAN.*



**Sect. 6.—Writ of sequestration: Sub-sect. 3, A., B., C. & D.; sub-sect. 4, A. & B.]**

that a writ of sequestration might issue without a prior writ of attachment.—*Re HALL, EAST OF ENGLAND BANK* (1864), 2 Drew. & Sm. 284; 62 E. R. 629; *sub nom. Re EAST OF ENGLAND BANK*, 11 L. T. 410; 10 Jur. N. S. 1093; 13 W. R. 128.

**Annotation:—***Folld. Miller v. Miller* (1870), L. R. 2 P. & D. 54.

**1780a.** ———.]—The ct. has power to issue a sequestration, although no attachment had previously been issued. The pension of a retired officer in the Indian navy received solely in respect of past services, held to be liable to sequestration.—*DENT v. DENT* (1867), L. R. 1 P. & D. 366; 36 L. J. P. & M. 61; 15 L. T. 635; 15 W. R. 591.

**Annotations:—***Distd. Lucas v. Harris* (1886), 18 Q. B. D. 127. *Refd. Willcock v. Terrell* (1878), 3 Ex. D. 323.

**1781.** ———.]—In a suit for restitution of conjugal rights against a wife, there being no defence, the usual order was made that she should return to her husband's house within a certain number of days, & certify to the ct. that she had done so, & on the ct. being satisfied that she had a considerable separate estate, it further ordered that she pay the costs of the proceedings. Resp. was abroad & did not obey the order of the ct. to return to her husband at all, or to pay the costs until after a long delay. The ct. ordered a writ of sequestration to issue against her estate, in the first instance, without attachment.—*MILLER v. MILLER* (1870), L. R. 2 P. & D. 54; 39 L. J. P. & M. 38; 22 L. T. 418; 18 W. R. 585.

**Annotations:—***Folld. Allen v. Allen* (1885), 10 P. D. 187. *Consd. Hyde v. Hyde* (1888), 13 P. D. 166. *Apld. R. v. Wigand, Re Wigand* (1913), 82 L. J. K. B. 735.

**1782.** ——— **Personal representative.]—***SYKES v. DYSON*, No. 1801, *post*.

**1783.** ———.]—*ALLEN v. ALLEN*, No. 1807, *post*.

**1784.** ——— **Return to writ of attachment—Made before return day.]—**(1) A sequestration will not issue on a return to a writ of attachment which is made before the return day mentioned in the writ.

(2) A writ of attachment against a person residing within twenty miles of London is void *ab initio*, is made returnable on a day certain instead of immediately.—*Re BROWN* (1868), 16 W. R. 962.

**1785. Issue of fresh sequestration—For unsatisfied portion of debt.]—***YARROTH v. SEYS* (1720), Bunb. 62; 145 E. R. 595.

**1786. Irregular writ—Waiver of irregularity—Defendant's instructions to sequestrators.]—***CONST v. BARR*, No. 1792, *post*.

**1787. Registration of writ—Court cannot vacate registration — Land Charges Act, 1888 (c. 51).]**—A husband being in default for non-payment of alimony & costs writs of sequestration were issued to enforce payment, & were duly registered under the above Act. Before the sequestrators could sell the property in respect of which the writs had been issued, the husband assigned his interest therein, & the assignee having satisfied the claims, by paying an agreed sum into ct., petitioner with the concurrence of all parties applied to discharge the sequestrators & to vacate the registration of the writs:—*Held*: there was no power under the Act to order the registration of the writs to be vacated.—*COOK v. COOK* (1890), 15 P. D. 116; 59 L. J. P. 69; 62 L. T. 667; 38 W. R. 656.

———.]—*See, further, Sect. 2, sub-sect. 7, ante.*

**B. Against Whom Writ may Issue.**

*See R. S. C., Ord. 42, r. 31; Ord. 43, r. 6; Ord. 71, r. 1.*

**1788. Person in custody—On attachment.]—**

Deft. committed to the Fleet for not performing a decree & sequestration & pltf. put in possession of the lands, shall not be discharged till the lands be assured to pltf. or money & damages satisfied.—*PERRYMAN v. DINHAM* (1611), 1 Rep. Ch. 152; 21 E. R. 535.

**1789.** ———.]—A receiver having been appointed, with the usual directions for the tenants to attorn; & a tenant having been served with a writ of execution of the order, & arrested upon an attachment & turned over to the Fleet, application was several times made for a sequestration, but the ct. refused it as a double execution, he being no party to the suit.—*A.-G. v. TANCRED* (prior to 1798), 2 Dick. 798; 21 E. R. 481.

**1790.** ——— **Only after return of attachment.]—**In Chancery, not only the body of deft., but also his lands & goods, are liable to a sequestration; but no sequestration lies till the time for the return of the attachment is out, on which the body was taken.—*MARTIN v. KERRIDGE* (1733), 3 P. Wms. 240; 24 E. R. 1045, L. C.

**1791.** ———.]—On hearing the cause, a commission of partition was directed to divide the estate in moieties between pltf. & deft. with directions for parties to produce deeds, etc., before the comrs. Deft. being in contempt for not producing the deeds, etc., he was taken on an attachment, being served with a writ of execution of the decree, & turned over to the Fleet. A sequestration was ordered to issue against him.—*TRIGG v. TRIGG* (1759), 1 Sim. & St. 274; 1 Dick. 325; 21 E. R. 291.

**1792.** ——— **Not brought up by habeas corpus.]—**(1) *Qu.*: whether it is regular to issue a sequestration against the property of a party who is in the Fleet under process from the Common Pleas, & is detained also upon an attachment from the Ct. of Ch., but who has not been brought up by *habeas corpus* to the bar of the ct. in order to be turned over to the custody of the warden.

(2) The irregularity of a sequestration is waived, if the party, against whom it is issued, gives the sequestrators directions how to deal with his property.—*CONST v. BARR* (1826), 2 Russ. 161; 38 E. R. 296, L. C.

**Annotation:—***Mentd. Re Suisse* (1842), 6 Jur. 654.

**1793. Defendant in Ireland—Only after ineffective sequestration in this country.]—**The Ct. of Ch. in England may grant a sequestration against deft. in Ireland, but it must be after a sequestration taken out here & *nulla bona* returned.—*FRYER v. BERNARD* (1724), 2 P. Wms. 261; 24 E. R. 722; *sub nom. FRYAR v. BARNARD*, 2 Eq. Cas. Abr. 711, L. C.

**Annotation:—***Consd. Portarlington v. Soulby* (1834), 3 My. & K. 104.

**1794.** ———.]—*FRYAR v. VERNON* (1725), Cas. temp. King, 5; 9 Mod. Rep. 124; 2 Eq. Cas. Abr. 711; 25 E. R. 191.

**1795. Member of Parliament.]—***CLIFFORD'S (LORD) CASE*, No. 1725, *ante*.

**1796.** ———.]—If there be a sequestration *nisi*, for want of an answer, against a member of Parliament, & he puts in an answer before the order is made absolute, & exceptions are taken to the answer, the ct. will enlarge the time for showing cause till it appear whether the answer is sufficient.—*BUTLER v. RASHFIELD* (1751), 3 Atk. 740; 26 E. R. 1224, L. C.

**1797. Peer—Infant.]—**Writ of sequestration against an infant lord for not appearing.—*ANON.* (1684), 2 Cas. in Ch. 163; 22 E. R. 895.

**1798.** ———.]—Where a peer of the realm

appeared, & did not answer, formerly an attachment lay; but now by order of Parliament, no process lies, but a sequestration.—ANON. (1687), Comb. 62; 90 E. R. 344.

1799. —.]—CLIFFORD'S (LORD) CASE, No. 1725, *ante*.

1800. —.]—SMALLBROOKE *v.* DONNEGAL (LORD) (1795), 3 Anst. 647; 145 E. R. 994.

1801. **Personal representative.**—Writ of sequestration issued against the property of a personal representative, who was in default for non-compliance with an order for payment of money, without attachment of his person.—SYKES *v.* DYSON (1870), L. R. 9 Eq. 228; 39 L. J. Ch. 288; 21 L. T. 696.

1802. **Lunatic—Not so found—Order made before becoming lunatic.**—ROBINSON *v.* GALLAND (1889), 5 T. L. R. 504.

**Companies.**—See Part II., Sect. 6, sub-sect. 5; Sub-sect. 2, B., *ante*.

**Corporations.**—See CORPORATIONS, Vol. XIII., pp. 426, 427, Nos. 1499–1506; Part II., Sect. 6, sub-sect. 6; Sub-sect. 2, B., *ante*.

**Foreign sovereigns & ambassadors.**—See Part II., Sect. 6, sub-sect. 10, *ante*.

#### C. The Order or Judgment.

See R. S. C., Ord. 41, r. 5; Ord. 43, r. 6.

1803. **Service of order—Sufficiency of—Incumbent absent from parish—Service at vicarage.**—Leaving a copy of a monition in a room of the vicarage house is sufficient service whereon to found a sequestration, although the incumbent do not reside there, but is absent from the parish, & his place of abode unknown, the officiating minister being the sequestrator, & having the original monition in his possession.—GREEN *v.* COBDEN (1836), 2 Bing. N. C. 627; 2 Hodg. 6; 3 Scott, 80; 5 L. J. C. P. 209; 132 E. R. 242.

1804. ——— **Defendant in Scotland—Service at house in England.**—(1) Service of process at the house of deft. in England, who was at the time residing in Scotland:—*Held*: good service.

(2) Personal service of the order *nisi* for a sequestration on deft. in Scotland, is good service, on which to found the order for a sequestration.—DAVIDSON *v.* HASTINGS (MARCHIONESS) (1838), 2 Keen, 509; 7 L. J. Ch. 215; 2 Jur. 756; 48 E. R. 723.

*Annotations*:—As to (1) *Consd.* Carron Iron Co. *v.* Maclaren (1855), 5 H. L. Cas. 416. *Refd.* Blackstone *v.* Laurie (1845), 2 Holt, Eq. 23.

1805. ——— **Personal service—Generally necessary.**—HYDE *v.* HYDE, No. 1855, *post*.

1806. ——— **When dispensed with—Defendant abroad.**—Costs & alimony, decreed in a matrimonial suit, not being paid by the husband, who had gone to reside beyond sea, the ct. pronounced him in contempt, & decreed the same to be signified, in order to sequestration, under 2 & 3 Will. 4, c. 4, without personal service of the monition.—MORSE *v.* MORSE (1846), 5 Notes of Cases, 49.

1807. ——— **Defendant evading service.**—Resp. in a suit for restitution of conjugal rights was evading service of the decree, & an order as to custody of children. The ct., though she was not abroad, ordered a writ of sequestration to issue, without a previous writ of attachment or personal service of the decree or order.—ALLEN *v.* ALLEN (1885), 10 P. D. 187; 54 L. J. P. 77; 33 W. R. 826.

*Annotations*:—*Consd.* Hyde *v.* Hyde (1888), 13 P. D. 166.

#### PART III. SECT. 6, SUB-SECT. 4.—B.

**g. Action for ejectment—Defence by sequestrators.**—Reference granted to

inquire whether it would be for the benefit of all parties, that sequestrators make defence in the name of the proper person, to an ejectment

*Appl.* *Re* Wigand, *R. v.* Wigand (1913), 82 L. J. K. B. 735. *Refd.* *Re* Suarez, *Suarez v.* Suarez, [1918] 1 Ch. 176.

1808. ———.]—HYDE *v.* HYDE, No. 1855, *post*.

1809. ———.]—Where a person, against whom an order has been made in the K. B. Div. ordering him to do a particular act, disobeyed the order with full knowledge of its having been made & went out of the jurisdiction before it had been formally served upon him, the ct. on an application for the issue of a writ of sequestration to enforce the order, dispensed with personal service of the order disobeyed & directed the writ to issue.—*R. v.* WIGAND, [1913] 2 K. B. 419; 109 L. T. 111; *sub nom.* *Re* WIGAND, 82 L. J. K. B. 735; 29 T. L.

509, D. C.

*Annotation*:—*Refd.* *Re* Suarez, *Suarez v.* Suarez, [1918] 1 Ch. 176.

1810. ——— **Order for payment of costs.**—*Re* DEAKIN, *Ex p.* CATHCART, No. 1779, *ante*.

1811. **Indorsement of order—R. S. C., Ord. 41, r. 5—When necessary.**—SELOUS *v.* CROYDON RURAL SANITARY AUTHORITY, No. 1744, *ante*.

1812. ———.]—*Re* DEAKIN, *Ex p.* CATHCART, No. 1779, *ante*.

#### D. Order Nisi for Sequestration.

1813. **Service of order nisi—Sufficiency—On clerk in court.**—SMALLBROOKE *v.* DONNEGAL (LORD) (1795), 3 Anst. 647; 145 E. R. 994.

1814. ——— **Personal service impossible.**—Service of an order of sequestration *nisi* upon the clerk in ct. good, the pltf. having tried in vain to serve it personally.—LOTHIAN (MARQUIS) *v.* GARFORTH (1799), 5 Ves. 113; 31 E. R. 499.

1815. ——— **Personal service—Defendant in Scotland.**—DAVIDSON *v.* HASTINGS (MARCHIONESS), No. 1804, *ante*.

1816. **Service of order absolute—Personal service necessary.**—SMALLBROOKE *v.* DONNEGAL (LORD) (1795), 3 Anst. 647; 145 E. R. 994.

#### SUB-SECT. 4.—EXECUTION OF WRIT.

##### A. In General.

1817. **For what sum plaintiff liable—Amount received from sequestrators—Larger sum realised by sequestrators.**—DACRES (LADY) *v.* CHUTE, No. 1866, *post*.

1818. **Proceedings in aid—Attachment.**—The ct. refused to enforce a writ of sequestration by an attachment against the tenants who held under the person whose estate had been sequestered, & who refused to give up possession, but ordered a writ of assistance to the sheriff to be issued.—BAYLEY *v.* BAYLEY (1859), 4 Sw. & Tr. 222; Sea. & Sm. 74; 29 L. J. P. M. & A. 72; 164 E. R. 1502; *previous proceedings*, 29 L. J. P. M. & A. 146.

1819. ——— **Writ of assistance.**—BAYLEY *v.* BAYLEY, No. 1818, *ante*.

##### B. The Sequestrators.

1820. **Power to break open—Boxes.**—PELHAM (LORD) *v.* NEWCASTLE (DUCHESS), No. 1849, *post*.

1821. ——— **Doors.**—Comrs. under a writ of sequestration have authority to break open doors

brought against the lands under sequestration. — CRONE *v.* O'DELL (1827), 2 Mol. 389.—IR.



**Sect. 6.—Writ of sequestration: Sub-sect. 4, B. & C.]**

in discharge of their office, by comparison with the proceeding under a commission of rebellion.—**LOWTEN v. COLCHESTER CORPN.** (1817), 2 Mer. 395; 35 E. R. 991; *subsequent proceedings*, 3 Mer. 543.

**Annotation:—Apld.** *Harvey v. Harvey* (1884), 26 Ch. D. 644.

**1822. — Sealed documents—Unless restrained by court.]**—The agents of a debtor against whom a writ of sequestration had been issued were ordered to hand over letters & documents of the debtor in their hands to the sequestrators, & to deposit other documents in ct. They had handed over most of the documents in sealed packets:—**Held:** the sequestrators were entitled to break the seals & to examine all the documents, with the exception of such documents as the ct. should ascertain to be of a confidential character, for the purpose of ascertaining whether there were further assets of the debtor which it was their duty to collect.—*Re SUAREZ, SUAREZ v. SUAREZ* (1918), 88 L. J. Ch. 10; 119 L. T. 667; 34 T. L. R. 586; 62 Sol. Jo. 791.

**1823. Disturbance of possession—Dispossession—Restored by injunction.]**—(1) Sequestrators forcibly dispossessed, restored by injunction. (2) No examination *pro interesse suo*, before the sequestrators have made a return.—**PELHAM (LORD) v. NEWCASTLE (DUCHESS)** (1713), 3 Swan. 289, n.; 36 E. R. 867.

**Annotation:—As to (2) Refd.** *Goldsmith v. Goldsmith* (1846), 5 Hare, 123.

**1824. — Contempt.]—ANGEL v. SMITH**, No. 85, *ante*.

**1825. — Not without leave of court.]**—The possession of a receiver or sequestrator is not to be disturbed without leave of the ct.—**BROOKS v. GREATHED** (1820), 1 Jac. & W. 176; 37 E. R. 342.

**Annotations:—Folld.** *Musadee M. C. Sherazee v. Meerza Shoostry* (1854), 8 Moo. P. C. C. 90. **Refd.** *Empringham v. Short* (1844), 3 Hare, 461.

**1826. — —.]**—A sequestrator in possession is not to be disturbed by a claimant without leave of the ct. The usual mode is to apply for permission to bring an action of ejectment or to examine *pro interesse suo*.—**MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALLY MAHOMED SHOOSTRY** (1854), 8 Moo. P. C. C. 90; 6 Moo. Ind. App. 27; 14 E. R. 35.

**1827. Proceedings against — Detinue — Goods taken by sheriff.]**—Detinue will lie for goods taken by a sheriff under a sequestration from the Ct. of Ch.—**BROGRAVE v. WATTS** (1599), Cro. Eliz. 651; 78 E. R. 890.

**1828. — For abuse of power.]**—Proceedings against a sequestrator for abuse of his power.—**PELHAM (LORD) v. HARLEY (LORD)** (1713), 3 Swan. 291, n.; 36 E. R. 868, L. C.

—**Remedies of third parties.]—See Sub-sect. 6, B. (b), post.**

### C. What Property may be Taken.

**1829. Real estate — Freeholds.]**—**WHITEHEAD v. HARRISON** (1730), 1 Barn. K. B. 431; 2 Eq. Cas. Abr. 712; 94 E. R. 290.

**1830. — Copyholds.]**—Though it was true sequestrations ran upon copyhold; yet it was to be doubted whether it could be revived in the hands of the heir to such lands (*per CUR.*).—

**WHITEHEAD v. HARRISON** (1730), 1 Barn. K. B. 431; 2 Eq. Cas. Abr. 712; 94 E. R. 290.

**1831. — —.]—CAERMARTHEN (MARQUESS) v. HAWSON**, No. 1930, *post*.

**1832. — Rents & profits thereout.]—POPE v. WARD** (1785), 1 Cox, Eq. Cas. 194; 29 E. R. 1125.

**Annotation:—Refd.** *Johnson v. Chippindall* (1828), 2 Sim. 55.

**1833. Annuity.]**—Sequestration discharged as to an annuity after the death of the offender.—**PROCTOR v. REYNEL** (1664), 1 Rep. Ch. 247; 21 E. R. 563.

**1834. — —.]**—(1) Deft., against whom a sequestration had issued, was entitled to a rentcharge issuing out of the estate of A., with power of distress; the rentcharge being in arrear was claimed both by the sequestrators & deft. A. offered to pay the arrears to the sequestrators on being indemnified; but no protection having been afforded her, she paid over the arrears to deft., who threatened to distrain:—**Held:** A. was entitled to protection, & an application ought to have been made to the ct. for an order for her to pay; &, under the circumstances, she was not liable to repay the amount to the sequestrators.

(2) Choses in action are subject to the process of sequestration. In a clear & simple case a sequestration may be made effective in respect of choses in action by an order only, or a voluntary payment may be protected; in other cases it may be necessary to resort to an action or suit under the direction of the ct.—**WILSON v. METCALFE** (1839), 1 Beav. 263; 8 L. J. Ch. 331; 3 Jur. 601; 48 E. R. 941.

**Annotations:—As to (1) Refd.** *Empringham v. Short* (1844), 13 L. J. Ch. 300; *Knight v. Knight* (1856), 25 L. J. Ch. 848; *Crispin v. Cumano* (1869), L. R. 1 P. & D. 622; *Craig v. Craig*, [1896] P. 171. **As to (2) Apld.** *Miller v. Huddleston* (1882), 22 Ch. D. 233. **Refd.** *Re Hoare, Ex p. Nelson* (1880), 14 Ch. D. 41; *Re Slade, Slade v. Hulme* (1881), 18 Ch. D. 653. **Generally, Refd.** *Tatham v. Parker* (1853), 22 L. J. Ch. 903.

**1835. — —.]—CLINTON v. CLINTON**, No. 1753, *ante*.

**1836. — Subject to defeasance.]**—Testator gave an annuity to pltf. for life, or until he should assign or encumber his interest under the will, or any part thereof, or until he should do or suffer some act or thing, or something should occur, whereby his interest under the will, or any part thereof, should, or might be, or but for that stipulation would, become vested in some other person, or whereby he would cease to be beneficially in receipt of the annuity; testator also gave two other specific gifts to pltf., to which the same clause of forfeiture was by reference appended, & a share of the ultimate residue of his estate to which the forfeiture clause did not apply. In Dec. 1874, a writ of sequestration was issued against pltf. Upon this the trustees of the will were advised that the forfeiture took effect, & they ceased to pay the proceeds of the annuity & the other gifts to pltf. In Mar. 1875, pltf. commenced this suit against them. In May, 1875, pltf.'s interest in the residue of testator's estate was sold under an order of the ct. that issued the writ of sequestration. A special case was stated for the opinion of the ct. as to whether pltf.'s interest under the will had not ceased under the forfeiture clause:—**Held:** (1) pltf. was no longer entitled to receive the annuity, or the proceeds of the other gifts, which ceased to be payable from the date of the sale of the residue; & all further proceedings in the suit must be

### PART III. SECT. 6, SUB-SECT. 4.—C.

**h. Real estate.]**—Lands cannot be sold under a writ of sequestration.—**NELSON v. NELSON** (1874), 6 P. R. 194.—**CAN.**

stayed, & pltf. must pay the costs of the suit & the special case; (2) pltf. had no ground of action against the trustees, & they were perfectly right in refusing to pay the annuity & proceeds of the other gifts after the issue of the writ of sequestration.—*DIXON v. ROWE* (1876), 35 L. T. 548.

**1837. Personal estate.]—***POPE v. WARD* (1785), 1 Cox, Eq. Cas. 194; 29 E. R. 1125.

*Annotation:—***Refd.** *Johnson v. Chippindall* (1828), 2 Sim. 55.

**1838. Choses in action.]—***DUNDAS v. DUTENS*, No. 607, *ante*.

**1839. ———.]—**Bill stating a sequestration for want of an answer prayed a discovery & account of all money or other property of deft. in the original cause in the hands of defts., who were bankers, at the time of service of the sequestration, or since. Upon demurrer as to the money & answer as to the rest of the bill the Lord Chancellor determined against the demurrer upon the form, considering it overruled by the answer; & would not in that stage of the cause decide the two points, whether a sequestration on mesne process can be executed farther than to pay the expenses; & whether a chose in action is liable to sequestration.—*SIMMONDS v. KINNAIRD* (LORD) (1799), 4 Ves. 735; 31 E. R. 380, L. C.

*Annotations:—***Folld.** *Wilson v. Metcalfe* (1839), 8 L. J. Ch. 330. **Refd.** *Walker v. Bell* (1816), 2 Madd. 21; *Franklyn v. Colhoun* (1819), 3 Swan. 276; *Johnson v. Chippindall* (1828), 2 Sim. 55; *Goldsmith v. Goldsmith* (1846), 5 Hare, 123; *Re Slade, Slade v. Hulme* (1881), 18 Ch. D. 653; *Craig v. Craig*, [1896] P. 171.

**1840. ———.]—***WILSON v. METCALFE*, No. 1834, *ante*.

**1841. ——— Salary or pension, etc.—Salary of Royal Equerry.]—**A salary to an equerry to one of the Royal Family is not a subject of sequestration.—*FENTON v. LOWTHER* (1787), 1 Cox, Eq. Cas. 315; 29 E. R. 1182, L. C.

*Annotation:—***Refd.** *Hyde v. Hyde* (1888), 13 P. D. 166.

**1842. ———.]—***SNOW v. BOLTON*, No. 1763, *ante*.

———.]—*See, further*, BANKRUPTCY, Vol. V., pp. 927–930, Nos. 7594–7615; CHOSSES IN ACTION, Vol. VIII., pp. 436–441, Nos. 135–176.

**1843. Growing crops.]—***DICKINSON v. SMITH*, No. 1905, *post*.

**1844. Money to credit of defendant—In court in another cause—Reversionary interest in stock.]—**A sequestration having issued against deft. who was entitled to a reversionary interest in stock standing in the name of the Accountant-General in another cause, the ct. gave the sequestrators liberty to sell that interest.—*COWPER v. TAYLOR* (1848), 16 Sim. 314; 60 E. R. 895; *subsequent proceedings, sub nom.* *FOLLETT v. JEFFERYES* (1850), 1 Sim. N. S. 3.

*Annotation:—***Mentd.** *Taylor v. Taylor* (1849), 1 H. & Tw. 437.

**1845. ———.]—**H., being an accounting deft. in one of two suits in different branches of the ct. & a party to the other, & entitled to a fund under a decree in that suit, was ordered to pay a sum of money as such deft.; but failing to do so, sequestration issued, & there being no return, the sequestrators petitioned for payment to them of the fund ordered to be paid to H. into the other suit, or a transfer of such fund into the other suit:—**Held:** there being no dispute as to H.'s

title, a petition might be presented in both suits to the Lord Chancellor asking for a transfer, this ct. granting an injunction to restrain H. receiving the fund, with liberty to apply to discharge the injunction in case the superior ct. should refuse the application.—*KNIGHT v. KNIGHT* (1856), 25 L. J. Ch. 848; 4 W. R. 771.

**1846. ——— Deposit on appeal.]—**Where the deposit on an appeal had been ordered to be returned to applt., & before it was paid to him sequestration was issued against him for non-payment of costs previously due, the deposit was ordered to be paid to the sequestrators instead of applt.—*CONN v. GARLAND* (1873), 9 Ch. App. 101; 22 W. R. 175, L. C. & L. J.

**1847. ——— Dividend—Bank of England stock.]—**In a testamentary suit an order was made on deft. both as exor. of the original deft. & as being himself a party, to pay the taxed costs. The costs not having been paid within the time appointed, & deft. being abroad, a writ of sequestration issued against his real & personal estate. A large amount of stock was standing in the books of the Bank of England to the credit of deft., as exor. of the original deft. in the suit, & a dividend was due thereon:—**Held:** the Ct. of Probate had no authority to make an order upon the Bank of England, without their assent, to pay over such dividends to the sequestrators.—*CRISPIN v. CUMANO* (1869), L. R. 1 P. & D. 622; 38 L. J. P. & M. 28; 20 L. T. 150; 17 W. R. 535.

*Annotations:—***Refd.** *Clarke v. Clarke* (1873), L. R. 3 P. & D. 57; *Re Slade, Slade v. Hulme*, (1881), 18 Ch. D. 653; *Craig v. Craig*, [1896] P. 171.

**1848. ——— Fund in court.]—**A dividend of a fund in ct. the income of which had been ordered to be paid to the separate use of a married woman, who was entitled to the same for life for her separate use without power of anticipation, fell due four days before the issue of a writ of sequestration for costs ordered by the Ct. for Matrimonial Causes to be paid by the married woman. Notice of the issue of the writ having been given at the Paymaster-General's office, payment of the dividend had been refused. Upon petition:—**Held:** the sequestrators were entitled to take so much as necessary of the dividend in satisfaction of their demand.—*CLAYDON v. FINCH* (1873), L. R. 15 Eq. 266; 42 L. J. Ch. 416; 28 L. T. 101.

*Annotations:—***Consd.** *Re Slade, Slade v. Hulme* (1881), 18 Ch. D. 653; *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559; *Pillers & Pershouse v. Edwards* (1894), 71 L. T. 788. **Refd.** *Re Glanvill, Ellis v. Johnson* (1886), 31 Ch. D. 532; *Craig v. Craig*, [1896] P. 171.

**1849. ——— Balance at bank.]—**(1) A sum of money in the hands of the banker of a party against whom a sequestration had issued, sequestered.

(2) Power of sequestrators to open boxes, etc.—*PELHAM (LORD) v. NEWCASTLE (DUCHESS)* (1713), 3 Swan. 290, n.; 36 E. R. 868.

*Annotation:—***As to** (1) **Refd.** *Johnson v. Chippindall* (1827), 2 Sim. 55.

**1850. ———.]—**An exor. had deposited at his bankers money, being part of testator's estate, & an order had been made that the exor. should pay the money into ct., & sequestration had issued against him:—**Held:** an adverse order to pay the money in could not be made against the bankers, not being parties to the suit,

**1838 i. Choses in action.]—**A chose in action can be reached by process of sequestration.—*IRVING v. BOYD* (1868), 15 Gr. 157.—**CAN.**

**1838 ii. ———.]—***Semble:* under a writ of sequestration a debtor's choses in action can be reached.—*LONDON &*

*CANADIAN LOAN & AGENCY CO. v. MERRITT* (1882), 32 C. P. 375.—**CAN.**

**1838 iii. ———.]—**Dividends of bank stock, being choses in action, cannot be sequestered.—*M'CARTHY v. GOULD* (1810), 1 Ball & B. 387.—**IR.**

**k. Interest of surety—In debt for which he is surety.]—**The right or interest of a surety in regard to the money for the payment of which he is surety, cannot be reached by sequestration.—*IRVING v. BOYD* (1868), 15 Gr. 157.—**CAN.**



**Sect. 6.—Writ of sequestration: Sub-sect. 4, C. & D. (a) & (b) i. & ii.]**

but on their submission to the jurisdiction a directory order was made.—**MANTON v. MANTON** (1870), 40 L. J. Ch. 93.

*Annotation*:—**Refd.** **Craig v. Craig**, [1896] P. 171.

**1851.** ———.—Where a sequestration had been issued against A.:—**Held**: A.'s balance at his bankers might be attached under it, & the ct. had jurisdiction to order the bankers to verify & pay the balance to the sequestration account.—**MILLER v. HUDDLESTONE** (1882), 22 Ch. D. 233; 52 L. J. Ch. 208; 47 L. T. 570; 31 W. R. 138.

*Annotation*:—**Refd.** **Craig v. Craig**, [1896] P. 171

**1852.** ———.—**When order of court made.]**—

On failure of P. to pay into ct., in accordance with an order in an administration action, the sum of £136, a writ of sequestration was issued against his estate. On the same day as the writ was issued the sequestrators gave notice thereof to the manager of the C. branch of the L. & C. Banking Co., where P. had an account, the balance to his credit at that time being £204. The manager having refused to pay over to the sequestrators the balance to the credit of P. without an order of ct., a summons was at once taken out with the view of obtaining an order & served on the banking co. Since the notice of sequestration had been given to the manager of the C. branch the cheques of P. had been honoured, so that a balance of £137 only remained to the credit of P.:—**Held**: the banking co. could not be ordered to pay the sum of £204 into ct., but only the balance of £137.—**Re POLLARD, POLLARD v. POLLARD** (1902), 87 L. T. 61; 51 W. R. 111; 18 T. L. R. 717; 46 Sol. Jo. 649.

*Annotation*:—**Apld.** **Giles v. Kruyer**, [1921] 3 K. B. 23.

**1853. Property of public authority—Although held upon specific trusts.]**—**SPOKES v. BANBURY BOARD OF HEALTH**, No. 1742, *ante*.

**1854. Income of trust fund—Payable to defendant.]**—**Re SLADE, SLADE v. HULME**, No. 1755, *ante*.

**1855.** ———.—**Married woman—Fund subject to restraint on anticipation.]**—A husband having obtained a decree *nisi* for divorce, an order was made for the wife to give up his children to him. This order was not served upon her personally, but it appeared that she knew of the order & kept out of the way to avoid service. The children were not delivered up, & the father could not discover where they were. A further order was thereupon made for a sequestration to issue against the estate of the wife, & directing her mother, sister, & brother-in-law, who were shown to be in communication with her, to attend to be examined as to their knowledge of the whereabouts of the wife & children. The wife was entitled under her marriage settlement to an income for her separate use with a restraint on anticipation:—**Held**: (1) it was no objection to the form of the writ of sequestration that it was in general terms without expressly defining the property of the wife which was subject to sequestration; (2) the sequestration could not during the coverture be enforced against future income, as to which the wife was restrained from anticipation, but that it applied to arrears which were due when the order for sequestration was made; (3) the sequestration was properly issued without personal service of the previous order.

As a general rule before a sequestration could be issued for disobedience to an order, the order must have been personally served; but if the person had been present in ct. & had heard the

order made, or, if it was shown that he had been evading personal service, then it was not necessary to prove personal service (**COTTON, L.J.**).—**HYDE v. HYDE** (1888), 13 P. D. 166; 57 L. J. P. 89; 59 L. T. 529; 36 W. R. 708; 4 T. L. R. 586, C. A.

*Annotations*:—As to (2) **Consd.** **Hood Barrs v. Cathcart**, [1894] 2 Q. B. 559; **Re Lumley, Ex p. Hood Barrs**, [1894] 3 Ch. 135; **Pillors & Pershouse v. Edwards** (1894), 71 L. T. 788. **Refd.** **Cox v. Bennett**, [1891] 1 Ch. 617; **Bolitho v. Gidley**, [1905] A. C. 98. As to (3) **Apld.** **Kistler v. Tettmar**, [1905] 1 K. B. 39. **Consd.** **Re Tuck, Murch v. Loosemore**, [1906] 1 Ch. 692. **Refd.** **Re Suarez, Suarez v. Suarez**, [1918] 1 Ch. 176. **Generally, Refd.** **Michell v. Michell**, [1891] P. 208; **Favard v. Favard** (1896), 75 L. T. 664.

**1856.** ———.—Where a married woman has separate estate restrained from anticipation, Married Women's Property Act, 1882 (c. 75), does not enable a judgment to be enforced against arrears of income to which the restraint applies, accruing due after the date of the judgment, either by the appointment of a receiver, by sequestration, by a charging order, or by any kind of process.—**HOOD BARRS v. CATHCART**, [1894] 2 Q. B. 559; 63 L. J. Q. B. 602, 798; 70 L. T. 862, 865; 42 W. R. 628; 10 T. L. R. 541; 38 Sol. Jo. 562; 9 R. 802, C. A.

*Annotations*:—**Expld.** **Pillors & Pershouse v. Edwards** (1894), 71 L. T. 788. **Foldd.** **Loftus v. Heriot**, [1895] 2 Q. B. 212. **Consd.** **Hood Barrs v. Heriot**, [1896] A. C. 174. **Expld. & Apprd.** **Whiteley v. Edwards**, [1896] 2 Q. B. 48. **Refd.** **Re Sampson, Sampson v. Sampson**, [1896] 1 Ch. 630. **Mentd.** **Bolitho v. Gidley**, [1905] A. C. 98.

**1857.** ———.—An order having been made for the payment of costs by a married woman who was tenant for life of real estate, for her separate use without power of anticipation:—**Held**: under a sequestration to enforce payment of the costs, the sequestrators could not take rents which had accrued due after the date of the order for payment, even though the writ of sequestration was issued after those rents had become due.—**Re LUMLEY, Ex p. HOOD BARRS**, [1894] 3 Ch. 135; 10 T. L. R. 544; *sub nom.* **Re LUMLEY, HOOD BARRS v. CATHCART**, 63 L. J. Ch. 897; 71 L. T. 7; 42 W. R. 633; 38 Sol. Jo. 563; 7 R. 400, C. A.

**D. Management of Property.**

**(a) In General.**

**1858. Duty of sequestrators—Sequestration for want of appearance—Duty to take guidance of court.]**—There is a difference between a sequestration for want of an appearance & for want of an answer; even in the first case it is to be looked upon only as a *distringas in infinitum* at law, & the distress there ought to be only, at first nothing, then increasing by degrees, as the ct. directs in order to compel an appearance; so the sequestrators ought in the first case, after seizure of some goods, to apply to the ct. for further directions for seizure, in order to compel an appearance; but in the second case the sequestrators have no power to remove any goods much less to sell, for the goods are only to be retained in nature of a pledge to answer the contempt, & pltf. receives no injury by this, for he may set down his cause & his bill may be taken *pro confesso* (*per cur.*).—**DESBROW v. CROMMIE** (1729), Bunb. 272; 1 Barn. K. B. 212; 145 F. R. 671.

*Annotations*:—**Consd.** **Goldsmith v. Goldsmith** (1846), 10 Jur. 561. **Refd.** **Walker v. Bell** (1816), 2 Madd. 21.

**1859.** ———.—**Sequestration for want of answer—No power to remove goods—Or to sell.]**—**DESBROW v. CROMMIE**, No. 1858, *ante*.

**Goods to be held as pledge.]**—**DESBROW v. CROMMIE**, No. 1858, *ante*.

**1861. Attornment of tenants—Agreement must be stamped.]**—**CORNISH v. SEARELL**, No. 1862, *post*.

**1862. — Sequestrators cannot take—Tenant may dispute sequestrators' title.]—**(1) A party, who, as tenant receives possession from another as landlord, is not allowed to dispute the title of the landlord. But where a party is in possession & attorns to another, from whom he did not receive possession, the attornment does not preclude the tenant from disputing the title of the persons to whom he attorned.

(2) A paper containing an attornment & stating that the person attorning is to hold upon terms to be afterwards agreed on, requires a stamp as an agreement stamp.

(3) Persons who are sequestrators, under the authority of the Ct. of Ch., but have no interest in the premises, cannot take an attornment to themselves as sequestrators.—**CORNISH v. SEARELL** (1828), 8 B. & C. 471; 1 Man. & Ry. K. B. 703; 6 L. J. O. S. K. B. 254; 108 E. R. 1118.

*Annotations:—As to (1) Consd.* Doe d. Wright v. Smith (1838), 8 Ad. & El. 255. *Refd.* Doe d. Chawner v. Boulter (1837), 1 Nev. & P. K. B. 650; Jolly v. Arbuthnot (1859), 4 De G. & J. 224; Morton v. Woods (1869), L. R. 4 Q. B. 293. *As to (2) Distd.* Doe d. Linsey v. Edwards (1836), 5 Ad. & El. 95. *As to (3) Refd.* Carlton v. Bowcock (1884), 51 L. T. 659.

(b) *Under Order of Court.*

i. *In General.*

**1863. Granting lease of premises.]—**Decree against debt., & a sequestration upon it, & the sequestrators in possession of a house, which was

make a lease, & the tenant to enjoy.—**HARVEY v. HARVEY** (1681), 3 Rep. Ch. 87; 21 E. R. 737.

**1864. —.]—**Application to empower sequestrators in mesne process, to grant leases, refused.—**BRAY v. HOOKER** (1784), 2 Dick. 638; 21 E. R. 420, L. C.

**1865. —.]—**Order to let a house & land in possession of sequestrator, on a contempt for not paying money into ct.—**DUNKLEY v. SCRIBNOR** (1815), 2 Madd. 443; 56 E. R. 398.

**1866. Felling timber.]—**Sequestrators having by virtue of an order power to fell timber, they fell timber to the value of £7,000, & pay over but £2,000 to pltf. for whose benefit the sequestration was taken out. Pltf. not chargeable with more than the £2,000.—**DACRES (LADY) v. CHUTE** (1683), 1 Vern. 160; 2 Cas. in Ch. 104; 23 E. R. 387.

**1867. Attornment of tenants—To sequestrators.]—**Tenants ordered to attorn to sequestrators, under a sequestration for a duty.—**WOOD v. ADAMS** (1780), 2 Dick. 576; 21 E. R. 394.

**1868. —.]—****GOLDSMITH v. GOLDSMITH**, No. 1876, *post*.

**1869. Order for payment into court—Sum of money.]—**A sequestration having issued for non-payment of money into ct. an individual in possession of a sum claimed by the party against whom the sequestration issued, & by a stranger, was ordered to pay that sum into ct.—**FRANCKLYN v. COLHOUN, FRANCKLYN v. THORNHILL, RUCKER v. PINNEY** (1819), 3 Swan. 276; 36 E. R. 860, L. C.

*Annotations:—Consd.* Johnson v. Chippindall (1828), 2 Sim. 55; *Re* Slade, Slade v. Hulme (1881), 18 Ch. D. 653. *Refd.* Wilson v. Metcalfe (1839), 8 L. J. Ch. 331; Goldsmith v. Goldsmith (1846), 5 Hare, 123; Ward v. Booth (1872), L. R. 14 Eq. 195; Craig v. Craig, [1896] P. 171. *Mentd.* Sauls v. Browne (1874), 10 Ch. App. 64.

**1870. Arrears of annuity—Order to grantor**

**to pay—When court has power to make—Grantor not party to cause.]—**The ct. has no jurisdiction to order, upon motion, a person not a party to the cause, to pay into ct. the arrears of an annuity granted by him to debt. against whom a sequestration has issued for want of a sufficient answer, unless the grantor has, by his conduct, waived the objection to the jurisdiction; but he may, notwithstanding, & without applying for the leave of the ct. obtain from the grantee a release of the annuity.—**JOHNSON v. CHIPPINDALL** (1828), 2 Sim. 55; 57 E. R. 711.

*Annotations:—Refd.* Wilson v. Metcalfe (1839), 8 L. J. Ch. 331; Ward v. Booth (1872), L. R. 14 Eq. 195; *Re* Slade, Slade v. Hulme (1881), 18 Ch. D. 653; Craig v. Craig, [1896] P. 171.

**1871. Compelling payment of rent from tenant—Tenant's costs in motion—Liability for.]—**A person who had refused to pay the rent of a sequestered estate which he occupied as tenant to the sequestrators, except under an indemnity:—*Held:* entitled to his costs of a motion by the sequestrators to compel payment of the money.—**WHITE v. WOOD** (1843), 2 Y & C. Ch. Cas. 615; 2 L. T. O. S. 116; 7 Jur. 1124; 63 E. R. 275.

**1872. Settlement of tenant rights—Claims for dilapidations.]—***Re* BURKILL, GODFREY v. BURKILL (1873), 1 Seton's Judgments & Orders, 7th ed. 447.

**Foreclosure.]—***See* No. 1874, *post*; Sub-sect. 4, D. (b) ii., *post*.

ii. *Sale.*

**1873. When court will sanction—Not before writ returned.]—**Upon a commission of sequestration, the comrs. sequestered some live cattle, which, not being sufficient to answer the debt, it was moved for leave to sell these cattle, but denied, because the comrs. had not returned the commission; but when that was done, & it appeared what they had sequestered, & the value as so much in part of the debt, then for the remainder a new sequestration should issue, & a *venditioni exponas* to sell the goods sequestered upon the first.—**YARROTH v. SEYS** (1720), Bunb. 62; 145 E. R. 595.

**1874. — On application for foreclosure.]—**A bill of foreclosure being heard on a sequestration, & security being defective, the ct. decreed a sale, instead of a foreclosure, because if pltf. sued debt. on his bond, that would open a degree of foreclosure, & it is usual in such cases to refer it to a master to set a value on the estate, & decree that pltf. should take it *pro tanto*.—**DASHWOOD v. BITHAZEY** (1729), Mos. 196; 1 Eq. Cas. Abr. 317; 25 E. R. 347.

**1875. — Upon interlocutory proceedings.]—**Sequestrators, upon a decretal order, have the same power to sell as on a final decree.—**CADELL v. SMITH** (1791), 3 Swan. 308, n.; 36 E. R. 875; *sub nom.* CAVIL v. SMITH, 3 Bro. C. C. 361, L. C.

**1876. — Sequestration on mesne process—Not until costs ascertained—Sale only for amount of costs.]—**(1) A sequestration on mesne process will in a proper case be executed, & the ct. will direct the tenants to attorn to the sequestrators; but will not, until the amount of the costs is ascertained, nor except for the purpose of paying such ascertained amount of costs, direct the sale of goods seized under the sequestration, even though the value of the goods be gradually absorbed by the expenses of keeping them.

PART III. SECT. 6, SUB-SECT. 4.—  
D. (b) ii.

1. *Application for sale—Necessity for notice.]—*Notice must be given of an application for an order to sell property

seized by sequestrators.—**FORBES v. CONNOLLY** (*circa* 1858), 1 Ch. Ch. 6.—**CAN.**

m. —.] — **RIDGWAY v. DAVIS** (1837), 2 Jo. Ex. Ir. 507.—**IR.**

n. — *Seat on Stock Exchange.]—*A sequestrator applied for an order under the writ of sequestration to sell the debts' seats on the Stock Exchange:—*Held:* although the seats were



*Sect. 6.—Writ of sequestration: Sub-sect. 4, D. (b) ii.; sub-sects. 5 & 6, A. & B. (a) & (b).]*

(2) It is not the practice to file a return to the writ of sequestration.—*GOLDSMITH v. GOLDSMITH* (1846), 5 Hare, 123; 15 L. J. Ch. 264; 10 Jur. 561; 67 E. R. 853.

**1877. — Petition under Judgments Act, 1864 (c. 112).]**—Deft. in an administration suit failed to comply with an order, which had been registered, directing him to pay two sums of money into ct. to the credit of the cause. Sequestrators, under a writ issued by plffs., having entered into possession of deft.'s real estate, a petition was presented by plffs. under Judgments Act, 1864 (c. 112), praying that such real estate might be sold & the proceeds applied in payment of the moneys due from deft.:—*Held*: plffs. were not creditors to whom the real estate of their debtor had been delivered in execution, & petition dismissed accordingly.—*JOHNSON v. BURGESS* (1873), L. R. 15 Eq. 398; 42 L. J. Ch. 400; 28 L. T. 188; 21 W. R. 453, L. J.

*Annotation*:—*Apld. Re Hastings, Ex p. Brown* (1892), 61 L. J. Q. B. 654.

**1878. Restraint of sale—Bankruptcy of debtor—Jurisdiction of county court.]**—A writ of sequestration had been issued out of the Ch. Div. to enforce payment into ct., under which debtor's property, both real & personal, was seized. Before sale debtor was adjudicated bkpt. upon the petition of other creditors, & the judge of the county ct. granted an injunction, under Bkpcy. Act, 1883 (c. 52), s. 10, restraining the sale:—*Held*: (1) the sequestrator was a creditor within sect. 9, clause 1; (2) he was not a secured creditor within the proviso in clause 2; (3) he was not an execution creditor who had completed an execution or attachment within sect. 45; & the ct. had jurisdiction to restrain the sale.—*Re HASTINGS, Ex p. BROWN* (1892), 61 L. J. Q. B. 654; 67 L. T. 234; 8 T. L. R. 683; 36 Sol. Jo. 733; 9 Morr. 234, D. C.

*Annotation*:—*As to (2) Consd. Re Pollard, Ex p. Pollard*, [1903] 2 K. B. 41.

**1879. In respect of what property—Leasehold.]**—Land held for a term ordered to be sold by sequestrators towards satisfaction of a decree for £500.—*ELLARD v. WARREN* (1681), 3 Rep. Ch. 87; 21 E. R. 737.

**1880. ———.]**—*SUTTON v. STONE* (1745), 1 Dick. 107; 21 E. R. 209, L. C.

**1881. ———.]**—(1) Bill for an account taken *pro confesso* against surviving exor. & devisee in trust, & leasehold estates taken under a sequestration for want of an answer: the ct. would not order the sequestrators to sell; but directed them to apply the profits. (2) Appointment of a receiver in the place of the sequestrators discharges the sequestration.—*SHAW v. WRIGHT* (1796), 3 Ves. 22; 30 E. R. 872.

**1882. — Real estate.]**—*NEALE v. BEALING*, No. 1770, *ante*.

**1883. — Perishable goods.]**—The ct. will not order perishable goods taken under a sequestration for want of an answer to be sold before decree.—*WILCOCKS v. WILCOCKS* (1762), Amb. 421; 27 E. R. 280.

**1884. — Furniture.]**—*MITCHELL v. DRAPER*, No. 1887, *post*.

the property of the debtors & should be saleable under process, & the ct. could implement its execution by ordering debts to do any act necessary to effect, or to refrain from any act to obstruct, the sale of the seats: yet inasmuch

as the ct. could not control the members of the exchange, no effectual order for sale of the seats could be made.—*LONDON & CANADIAN LOAN & AGENCY CO. v. MORPHY* (1885), 10 O. R. 86.—**CAN.**

**1885. Issue of venditioni exponas.]**—*YARROTH v. SEYS*, No. 1873, *ante*.

———.]—*See, generally*, Sect. 1, sub-sect. 13, *ante*.

**1886. Application for sale—By motion—On notice—Not of course.]**—*NEALE v. BEALING*, No. 1770, *ante*.

**1887. ———.]**—Motion to sell furniture under a sequestration for not performing the decree must be on notice.—*MITCHELL v. DRAPER* (1803), 9 Ves. 208; 32 E. R. 582, L. C.

**1888. ——— Ex parte—Party out of jurisdiction.]**—Order to sell goods under a sequestration for not obeying the order of the ct. made on motion *ex p.*, the party having gone out of the jurisdiction.—*Re RUSH* (1870), 22 L. T. 116; 18 W. R. 417.

**1889. ——— To be made in chambers—Not in court.]**—*TURNER v. CLIFFORD*, [1870] W. N. 199.

#### SUB-SECT. 5.—RETURN TO WRIT.

**1890. Not usually made.]**—*GOLDSMITH v. GOLDSMITH*, No. 1876, *ante*.

#### SUB-SECT. 6.—EFFECT OF WRIT.

##### A. Binding the Property.

**1891. From when property bound—Issue of writ.]**—*CROFTS v. OLDFIELD* (1676), 3 Swan. 278, n.; 36 E. R. 863.

*Annotation*:—*Refd. Empringham v. Short* (1844), 13 L. J. Ch. 300.

**1892. ——— Not commencement of execution.]**—*BURDETT v. ROCKLEY*, No. 1926, *post*.

**1893. To what extent bound—In favour of creditor—Where debtor becomes bankrupt.]**—*Re POLLARD, Ex p. POLLARD*, No. 1724, *ante*.

———.]—*See, further*, **BANKRUPTCY**, Vol. IV., pp. 359, 360, Nos. 3356–3359.

——— **Bankruptcy of defendant.]**—*See* **BANKRUPTCY**, Vol. IV., pp. 359, 360, Nos. 3356–3359; Vol. V., pp. 815, 835, Nos. 6932, 6933, 7068.

##### B. Position of Third Parties.

##### (a) Rights as against Sequestrators.

**1894. Alienee—Under voluntary conveyance—Pendente lite.]**—(1) Sequestration not defeated by a voluntary conveyance, *pendente lite*.

(2) Sequestration against the heir for a personal duty decreed against the father.—*WITHAM v. BLAND* (1675), 3 Swan. 276, n.; 36 E. R. 862.

*Annotations*:—*As to (1) Refd. Colston v. Gardner* (1681), 2 Cas. in Ch. 43. *As to (2) Refd. Wharam v. Broughton* (1748), 1 Ves. Sen. 180.

**1895. — Conveyance prior to sequestration—With intent to defeat it.]**—A sequestration prevails against a prior conveyance designed to defeat it; not against prior conveyances for valuable consideration, or *bonâ fide*.—*COULSTON v. GARDINER* (1681), 3 Swan. 279, n.; 36 E. R. 863; *sub nom. COLSTON v. GARDNER*, 2 Cas. in Ch. 43.

*Annotations*:—*Consd. Wharam v. Broughton* (1748), 1 Ves. Sen. 180. *Refd. Cook v. Cook* (1739), 2 Com. 712.

**1896. ——— For valuable consideration.]**—*COULSTON v. GARDINER*, No. 1895, *ante*.

**1897. ———.]**—*BIRD v. LITTLEHALES* (1743), 3 Swan. 299, n.; 36 E. R. 871, L. C.

*Annotation*:—*Refd. Empringham v. Short* (1844), 13 L. J. Ch. 300.

#### PART III. SECT. 6, SUB-SECT. 6.—B. (a).

**o. Tenant—Right of sequestrators to distrain—Voluntary payment by tenant.]**—Sequestrators cannot distrain, & if they do, they will be punished by

**1898. — Lessee—Lease after sequestration—No notice thereof.]—**A lease of lands in Ireland, made after the lessor's estate had been put under sequestration for a contempt of the Ct. of Exch. in that kingdom:—*Held*: to be good, the lessee having no notice of such sequestration.—*VICARS v. COLCLOUGH* (1779), 5 Bro. Parl. Cas. 31; 2 E. R. 514, H. L.

**1899. Assignee—Of annuity.]—***COLE v. FROST* (1844), 4 L. T. O. S. 153.

**1900. Trustees—Deed of assignment—For benefit of creditors—Executed before default.]—**An order was made in a suit in equity upon H., a trustee, to pay a balance found due from him on or before a day named. Shortly before the day fixed, H. by deed assigned substantially the whole of his property to trustees for the benefit of five creditors, excluding the persons interested in the trust money. The deed contained a proviso for redemption on payment of the debts due to the five creditors within six months, & a proviso that H. should continue in possession of the property comprised in it for six months, but not so as to let in any sequestration or other process, & that, in case any such process should be enforced, or be attempted to be enforced, the possession of H. should cease & determine. H. not having paid the money under the order of the ct., a sequestration was issued against his property:—*Held*: the trustees of the deed were entitled to the property comprised in it as against the sequestrators.—*ALTON v. HARRISON, POYSER v. HARRISON* (1869), 4 Ch. App. 622; 38 L. J. Ch. 669; 21 L. T. 282; 17 W. R. 1034, L. J.

*Annotations*:—*Refd.* *Re Bamford, Ex p. Games* (1879), 12 Ch. D. 314; *Boldero v. London & Westminster Discount Co.* (1879), 5 Ex. D. 47. *Mentd.* *Allen v. Bonnett* (1870), 5 Ch. App. 577; *Re Yates, Ex p. Brown* (1879), 27 W. R. 651; *Mason v. Briton Medical & General Life Assn.* (1888), 4 T. L. R. 755; *Maskelyne & Cooke v. Smith*, [1903] 1 K. B. 671; *Glegg v. Bromley*, [1912] 3 K. B. 474; *Re Fasey, Ex p. Trustees*, [1923] 2 Ch. 1.

**1901. Mortgagee—Possession obtained by sequestrators—Accountable for rents & profits.]—**A conveyance established against a sequestration, & the sequestrators, who had obtained possession, ordered to account to the alienee for rents & profits. Another conveyance rescinded, but the alienee declared entitled to be reimbursed from the subsequent rents, the balance of payments for interest, taxes, & repairs.—*HAMBLYN v. LEY* (1743), 3 Swan. 301, n.; 36 E. R. 872; *sub nom.* *HAMLYN v. LEE*, 1 Dick. 94, L. C.

*Annotations*:—*Consd.* *Re Hoare, Hoare v. Owen*, [1892] 3 Ch. 94. *Mentd.* *Simmonds v. Kinnaird* (1799), 4 Ves. 735; *Wilson v. Metcalfe* (1839), 8 L. J. Ch. 331; *Empringham v. Short* (1844), 3 Hare, 461; *Musadee M. C. Sherazee v. Meerza Shoostry* (1854), 8 Moo. P. C. C. 90.

**1902. — — — — — Re-delivery of possession.]—**Sequestrators took possession of certain mtged. estates. The mtgees., on petition, obtained an order to have the rents & profits of the mtged. estates, in the hands of the sequestrators, applied towards payment of their mtge. money, etc., & possession of the mtged. estates to be delivered up to them.—*WALKER v. BELL* (1816), 2 Madd. 21; 56 E. R. 243.

*Annotations*:—*Expld.* *Tatham v. Parker* (1853), 1 Sm. & G. 506. *Refd.* *Re Hoare, Hoare v. Owen*, [1892] 3 Ch. 91.

**1903. — — — — — Equitable mortgagee—Acquisition of prior legal mortgage—Right to back rents.]—**In 1846, A. made an equitable mtge. of lands by deposit of title deeds. In Dec. 1849, a sequestration in the suit, to which the mtgees. were not parties & which did not relate to the mtged.

property, issued against A.'s estate. The equitable mtgees. afterwards became the transferees of a legal mtge. for another debt executed by A. after the filing of the bill but before the sequestration, but they had never been in possession. On petition by the mtgees. praying to be let into possession, & that the sequestration might be discharged as against them:—*Held*: they were entitled to back rents in the sequestrator's hands after payment of costs, & ordered as prayed.—*TATHAM v. PARKER* (1855), 1 Sm. & G. 506; 1 Eq. Rep. 257; 22 L. J. Ch. 903; 25 L. T. O. S. 22; 1 Jur. N. S. 992; 3 W. R. 347; 65 E. R. 221.

*Annotations*:—*Refd.* *Re Hoare, Hoare v. Owen*, [1892] 3 Ch. 94. *Mentd.* *Re Suarez, Suarez v. Suarez*, [1918] 1 Ch. 176.

**1904. — — — — — Mortgage for value—To avoid effect of writ—Knowledge of mortgagee.]—**(1) The title of a person claiming under a writ of sequestration issued by the Ct. of Ch. prevails over that of a mtgee. under a mtge. for value made in order to avoid the effect of the writ, & with full knowledge on the part of the mtgee. of all the circumstances.

(2) An order for payment into ct. of a fund in the hands of a stakeholder in this country may be made in a suit in which one of two parties, each of whom claims the fund under a person residing abroad, is pltf. & the other a deft., although the person residing abroad may not be made effectually a party to the suit.

*Semble*, an order will not be made for payment of the fund out of ct. until such person has been served.—*WARD v. BOOTH* (1872), L. R. 14 Eq. 195; 41 L. J. Ch. 729; 27 L. T. 364; 20 W. R. 880.

*Annotations*:—*As to* (1) *Refd.* *Re Hoare, Ex p. Nelson* (1880), 14 Ch. D. 41. *As to* (2) *Refd.* *Re Slade, Slade v. Hulme* (1881), 18 Ch. D. 653.

**1905. Recipient of tithes—Recipient of composition therefor—Distinguished.]—**Motion, for payment of a sum due in respect of a composition for tithes, out of a fund in ct., the produce of growing crops on a farm, paid in by sequestrators, refused, with costs.

If tithes had been due in respect of the produce of the land taken, this motion would have been correct, for the sequestrators would not be justified in taking the produce of the land without paying the tithes, but here there is a composition for tithe, which is no lien on the land, but only a personal demand (*LEACH, V.-C.*).—*DICKINSON v. SMITH* (1813), 4 Madd. 177; 56 E. R. 672.

**1906. Landlord—Entitled to arrears of rent.]—**Under a sequestration, the landlord is entitled to be paid arrears of rent.—*DIXON v. SMITH* (1818), 1 Swan. 457; 36 E. R. 464, L. C.

*Annotations*:—*Expld.* *Brandling v. Barrington* (1827), 6 B. & C. 467. *Mentd.* *Russell v. East Anglian Ry.* (1850), 3 Mac. & G. 104.

—.]—*See, also*, Sect. 2, sub-sect. 5, A., *ante*; *DISTRESS*, Vol. XVIII., pp. 342–349, Nos. 779–870.

#### (b) Remedies.

**1907. Mode of trying third party's right—In discretion of court.]—**Where a sequestrator obtains possession of property, as belonging to the party against whom the process issued, & such property is claimed by a third person, the mode of trying the right is in the discretion of the ct.

Deft. being in contempt for non-payment of money, executed a conveyance of his real estate to his son, & the son entered into possession under

the ct., but if on service of the sequestration, the tenant voluntarily & without any order pay the rent, or part of

it, or gives security for it, it is good. — *A.-G. v. WYNNE* (1745), 2 How. E. E. 781.—*IR.*

PART III. SECT. 6, SUB-SECT. 6.—  
B. (b).

p. Examination pro interesse suo



*Sect. 6.—Writ of sequestration: Sub-sect. 6, B. (b); sub-sects. 7 & 8. Sects. 7 & 8.]*

the conveyance. Some months afterwards a sequestration issued against deft. founded on the same contempt, & the sequestrator took possession of the estate. Deft.'s son was examined *pro interesse suo*, & the master found that, as between deft. & all persons claiming under him, the son had an absolute estate & interest in the premises under the conveyance, & the possession taken thereunder, subject to the question between deft.'s son & pltf. or between the ct. & pltf. & deft.'s son, arising out of the contempt & the sequestration: the ct. directed issues to try whether the conveyance by deft. to his son was fraudulent, within 13 Eliz. c. 5, & whether the consideration monies were paid before the sequestration issued.

*Qu.*: whether the proper form of objecting to the report of the master, or an examination *pro interesse suo*, is by exceptions.—*EMPRINGHAM v. SHORT* (1844), 3 Hare, 461; 13 L. J. Ch. 300; 8 Jur. 856; 67 E. R. 463.

**1908. Proceedings at law—Recovery of rent charge—On sequestered land.]**—Where lands of a corp. were sequestered:—*Held*: this did prevent one entitled to a rentcharge payable by the corp. from pursuing his remedy at law to recover it.—*A.-G. v. COVENTRY CORPN.* (1715), 1 P. Wms. 306; 2 Vern. 713; 24 E. R. 402, L. C.

*Annotations*:—*Mentd.* Walker v. Bell (1816), 2 Madd. 21; Russell v. East Anglian Ry. (1850), 3 Mac. & G. 104.

**1909. — Court will restrain.]**—The ct. will restrain a proceeding at law against a sequestrator, but has no authority to compel a party to be examined *pro interesse suo*.—*KAYE v. CUNNINGHAM* (1820), 5 Madd. 406; 56 E. R. 950.

**1910. —.]**—*MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALLY MAHOMED SHOOSTRY*, No. 1826, *ante*.

**1911. Inquiry by master—Not without order of court.]**—The master cannot inquire into the property in chattels sequestered, without an order.—*ANON.* (1747), 3 Swan. 311, n.; 36 E. R. 876, L. C.

**1912. Motion in suit—Only if third party a party thereto—Trustees of settlement.]**—The right of sequestrators to attach moneys, alleged to be held by third persons for the judgment debtor, but denied by them to be so held, cannot be determined upon a motion in a suit to which the third persons are not parties, unless they appear & submit to the jurisdiction of the ct.

Co-resp. in a divorce suit not having paid the damages assessed against him by the jury, a writ of sequestration was issued against his property, in pursuance of which the sequestrators applied by a motion in the suit for an order calling upon the trustees of his marriage settlement to pay into ct. any moneys in their hands belonging to him. The trustees disputed their liability to co-resp., & the jurisdiction of the ct. to make the order:—*Held*: as the trustees were not parties to the suit, & disputed their liability to co-resp., & the juris-

diction of the ct., the ct. had no power to make the order on motion in the suit.—*CRAIG v. CRAIG*, [1896] P. 171; 65 L. J. P. 99; 75 L. T. 280; 12 T. L. R. 375; 45 W. R. 64.

**1913. Trial of issue—Verdict for third party—Costs payable by sequestrators.]**—A writ of sequestration issued to enforce an order of ct., defts. being the sequestrators. Under the writ they claimed certain property which had been purchased by pltf., they alleging fraud & *mala fides* in pltf. On the trial of an issue the jury found in favour of pltf.:—*Held*: although defts. as sequestrators, had acted under the direction of the ct. that did not justify them in taking action as to property to which they had no right, & therefore that they were liable for the costs of the action.—*WIEBALCK v. TOLD* (1913), 29 T. L. R. 741.

**1914. Examination pro interesse suo—Subsequent report of master—Whether exception may be taken thereto.]**—*HAMLIN v. LEE* (1743), 1 Dick. 94; 21 E. R. 203; *sub nom.* *HAMBLIN v. LEY*, 3 Swan. 301, n., L. C.

*Annotations*:—*Refd.* *Empringham v. Short* (1844), 3 Hare, 461. *Mentd.* *Simmonds v. Kinnaird* (1799), 4 Ves. 735; *Wilson v. Metcalfe* (1839), 1 L. J. Ch. 331; *Musadee M. C. Sherazee v. Meerza Shoostry* (1854), 8 Moo. P. C. C. 90; *Re Hoare*, *Hoare v. Owen*, [1892] 3 Ch. 94.

**1915. —.]**—*EMPRINGHAM v. SHORT*, No. 1907, *ante*.

**1916. — Not before return by sequestrators.]**—*PELIAM (LORD) v. NEWCASTLE (DUCHESS)*, No. 1823, *ante*.

**1917. — Admitted to sue in formâ pauperis.]**—A person ordered to be examined *pro interesse suo*, was permitted to prosecute, & make out her right in *formâ pauperis*.—*JAMES v. DORE* (1744), 2 Dick. 788; 21 E. R. 477, L. C.

**1918. — Mode of procedure.]**—*HUNT v. PRIEST* (1778), 2 Dick. 540; 21 E. R. 380, L. C.

**1919. — Mortgagee.]**—Upon a sequestration, a mtgee. must come to be examined *pro interesse suo*.—*ANON.* (1801), 6 Ves. 287; 31 E. R. 1055, L. C.

*Annotations*:—*Refd.* *Angel v. Smith* (1804), 9 Ves. 335. *Mentd.* *Aston v. Heron* (1834), 2 My. & K. 390.

**1920. — Prior judgment creditor.]**—*ANGEL v. SMITH*, No. 85, *ante*.

**1921. — Authority of court to compel examination.]**—*KAYE v. CUNNINGHAM*, No. 1909, *ante*.

**1922. —.]**—*MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALLY MAHOMED SHOOSTRY*, No. 1826, *ante*.

**1923. On discharge of sequestration improperly obtained—Order of discharge set aside.]**—*WARD v. CORNWALL*, No. 1941, *post*.

#### SUB-SECT. 7.—EFFECT OF DEATH OF PARTY.

**1924. Sequestration in equity—Abates—May be revived.]**—*WHITE v. HAYWARD*, No. 67, *ante*.

**1925. Death of defendant—Whether sequestration discharged or continued.]**—*PROCTOR v. REYNEL*, No. 1833, *ante*.

—*Reference to ascertain damages.]*—Where the goods of a third person are seized by sequestrators, an order to examine *pro interesse suo* will be made, & if the goods taken are found to belong to the party so applying, a reference to ascertain his damages will be granted.—*COPELAND v. MAPE* (1812), 2 Ball & B. 66.—*IR.*

#### PART III. SECT. 6, SUB-SECT. 7.

**1925 i. Death of defendant—Whether sequestration discharged or continued.]**—After a decree upon sequestration the

heir of the party is bound. But if only process of sequestration issues against the party & he dies before the decree, the heir is not bound.—*MAXWELL v. KELSEY* (1807), 2 Mol. 320.—*IR.*

**1925 ii. —.]**—When a sequestration had issued to compel payment under a decree, & there appeared to have been considerable delay in enforcing the payment of rents, during which period deft. had died, & one of the heirs had received sundry sums for

rent, a motion that such rents be paid over again to the sequestrators by the tenants was refused, & the tenants ordered to attorn as to future rents only.—*HARRIS v. MEYERS* (1870), 3 Ch. Ch. 107.—*CAN.*

**1925 iii. —.]**—In case of a debtor dying leaving insufficient assets to pay all his debts a creditor who has a sequestration in the hands of the sequestrators does not lose the advantage of it.—*MEYERS v. MEYERS* (1872), 19 Gr. 185.—*CAN.*

**1926. ——— Sequestration in mesne process.]**

—(1) A sequestration that issues as mesne process of this ct., will be discontinued, & determined by the death of the party: but where a sequestration issues in pursuance of a decree, & to compel the execution of it, there though the same be for a personal duty, it shall not be determined by the death of the party.

(2) The sequestration binds from the very time of awarding the commission, & not only from time to time of executing of it & its being laid on by the comrs. (LORD NOTTINGHAM, C.).—BURDETT *v.* ROCKLEY (1682), 1 Vern. 58; 23 E. R. 308, L. C.

*Annotations:—As to (1) Reidd. Pratt v. Inman (1889), 6 T. L. R. 91. As to (2) Consd. Payne v. Drewe (1804), 4 East, 523.*

**1927. ——— ———.]**—Where a sequestration issues as a mesne process, it falls with the death of the person, but if for non-performance of a decree, the death of the party does not determine it.—HAWKINS *v.* CROOK (1747), 3 Atk. 594; 26 E. R. 1142, L. C.

**1928. ——— ——— Non-performance of decree.]**—BURDETT *v.* ROCKLEY, No. 1926, *ante*.

**1929. ——— ———.]**—HAWKINS *v.* CROOK, No. 1927, *ante*.

**1930. ——— ———.]**—*Qu.*: whether a sequestration after decree, is determined by the death of deft.; & whether copyhold lands are subject to sequestration.—CAERMARTHEN (MARQUESS) *v.* HAWSON (1730), 3 Swan. 294, n.; 36 E. R. 869.

**1931. ——— ——— As against defendants' land—Entailed estate.]**—ATHOL (EARL) *v.* DERBY (EARL) (1672), 2 Lev. 72; 1 Cas. in Ch. 220; 83 E. R. 455, L. C.

*Annotations:—Reidd. Wharam v. Broughton (1748), 1 Ves. Sen. 180; Goudy v. Duncombe (1847), 1 Exch. 430.*

**1932. ——— ——— Copyholds.]**—WHITEHEAD *v.* HARRISON (1730), 1 Barn. K. B. 431; 2 Eq. Cas. Abr. 712; 94 E. R. 290.

**1933. ——— ———.]**—HYDE *v.* GREENHILL (1746), 1 Dick. 106; 21 E. R. 208, L. C.

*Annotations:—Consd. Wharam v. Broughton (1748), 1 Ves. Sen. 180; Pratt v. Inman (1889), 43 Ch. D. 175.*

**1934. ——— ——— Non-performance of duty—Revival of suit.]**—UNIVERSITY COLLEGE, OXFORD *v.* FOXCROFT (1683), 1 Vern. 166; 2 Rep. Ch. 244; 23 E. R. 390.

**1935. ——— ———.]**—HYDE *v.* GREENHILL (1746), 1 Dick. 106; 21 E. R. 208, L. C.

*Annotations:—Consd. Wharam v. Broughton (1748), 1 Ves. Sen. 180. Follid. Pratt v. Inman (1889), 43 Ch. D. 175.*

**1936. ——— ———.]**—WITHAM *v.* BLAND, No. 1894, *ante*.

**1937. ——— ———.]**—PRATT *v.* INMAN, No. 1768, *ante*.

**1938. Death of plaintiff—Sequestration continued—If suit revived—Sequestration on mesne process.]**—Sequestration against deft. on mesne process abates on the death of pltf., but is revived with the suit.—HYDE *v.* FORSTER (1748), 1 Dick. 132; 21 E. R. 218, L. C.

*Annotation:—Follid. Wharam v. Broughton (1748), 1 Dick. 137.*

**1939. ——— ———.]**—WHARAM *v.* BROUGHTON (1748), 1 Dick. 137; 1 Ves. Sen. 180; 21 E. R. 220, L. C.

*Annotations:—Consd. White v. Hayward (1752), 2 Ves.*

*Sen. 461. Reidd. Walker v. Bell (1816), 2 Madd. 21; Johnson v. Chippindall (1828), 2 Sim. 55; Empringham v. Short (1844), 3 Hare, 461.*

## SUB-SECT. 8.—DISCHARGE OF SEQUESTRATION.

**1940. Discharge improperly obtained—Discharge order set aside.]**—Where deft. was prosecuted upon contempts to a sequestration, & that was removed upon a false pretence, pltf. shall have a writ of restitution.—LEWIS *v.* LEWIS (1680), Cas. temp. Finch, 471; 23 E. R. 254, L. C.

**1941. ——— ———.]**—A solr. who had been conducting a suit, but who was not then acting for pltf., accepted a sum of money on pltf.'s behalf, & allowed an order of sequestration previously granted against deft. to be discharged. On the application of pltf., the order of discharge thus obtained was set aside.

*Qu.*: as to the remedy in such cases of a third party prejudiced by the operation of the order so obtained.—WARD *v.* CORNWALL (1871), 19 W. R. 1075.

**1942. Writ to be first returned.]**—A sequestration must be returned before the ct. can be moved to discharge it on the death of the party, as to lands.—ANON. (1718), Bunb. 31; 145 E. R. 584.

**1943. On satisfaction of debt—Principal, interest, & costs.]**—On a question whether deft. could be heard before he had cleared his contempts, though he offered to pay all pltf.'s demands; it was ordered, that he should bring before the master all the principal, interest, & costs, & then be at liberty to move to have his sequestration discharged.—WENMAN (LORD) *v.* OSBALDISTON (1719), 2 Bro. Parl. Cas. 276; 2 Eq. Cas. Abr. 222; 1 E. R. 941, H. L.

**1944. ——— Arrears of Annuity.]**—Execution set aside, in the circumstances of the case, the ct. considering that on the facts stated in the affidavit the arrears of annuity due at the time of issuing of the sequestration had been satisfied.—CURLEWS *v.* BUTTS (1831), 9 L. J. O. S. K. B. 69.

**1945. By appointment of receiver.]**—SHAW *v.* WRIGHT, No. 1881, *ante*.

## SECT. 7.—EXECUTION AGAINST ECCLESIASTICAL PERSONS.

*See R. S. C., Ord. 43, rr. 3, 4, 5.*

**Judgments as a charge on benefice.]**—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 416, Nos. 2507–2510.

**Sequestration of benefices.]**—*See* ECCLESIASTICAL LAW, Vol. XIX., pp. 417–425, Nos. 2518–2614.

**Liability of sequestrators for dilapidations.]**—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 508, Nos. 3664–3668.

## SECT. 8.—EXTENTS.

*See* CROWN PRACTICE, Vol. XVI., pp. 221–232, Nos. 99–258.

**1926 i. ——— Sequestration in mesne process.]**—Where a sequestration to compel the performance of a decree

had been issued against a person who subsequently died:—*Held*: the writ could be revived against his heirs.

*Semble*: sequestration issued on mesne process cannot be revived.—TURLEY *v.* MEYERS (1870), 3 Ch. Ch. 102.—CAN.



## Part IV.—Costs and Expenses of Execution.

### SECT. 1.—IN GENERAL.

See, generally, SHERIFFS & BAILIFFS.

**1946. Must be reasonable.**—Pltf. who levies costs & expenses of an execution, in addition to the sum recovered by the judgment, under 43 Geo. 3, c. 46, s. 5, must at his peril take care to keep them within such a reasonable sum as will be afterwards allowed in taxation by the prothonotary, otherwise the ct., on motion, will order the excess to be restored, with costs to be paid by pltf.—*BENWELL v. OAKLEY* (1809), 2 Taunt. 174; 127 E. R. 1043.

**1947.** ———.]—The sheriff when levying under a writ of *fi. fa.* is bound at his peril to take but his reasonable extra expenses; & if he take more than is afterwards allowed in taxation, he will be compelled to pay the costs of the rule to make him refund.—*KING v. MILNE* (1823), 1 L. J. O. S. K. B. 108.

**1948. Scale of taxation—As between party & party—Sequestration.**—*Re SHAPLAND, Ex p. HUNT* (1874), 23 W. R. 40.

**1949. What may be included as costs—Costs of previous abortive execution—Fieri facias.**—Pltf. having signed judgment for £23 debt & costs, took out a *fi. fa.* for £24, the £1 being claimed for costs of execution, under 43 Geo. 3, c. 46, s. 5, an attempt was made to levy, which failed, debt. having no goods. Debt. then tendered £23, which pltf. refused, & issued an *elegit* for the £24:—*Held*: the tender was insufficient, pltf. being entitled, under the statute, to the costs claimed above £23, & the ct. refused to set aside the *elegit*.—*BAYLEY v. POTTS* (1838), 8 Ad. & El. 272; 3 Nev. & P. K. B. 365; 1 Will. Woll. & H. 427; 2 Jur. 819; 112 E. R. 841.

*Annotations*:—*Refd.* *Salisbury v. Wray* (1860), 6 Jur. N. S. 1117; *Sneary v. Abdy* (1876), 45 L. J. Q. B. 803.

**1950.** ———.]—A *ca. sa.* must not be endorsed to levy expenses of a *fi. fa.*, in the same cause, to which *nulla bona* was returned.—*EARP v. SATCHELL* (1843), 4 Q. B. 121; 3 Gal. & Dav. 346; 12 L. J. Q. B. 122; 7 Jur. 172; 114 E. R. 843.

**1951.** ———.]—C. L. P. Act, 1852 (c. 76), s. 123, which gives pltf. in every case of execution a right to levy “the expenses of the execution,” over and above the sum recovered by the judgment, does not entitle him to take under a *ca. sa.* the expenses of a previous abortive writ of *fi. fa.*—*SALISBURY (MARQUIS) v. RAY* (1860), 8 C. B. N. S. 193; 29 L. J. C. P. 225; 2 L. T. 286; 6 Jur. N. S. 1117; 8 W. R. 462; 141 E. R. 1139.

*Annotations*:—*Expld.* *Armitage v. Jessop* (1866), 36 L. J. C. P. 63. *Apld.* *Re Long, Ex p. Cuddeford* (1888), 20 Q. B. D. 316.

**1952.** ——— **Costs of judgment.**—A judge's order for the payment of money having been

made a rule of ct., pltf. issued a *fi. fa.* upon it, under Judgments Act, 1838 (c. 110), s. 18, & levied, as well the sum ordered to be paid, as the costs of making the order a rule of ct. The ct. set aside so much of the execution as related to the costs of making the order a rule of ct.—*BAREHEAD v. HALL* (1840), 9 L. J. Ex. 323.

**1953.** ———.]—The right of a party entitled to execution to levy the expenses of the execution, which is conferred by C. L. P. Act, 1852 (c. 76), s. 123, is not taken away by 19 & 20 Vict. c. 108, s. 30, which provides that when, in an action of contract brought to recover a sum not exceeding £20, debt. suffers judgment by default, “ptf. shall recover no costs,” since the costs of the execution are accessory to the execution, not to the judgment, & the word “costs” in the latter sect. means “costs of the action.”—*ARMITAGE v. JESSOP* (1866), L. R. 2 C. P. 12; 36 L. J. C. P. 63; 15 L. T. 214; 12 Jur. N. S. 963; 15 W. R. 130.

**1954.** ——— **Costs of interpleader.**—*HAMMOND v. NAIRN*, No. 161, *ante*.

**1955.** ———.]—Goods of a judgment debtor which had been seized by the sheriff under a writ of *fi. fa.* were claimed by a bill of sale holder & the sheriff interpleaded. On the hearing of the interpleader summons the claim was admitted & an order was made for the sale of the goods & for payment out of the proceeds of the claim of the bill of sale holder, the amount of the execution, & the costs of all parties, including the costs & charges of the sheriff. Before the sale, notice was served on the sheriff that a receiving order had been made against the judgment debtor:—*Held*: the sheriff's costs of the interpleader were not “costs of the execution” within Bankruptcy Act, 1890 (c. 71), s. 11, & consequently were not payable out of the debtor's estate.—*Re ROGERS*, [1911] 1 K. B. 641; *sub nom. Re ROGERS, Ex p. SUSSEX, SHERIFF*, 80 L. J. K. B. 418; 103 L. T. 883; 55 Sol. Jo. 219; 18 Mans. 22; *sub nom. Re ROGERS, Ex p. OFFICIAL RECEIVER*, 27 T. L. R. 199, C. A.

**1956.** ——— **Costs of inquisition.**—An execution creditor, who is in possession of his debtor's lands under a writ of *elegit*, is not entitled to ascertain & tax & add to the sheriff's costs of the issuing of the execution his own costs incidental to the suing out of the writ & of the inquisition held thereon, at least as long as he remains in possession of the lands.—*MAHON v. MILES* (1881), 45 L. T. 540; 30 W. R. 123, D. C.

**1957.** ———.]—R. S. C., Ord. 42, r. 15, does not authorise a judgment creditor to recover by execution the costs of an inquisition consequent upon *elegit*, nor can he have such costs taxed with a view to further execution.—*PORTER v. WOTTON* (1884), 28 Sol. Jo. 548, D. C.

### PART IV. SECT. 1.

**g. What may be included as costs—Future costs of execution.**—*Ex p. THOMPSON* (1877), 22 L. C. J. 89.—*CAN.*

**r.** ——— **Whether costs of second execution—First execution sufficient.**—Pltfs. had recovered judgment against debts, directors of the B. co., for sums due pltfs. in respect of which executions against the co. had been returned unsatisfied. A second writ of execution was issued by them:—*Held*: pltfs., having been allowed the costs of one writ of execution to the sheriff at T., where the head office of the co. was

situate, could not be allowed the costs of a second writ to the sheriff of N., where the co.'s business was carried on.—*PUKULSKI v. JARDINE, PERRYMAN v. JARDINE* (1912), 21 O. W. R. 983; 3 O. W. N. 1172; 26 O. L. R. 323; 5 D. L. R. 242.—*CAN.*

**s. By whom payable—Execution debtor—Though claiming exemption from liability to seizure.**—*Held*: where a judgment debtor claims the benefit of Homestead Amendment Act, 1873, in respect of goods seized by the sheriff under a *fi. fa.*, the judgment debtor must pay the sheriff's costs of seizure

& possession moneys.—*SEHL v. HUMPHREYS* (1886), 1 B. C. R. pt. 2, 257.—*CAN.*

**t. Proceedings to confirm sale—What costs will be allowed.**—*Held*: in confirming the sale of land by a sheriff, the only costs which will be allowed by the taxing master on any proceedings to confirm the same are those arising out of proceedings to obtain the order to confirm the same & also to prove the regularity of the sale.—*MASSEY v. EWEN* (1902), 7 Terr. L. R. 133.—*CAN.*

**u. Ratable distribution amongst creditors—Subject to payment of costs—**

**1958. What may be included as expenses—Expenses of auctioneer.]—***R. v. CRACKENTHORP* (1794), 2 Anst. 412; 145 E. R. 920.

**1959. — Costs of advertising sale by auction.]—**The sheriff is not entitled, by Bkpcy. Act, 1861 (c. 134), to deduct from the amount produced by the levy, the money he has expended in advertising a sale of the execution debtor's effects.—*BRAITHWAITE v. MARRIOTT* (1862), 1 H. & C. 591; 1 New Rep. 105; 32 L. J. Ex. 24; 7 L. T. 363; 9 Jur. N. S. 26; 11 W. R. 93.

**1960. — Expenses of levying.]—***Semble*: under 43 Geo. 3, c. 46, expenses of execution include expenses of levying.—*RUMSEY v. TUFNELL* (1824), 2 Bing. 255; 9 Moore, C. P. 425; 3 L. J. O. S. C. P. 259; 130 E. R. 304.

**1961. — Costs of rule to return writ.]—**A judge's order directed a stay of proceedings on payment of debt & costs, with a stipulation, that in default of payment pltf. should be at liberty to sign judgment, issue execution, & levy the debt & costs, together with the costs of execution, sheriff's poundage, officers' fees, & all other incidental expenses:—*Held*: the sheriff was right in refusing to levy as incidental expenses the costs of a rule to return the writ.—*HUTCHINSON v.* (1841), 8 M. & W. 638; 10 L. J. Ex. 418; 5 Jur. 732; 151 E. R. 1194.

**1962. — Expenses of appraisalment & sale.]—**A sheriff who has seized goods under a *fi. fa.*, & disposed of them by appraisalment & bill of sale, is not entitled to deduct the expenses of the appraisalment & sale.—*PHILLIPS v. CANTERBURY (VISCOUNT)* (1843), 11 M. & W. 619; 1 Dow. & L. 283; 12 L. J. Ex. 401; 1 L. T. O. S. 317; 7 Jur. 518.

*Annotation*:—*Consd.* *Marshall v. Hicks* (1847), 16 L. J. Q. B. 134.

**1963. — Expenses of cutting & dressing corn.]—***Re WOODHAM, Ex p. CONDER*, No. 620, *ante*.

## SECT. 2.—SHERIFF'S REMUNERATION.

### SUB-SECT. 1.—IN GENERAL.

*See, generally*, SHERIFFS & BAILIFFS; Sheriffs Act, 1887 (c. 55); R. S. C., Ord. 42, r. 15.

**1964. Regulated by statute.]—**If it appear by the sheriff's return to a writ of execution that greater fees have been taken for the levy than are allowed by 29 Eliz. c. 4, the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved. Under that statute

*Meaning of "costs."*—Under Creditors' Relief Act, R. S. A. 1922, c. 88, s. 5 (2), moneys levied by a sheriff under execution are to be distributed ratably among all the creditors mentioned "subject to the payment of the costs of the creditor under whose execution the amount was made":—*Held*: the "costs" referred to are the taxed costs of the action under which the writ of execution issued.—*Re CREDITORS' RELIEF ACT, Re WARD & DOMINION PUREBRED STOCK CO.*, [1923] 3 W. W. R. 694.—CAN.

### PART IV. SECT. 2, SUB-SECT. 1.

**b. Application to settle amount—To judge in first instance.]—**Where a sheriff's fees & poundage had been taxed by a deputy clerk of the Crown at the instance of pltf., & it appeared that the amount allowed was not unreasonable, a revision of the taxation was refused. *Semble*: even if the allowance had been too liberal, an appeal would not be allowed to pltf., who should have applied in the first instance to a judge to fix the amount.—

the sheriff cannot take any other charge except for the poundage.—*WOODGATE v. KNATCHBULL* (1787), 2 Term Rep. 148; 100 E. R. 80.

*Annotations*:—*Consd.* *Sturmy v. Middlesex, Sheriff* (1809), 11 East, 25. *Folld.* *Buckle v. Bewes* (1825), 4 B. & C. 154. *Reid.* *The Rendsberg* (1805), 6 Ch. Rob. 142; *Dew v. Parsons* (1819), 1 Chit. 295; *R. v. Jones* (1830), 1 Cr. & J. 140; *Grainger v. Hill* (1838), 7 L. J. C. P. 85; *Berton v. Lawrence* (1850), 5 Exch. 816; *Lee v. Dangar, Grant, etc.* (1892), 61 L. J. Q. B. 780; *Woolford's Estate Trustee v. Levy*, [1892] 1 Q. B. 772. *Mentd.* *Thomas v. Pearce* (1818), 5 Price, 578; *R. v. Jones* (1831), 9 L. J. O. S. Ex. 2; *Hardcastle v. Bielby*, [1892] 1 Q. B. 709; *Shoppes v. Nathan*, [1892] 1 Q. B. 245.

**1965. Whether entitled to extra allowance.]—**Sheriff, claiming extra allowance, must apply to the ct., who will refer it to the deputy remembrancer to ascertain what he is entitled to; it is a rule to show cause; if inefficient cause be shown against such an application, & the deputy remembrancer be attended to resist or diminish the sheriff's claim, he is still not entitled to the costs of either the application or the reference.—*R. v. FEREDAY* (1817), 4 Price, 131; 146 E. R. 417.

**1966. —.]—**A sheriff, on making a levy under an execution, is only entitled to his poundage under 29 Eliz. c. 4, & to such fees as are allowed by the table of fees framed under 7 Will. 4 & 1 Vict. c. 55; & although put to extra trouble & expense in making the levy, he cannot claim more.—*SLATER v. HAMES* (1841), 7 M. & W. 413; 10 L. J. Ex. 100; 5 Jur. 43; 151 E. R. 826.

*Annotation*:—*Reid.* *Curlewis v. Bird* (1842), 11 L. J. Q. B. 273.

**1967. Assessed by district registrar—Right of appeal—Sheriffs Order, 1920.]—**By sect. 20 (2) of Sheriffs Act, 1887 (c. 55), a sheriff may demand, take, & receive such fees & poundage as may from time to time be fixed as therein provided.

By the above Order, made in pursuance of this Act, the fees to be demanded, taken & received by a sheriff are fixed sometimes exactly, sometimes within limits, & sometimes by "the sum actually & reasonably paid"; & it is provided that "the amount of any fees & charges payable . . . shall be taxed by a master of the Supreme Ct., or a district registrar of the High Ct., as the case may be, in case the sheriff & the party liable to pay such fees & charges differ as to the amount thereof":—*Held*: (1) the order was not *ultra vires*; (2) no appeal lies from the decision of a district registrar fixing the amount of poundage; (3) his jurisdiction is confined to fixing the amount; (4) where the difference between the parties depends on a matter of principle it is to

*BROCKVILLE & OTTAWA RY. CO. v. CANADA CENTRAL RY. CO.* (1878), 7 P. R. 372.—CAN.

**c. Bankruptcy of debtor—After seizure but before sale—Whether entitled to recover.]—**Where after seizure on foot of a writ of *fi. fa.*, but before sale, the execution debtor becomes bkpt., & the messenger of the goods so seized, the sheriff is entitled to recover from the execution creditor the amount of expenses necessarily & properly incurred by him.—*KIRK v. PURCHASE* (1893), 32 L. R. Ir. 359.—IR.

**d. Amount—By whom fixed.]—**A judge has power to fix the sheriff's fees on a writ of *hab. fac. poss.*, with a discretion as to the amount.—*ARENAS v. SAVAGE* (1889), 7 N. Z. L. R. 553.—N.Z.

**e. — Motion to fix—Time for.]—**The proper time to apply to have the sheriff's fees fixed, under Sheriff's Act, 1883, s. 18, for or in respect of the execution of a writ of *hab. fac. poss.* is after the execution of the writ.—*BRAY v. JOHNSTON* (1893), 12 N. Z. L. R. 271.—N.Z.

**f. — How fixed.]—**The amount to which the sheriff is entitled for fees in respect of execution of a writ of *hab. fac. poss.* must be determined, except in special circumstances, by the value of the land or property the subject of the writ.—*BRAY v. JOHNSTON* (1893), 12 N. Z. L. R. 271.—N.Z.

**g. —.]—**Pltf., the deputy sheriff of L., attached movables to the value of £600 under a writ issued in execution of a judgment for £1,500 on a mtge. bond, & advertised a sale of the immovable property. Upon direction of the judgment creditor, however, the sale was suspended & ultimately, in consequence of payment of the £1,500 to the sheriff on behalf of the debtor, was not proceeded with:—*Held*: as, in consequence of the attachment, the sum of £1,500 had been recovered there had been a "levy" of that amount & the sheriff was entitled to 5 per cent. for the first £100 & 4 per cent. for every following £100 or fraction thereof.—*LEGRANGE v. MARAIS* (1909), 3 Buch. A. C. 54.—S. AF.



*Sect. 2.—Sheriff's remuneration: Sub-sects. 1 & 2.]* be settled by an action.—**UNION BANK OF MANCHESTER, LTD. v. GRUNDY**, [1921] 1 K. B. 833; 93 L. J. K. B. 718; 131 L. T. 49, C. A.

#### SUR-SECT. 2.—POUNDAGE.

*See, generally, SHERIFFS & BAILIFFS.*

**1968. Fixed by district registrar—Sheriffs Order, 1920—Right of appeal.]—UNION BANK OF MANCHESTER, LTD. v. GRUNDY**, No. 1967, *ante*.

**1969. How calculated.]—A** sheriff may take 12d. in the pound for the first £100 & 6d. per pound for every pound above the £100; & this extends to the sheriffs of cities & corps. executing judgments out of the superior cts.; but he cannot take a bond for his fees.—**LYSTER v. BROMLEY** (1632), Cro. Car. 286; 79 E. R. 852.

*Annotation:—Mentd.* Jayson v. Rash (1705), 1 Salk. 209.

**1970. In what circumstances payable—On seizure & money received under writ.]—The** sheriff is entitled to poundage, by 3 Geo. 1 (c. 16), where he takes inquisitions & makes seizures upon extents in aid, & prosecutors receive the money for which the extents issued from the sheriff.—**R. v. JETHERELL** (1757), Park. 176; 145 E. R. 749.

*Annotations:—Refd.* R. v. Fry (1793), 2 Anst. 358; R. v. Robinson (1835), 2 Cr. M. & R. 334; Colls v. Coates (1840), 11 Ad. & El. 826.

— **On levy—Compromise as to amount.]**

—If a sheriff levy under a *fi. fa.* he is entitled to poundage though the parties compromise before he sells any of debt's goods. If after such a compromise either party rule the sheriff to return the writ, the ct. will discharge that rule with costs, to be paid by the party obtaining it.—**ALCHIN v. WELLS** (1793), 5 Term Rep. 470; 101 E. R. 265.

*Annotations:—Expld.* R. v. Robinson (1835), 2 Cr. M. & R. 334; Roe v. Hammond (1877), 2 C. P. D. 300. *Refd.* Chapman v. Bowlby (1841), 8 M. & W. 249; Sneary v. Abdy (1876), 1 Ex. D. 299; Mortimore v. Cragg (1878), 3 C. P. D. 216; Re Thomas, *Ex p.* Middlesex, Sheriff, [1899] 1 Q. B. 460. *Mentd.* Hedges v. Jordan (1836), 2 Har. & W. 92; Richardson v. Trundle (1860), 8 C. B. N. S. 474; Harding v. Hall (1866), 14 L. T. 410.

**1972. ———.]—A** writ of *extendi facias* was delivered to the sheriff indorsed to levy £1,000; he seized goods appraised at £170 & took debt. in execution for the remainder. By a compromise

between the excise office & debt. £500 was accepted as a compromise:—*Held*: the sheriff was entitled to poundage on the latter sum only. *Semble*: in no case is he entitled to poundage on more than the actual fruits received from the levy.—**R. v. ROBINSON** (1835), 2 Cr. M. & R. 334; 4 Dowl. 447; 1 Gale, 209; 5 Tyr. 1095; 4 L. J. Ex. 319; 150 E. R. 144.

*Annotations:—Refd.* Miles v. Harris (1862), 12 C. B. N. S. 550; Roe v. Hammond (1877), 2 C. P. D. 300; Mortimore v. Cragg (1878), 3 C. P. D. 216.

**1973. ———.]—The** sheriff is not entitled to poundage on a *fi. fa.* unless there has been a levy. Accordingly where, after the sheriff had received the writ, but before execution, debt. to stop execution offered the sheriff to pay the money for which the writ issued & the sheriff refused to receive it without poundage, which debt. paid under protest; the ct. ordered the sheriff to refund the poundage.—**COLLS v. COATES** (1840), 11 Ad. & El. 826; 3 Per. & Dav. 511; 113 E. R. 628; *sub nom.* COLES v. COATES, 9 L. J. Q. B. 232.

*Annotation:—Folld.* Brun v. Hutchinson (1844), 2 Dow. & L. 43.

**1974. ——— Colourable levy.]—A.**, being informed that a writ of *fi. fa.* was in the sheriff's hands against him, sent a party to the house of the sheriff's officer, to whom the warrant had been delivered, with a bank post bill, & some country notes to an amount sufficient, as he thought, to discharge the execution. On inquiry, however, the amount not being sufficient, the party returned to fetch the balance, leaving the bill & notes on the table; & in his absence, the sheriff's officer levied on the money so left in his hands, & claimed poundage thereon, which was paid under protest:—*Held*: this was a colourable levy; the sheriff was not entitled to poundage, & the ct. would order him to refund the sum he had so received.—**BRUN v. HUTCHINSON** (1844), 2 Dow. & L. 43 13 L. J. Q. B. 244.

*Annotation:—Refd.* Mortimore v. Cragg (1878), 3 C. P. D. 216.

**1975. ——— Whether where money paid before goods sold.]—ANON.** (1774), Lofft, 433; 98 E. R. 732.

*Annotations:—Refd.* Bissicks v. Bath Colliery Co. (1877), 46 L. J. Q. B. 611; Roe v. Hammond (1877), 46 L. J. Q. B. 791.

#### PART IV. SECT. 2, SUB-SECT. 2.

**1970 i. In what circumstances payable—On seizure & money received under writ.]—Pltf.'s** attorney is not liable to the sheriff for poundage on an execution, unless he receives the amount from debt., though debt. has escaped from the limits, & his bail have paid the debt & costs to the attorney.—**CALDWELL v. BADGER** (1852), 2 All. 516.—CAN.

**h. ——— Before seizure—Where payment forced by act of sheriff.]—On** executions against person or goods, if the money be paid before seizure, this defeats the right to poundage, but if the money be forced by the act of the sheriff, then, though it does not pass through his hands, his right to poundage accrues.—**MORRIS v. BOULTON** (circa 1852), 2 C. L. Ch. 60.—CAN.

**k. ——— Money received by sheriff.]—The** receipt of money by a sheriff under a *fi. fa.* is a virtual execution of the writ, although there has been no seizure or sale, & entitles the sheriff to his poundage & fees. Debt. requested the sheriff never to make a seizure upon receiving a writ of *fi. fa.* against him, promising that he would pay his fees as if a formal seizure had been made. Subsequently the sheriff notified debt. of the receipt of a writ against him & issued his warrant, but

did not levy, & debt. paid:—*Held*: the sheriff was entitled to the poundage & fees.—**CONSOLIDATED BANK v. BICKFORD** (1877), 7 P. R. 172.—CAN.

**l. ——— Money must be levied by sheriff.]—Under** C. S. U. C., c. 22, s. 271, a sheriff is not entitled to poundage unless he actually levies the money due under the writ in his hands; even though by the pressure exerted by seizure debt. has paid or otherwise settled the debt.—**BUCHANAN v. FRANK** (1865), 15 C. P. 196.—CAN.

**m. ——— On levy—Though no sale.]—Where** a sheriff, before 7 Will. 4, c. 3, s. 32, levied on a debt's goods, he was entitled to poundage, although there was no sale, that Act not being retrospective.—**COMMERCIAL BANK v. VAN NORMAN** (1841), (1823–1900), 3 Ont. Dig. 6416.—CAN.

**n. ——— Money levied restored.]—Semble**: where money levied has to be restored to debt., in consequence of something for which pltf. is answerable, the sheriff may recover his poundage from pltf.—**HENRY v. COMMERCIAL BANK OF CANADA** (1859), 17 U. C. R. 104.—CAN.

**o. ——— Not where payment independent of execution.]—To** entitle a sheriff to poundage on moneys collected by a judgment creditor, the payment

must be the result, directly or indirectly, of a seizure made by him.—**BANK OF MONTREAL v. SHIRREFF** (1895), 33 N. B. R. 298.—CAN.

**1975 i. ——— Whether where money paid before goods sold.]—Pltf.** was deputy sheriff of P. county, & had extended an execution at H.'s suit on lands of a judgment debtor of the latter. The debt was settled & the land was not sold. Pltf. then brought his action in the comr.'s ct. against H. for his expenses & poundage, & that ct. gave judgment for the expenses but refused to allow the poundage, & from that judgment pltf. appealed:—*Held*: pltf. was not entitled to poundage.—**CRESWELL v. HUNT** (1862), 1 P. E. I. 191.—CAN.

**1975 ii. ———.]—Where** a sheriff has seized under a writ of *fi. fa.* & a compromise payment is made by the execution debtor, the sheriff is not entitled to poundage unless the payment is the result of seizure, & the *onus* is on the sheriff to show that the payment was so made.—**RICHARDS v. PRODUCERS ROCK & GRAVEL CO., LTD.** (1914), 20 B. C. R. 109.—CAN.

**1975 iii. ———.]—A** sheriff has no right to poundage upon an execution against lands, unless there has been an

**1976.** ——— **Under protest.**—A sheriff's officer went with a warrant to debt.'s premises for the purpose of levying under a *fi. fa.*, & without saying or doing anything more, produced the warrant & demanded the debt & costs, together with poundage & expenses of levy. The money was paid under protest:—*Held*: this did not amount to a levy so as to entitle the sheriff to poundage or the officer to fees.—*NASH v. DICKENSON* (1867), L. R. 2 C. P. 252.

*Annotations*:—*N.F.* Bissicks v. Bath Colliery Co. (1877), 2 Ex. D. 459. *Distd.* Mortimore v. Cragg (1878), 3 C. P. D. 216.

**1977.** ——— **After seizure.**—If a sheriff, who has seized pursuant to a writ of *fi. fa.* the goods of an execution debtor, is paid out before sale, he is not entitled to poundage, but he is entitled to a discharge fee for the release of the goods.

The goods of debts. were seized by the sheriff of M. under a writ of *fi. fa.* issued at the suit of pltf., & afterwards a similar writ in an action by I. against one of debts. was lodged with him. The sheriff remained in possession some days afterwards, but ultimately the amount of the judgment debts was paid on behalf of debts., & no part of the goods seized was sold. The sheriff claimed & received payment of a discharge fee in each action, & in the action at the suit of I., poundage & a levy fee. A rule was obtained under 7 Will. 4 & 1 Vict. c. 55, s. 3, for a return of these fees & the poundage:—*Held*: the sheriff was not entitled to poundage, which must be returned; but that he was entitled to retain the discharge fees & the levy fee.—*ROE v. HAMMOND* (1877), 2 C. P. D. 300; 46 L. J. Q. B. 791.

*Annotations*:—*Dbtd.* Bissicks v. Bath Colliery Co. (1877), 2 Ex. D. 459. *N.F.* Mortimore v. Cragg (1878), 3 C. P. D. 216. *Refd.* Glassbrook v. David & Vaux (1905), 53 W. R. 408.

**1978.** ——— **—**—A sheriff, who by compulsion of a writ of *fi. fa.* recovers the amount of a judgment debt, is entitled to poundage, although after seizure he is paid out by the execution debtor, without a sale of any portion of the goods seized.—*MORTIMORE v. CRAGG* (1878), 3 C. P. D. 216; 47 L. J. Q. B. 348; 26 W. R. 363; *sub nom.* *Re SURREY, SHERIFF, MORTIMORE v. CRAGG*, 38 L. T. 116, C. A.

*Annotations*:—*Apld.* Bissicks v. Bath Colliery Co. (1878), 47 L. J. Q. B. 408. *Refd.* Lee v. Dangar Grant, [1892] 1 Q. B. 231.

**1979.** ——— **—**—A sheriff's officer in the execution of a warrant of *fi. fa.* went with another man to debtor's house, showed him the warrant, & demanded payment, & told him that in default of payment the man must remain in possession, & further proceedings would be taken; debtor then paid the sum demanded in the warrant,

which included poundage & officer's fee:—*Held*: there had been seizure upon the *fi. fa.* & the sheriff was entitled to poundage.—*BISSICKS v. BATH COLLIERY CO., LTD.* (1878), 3 Ex. D. 174; 47 L. J. Q. B. 408; 38 L. T. 163; 42 J. P. 708; *sub nom.* *BISSICKS v. BATH COLLIERY CO., LTD., Ex p. BISSICKS*, 26 W. R. 365, C. A.

*Annotations*:—*Refd.* Mortimore v. Cragg (1878), 3 C. P. D. 216; Smith v. Critchfield (1885), 14 Q. B. D. 873; Lee v. Dangar, Grant, etc. (1892), 61 L. J. Q. B. 780.

**1980.** ——— **—**—As a general proposition of law it is undoubted that a sheriff is entitled to poundage when he has obtained some money for the execution creditor by operation of law, whether he gets it by selling the goods he has seized or by the debtor or some one on his behalf paying him out to prevent a sale (*CAVE, J.*).—*Re LUDFORD* (1884), 13 Q. B. D. 415; 51 L. T. 240; 33 W. R. 152; 1 Morr. 131; *sub nom.* *Re LUDFORD, OFFICIAL RECEIVER v. WARWICKSHIRE, SHERIFF*, 53 L. J. Q. B. 418.

*Annotations*:—*Refd.* Lee v. Dangar, Grant, etc. (1892), 61 L. J. Q. B. 780; *Re Thomas, Ex p. Middlesex, Sheriff*, [1899] 1 Q. B. 460.

**1981.** ——— **Whether where proceedings irregular.**—*ANON.* (1773), Lofft, 253; 98 E. R. 637.

*Annotation*:—*Refd.* Bissicks v. Bath Colliery Co. (1877), 46 L. J. Q. B. 611.

**1982.** ——— **Judgment set aside after levy.**—The sheriff is entitled to his poundage on an execution levied, though that execution is afterwards set aside for irregularity.—*BULLEN v. ANSLEY & SMITH* (1807), 6 Esp. 111, N. P.

**1983.** ——— **—**—Where the sheriff levied under a *fi. fa.*, & received the money, & afterwards the judgment & execution being set aside for irregularity, & the money ordered to be returned, paid it back with the assent of pltf.:—*Held*: 43 Geo. 3, c. 46, does not take away his remedy by action of debt against pltf. for his poundage.—*RAWSTORNE v. WILKINSON* (1815), 4 M. & S. 256; 105 E. R. 829.

*Annotations*:—*Refd.* *Re Lightfoot* (1851), 18 L. T. O. S. 54; Searle v. Blaise (1863), 14 C. B. N. S. 856; *Re Ludford, Official Receiver v. Warwickshire, Sheriff* (1884), 53 L. J. Q. B. 418. *Mentd.* Aldred v. Constable (1844), 3 L. T. O. S. 299.

**1984.** ——— **Judgment set aside before sale.**—The sheriff is not entitled to poundage, where after seizure & before sale, the judgment & all subsequent proceedings are set aside for irregularity.—*MILES v. HARRIS* (1862), 12 C. B. N. S. 550; 31 L. J. C. P. 361; 6 L. T. 649; 142 E. R. 1258.

*Annotations*:—*Refd.* Searle v. Blaise (1863), 14 C. B. N. S. 856; Mortimore v. Cragg (1878), 47 L. J. Q. B. 348; *Re Ludford, Official Receiver v. Warwickshire, Sheriff* (1884), 53 L. J. Q. B. 418; *Re Thomas, Ex p. Middlesex, Sheriff*, [1899] 1 Q. B. 460.

**1985.** ——— **Sale by bill of sale.**—Where a

actual sale.—*MERCHANTS BANK v. CAMPBELL* (1881), 32 C. P. 170.—*CAN.*

**1975 iv.** ——— **—**—*FRENCH v. LAKE SUPERIOR MINERAL CO.* (1892), 14 P. R. 541.—*CAN.*

**1977 i.** ——— **After seizure.**—Where, after seizure by a sheriff under an execution for \$1,100, the execution was settled between the parties by the taking of promissory notes from debt., & the sheriff was ordered to deliver up possession, but the writ was not withdrawn:—*Held*: the execution was satisfied so as to entitle the sheriff to something for poundage.—*MCKROBERTS v. HAMILTON* (1877), 7 P. R. 95.—*CAN.*

**1977 ii.** ——— **—**—Where a sheriff made a seizure under writs of *fi. fa.* of property of the judgment debtor, & a few hours before the sale the judgment debtor came to the sheriff & paid the full amount of the judgment debt:—*Held*: the sheriff was entitled

to poundage on the full amount of the judgment debt, & not merely on the value of the property seized.—*Re BLACK EAGLE GOLD MINING CO.* (1903), 6 O. L. R. 512; 23 C. L. T. 331; 2 O. W. R. 797.—*CAN.*

**p.** ——— **Whether on withdrawal from possession.**—Where the sheriff under a *fi. fa.* seized goods sufficient to cover the claim, & afterwards withdrew from possession, in obedience to a judge's order founded upon an undertaking of debt. to credit the amount of the levy on an execution which he held against pltf.:—*Held*: entitled to poundage.—*THOMAS v. COTTON* (1854), 12 U. C. R. 148.—*CAN.*

**q.** ——— **Writ superseded — Withdrawal of seizure.**—A sheriff made a seizure under a *fi. fa.* against the goods of debt., but, learning that they were about to appeal, of his own motion, & for the purpose of saving expense to

the parties, withdrew his officer in possession, & the appeal having been subsequently brought, the execution was superseded. The appeal was dismissed, & the judgment debt & costs were afterwards settled by arrangement between the parties:—*Held*: the sheriff had not so withdrawn from the seizure as to disentitle him to poundage or an allowance in lieu thereof, & notwithstanding the superseding of the execution, he was entitled to such allowance.—*WEEGAR v. GRAND TRUNK RY. CO.* (1894), 16 P. R. 371.—*CAN.*

**r.** ——— **Whether where proceedings irregular — Goods of third party sold.**—Where goods seized by a sheriff under execution, & sold under an interpleader order, were afterwards found to be the goods of claimant therein & not of the execution debt.:—*Held*: the sheriff was not entitled to an



*Sect. 2.—Sheriff's remuneration: Sub-sects. 2 & 3.]*

sheriff sells the goods of deft. under a *fi. fa.* by bill of sale, & not by auction, he is not entitled to the percentage allowed under 7 Will. 4 & 1 Vict. c. 55.—*MARTIN v. SHARP* (1844), 3 L. T. O. S. 106.

**1986. — When land extended—Under *elegit*.]**  
—Where lands are extended under a writ of *elegit*, there is no interest in them left in the debtor which can be extended under a subsequent writ. The sheriff, under a second writ of *elegit*, at the suit of the same execution creditor, made at his request a special return extending the same lands, subject to the first extent:—*Held*: the sheriff was not entitled to poundage on the second writ, although the amount of the first writ was less than the annual value of the lands.

In this case the execution debtor had only a term in the land, & upon the transfer of that, the whole is spent, & what remains in him is not a reversion but a right to the possession of the term after satisfaction of the first writ (*MARTIN, B.*).

It is clear that land cannot be extended under a second writ when possession has been delivered under the first (*WATSON, B.*).—*CARTER v. HUGHES* (1858), 2 H. & N. 714; 27 L. J. Ex. 225; 30 L. T. O. S. 275; 6 W. R. 212; 157 E. R. 294.

*Annotations*:—*Reid*. *Hatton v. Haywood* (1874), 9 Ch. App. 229; *Mortimore v. Cragg* (1878), 3 C. P. D. 216; *Johns v. Pink*, [1900] 1 Ch. 296.

**1987. — Where execution withdrawn.]**  
*MADELEY v. GREENWOOD* (1897), 42 Sol. Jo. 34, D. C.

*Annotations*:—*Reid*. *Re Thomas, Ex p. Middlesex, Sheriff*, [1899] 1 Q. B. 460. *Mentd.* *Union Bank of Manchester v. Grundy*, [1924] 1 K. B. 833.

—.]—*See* *BANKRUPTCY*, Vol. V., p. 822, Nos. 6983, 6984.

**1988. On what calculated—Rent paid to landlord.]**—On execution the landlord's rent shall be paid without deduction of poundage for the sheriff.—*GORE v. GOFTON* (1725), 1 Stra. 643; 93 E. R. 754.

**1989. — — —.]**—A sheriff, on making a levy under an execution, is entitled to a percentage on the whole proceeds of the sale, including a year's rent paid by him to the landlord, as well as on the amount of the execution; but he is not entitled to be allowed extra expenses incurred by

allowance in lieu of poundage in respect of the goods seized.—*TURNER v. CROZIER* (1891), 14 P. R. 272.—*CAN.*

**s. — Whether on successful claim to goods by third party.]**—A sheriff is not entitled to a poundage fee where the claimant of the goods seized succeeds on an interpleader issue, although the seizure was made under the explicit instructions of the solrs. for execution creditors.—*MCDONALD (A.) CO. v. CUSHING*, [1918] 3 W. W. R. 89.—*CAN.*

**1987 i. — Where execution withdrawn.]**—S. lodged a writ of *fi. fa.*, indorsed to levy on the lands, goods, etc., of L. The sheriff went into possession, & shortly afterwards the sheriff was instructed by S. to withdraw, no sale having been effected & there being no compromise. The sheriff claimed poundage fees, but S. refused to pay them on the ground that no money was received under the writ:—*Held*: the sheriff was not entitled to poundage fees.—*Re SLY* (1890), 11 N. S. W. L. R. 39; 6 N. S. W. W. N. 14.—*AUS.*

**1987 ii. — — —.]**—A sheriff is not entitled to poundage where the execution creditors withdraw an execution upon a claim being made to the goods.—*IMPERIAL ELEVATOR & LUMBER CO. v. HODEL*, [1917] 1 W. W. R. 1158.—*CAN.*

**1987 iii. —**

seized by a sheriff under a writ of sale, & the writ is withdrawn before sale, the sheriff is entitled to poundage upon the value of deft.'s interest in the land seized, the amount of which will be fixed on application to a judge.—*Re CORPE v. MULBROCK* (1887), 6 N. Z. L. R. 37.—*N.Z.*

**1987 iv. — — —.]**—Where a sheriff makes a levy on goods, & before the sale is directed by the execution creditor to withdraw, then, in the event of the debtor neither paying the sum indorsed on the writ nor asking for an appraisal, the sheriff is entitled, under Sheriffs Act, 1883, ss. 14 & 15, to poundage fees calculated on the full amount indorsed on the writ.—*SHAND v. RIELY* (1888), 6 N. Z. L. R. 572.—*N.Z.*

**t. — Writ of *capias ad satisfaciendum*.]**—When the sheriff has the party in custody on a *ca. sa.* he can claim poundage.—*CORBETT v. —* (1850), 6 U. C. R. 605.—*CAN.*

**a. — — — Defendant surrendered by bail.]**—Where a *ca. sa.* was delivered with instructions to return it “*non est inventus*” after four days, & the bail in the meantime surrendered deft.:—*Held*: entitled to poundage.—*GILLESPIE v. NICKERSON* (1850), 1

him in making the levy, which are not included in the table of fees framed under 7 Will. 4 & 1 Vict. c. 55.

The master is bound to allow the expenses of such a possession as was necessary for the sale of the goods. Here he has thought fit to allow for the expenses of seven days' possession & that was a reasonable charge. Extra expenses cannot be allowed (*PARKE, B.*).—*DAVIES v. EDMONDS* (1843), 12 M. & W. 31; 1 Dow. & L. 395; 13 L. J. Ex. 1; 2 L. T. O. S. 101; 8 J. P. 663; 152 E. R. 1099.

**1990. — *Elegit*—On annual value of land.]**—*Estreats Act* (c. 15), s. 16, which, “for ascertaining the fees for executing of writs of *elegit*,” so far as they affect real estate, enacts that the poundage to be taken by sheriffs “by reason or colour of their office,” or “by reason or colour of their executing of any writ or writs of *habere facias possessionem aut seisinam*,” shall not exceed a certain proportion of the yearly value of any lands “whereof possession or seisin shall be by them or any of them given,” applies to the execution of writs of *elegit*, though not expressly named in the enacting part; & the sheriff taking more than the limited poundage for such execution is liable to the penalties imposed by 8 Geo. 1, c. 25, s. 5, & 29 Eliz. c. 4, s. 1.—*NASH v. ALLEN* (1843), 4 Q. B. 784; 1 Dav. & Mer. 16; 12 L. J. Q. B. 298; 7 Jur. 667; 114 E. R. 1092; *sub nom.* *NASH v. NIXON*, 1 L. T. O. S. 229.

*Annotation*:—*Reid*. *Carter v. Hughes* (1858), 27 L. J. Ex. 225.

**1991. — — — Not stamps in hands of distributor.]**—The sheriff is not entitled to poundage upon stamps in the possession of a distributor seized under an extent.—*R. v. VILLERS* (1810), Wight. 95; 145 E. R. 1188.

**1992. — — — On actual amount received.]**—*R. v. ROBINSON*, No. 1972, *ante*.

**1993. — — — On actual amount due.]**—*EVANS v. MANERO*, No. 144, *ante*.

**1994. — — — On sale of ship.]**—By an order dated Aug. 31, 1888, & made under Sheriffs Act, 1887 (c. 55), a scale of fees to be demanded & received by a sheriff upon the execution of writs of *fi. fa.* is fixed, amongst others it provides that he shall demand, “for the inventory & valuation, cataloguing lotting, & preparing for sale, where no sale takes

P. R. 305.—*CAN.*

**b. — — — Sheriff entitled immediately on arrest.]**—A sheriff upon arresting a judgment debtor under a *ca. sa.* thereby becomes at once entitled as against the execution creditor to full poundage on the amount of the execution.—*MENAB v. OPPENHEIMER* (1886), 11 P. R. 348.—*CAN.*

**c. — — — Where execution set aside before sale.]**—Where a levy had been made under a *fi. fa.*, but before sale the writ & all proceedings thereon were set aside:—*Held*: not entitled to poundage.—*WALKER v. FAIRFIELD* (1858), 8 C. P. 95.—*CAN.*

**d. — — — Sale in spite of notice of act of bankruptcy.]**—A judgment debtor against whom there was an execution in the sheriff's hands, had committed an act of bkpcy., of which the sheriff had notice, & on foot of which the judgment debtor was afterwards adjudicated bkpt. The sheriff, notwithstanding such notice, sold the debtor's goods under the execution, deducted his poundage fees & expenses of the sale, & paid the balance to the assignees:—*Held*: the sheriff was not entitled to these deductions, & was disallowed the poundage.—*Re PRIESTLY* (1889), 23 L. R. Ir. 536.—*IR.*

**e. — — — Bankruptcy before sale.]**—

place by reason of the execution being withdrawn, satisfied, or stopped, 2½ per cent. on the value of the goods":—*Held*: the above rule did not apply to the sale of a ship.—*COHEN v. DE LAS RIVAS, Ex p. DURHAM, SHERIFF* (1891), 64 L. T. 661; 39 W. R. 539, D. C.

**1995. Where two seizures for same debt—Poundage apportioned.**—Where the debt is paid to the officers of the Crown immediately, although upon compulsion of one levy, the poundage shall be apportioned between the sheriffs.—*R. v. FRY* (1794), 3 Anst. 718, n.; 145 E. R. 1017.

*Annotations*:—*Consd. R. v. Barber* (1796), 3 Anst. 717; *R. v. Robinson* (1835), 4 L. J. Ex. 319.

**1996. — Sheriff who recovers money entitled.**—*R. v. CALDWELL* (1793), 1 Anst. 279; 145 E. R.

*Annotations*:—*Folld. R. v. Fry* (1793), 3 Anst. 718, n.; *R. v. Barber* (1796), 3 Anst. 717.

**1997. — — —**—Two extents issued into different counties for the same debt, both sheriffs seized goods; the debt was paid to one before a *venditioni exponas* issued to either, he shall have the whole poundage.—*R. v. BARBER* (1796), 3 Anst. 717; 145 E. R. 1017.

**1998. — — —**—Two extents having issued against A., & an extent in aid into another county court against B., for the same sums. B. paid the whole debt giving notice to the sheriff to retain the money till the legality of the extent in aid was tried; afterwards A. paid part of the money to B., in consequence of an arrangement among themselves. The sheriff who took the inquisitions against A. is not entitled to any share of the poundage.—*R. v. BOWLES* (1810), Wight. 116; 145 E. R. 1196.

**1999. — — —**—*LEE v. DANGAR, GRANT & Co.*, No. 170, *ante*.

#### SUB-SECT. 3.—POSSESSION MONEY.

**2000. Possession must be confined to reasonable time.**—*DAVIES v. EDMONDS*, No. 1989, *ante*.

**2001. — — —**—A sheriff who has remained in

Where the sheriff takes possession under a writ of sale, but bkpey. takes place before sale, the sheriff is not entitled to poundage.—*Re SUTHERLAND* (1888), 6 N. Z. L. R. 596.—N.Z.

**f. On what calculated—Not on sums retained.**—The sheriff is entitled to poundage only on the sum paid over by him, not on what he retains for himself.—*MICHIE v. REYNOLDS* (1865), 24 U. C. R. 303.—CAN.

**g. — — —**—Money expended by a sheriff upon property after seizure in order to render it saleable forms no part of the "sum made" by the sheriff within the meaning of the tariff of sheriff's fees, & he is, therefore, not entitled to poundage upon these or other sums which he retains to cover his own expenses.—*STURGEON v. HENDERSON*, [1917] 3 W. W. R. 56; 37 D. L. R. 54.—CAN.

**h. — On money passing through sheriff hands.**—Where the parties to a suit arranged outside the sheriff's office for the payment of \$3,000 on account of an execution in his hands, & plffs. in the cause paid his poundage on that amount as well as on the moneys actually paid to the sheriff, the ct. refused to allow them to charge the amount against defts.—*HAMILTON & PORT DOVER RY. Co. v. GORE BANK* (1873), 20 Gr. 191.—CAN.

**k. — Writ of possession—Yearly rental value.**—Where a sheriff has executed a writ of possession, he is entitled to poundage on the yearly rental value of the premises to which

possession is given.—*BELL v. NICHOLLS, Ex p. RICHARDS* (1919), 26 B. C. R. 102.—CAN.

**l. — Fieri facias—On sum marked on writ.**—On foot of a *fi. fa.* marked for £30 8s. 11d., the sheriff, by seizure & sale of a term of years, levied £530, & with the assent of the attorney of the execution debtor, retained poundage fees on the whole sum levied:—*Held*: he was entitled to poundage fees, not on the sum levied, but on the sum marked on the writ, & no more.—*BYRNE v. HUTCHINSON* (1875), 1 I. R. 9 C. L. 75.—IR.

**m. On what writs payable—Writ of possession.**—Poundage is payable to, & recoverable by, the sheriff under the execution of a writ of possession by him.—*MCCRORTS v. JOHNSON* (1890), 16 V. L. R. 725.—AUS.

**n. — Writ of extent.**—Poundage is recoverable from deft. upon a writ of extent.—*R. v. PATTON* (1852), 9 U. C. R. 307.—CAN.

**o. Allowance in lieu of poundage—Question for court.**—The poundage of a sheriff cannot be taken to cover more than the risk & responsibility cast upon him when he seizes, retains, & sells goods & from this levy returns the money. If the sheriff's action be intercepted, so that he does not make this money, it is for the ct. to say what allowance shall be made to him in lieu of poundage.—*WADSWORTH v. BELL* (1881), 8 P. R. 478.—CAN.

**p. Computation.**—The usual mode of computing sheriff's poundage is

possession for an unreasonable period at the instance of the execution creditor & without debtor's consent is not entitled to charge against debtor the costs of retaining such possession beyond what is a reasonable period.—*Re FINCH, Ex p. ESSEX, SHERIFF* (1891), 65 L. T. 466; 40 W. R. 175; 36 Sol. Jo. 44; 8 Morr. 284.

*Annotation*:—*Distd. Re Hurley* (1893), 41 W. R. 653.

**2002. Only chargeable for one person.**—It is extortion for a bailiff on a *fi. fa.* to charge costs of a second man in possession & of a valuation of the goods.—*HALLIWELL v. HEYWOOD* (1862), 10 W. R. 780.

**2003. Not chargeable unless possession taken—Unless by agreement between parties.**—The table of fees framed under 7 Will. 4 & 1 Vict. c. 55, s. 2, allows the sheriff's bailiff, for executing a *fi. fa.*, if the distance do not exceed five miles, £1 1s.; if beyond that distance, per mile 6d., & for each man in possession, *per diem* 5s. On execution of a *fi. fa.* deft. requested that a man might not be put in possession, & agreed to pay the possession money, the bailiff charged three days' possession money & 1s. mileage:—*Held*: the agreement of deft. was an answer as to the possession money, but the charge of 6d. per mile each way was illegal.—*GILL v. JOSE* (1856), 6 E. & B. 718; 27 L. T. O. S. 171; 2 Jur. N. S. 860; 119 E. R. 1032.

*Annotation*:—*Refd. Cooper v. Hill* (1859), 6 Jur. N. S. 99.

**2004. — — —**—If when the sheriff presented himself, debtor had handed him the money & had said go about your business, or had said take away the goods at once I won't have them left here, there would have been no necessity to take possession; but here possession was actually taken by the officer of the law, & that being so possession money was a legal incidental expense (*BACON, C.J.*).—*Re GRUBB, Ex p. SIMS* (1877), 4 Ch. D. 521; 46 L. J. Bcy. 103; 36 L. T. 40; 25 W. R. 276; *affd.*, 5 Ch. D. 375, C. A.

*Annotations*:—*Refd. Re Bullen, Ex p. Ind, Coope* (1881), 44 L. T. 587; *Turner v. Bridgett* (1882), 30 W. R. 586; *Glasbrook v. David & Vaux*, [1905] 1 K. B. 615. *Mentd.* *Mostyn v. Stock* (1882), 9 Q. B. D. 432.

correct, namely, to allow six per cent. on the first \$1,000, & in addition thereto three per cent. on the amount over \$1,000, & under \$4,000; & in addition thereto one & a half per cent. on the amount over \$4,000.—*FLEMING v. HALL* (1882), 9 P. R. 310.—CAN.

#### PART IV. SECT. 2, SUB-SECT. 3.

**2003i. Not chargeable unless possession taken—Unless by agreement.**—A sheriff who had made a seizure under execution, the goods being claimed by the execution debtor's wife, took from the execution debtor & his wife a letter recognising the sheriff's possession, & agreeing to deliver the goods on demand. He did not thereafter keep a man in possession but exercised some care & supervision over the goods. He took up with the execution creditor & her solrs. the matter of his payment for looking after the goods & certain expressions of agreement were made to him as to remuneration:—*Held*: the sheriff was entitled to charge for his services in looking after the goods, whether his claim was for keeping "possession" or based on a *quantum meruit* for services rendered.—*RANKIN v. BELL*, [1923] 2 W. W. R. 922; 3 D. L. R. 907.—CAN.

**q. — Amount chargeable.**—The fee for possession is not one which a sheriff is entitled to collect for his own use, where he is paid by fees, or as revenue, unless he has in person been in actual possession. Where he has placed a bailiff in possession it becomes



*Sect. 2.—Sheriff's remuneration: Sub-sects. 3, 4*

**2005. Possession under several writs—Possession money only payable once.]**—Where a sheriff has put a man in possession of goods under writ of *fi. fa.* issued by one creditor, & afterwards received other writs against the same debtor from other creditors, & has merely kept the same man in possession on behalf of all the creditors, he cannot, upon the executions being withdrawn, recover possession money at 5s. a day from more than one creditor.—*GLASBROOK v. DAVID & VAUX*, [1905] 1 K. B. 615; 74 L. J. K. B. 492; 92 L. T. 299; 53 W. R. 408; 21 T. L. R. 276; 49 Sol. Jo. 298.

*See, also, COUNTY COURTS, Vol. XIII., p. 515, No. 648.*

**Costs of execution in bankruptcy proceedings.]**—*See BANKRUPTCY, Vol. V., pp. 822, 823, Nos. 6986–6993.*

#### SUB-SECT. 4.—FEES.

**2006. Assessment of fees.]**—*UNION BANK OF MANCHESTER, LTD. v. GRUNDY*, No. 1967, *ante*.

**2007. Of sequestrator.]**—I do not remember that 6s. 8d. is an absolute stated fee, to all sequestrators, whether the effects seized under the sequestration are large or small, & as the sequestrator, in this case, had not got in £40 in almost two years, I think the gross sum the master has allowed him, is sufficient for his trouble (*LORD HARDWICKE, C.*)—*WOOD v. FREEMAN* (1743), 2 Atk. 542; 26 E. R. 725, L. C.

**2008. When payable—Not until levy completed.]**

a disbursement which he is entitled to collect, but only to the amount of the sum paid the bailiff & in no case to exceed the fee fixed by the tariff.—*Re PENNY LUMBER CO.*, [1921] 3 W. W. R. 352.—**CAN.**

**r. ———.]**—A sheriff, when not personally in possession of goods, is not entitled to make profit out of possession money, & so, in a proper case for putting a man in possession, possession money cannot be charged unless the man actually entered into possession, nor for any period beyond that of the actual possession, nor for any amount beyond the actual sums paid out by the sheriff in that connection, & the sheriff must produce vouchers for the sums so paid out to him.—*LI DIN v. CHOW [TOY DONG]*, [1923] 2 W. W. R. 799; 3 D. L. R. 957; 32 B. C. R. 296.—**CAN.**

**s. Seizure of goods of third person—On whom chargeable.]**—*C. & W.*, attorneys, instructed the sheriff to levy upon certain goods which were claimed by two persons. The sheriff interpleaded, & the usual orders were made. Payment was not made, nor was security given within the time allowed, but the sheriff was instructed to stay proceedings, & finally *C. & W.* wrote to the sheriff, telling him to withdraw on payment of possession money by claimants. Claimants refused to pay, the sheriff tried to sell the goods & failed, & before a sale was effected, the interpleader was decided in favour of claimants & the sheriff had to withdraw:—*Held*: the sheriff could recover the possession money from *C. & W.*—*Re CREAGH & WILLIAMS* (1890), 11 N. S. W. L. R. 16; 6 N. S. W. N. 141.—**AUS.**

**t. Evidence of expenses—Delay caused by creditor.]**—Where property is attached by the sheriff & the sale is delayed at the instance of the attaching creditor & for his own benefit, but slight evidence will be required to support an action against the creditor for

expenses necessarily incurred in caring for the property attached.—*MCDONALD v. CURRY* (1896), 28 N. S. R. (16 R. & G.) 305.—**CAN.**

**a. Withdrawal after seizure—At instance of creditor.]**—Where a sheriff after a seizure of the execution debtor's goods under a writ of *fi. fa.* withdraws from possession by the authority of a person at whose instance he was required to execute the writ, he is entitled to bailiff's fee for executing the warrant, & bailiff's expenses while in possession of the goods. A writ is executed when the goods of the execution debtor are in custody of the sheriff.—*PIRIE v. STEWART*, [1899] 2 I. R. 546.—**IR.**

#### PART IV. SECT. 2, SUB-SECT. 4.

**2008 i. When payable—Not until levy completed.]**—*A.* issued an execution against *B.*, under which a levy was made of *B.*'s goods, but no sale, the execution being withdrawn. A second execution under another judgment was issued by *A.* against *B.*, & the sheriff, after selling goods to satisfy that execution, proceeded to sell other goods of *B.* to satisfy him for fees on the first execution:—*Held*: such sale by the sheriff was a wrongful conversion, & trover would lie.—*MILLER v. WELDON* (1871), 2 Han. 188.—**CAN.**

**b. ——— Payment for services rendered.]**—Pltf. had obtained a decree in this cause against defts., by which money was ordered to be paid, & on which pltf. issued execution & lodged it in the hands of a sheriff. After seizure under the writ, but before the money was levied, defts. moved for & obtained leave to rehear the cause, & a stay of the execution on the terms of paying the money into ct., which was done:—*Held*: the sheriff, not having actually levied the money under the execution, was entitled only to fees for services actually rendered.—*WINTERS v. KINGSTON PERMANENT BUILDING SOCIETY (circa 1861)*, 1 Ch. Ch. 276.—**CAN.**

—*EMPSON v. BATHRUST* (1622), Win. 20, 50; Hut. 52; 124 E. R. 18, 43.

*Annotation*:—*Reid. Gilles v. Grover* (1832), 9 Bing. 128.

**2009. ———.]**—Under-sheriff cannot refuse to execute process till he has his fees.—*HESCOTT'S CASE* (1694), 1 Salk. 330; 91 E. R. 291.

**2010. ———.]**—The sheriff in possession under a *fi. fa.* is not entitled to his costs of entry & possession unless he has actually proceeded to a sale before adjudication issues against debtor.—*Re WHITE, Ex p. WHITE'S ASSIGNEES* (1862), 6 L. T. 511.

**2011. ——— Payment under seizure.]**—*NASH v. DICKENSON*, No. 1976, *ante*.

**2012. ——— Where not indorsed on writ.]**—A sheriff may levy under a *fi. fa.* the amount of his fees authorised by 7 Will. 4 & 1 Vict. c. 55, although not indorsed on the writ, & he need not particularise their respective amounts in his return.—*CURTIS v. MAYNE* (1812), 2 Dowl. N. S. 37; 7 Jur. 154.

*Annotations*:—*Expld. Sncary v. Abdy* (1876), 1 Ex. D. 299. *Mentd. Withers v. Parker* (1860), 5 Jur. N. S. 1033.

—*See BANKRUPTCY, Vol. V., p. 823, No. 6994.*

**2013. Not payable in respect of more than one person.]**—By the table of fees allowed by 7 Will. 4 & 1 Vict. c. 55, s. 2, a sheriff's officer is entitled to charge one guinea for executing a warrant of *ca. sa.*, & 1s. per mile for travelling expenses; but he is not entitled to charge for an assistant, nor for conducting the party arrested to gaol.—*COOPER v. HILL* (1859), 6 C. B. N. S. 703; 28 L. J. C. P. 311; 33 L. T. O. S. 239; 6 Jur. N. S. 99; 141 E. R. 627.

**2014. Taxation of fees.]**—A sheriff claimed

**c. ——— Only on sum actually levied.]**—A writ of *fi. fa.* for £283 4s. 1d. was delivered to a sheriff, under which he seized several musical instruments at the warehouse of *P.*, the execution debtor, who was a piano-seller, & without receiving any directions from either *P.* or the execution creditor, but acting on his own responsibility, the sheriff without, as the ct. considered, sufficient grounds for so doing, removed the goods from *P.*'s premises to a sale mart close by, where a small part of them were sold by auction for £62 5s., & in consequence of the insufficient bidding the sale of the remainder was adjourned. *P.* was adjudicated a bkpt. before the day to which the sale stood adjourned. The sheriff claimed, as against *P.*'s assignees in bkpcy., to retain out of the proceeds of the sale in his hands, fees on the entire sum for which the execution was issued, together with the expenses of removing the goods to the sale mart & the hire of the mart:—*Held*: the sheriff was only entitled to retain fees on the amount actually levied, & the residue of his claim must be disallowed.—*Re PURCELL* (1884), 13 L. R. Ir. 489.—**IR.**

**d. ——— Writ of capias ad satisfaciendum—Debtor discharged without payment of debt.]**—Where a debt. was arrested on a *ca. sa.*, & discharged without any part of the money being paid, the sheriff is not entitled to poundage on the amount of the execution, under the ordinance of fees; but he is entitled to his fees for executing the writ, & both pltf. & his attorney are liable therefor.—*KAVANAGH v. L'HELOD* (1842), 1 Kerr, 472.—**CAN.**

**e. ——— Money paid to sheriff by debtor.]**—The receipt of money by a sheriff under a *fi. fa.* is a virtual execution of the writ, although there has been no seizure or sale, & entitles the sheriff to his poundage & fees. Debt. requested the sheriff never to make a seizure upon receiving a writ of *fi. fa.* against him,

certain fees upon the execution of a writ of *fi. fa.* By a judge's order, made by consent of the parties, his bill was referred to the master to be taxed; the order said nothing as to the costs of taxation, & the master disallowed two-thirds of the sum claimed:—*Held*: in these circumstances, neither at common law nor under 7 Will. 4 & 1 Vict. c. 55, had the ct. power to order that the sheriff should pay the costs of taxation.—*CURLEWIS v. BIRD* (1842), 1 Dowl. N. S. 752; 11 L. J. Q. B. 273; 6 Jur. 669.

2015. —. —. —.]—By Sheriffs Act, 1887 (c. 55), s. 20, a sheriff may demand such fees & poundage as may from time to time be fixed. By order of Aug. 31, 1888, made under the Act, fees were fixed, & "In every case where an execution is withdrawn, satisfied, or stopped, the fees under this order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be; & the amount of any costs & charges payable under this scale shall be taxed in case the sheriff & the party liable to pay such costs & charges differ as to the amount thereof":—*Held*: there was no appeal from the taxation of the amount of costs & charges payable under the order to the sheriff.—*TOWNEND v. YORKSHIRE, SHERIFF* (1890), 24 Q. B. D. 621; 59 L. J. Q. B. 156; 62 L. T. 402; 54 J. P. 598; 38 W. R. 381, D. C.

*Annotations*:—*Distd.* *Madeley v. Greenwood* (1897), 42 Sol. Jo. 34; *Re Beeston, Ex p. Board of Trade* (1899), 68 L. J. Q. B. 344. *Apprvd. & Follid.* *Union Bank of Manchester v. Grundy*, [1924] 1 K. B. 833. *Refd.* *Glasbrook v. David & Vaux* (1905), 92 L. T. 299.

2016. —. —. —.]—*UNION BANK OF MANCHESTER, LTD. v. GRUNDY*, No. 1967, *ante*.

#### SUB-SECT. 5.—RECOVERY OF FEES AND POUNDAGE.

##### 2017. Liability of execution creditor—To sheriff.]

—The sheriff may bring *assumpsit* for his poundage.

promising that he would pay his fees as if a formal seizure had been made. Subsequently the sheriff notified deft. of the receipt of a writ against him & issued his warrant, but did not levy, & deft. paid:—*Held*: that the sheriff was entitled to the poundage & fees.—*CONSOLIDATED BANK v. BICKFORD* (1877), 7 P. R. 172.—*CAN.*

1. —. —. —.]—*After sale—Agreement not to complete sale.*—Lands were sold by the sheriff of S. at public auction, under execution on a judgment obtained against F. & another, & were knocked down to pltf. as the highest bidder. After the sale & payment of the usual deposit of 10 per cent., it was agreed between pltf. & the judgment creditors that the sale should not be completed, & that the money paid should be returned:—*Held*: the sheriff was entitled to retain the percentage fixed by the schedule of sheriff's fees on the amount for which the property was knocked down.—*FREEMAN v. MCLEAN* (1894), 27 N. S. R. (15 R. & G.) 324.—*CAN.*

g. *Liability to taxation.*—An execution & the judgment under which it issued were set aside on the ground of irregularity in obtaining the judgment:—*Held*: pltf. was not entitled to have the sheriff's bill against him taxed under R. S. O., 1877, c. 66, s. 48, as the setting aside of the execution was not a "settlement by payment, levy, or otherwise," within the Act, or under sect. 47, as pltf. was not a "person liable on any execution"; but a sheriff, as an officer of the ct. claiming fees by virtue of its process, is so far within its jurisdiction that his bill may be taxed.—*MORRISON v. TAYLOR* (1882),

9 P. R. 390.—*CAN.*

h. —. —. —.]—*Place of taxation—Notice.*—*Held*: a sheriff's bill of fees may be taxed on notice under Execution Act, R. S. O., 1877, c. 66, s. 48, either at Toronto or in the sheriff's own county, as the party taxing may elect.—*DOMINION TYPE FOUNDRY CO. v. NAULR* (1879), 8 P. R. 174.—*CAN.*

k. —. —. —.]—*Revision.*—Where a sheriff's fees have been taxed before a deputy clerk of the Crown under R. S. O., 1877, c. 66, s. 48, a revision of such taxation cannot take place before the principal clerk of the Crown, but the ct. may refer the bill back to the same deputy clerk for a revision of the taxation, where it appears that items have been improperly allowed.—*HAY v. DRAKE* (1879), 8 P. R. 120.—*CAN.*

l. *Application to fix fees—Seizure—No money levied—Costs.*—If, after a seizure, the parties settle, pltf. may apply to the ct. to fix the sheriff's fees, but he will not get the costs of the rule, though no cause be shown.—*Re HOME (SHERIFF)* (1844), 1 U. C. R. 412.—*CAN.*

m. —. —. —.]—A judge's order fixing the allowance to be made to the sheriff where there has been a seizure, but no money levied, is final. [In this case the sheriff rendered his bill, & pltf. obtained a summons to reduce it or determine who would be reasonable. *Semble*: (1) the sheriff should have applied in order to authorise charges not sanctioned by the tariff; (2) the judge's duty is not to tax the sheriff's account, but to fix a rate for services rendered, leaving to the master to determine the amount

—*STANTON v. SULIARD* (1599), Cro. Eliz. 654; 78 E. R. 893; *sub nom.* *SULIARD v. STAMP*, Moore, K. B. 468; *sub nom.* *STANTON v. SULIARD*, Moore, K. B. 699, Ex. Ch.

*Annotation*:—*Consd.* *Montague v. Davies, Benachi*, [1911] 2 K. B. 595.

2018. —. —. —.]—A sheriff may maintain an action for his poundage on an execution.

Sheriff [tenant by *elegit*] may maintain ejectment & may enter & assign his interest. . . . He must enter before he can assign it over (*HOLT, C.J.*).—*TYSON v. PASKE* (1705), 2 Ld. Raym. 1212; 1 Salk. 333; *Holt*, K. B. 318; 92 E. R. 300; *sub nom.* *JAYSON v. RASH*, 1 Salk. 209.

*Annotations*:—*Consd.* *Carter v. Hughes* (1858), 2 H. & N. 714. *Refd.* *R. v. Giles* (1820), 8 Price, 293; *Mortimore v. Cragg* (1878), 47 L. J. Q. B. 348. *Mentd.* *Frederick v. Laokup* (1767), 4 Burr. 2018; *R. v. O'Connor* (1843), 13 L. J. M. C. 33.

2019. —. —. —.]—*Where goods not sold.*—The sheriff cannot maintain an action for the expense incurred in seizing & keeping possession of goods under a *fi. fa.* at the request of the party suing out the writ, although they are not sold, on account of his refusing to give an indemnity against the claims of third persons.—*BILKE v. HAVELOCK* (1813), 3 Camp. 374, N. P.

*Annotations*:—*Consd.* *Foster v. Blakelock* (1826), 8 Dow. & Ry. K. B. 48; *Sneary v. Abdy* (1876), 1 Ex. D. 299; *Roe v. Hammond* (1877), 2 C. P. D. 300.

2020. —. —. —.]—*For charges of interpleader proceedings.*—On Feb. 17, 1881, the sheriff seized goods under an *elegit* against D. for £72, & interest, & costs. W. claimed the goods as his. On Feb. 19 the sheriff took out an interpleader summons. On July 15, an order was made for the sheriff to withdraw on W. giving security, in default of security the sheriff was ordered to sell the goods & pay the net proceeds into ct. Security was not given, & on Aug. 12 the sheriff paid £52, the net proceeds of the goods, into ct. On June 21, 1882, CHITTY, J., made an order that W. should be barred, that the fund in ct. should be paid to

in case of dispute.—*GWYNNE v. GRAND TRUNK RY. CO.* (1865), 24 U. C. R. 482.—*CAN.*

n. *Whether payable on more than one writ.*—Where attachments for three claims are served by the sheriff at the same time & place, the sheriff is entitled to full fees, including mileage, on each writ.—*MURCHIE v. FRASER* (1903), 36 N. B. R. 161.—*CAN.*

#### PART IV. SECT. 2, SUB-SECT. 5.

2017 i. *Liability of execution creditor—To sheriff.*—Deft. tendered pltf. the amount due on a judgment, which he refused to take, & issued execution, under which the sheriff levied on deft.'s property; deft. then obtained a judge's order that on payment to the sheriff of the amount tendered, the execution should be returned "satisfied," & that satisfaction should be entered on the roll; deft. thereupon paid this amount to the sheriff, who returned the execution satisfied:—*Held*: the sheriff was entitled to retain out of the amount so paid to him, his poundage & execution fees.—*CENTRAL BANK v. MCKEEN* (1863), 5 All. 529.—*CAN.*

2017 ii. —. —. —.]—The sheriff is entitled to be paid his fees by the execution creditor whether he acts by request or takes steps which he is required to do by statute.—*Re SOLICITORS* (1909), 12 W. L. R. 687.—*CAN.*

2020 i. —. —. —.]—*For charges of interpleader proceedings.*—Where an interpleader issue, ordered upon the application of a sheriff who had seized certain goods under the direction of the execution creditors, was determined as to



**Sect. 2.—Sheriff's remuneration: Sub-sect. 5.]**

the execution creditor, & that W. should pay to the execution creditor & the sheriff their costs of the interpleader summons, including in the costs of the sheriff his possession money caused by W.'s claim. The sheriff, not being satisfied that W. could pay him, appealed, asking that his possession money might be paid out of the fund in ct. in priority to the claim of the execution creditor. In the meantime the money had been paid to pltf.:—*Held*: (1) C. L. P. Act, 1860 (c. 126), s. 17, making a summary decision under the Act final & conclusive against "the parties," did not make it final against the sheriff, & he could appeal; (2) where an interpleader has been directed on the application of the sheriff, & the claim of the third party fails, the strict form of order upon which the sheriff is entitled to insist, is to direct the execution creditor to pay the sheriff's charges of the interpleader, with a remedy over to the execution creditor against the third party, though it is a common form of order simply to order the third party to pay them to the sheriff.—*SMITH v. DARLOW* (1884), 26 Ch. D. 605; 53 L. J. Ch. 696; 50 L. T. 571; 32 W. R. 665, C. A.

*Annotations*:—As to (1) *Consd.* *Bramsdén v. Parker* (1885), 1 T. L. R. 510. As to (2) *Refd.* *Montague v. Davies*, *Benachi*, [1911] 2 K. B. 595; *Re Rogers, Ex p. Sussex, Sheriff*, [1911] 1 K. B. 104.

**2021. — Discretion of court.]**—The costs of a sheriff in interpleader proceedings are in the discretion of the judge.—*BRAMSDÉN v. PARKER* (1885), 1 T. L. R. 510, C. A.

**2022. — Where sale stopped by winding up of company.]**—After a resolution for the voluntary winding up of a co. certain goods of the co. were seized by the sheriff under a writ of *fi. fa.* in execution of a judgment recovered against the co. before the commencement of the winding-up. Upon the application of the liquidator of the co., the ct. made an order restraining the execution creditor from selling the goods or further proceeding upon the judgment, & by a subsequent order directed the sheriff to withdraw, but made no order as to payment of the sheriff's fees. In an action by the sheriff against the execution creditor to recover his fees, the latter contended that under the Ord. as to Fees of Aug. 31, 1888, the liquidator alone was liable as the person at whose instance the sale was stopped:—*Held*: (1) the execution creditor, as the person who had issued the execution, & not the liquidator, was liable to pay the sheriff's fees.

(2) The Ord. as to Fees of Aug. 31, 1888, has merely fixed the scale of fees payable to the sheriff, & has not altered the law as to the liability to pay them.

(3) "The person at whose instance the sale is stopped" refers to the case of the official receiver or trustee in bkptcy. of a judgment debtor who requires the sheriff, under s. 11, Bkpcy. Act, 1890 (c. 71), s. 11, to hand over to him the goods taken in execution, & thereby stops the sale.—*MONTAGUE v. DAVIES, BENACHI & Co.*, [1911] 2 K. B. 595; 80 L. J. K. B. 1131; 104 L. T. 645, D. C.

**2023. — Where goods seized subject to lien.]**—A vessel seized under a sheriff's writ of

*fi. fa.* was subsequently arrested & sold by the Admiralty marshal at the instance of the master in an action *in rem* for wages & disbursements. The sums claimed by the master, which exhausted the proceeds, were owing before the date of the seizure by the sheriff. The master moved for judgment & payment out of the proceeds. The sheriff intervened & claimed that his fees & expenses should be a first charge on the proceeds:—*Held*: (1) the master having a maritime lien in respect of his claim, the sheriff could only seize the vessel subject to that lien; (2) the master's claim accordingly had priority over the claim of the sheriff.—*THE ILE DE CEYLAN*, [1922] P. 256; 91 L. J. P. 222; 128 L. T. 154; 38 T. L. R. 835; 16 Asp. M. L. C. 23.

**2024. — To sheriff's officer.]**—A sheriff's officer cannot maintain an action against an execution creditor for expenses incurred by him under a writ of *fi. fa.* issued by the creditor, in making inquiries as to the goods of an execution debtor.—*SMITH v. BROADBENT & Co.*, [1892] 1 Q. B. 551; 61 L. J. Q. B. 490; 66 L. T. 260; 56 J. P. 345; 40 W. R. 332; 36 Sol. Jo. 273, D. C.

**2025. Liability of solicitor of execution creditor — To sheriff's officer—Express promise to pay.]**—*ORMEROD v. FOSKETT* (1796), Peake, Add. Cas. 77, N. P.

**2026. — ]**—In an action by a sheriff's officer for his fees & for work & labour in executing divers writs:—*Held*: (1) the prohibition against a sheriff's officer taking more than certain fees upon an arrest, is confined to the fees to be taken of the party arrested, & does not extend to restrain the officer from suing for a reasonable compensation for work & labour at the hands of the party by whom he is employed; (2) a sheriff's officer expressly employed by an attorney to execute process, may maintain an action against the latter for such fees, etc., as are usually allowed on the taxation of costs by the course & practice of the ct., & is not bound to resort to the clients of the attorney; (3) the officer may sue for the sheriff's poundage upon levies, where he is accountable over to the sheriff.—*FOSTER v. BLAKELOCK* (1826), 5 B. & C. 328; 8 Dow. & Ry. K. B. 48; 4 L. J. O. S. K. B. 170; 108 E. R. 122.

*Annotations*:—As to (1) *Refd.* *Newton v. Chambers* (1844), 8 Jur. 244. As to (2) *Folld.* *Walbank v. Quarterman* (1846), 3 C. B. 94; *Maile v. Mann* (1848), 2 Exch. 608; *Brewer v. Jones* (1855), 3 C. L. R. 369; *Consd.* *Royle v. Busby* (1880), 6 Q. B. D. 171. *Refd.* *Bramwell v. Penneck* (1827), 1 Man. & Ry. K. B. 409; *Maybery v. Mansfield* (1846), 9 Q. B. 754. As to (3) *Refd.* *Miles v. Harris* (1862), 12 C. B. N. S. 550. *Generally, Refd.* *Innes v. Levi* (1835), 1 Hodg. 195. *Mentd.* *Stearn v. Mills* (1833), 4 B. & Ad. 657; *Maile v. Lang* (1835), 3 Ad. & El. 699; *Robins v. Bridge* (1837), 6 Dowl. 140.

**2027. — Employed by request.]**—The attorney who engages the service of the bailiff, & not the client, is the party liable to the bailiff for the fees usually allowed on taxation for the execution of process.—*WALBANK v. QUARTERMAN* (1846), 3 C. B. 94; 136 E. R. 38; *sub nom.* *WALBANCKE v. MASTERMAN*, 7 L. T. O. S. 184; *sub nom.* *WALLBANK v. MASTERMAN*, 1 New Pract. Cas. 437.

*Annotations*:—*Folld.* *Maile v. Mann* (1848), 2 Exch. 608;

part of the goods in favour of claimant & as to the remainder in favour of the execution creditors, & no costs of the issue were given to either party to it:—*Held*: the execution creditors should pay the sheriff his fees & poundage on the value of the part of the goods they were found entitled to, & his costs of the interpleader application & of a subsequent application to dispose of the

costs, etc.; & the execution creditors should have an order over against claimant for one-half of such costs.—*ONTARIO SILVER CO. v. TASKER* (1893), 15 P. R. 180.—*CAN.*

*o. Liability of solicitor of execution creditor—To sheriff's officer—Express or implied promise to pay.]*—A district council bailiff cannot maintain an

action against the attorney of an execution creditor for payment of possession fees incurred by the bailiff in levying under a writ of execution lodged by the attorney on behalf of his client, unless there is evidence of a contract, express or implied, by the attorney to pay these fees.—*EGAN v. BULLER* (1906), 6 S. R. N. S. W. 389.—*AUS.*

Brewer v. Jones (1855), 10 Exch. 655. **Consd.** Royle v. Busby (1880), 6 Q. B. D. 171. **Mentd.** Lee v. Everest (1857), 26 L. J. Ex. 334.

**2028.** ———. ———.]—I do not see how the mere fact of pltf.'s name being placed on the back of the writ in deft.'s handwriting could be an appointment by the latter of the former as special bailiff (COLERIDGE, J.).—SEAL v. HUDSON (1847), 4 Dow. & L. 760; 2 Saund. & C. 55; 11 Jur. 610.

**Annotations:**—**Refd.** Malle v. Mann (1848), 2 Exch. 608; Royle v. Busby (1880), 6 Q. B. D. 171.

—Where a bailiff is employed by an attorney to issue execution against a deft., the attorney, & not the client, is liable to the bailiff for his fees.—MAILE v. MANN (1848), 2 Exch. 608; 6 Dow. & L. 42; 17 L. J. Ex. 336; 12 J. P. 647; 154 E. R. 634.

**Annotations:**—**Foldd.** Brewer v. Jones (1855), 10 Exch. 655. **Mentd.** Langridge v. Lynch (1876), 34 L. T. 695.

**2030.** ———. ———.]—The bailiff who executes a writ of *fi. fa.* may sue the attorney who lodged the writ with the sheriff, for his fees under 7 Will. 4, & 1 Vict. c. 55, s. 2, although the attorney gave no directions as to any particular person by whom the writ should be executed.—BREWER v. JONES (1855), 10 Exch. 655; 3 C. L. R. 369; 24 L. J. Ex. 143; 24 L. T. O. S. 262; 19 J. P. 314; 1 Jur. N. S. 240; 3 W. R. 215; 156 E. R. 602.

**Annotations:**—**Distd.** Newman v. Merriman (1872), 26 L. T. 397. **Foldd.** Heath v. Philp (1875), 39 J. P. 504. **N.F.** Royle v. Busby (1880), 6 Q. B. D. 171. **Refd.** Miles v. Harris (1862), 12 C. B. N. S. 550.

**2031.** ———. ———.]—A sheriff's officer having made an ineffectual levy under a *fi. fa.* upon the goods of deft. by reason of a claim by an assignee, upon which the officer was obliged to abandon the possession, is not entitled to sue the attorneys for pltf. who sent the writ to the sheriff for execution, for his charges.—COLE v. TERRY (1861), 5 L. T. 347.

**2032.** ———. ———. **Unsuccessful levy.**]—An attorney who issues a writ of *fi. fa.* is not bound to pay the costs incurred by a sheriff's officer, who makes an unsuccessful levy under the writ.

Applt. being the attorney of certain judgment creditors issued a writ of *fi. fa.*; the warrant was placed in the hands of resp. for execution; he thereunder seized certain goods which were claimed by other persons. An interpleader summons was taken out, & resp. was ordered to withdraw upon payment to him by the claimants in the interpleader proceedings of four days' possession money. Resp. was in possession of the goods seized eleven days. Resp. sued applt. for the fee for executing the warrant, & for seven days' possession money:—**Held:** as the levy under the writ had produced nothing, applt. was not liable.—NEWMAN v. MERRIMAN (1872), 26 L. T. 397; *sub nom.* MERRIMAN v. NEWMAN, 20 W. R. 369.

**Annotations:**—**Consd.** Royle v. Busby (1880), 6 Q. B. D. 171. **Refd.** Thomas v. Peek (1888), 20 Q. B. D. 727.

**2035 i.** ———. **To sheriff.**]—The sheriff can, by summary application to the ct., call on the attorney in the cause to pay fees & expenses of execution.—*Re* MITCHELL (1889), 10 N. S. W. L. R. 111; 5 N. S. W. W. N. 129.—**AUS.**

**2035 ii.** ———. ———.]—The attorney is liable to the sheriff for the latter's fees for executing a *fi. fa.*—PALMER v. HARDING (1879), 19 N. B. R. (3 P. & B.) 281.—**CAN.**

**p. Liability of Attorney-General—For fees on execution of Crown process.]**—The A.-G. is liable in his personal capacity to a sheriff for such of the sheriff's fees of office on the execution of Crown processes as are included in the A.-G.'s taxed bill of costs, &

received by him from defts. in the several Crown suits, after demand made, where no ground is shown for retaining them.—WHITE v. PETERS (1843), 2 Kerr, 329.—**CAN.**

**q. Right of sheriff to retain surplus proceeds.]**—H., a sheriff, seized & sold under execution goods to the amount of £3,823 12s. 2d. The terms were cash, but it was agreed that the purchaser might make arrangements as he could with the execution creditors, all of whom required cash except the last ten, who agreed to give time, & take notes. In the settlement £2,762 was paid to the sheriff, & notes were given for £1,146, making in all £386 1s. more than the amount of the purchase.

**2033.** ———. ———.]—The attorney in the cause is liable to the bailiff for the costs of executing a writ of *fi. fa.*, although the bailiff was not specially nominated by him.—HEATH v. PHILP (1875), 39 J. P. 501.

**2034.** ———. ———.]—The solrs. of a judgment creditor, in the course of their duty as such solrs., lodged a writ of *fi. fa.* at the office of the sheriff, with a request for execution, giving, however, no instructions as to the selection of any particular bailiff. The sheriff employed one of his officers to execute the writ, which the officer thereupon proceeded to do. On an action being brought by such sheriff's officer against the solrs. of the judgment creditor to recover his fees for executing the writ:—**Held:** the solrs. were not liable to pay the fees. The law, apart from a contract to pay them, express or implied, cast no such liability upon them, & from the mere fact that they in the ordinary course of their duty lodged the writ at the sheriff's office for execution, no such contract could be implied.—ROYLE v. BUSBY (1880), 6 Q. B. D. 171; 50 L. J. Q. B. 196; 43 L. T. 717; 29 W. R. 315, C. A.

**2035.** ———. **To sheriff.]**—The attorney of the execution pltf. is not liable to the sheriff for the fees due on the execution of a writ of *ca. sa.*

We think there is nothing like proof of any special circumstances, which have in some cases been held to create a liability on the attorney rather than the client (*per* CUR.).—MAYBERY v. MANSFIELD (1846), 9 Q. B. 754; 16 L. J. Q. B. 102; 8 L. T. O. S. 158; 11 Jur. 60; 115 E. R. 1465.

**Annotations:**—**Consd.** Malle v. Mann (1848), 2 Exch. 608; Brewer v. Jones (1855), 3 C. L. R. 369. **Foldd.** Royle v. Busby (1880), 6 Q. B. D. 171.

**2036. Right of sheriff to retake goods to pay poundage.]**—Where, under a *fi. fa.*, a judgment creditor was left in possession by the sheriff's officer of a chattel taken in execution, & with the consent of the debtor & creditor, it was delivered to A., & the officer retook it to pay poundage:—**Held:** A., who had *bond fide* paid the price of the chattel, might maintain trover for it against the sheriff.

I am of opinion that it was his duty not to permit it to go out of his [sheriff's] possession, & by doing so his lien for poundage was gone (LORD TENTERDEN, C.J.).—GOODE v. LANGLEY (1827), 7 B. & C. 26; 9 Dow. & Ry. K. B. 791; 5 L. J. O. S. K. B. 353; 108 E. R. 634.

**Annotation:**—**Mentd.** Clarke v. Spence (1836), 4 Ad. & El. 448.

**2037. Action for poundage—Proof of sheriff's appointment.]**—In an action by a sheriff for his poundage, proof that he has acted as sheriff is sufficient evidence of his being so, without proof of his appointment.

In an action for sheriff's poundage, the sheriff's officer produced the sheriff's warrant under which

Upon an action brought against the sheriff for that amount, he proved that he had paid upon the executions all moneys received except £165 7s. 10d. & he claimed £442 2s. for fees & poundage:—**Held:** he was not liable, not being shown to have received more than he should have.—KENNEDY v. MOODIE (1859), 8 C. P. 544.—**CAN.**

**r. Whether execution debtor liable for poundage.]**—The sheriff cannot maintain an action against the execution debtor for his poundage.—THOMAS v. GREAT WESTERN RY. Co. (1865), 24 U. C. R. 326.—**CAN.**

**s. Assignment under Insolvent Act after seizure—Lien for sheriff's fees.]**—Judgment creditors having executions



*Sect. 2.—Sheriff's remuneration: Sub-sects. 5 & 6.*  
*Part V. Sect. 1: Sub-sect. 1.]*

he had acted, which concluded, "given under the seal of my office." The only seal to it was a small piece of blue paper wafered to it, & stamped with a wafer stamp. The officer stated that he did not know this to be the seal of the sheriff, or of his office, but stated that he had received the warrant from Mr. B., who had acted as pltf.'s under-sheriff, & that it was precisely similar to all the other warrants on which he had acted:—*Held*: sufficient proof of the seal.

*Semble*: Prisons Act, 1842 (c. 98), which provides that, after Mar. 1, 1843, sheriff's poundage shall not be "payable" on writs of *ca. sa.*, does not apply to cases where the party has been taken on the *ca. sa.* before that day; but if it does, a debt., in an action for sheriff's poundage, cannot take advantage of that defence on the plea of *nunquam indebitatus*, but must plead it specially.—*BUNBURY v. MATTHEWS* (1844), 1 Car. & Kir. 380.

**2038. — Right of execution creditor to set off—Costs of sale by appraisement.]**—Where the execution creditor paid the expenses of a sale by appraisement of the goods sold under the *fi. fa.*:—*Held*: in the absence of all proof of the circumstances under which such appraisement took place, he could not set off the amount so paid against the sheriff's demand for poundage.—*MARSHALL v. HICKS* (1847), 10 Q. B. 15; 16 L. J. Q. B. 134; 11 Jur. 305; 116 E. R. 6.

**2039. Sale of goods seized to pay poundage—Without instructions from execution creditor.]**—When goods have been seized under a writ of *fi. fa.*, & the execution creditor afterwards becomes disentitled to recover the amount of the judgment debt, the sheriff cannot, at least without instructions from the execution creditor, sell any portion of the goods seized in order to realise thereby the amount of his possession-money, fees, & expenses.

Goods having been seized under a writ of *fi. fa.*, the execution debtor under Bkpcy. Act, 1869 (c. 71), s. 126, entered into a composition, to which the execution creditor assented. The sheriff afterwards, without instructions from the execution creditor, sold a portion of the goods seized under the writ in order to realise the amount of his possession-money, fees, & expenses. The execution debtor having sued in a county ct. the sheriff for an unlawful sale, the judge directed the jury, that, in the absence of evidence to show that the sheriff was required to proceed to the sale by the execution creditor, a cause of action accrued to the execution debtor:—*Held*: the direction by the judge of the county ct. was correct.—*SNEARY v. ABDY* (1876), 1 Ex. D. 299; 45 L. J. Q. B. 803; 34 L. T. 801, D. C.

*Annotations*:—*Consd.* *Roe v. Hammond* (1877), 2 C. P. D. 300. *Refd.* *Smith v. Darlow* (1884), 26 Ch. D. 605; *Re Thomas, Ex p. Middlesex, Sheriff*, [1899] 1 Q. B. 460.

in the sheriff's hands under which a seizure had been made, signed an agreement giving debt. an extension of time for payment on certain conditions therein mentioned. Upwards of thirty days afterwards debt. assigned under Insolvent Act; the conditions of the agreement having been so far performed:—*Held*: the sheriff had no lien or claim on the goods seized for his fees.—*Re Ross* (1866), 3 P. R. 394.—**CAN.**

*t. Sheriff's officer—Right to retain party.]*—A constable has a right to his fees on an execution, & to detain party until they are paid.—*TAIT v. STRONACH* (1877), 17 N. B. R. (1 P. & B.) 226.—**CAN.**

*u. Seizure after assignment for bene-*

*fit of creditors—Liability of assignee—To sheriff & execution creditor.]*—The lien of an execution creditor for his costs when the writ of *fi. fa.* is placed in the sheriff's hands, is not taken away upon the making of an assignment for the benefit of creditors. The assignee has no right to demand possession of property seized by the sheriff, without payment to him of his own & the execution creditor's costs.—*THOR-DARSON v. JONES* (1908), 18 Man. L. R. 223; 9 W. L. R. 233.—**CAN.**

**PART IV. SECT. 2, SUB-SECT. 6.**

*a. Jurisdiction of court—To order taxation.]*—The ct. expressed surprise at finding that on a sale of goods, producing in gross \$846, the expenses

**SUB-SECT. 6.—OVERCHARGE AND EXTORTION.**

*See, generally, SHERIFFS & BAILIFFS; Sheriffs Act, 1887 (c. 55), s. 29.*

**2040. What amounts to overcharge under Sheriffs Act, 1887 (c. 55)—Clerical error of clerk.]**—Sect. 29 of above Act imposes a penalty on any sheriff's officer "who takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by the Act or any other Act."

Owing to a clerical error made by their clerk, a firm of sheriff's officers claimed & received from an execution debtor a sum for poundage which was £3 in excess of the amount due:—*Held*: the sheriff's officers were not liable in a penalty under the above sect. in respect of such unintentional overcharge.—*SHOPPEE v. NATHAN & Co.*, [1892] 1 Q. B. 245; 8 T. L. R. 209.

*Annotation*:—*Follid. Lee v. Dangar, Grant*, [1892] 2 Q. B. 337.

**2041. — Account greatly reduced on taxation.]**—(1) After goods had been seized by the sheriff under a writ of *fi. fa.*, a receiving order was made against the judgment debtor, of which notice was given to the sheriff. The official receiver did not, however, request the sheriff to deliver up the goods; but told him to realise them to the best advantage. The sheriff's officer having proceeded to sell the goods under the writ of *fi. fa.*, the trustees in bkpcy. subsequently appointed brought an action against him for wrongfully selling the goods:—*Held*: the official receiver having elected not to request the sheriff to deliver up the goods, the sheriff was right in proceeding with the sale of the goods under the writ, & the action could not be maintained.

(2) The sheriff's officer having sold the goods as above-mentioned was requested to send in to the official receiver an account of the sale. He sent in an account, in which he claimed to deduct from the proceeds of the sale certain amounts in respect of his charges of the execution. The official receiver thereupon requested him to bring in his charges for taxation, & he accordingly took steps to obtain taxation of such charges, which, however, was resisted by the trustee in bkpcy., who had in the meantime brought an action for the penalty. Ultimately he obtained an order for taxation of his charges, & upon such taxation a large amount of the sum claimed in his account was taxed off as excessive:—*Held*: under the circumstances of the case the claim made by the sheriff's officer in his account must be taken to have been made subject to & in contemplation of taxation, & did not amount to a taking or demand of money within the above-mentioned enactment, so as to render the sheriff's officer liable to a penalty.—*WOOLFORD'S ESTATE TRUSTEE v. LEVY*, [1892] 1 Q. B. 772; 61 L. J. Q. B. 546;

amounted to \$106, believing that such a charge would not be found justified by the tariff & the proper practice under it. The bill was referred to the master to tax what in his discretion was necessarily incurred in the care & removal of the goods.—*MICHIE v. REYNOLDS* (1865), 24 U. C. R. 303.—**CAN.**

*b. — To decree account—Costs.]*—A sheriff had moneys properly applicable to certain executions in his office, but the debtor, having otherwise arranged with pltf. in the writs, obtained from them orders on the sheriff for payment of their amounts respectively, but the sheriff refused to pay unless the debtor would consent to pay his full poundage as on a sale,

66 L. T. 812; 56 J. P. 694; 40 W. R. 483; 8 T. L. R. 492, C. A.

*Annotations* :—As to (2) **Consd.** *Lee v. Dangar, Grant*, [1892] 2 Q. B. 337; *Shoppes v. Nathan*, [1892] 1 Q. B. 245. **Refd.** *Re Thomas, Ex p. Middlesex, Sheriff*, [1899] 1 Q. B. 460.

**2042.** ——— **Mistake of sheriff's officer.**—*LEE v. DANGAR, GRANT & CO.*, No. 170, *ante*.

**2043.** **What amounts to extortion—Payment under illegal execution.**—A debt. who has paid money to the sheriff under pressure of an illegal execution has a right to say that it is extorted & not paid in discharge of the debt.—*BAYNTON v. SEAL* (1844), 8 J. P. 571; *subsequent proceedings* (1845), 4 L. T. O. S. 373.

**2044.** **Action for extortion—Particulars of extortion must be pleaded.**—*Semble*: a declaration against a sheriff for extortion in the execution of a *fi. fa.*, must state the sum actually taken by him. It is not sufficient to allege that he took £— more than by the statute is allowed.—*ASHBY v. HARRIS* (1837), 2 M. & W. 673; 5 Dowl. 742;

*Murp. & H.* 173; 6 L. J. Ex. 182; 1 Jur. 776; 150 E. R. 927.

*Annotation* :—**Refd.** *Berton v. Laurence* (1850), 5 Exch. 816.

**2045.** ———.]—The declaration alleged that the sheriff, on the execution of a *fi. fa.* under which £26 3s. 9d. was levied, took greater fees than by the statutes in such case is allowed, that is to say, the sum of £10 4s. 6d., when by the statutes there is allowed the recompense following, that is to say, 1s. in the pound as poundage, amounting to £1 6s.; for the warrant to the officer 6s.; for the bailiff executing the warrant £1 11s.; for the man in possession £1 5s. for the sale by auction £1 6s. 3d.; for the certificate to save auction duty 2s. 6d. Debt. thereby took £4 7s. 9d. above the recompense allowed :—**Held** : bad, for not averring the particulars of the excess, & for not averring what fees had been allowed by the cts.—*USHER v. WALTERS* (1843), 4 Q. B. 553; 3 Gal. & Dav. 594; 12 L. J. Q. B. 246; 1 L. T. O. S. 78; 7 Jur. 511; 114 E. R. 1007.

*Annotation* :—**Refd.** *Wrightup v. Greenacre* (1847), 10 Q. B. 1.

## Part V.—Analogous Proceedings.

### SECT. 1.—ATTACHMENT OF DEBTS—GARNISHEE ORDER.

#### SUB-SECT. 1.—NATURE OF PROCESS.

For foreign attachment & attachment in the Mayor's Court, *see* METROPOLIS.

**2046.** **Form of execution—Contrast to attachment in Mayor's Court.**—The operation of a garnishee order made under C. L. P. Act, 1854 (c. 125), is not suspended by the existence of an attachment in the Lord Mayor's Ct., the former being a process of execution, the latter merely a process to compel an appearance.—*RICHTER v. LAXTON* (1878), 48 L. J. Q. B. 184; 39 L. T. 499; 27 W. R. 214.

*Annotation* :—**Refd.** *Levy v. Lovell* (1880), 14 Ch. D. 234.

**2047.** ——— **Whether within R. S. C., Ord. 42, r. 8.**—*FELLOWS v. THORNTON*, No. 64, *ante*.

**2048.** ———.]—*Re SMITH, Ex p. BROWN*, No. 9, *ante*.

**2049.** ——— **Nature of incumbrance created.**—(1) The holder of a debenture constituting only a floating security while the co. is carrying on business cannot, if the co. has not been wound up & a receiver has not been appointed, require by notice that a particular debt owing to the co. shall be paid to him or not to the co.; & *a fortiori*, if a garnishee order absolute has been obtained attaching the debt, the garnishee may pay it to the judgment creditor notwithstanding any such notice.

(2) Words in a debenture prohibiting a co. from creating a prior "charge" are to be read strictly, & do not extend to defeat the rights obtained under a garnishee order.

Pltf.'s debenture contained the not unusual provision that the co. should not be at liberty to create any mtge. or charge upon any property in priority to the debenture, but this provision is not material in this action, for garnishee proceedings are only a form of execution, & do not

lead to any "charge," in the true sense, being created by the co. on the debt garnished (*ROMER, J.*).—*ROBSON v. SMITH*, [1895] 2 Ch. 118; 64 L. J. Ch. 457; 72 L. T. 559; 43 W. R. 632; 11 T. L. R. 351; 2 Mans. 422; 13 R. 529.

*Annotations* :—As to (1) **Apld.** *Robinson v. Burnell's Vienna Bakery Co.*, [1904] 2 K. B. 624. **Distd.** *Norton v. Yates*, [1906] 1 K. B. 112. **Consd.** *Cairney v. Back*, [1906] 2 K. B. 746; *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979. As to (2) **Apld.** *Geisse v. Taylor & Weston* (1905), 74 L. J. K. B. 912. **Generally, Mentd.** *Pegge v. Neath & District Tram. Co.* (1895), 64 L. J. Ch. 737.

**2050.** ——— **Common Law Procedure Act, 1854 (c. 125)—R. S. C., Ord. 45, r. 1.**—Garnishee process in the High Ct. is intended to have the effect of process by way of execution of a judgment. It may not be execution in the strict technical sense, but the intention of R. S. C., Ord. 45, s. 1, was to render property available for the purpose of satisfying a judgment for payment of money in all divisions of the High Ct., which, before C. L. P. Act, 1854 (c. 125), was not so available, & under that Act, was only so available in the superior cts. of common law, & to bring debts due to the judgment debtor into the same position as his chattels for that purpose. C. C. R., Ord. 26, r. 1, is intended to have the same effect in the County Ct. (*FARWELL, L.J.*).—*WHITE, SON & PILL v. STENNINGS*, [1911] 2 K. B. 418; 80 L. J. K. B. 1124; 104 L. T. 876; 27 T. L. R. 395; 55 Sol. Jo. 441, C. A.

**2051.** ———.]—Merely to obtain a garnishee order *nisi*, especially having regard to Courts (Emergency Powers) Act, 1914 (c. 78), s. 1 (2), is not "to proceed to execution on, or otherwise to the enforcement of" a judgment within the meaning of sect. 1 (1). The making of the order absolute is a proceeding to execution on or otherwise to the enforcement of the judgment, & such an order cannot be made without a preliminary inquiry, & as it seems to me, it cannot be made without inquiry into the positions not only of

which he was not entitled to claim, & defended an action for the amount, in which he defeated pltf. The ct., on a bill filed against the sheriff, granted a decree for an account & ordered him to pay the costs up to the hearing.—*DAVIES v. DAVIDSON* (1868), 14 Gr. 111.—**CAN.**

c. ——— **To order refund.**—The ct. has jurisdiction to make sheriffs refund fees illogically exacted.—*HAYDEN v. BARTON* (1842), Long. & T. 682; 5 L. L. R. 410.—**IR.**

#### PART V. SECT. 1, SUB-SECT. 1.

d. An "action" or "cause"—

**Capable of being transferred to right forum.**—A garnishee proceeding under Division Cts. Act, R. S. O. 1887, s. 185 is an "action" or a "cause" & may be transferred from a wrong to the proper forum under sect. 87.—*Re MCCABE v. MIDDLETON* (1896), 27 O. R. 170.—**CAN.**



**Sect. 1.—Attachment of debts—Garnishee order:**  
**Sub-sects. 1 & 2, A. & B.]**

the garnishee, who will be directly affected by the order, but also of the judgment debtor, who may thereby be deprived of a part of his property, namely, a debt due to him (PHILLIMORE, L.J.).—KEATS v. CONOLLY, [1915] W. N. 174, C. A.

**2052. Operation of—Against garnishee.]—**  
**FELLOWS v. THORNTON, No. 64, ante.**

**2053. ———.]—**A garnishee can do nothing which would put it out of his power to pay to the judgment creditor the debt which, before the garnishee order, he owed to the judgment debtor. He is bound to respect the order of the ct., & is guilty of contempt if he acts in defiance of it (LORD ALVERSTONE, C.J.).—GEISSE v. TAYLOR, [1905] 2 K. B. 658; 74 L. J. K. B. 912; 93 L. T. 534; 54 W. R. 215; 12 Mans. 400.

**Annotations:—**Refd. Norton v. Yates, [1906] 1 K. B. 112; Evans v. Rival Granite Quarries, [1910] 2 K. B. 979; Galbraith v. Grimshaw & Baxter, [1910] 1 K. B. 339.

**SUB-SECT. 2.—AVAILABILITY OF PROCESS.**

**A. In Respect of What Judgments and Orders.**

**2054. Inferior courts of record.]—**The garnishee clauses of C. L. P. Act, 1854 (c. 125), ss. 60, 61, 62 apply to all inferior cts. of record to which the said Act has been applied by an Ord. in Council.—DAWLER v. BARNES (1862), 6 L. T. 333; 10 W. R. 605; *sub nom.* DAUBER v. BARNES, 31 L. J. Q. B. 302; 8 Jur. N. S. 512.

*See, further, Sub-sect. 5, post; COUNTY COURTS, Vol. XIII., pp. 517, 518, Nos. 671–676.*

**2055. Plaintiff in county court—On High Court judgment—County court order for payment by instalments.]—**Where pltf. had recovered a judgment in this ct. & had issued a plaintiff in the county ct. on that judgment & an order had been made for payment by instalments, & certain instalments had been paid:—*Held*: an order would not be made to allow him to proceed under the garnishee clauses of C. L. P. Act, 1854 (c. 125).—JONES v. JENNER (1856), 25 L. J. Ex. 319; 27 L. T. O. S. 191; 2 Jur. N. S. 574; 4 W. R. 651.

**Annotations:—**Apld. Montgomery v. De Bulmes, [1898] 2 Q. B. 420. Refd. White & Pill v. Stenning (1911), 80 L. J. K. B. 1124. Mentd. *Re A Debtor, Ex p. Rock Red Brick Co.* (1904), 52 W. R. 302.

**2056. Judgment not immediately enforceable—**

**Whether process lies.]—**The Westminster Improvement Comrs. incorporated by Act of Parliament, for the purpose of effecting certain improvements in Westminster were empowered to borrow money on bond, & to advance money to builders for building purposes. By the condition of these bonds, all the bondholders were to be paid *pari passu*. The Comrs. advanced a certain sum to K., a builder. Pltf. sued the comrs. on one of their bonds; & they suffered judgment by default:—*Held*: the debt due from K. to the comrs. was not such a debt as could be attached under C. L. P. Act, 1854 (c. 125), s. 61, for pltf. could not enforce immediate payment of his judgment, & the effect of the garnishment would be to give him a priority over the other bondholders.

The interference of the judges in these cases of attachment is discretionary. It is not every debt due to a judgment debtor that is to be

attached. The debt may be attended with circumstances which would prevent the judgment creditor from enforcing its immediate payment, & where such is the case it is not a debt of the nature contemplated by this Act. The object of the Act is plain. A person may not be able to pay his creditors by reason of not being paid what is owing to him; & therefore if judgment is obtained against him it is very reasonable that debts due to him should be attached for the purpose of relieving him from the burden of the judgment (PLATT, B.).—KENNETT v. WESTMINSTER IMPROVEMENT COMRS. (1855), 11 Exch. 349; 3 C. L. R. 1070; 25 L. J. Ex. 97; 25 L. T. O. S. 248; 3 W. R. 597; 156 E. R. 865.

**Annotations:—**Consd. White & Pill v. Stennings (1911), 104 L. T. 876. Refd. Bowen v. Brecon Ry., *Ex p. Howell* (1867), L. R. 3 Eq. 541.

**2057. Judgments & orders of Chancery Courts—Effect of Judicature Acts.]—**(1) By R. S. C., 1875, Ord. 45, r. 2, the ct. or judge has power to order, on the application of a judgment creditor, that all debts owing or accruing from a third party to the judgment debtor, shall be attached to answer the judgment debt. Under an order made in an action for the administration of a testator's estate, the receiver of the estate was directed to pay an annuity & certain other income by quarterly payments to testator's widow. A judgment was recovered against the widow in an action at law for payment of certain moneys:—*Held*: the words "owing or accruing" ought not to be restricted so as to exclude ascertained income of the judgment debtor, & therefore, the future income payable by the receiver to testator's widow must be attached in the hands of the receiver to answer the judgment debt.

(2) Jud. Acts & Rules give the Ch. Div. the jurisdiction formerly vested in the common law cts. only, under the garnishee clauses of C. L. P. Acts.—*Re COWANS' ESTATE, RAPIER v. WRIGHT* (1880), 14 Ch. D. 638; 49 L. J. Ch. 402; 42 L. T. 866; 28 W. R. 827.

**Annotations:—**As to (1) Dbtd. Webb v. Stenton (1883), 11 Q. B. D. 518. Refd. *Re Slade, Slade v. Hulme* (1881), 30 W. R. 28.

**2058. Judgment of Scottish court—Under Judgments Extension Act, 1868 (c. 54).]**—A judgment for a sum of money which was obtained in an action in Scotland was extended to England under above Act, & the judgment creditor served a garnishee order *nisi* on a firm who owed a debt in England to the judgment debtor. After the service of the garnishee order *nisi*, the whole estate of the judgment debtor was sequestrated under the Scottish bkpcy. law & transferred, wherever situated to applt. as trustee for the creditors, with power to recover all estates, debts, or money due to the judgment debtor. In an interpleader issue in England between the trustee & the judgment creditor as to their respective claims to the garnished debt:—*Held*: the judgment creditor had, by the service of the garnishee order *nisi*, obtained an attachment in England before the date of sequestration, & the Scottish ct. had no power to interfere with his claim.—GALBRAITH v. GRIMSHAW, [1910] A. C. 508; 79 L. J. K. B. 1011; 103 L. T. 294; 54 Sol. Jo. 634; 17 Mans. 183, H. L.

**Annotation:—**Apld. Singer v. Fry (1915), 84 L. J. K. B. 2025.

**2059. Judgment against sovereign state.]—**

**PART V. SECT. 1, SUB-SECT. 2.—A.**

**e. Judgment for costs only.]—**A judgment creditor, whose judgment is for costs only, cannot garnish debts due to his judgment debtor.—GHENT v. MCCOLL (1881), 8 P. R. 428.—CAN.

**f. ———.]—**Under r. 935 an order

to attach debts may be founded on a judgment for costs only.—MCLEAN v. BRUCE (1891), 14 P. R. 190.—CAN.

**g. Judgment appealed against—Security given for costs—Whether garnishee proceedings available to collect costs.]—**Deft. in appealing to the Ct.

of Appeal gave security for the costs of appeal & for payment of the costs of the action, but did not otherwise comply with the judgment:—*Held*: upon the perfecting of the security, there was a stay of execution, as to the costs of the action, although deft. had done nothing with respect to other parts

The ct. refused to order garnishees to pay over to creditors of the Govt. of Kelantan a sum which was in the garnishees' hands & which was alleged to be due by them to that Govt., the ground of the refusal being that Kelantan was a sovereign state which had not submitted to the jurisdiction for the purpose of execution.—**DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT**, [1923] 1 Ch. 385; 92 L. J. Ch. 273; 129 L. T. 290; 39 T. L. R. 187; 67 Sol. Jo. 260, C. A.; *on appeal, sub nom. KELANTAN GOVERNMENT v. DUFF DEVELOPMENT CO.*, [1923] A. C. 395, H. L.

**Judgments against married women.**—See **HUSBAND & WIFE**.

**2060. Order for costs—Under 1 & 2 Will. 4, c. 58.**—(1) A party in an interpleader issue who has obtained an order for his costs under 1 & 2 Will. 4, c. 58, s. 7, is a judgment creditor within the garnishee clauses of C. L. P. Act, 1854 (c. 125), ss. 60, 61.

(2) A judgment creditor is not prevented from attaching a debt due to his debtor by the fact that the garnishee is taken in execution for the debt.—**HARTLEY v. SIEMWELL**, **MARPLES v. HARTLEY** (1861), 1 B. & S. 1; 30 L. J. Q. B. 223; 7 Jur. N. S. 774; 9 W. R. 520; 121 E. R. 615.

*Annotations*:—*As to* (1) **Consd.** *Re Frankland* (1872), L. R. 8 Q. B. 18. **N.F.** *Best v. Pembroke* (1873), L. R. 8 Q. B.

**2061.** ———.]—A person who has obtained an order for the costs of an interpleader issue & entered it of record, pursuant to 1 & 2 Will. 4, c. 58, s. 7, so as to have the force & effect of a judgment, is not a judgment creditor within the garnishee clauses of C. L. P. Act, 1854 (c. 125), ss. 60, 61.—**BEST v. PEMBROKE** (1873), L. R. 8 Q. B. 363; 42 L. J. Q. B. 212; 29 L. T. 327; 21 W. R. 919.

*See, now*, R. S. C., Ord. 42, r. 24.

*See, now*, Statute Law Revision & Civil Procedure Act, 1883 (c. 49), ss. 3, 7.

**2062.** ——— **Under rule of court—Judgments Act, 1838 (c. 110), s. 18.**—After a rule has been discharged with costs, the person in whose favour the rule has been discharged cannot obtain a garnishee order under C. L. P. Act, 1854 (c. 125), s. 60, 61, Judgments Act, 1838 (c. 110), s. 18, giving to rules of the cts. of common law the effect of judgments for the purposes of the Act, but not actually making them judgments.—*Re FRANKLAND* (1872), L. R. 8 Q. B. 18; *sub nom. SUNDERLAND LOCAL MARINE BOARD v. FRANKLAND*, 42 L. J. Q. B. 13; 28 L. T. 18; 37 J. P. 439.

*Annotation*:—**Appld.** *Best v. Pembroke* (1873), 42 L. J. Q. B.

**2063.** ——— **Of dismissed action.**—An order dismissing an action with costs for want of prosecution is not enforceable by attachment of debts under R. S. C., Ord. 45, r. 2.—**CREMETTI v. CROM** (1879), 4 Q. B. D. 225; 48 L. J. Q. B. 337; 27 W. R. 411.

*Annotation*:—**Dbtd.** *Nott v. Sands*, [1883] W. N. 74.

*See, now*, R. S. C., Ord. 42, r. 24.

**2064.** ——— **Against respondent in divorce proceedings—Power of court.**—Under Jud. Act, 1873 (c. 60), s. 25 (8), the Ct. of Divorce has power

of the judgment & garnishing proceedings taken for the purpose of collecting such costs were not sustainable.—**VIGEON v. NORTHCOTE** (1893), 15 P. R. 171.—**CAN.**

**h. Judgment in matrimonial suit.**—A judgment in an action under Divorce & Matrimonial Causes Act is enforceable by an attaching order issued under Attachment of Debts Act. ——— *v. McLEOD* (1919), 25 B. C. R. 430.—**CAN.**

**k. Judgment obtained in England**

—*Extended to Ireland by statute.*—A garnishee order can be made on foot of a judgment obtained in England, & subsequently extended to Ireland under Judgments Extension Act, 1868.—**JOHNSTONE v. BUCKNALL**, [1898] 2 I. R. 499.—**IR.**

#### PART V. SECT. 1, SUB-SECT. 2.—B.

**1. Judgment creditor—Holder of order for payment of costs—Defendant.**—Where money, the proceeds of land belonging to some of debts, had been

to attach a debt due to a resp. in order to compel obedience to an order of that ct. for payment of costs.—**WHITTAKER v. WHITTAKER** (1881), 7 P. D. 15; 51 L. J. P. 80; 47 L. T. 131; 30 W. R. 431.

*Annotations*:—**Consd.** *Manchester & Liverpool District Banking Co. v. Parkinson* (1888), 22 Q. B. D. 173. **Dbtd.** *Holmes v. Millage*, [1893] 1 Q. B. 551. **Refd.** *Edmunds v. Edmunds*, [1904] P. 362.

**2065.** ——— **Necessity for previous demand for payment.**—**NOTT v. SANDS**, [1883] W. N. 74.

**2066. Order for payment of money—Judgments Act, 1838 (c. 110), s. 18.**—By the above sect. orders of cts. of equity for payment of money shall have the effect of judgments in the superior cts. of common law, & the persons to whom such money shall be payable shall be deemed judgment creditors within the meaning of the Act. By C. L. P. Act, 1854 (c. 125), ss. 60, 61, debts owing by a third person, the garnishee, to a judgment debtor may be attached, to answer the judgment debt. F., having obtained an order of a ct. of equity upon P. for payment of money, sought to attach a debt due to P. from C.:—**Held**: C. L. P. Act, 1854 (c. 125), ss. 60, 61, applied only to judgments in the superior cts. of common law, & an order to attach C.'s debts would be refused.—*Re PRICE* (1869), L. R. 4 C. P. 155.

*Annotations*:—**Consd.** *Re Frankland* (1872), L. R. 8 Q. B. 18. **Refd.** *Best v. Pembroke* (1873), L. R. 8 Q. B. 3.

**2067.** ———.]—*Re FRANKLAND*, No. 2062, *ante*.

*See, now*, R. S. C., Ord. 45, r. 1.

**2068.** ——— **Into court.**—A sum of money directed to be paid by A. to B. by the master's *allocatur*, cannot be attached in A.'s hands by process out of the sheriff's ct. in an action against B.—**COPPELL v. SMITH** (1791), 4 Term Rep. 312; 100 E. R. 1037.

*Annotation*:—**Appld.** *Caila v. Elgood* (1822), 2 Dow. & Ry. K. B. 193.

Foreign attachment, generally, *see* **METROPOLIS**.

**2069.** ———.]—Where a sum of money has been ordered to be paid into ct., a garnishee order cannot be made attaching a debt to answer the sum so ordered to be paid in.—*Re GREER, NAPPER v. FANSHAW*, [1895] 2 Ch. 217; 64 L. J. Ch. 620; 59 J. P. 441; 43 W. R. 547; 39 Sol. Jo. 503; 2 Mans. 350; 13 R. 598; *sub nom. Re GRIER, NAPPER v. FANSHAW*, 72 L. T. 865.

*Annotations*:—**Refd.** *White & Pill v. Stennings*, [1911] 2 K. B. 418. **Mentd.** *Re Turnbull, Turnbull v. Nicholas*, [1900] 1 Ch. 180.

#### B. To Whom Available.

*See* R. S. C., Ord. 45, r. 1.

**2070. General rule.**—A judgment creditor cannot obtain a charge in equity on an equitable debt by analogy to an attachment of a legal debt under the garnishee clauses of C. L. P. Act, 1854 (c. 125). A judgment debtor was entitled under a will to one-fourth of the profits of a business which was managed by trustees, subject to a condition of forfeiture if he alienated or charged his share. A sum of money arising from the business was standing at the bankers in the names of the

ordered to be paid into ct., to meet a judgment held by pltf. against one of these debts, & the decree directed that pltf. should pay to the other debts. their costs of suit:—**Held**: these debts. were entitled to a garnishee order against the money to be paid into ct.—**GRANT v. KENNEDY** (circa 1868), 2 Ch. Ch. 269.—**CAN.**

**m.** ———.]—A debt. who has obtained execution upon a rule of ct. for the payment of costs of the day by pltf., is a judgment creditor, &



**Sect. 1.—Attachment of debts—Garnishee order:**  
**Sub-sect. 2, B. & C.; sub-sect. 3, A.]**

trustees. The judgment creditor filed a bill to establish a charge against the money at the bankers representing the judgment debtor's share of past profits, by analogy to an attachment under the garnishee clauses of C. L. P. Act (c. 125):—*Held*: the bill could not be sustained.

*Semble*: if such a bill could be sustained, the filing of the bill would be the process analogous to the garnishee order, & the charge would affect the fund in the hands of the trustees from the date of the bill.

It is clear that the process is only adapted for the simple case of a debt due from a third person to the judgment debtor, where the judgment creditor could at once obtain payment of the debt (LORD HATHERLEY, C.).—HORSLEY v. COX (1869), 4 Ch. App. 92; 38 L. J. Ch. 285; 20 L. T. 128; 17 W. R. 596, L. C.

*Annotations*:—*Reid*. Webb v. Stenton (1883), 52 L. J. Q. B. 584; Sutton, Carden v. Goodrich (1899), 80 L. T. 765.

**2071. Judgment creditor.]—Re COWANS' ESTATE, RAPIER v. WRIGHT, No. 2057, ante.**

**2072. — Though garnishee taken in execution —By judgment debtor.]—HARTLEY v. SHEM-WELL, MARPLES v. HARTLEY, No. 2060, ante.**

**2073. — .]**—A judgment creditor having arrested his debtor on a *ca. sa.*, the judgment debtor filed a petition under Bkpcy. Act, 1861 (c. 134), & obtained his discharge:—*Held*: the judgment creditor might attach the debts of his judgment debtor in the hands of a third party, under the garnishee clause of C. L. P. Act, 1854 (c. 125), notwithstanding his arrest under the *ca. sa.* *Ex p.* WORMAN (1862), 1 New Rep. 29; *sub nom.* *Re* HALAHAN, *Ex p.* WORMAN, 7 L. T. 278; *sub nom.* HALAHAN v. WORMAN, 11 W. R. 10.

*See, further*, Sub-sect. 2, A., *ante*.

**2074. Assignee of judgment debt.]—**The assignee of a judgment debt is a person who has "obtained" a judgment within R. S. C., Ord. 45, r. 1, & is entitled to a garnishee order attaching debts due to the judgment debtor.—GOODMAN v. ROBINSON (1886), 18 Q. B. D. 332; 56 L. J. Q. B. 392; 55 L. T. 811; 35 W. R. 274; 3 T. L. R. 212, D. C.

*Annotations*:—*Consd.* Forster v. Baker, [1910] 2 K. B. 636; *Re* Freshwater, Yarmouth & Newport Ry. (1913), 29 T. L. R. 568.

*Compare* No. 81, *ante*.

**Personal representatives.]—See EXECUTORS.**

entitled to garnish moneys due to plaintiff.—ELLIOT v. CAPELL (1881), 9 P. R. 35.—CAN.

**n. — .]**—The person to receive payment under an order for payment of costs only, is entitled to an order attaching debts due or accruing due to the person to pay.—*Re* IRVINE (1887), 12 P. R. 297.—CAN.

**o. — Of mortgagor—After notice on garnishee by mortgagee.]—**A. who was the owner of lands mortgaged them by deed first to B. & secondly to C. whose mortgage deed rented B.'s security but subject to B.'s rights empowered C. to enter into receipt of the rents & profits. B. not having interfered C. served notice on the tenants to pay him:—*Held*: a judgment against A. obtained after this notice could not be enforced by a garnishee order against debts due by the tenants.—PALMER,

**2074 i. Assignee of judgment debt.]—**The assignee of a judgment creditor can proceed in his name to attach a debt.—*Re* SMART v. MILLER (1866), P. R. 385.—CAN.

**2074 ii. — .]**—Under r. 935 an

assignee of a judgment, though not a party to the action, may apply to enforce the judgment by attachment.—MCLEAN v. BRUCE (1891), 14 P. R. 190.—CAN.

**p. Not Crown.]—**The garnishee clauses of C. L. P. Act do not extend to the Queen. The Crown, therefore, cannot under them attach a debt.—R. v. BENSON (1858), 2 P. R. 350.—CAN.

**q. Counterclaiming defendant.]—**A counterclaiming debt, whose counterclaim is in the nature of a cross-action for a sum certain may by garnishment proceedings attach money owing to plaintiff.—JOHNSTON v. RICE, [1921] 1 W. W. R. 38; 55 D. L. R. 699; 16 Alta. L. R. 136.—CAN.

**PART V. SECT. 1, SUB-SECT. 2.—C.**

**2076 i. Partners of firm—In firm name—Whether allowed.]—**A debt owing to a firm cannot be attached in an action against an individual member of a firm; & an attachment against an individual who is a member of a firm cannot affect a debt owing by the firm.—*Re* CRIST, MINGER v. ANDERSON (1908), 1 Alta. L. R. 400; 8 W. L. R.

**C. Against Whom Available.**

**2075. General rule.]—Re COWANS' ESTATE, RAPIER v. WRIGHT, No. 2057, ante.**

**2076. Partners of firm—In firm name—Whether allowed.]—**A garnishee order cannot be made under R. S. C., Ord. 45, r. 2, attaching a debt due from a partnership firm described by its partnership name.—WALKER v. ROOKE (1881), 6 Q. B. D. 631; 50 L. J. Q. B. 470, D. C.

**2077. Persons in fiduciary capacity—Trustees.]—**HORSLEY v. COX, No. 2070, *ante*.

**2078. — .]**—R. S. C., Ord. 3, r. 6, expressly says that there may be a special indorsement of a trust debt. If M. brings an action against his trustee, he can recover his half-year's salary. It is submitted for the garnishee that there cannot be an attachment of an equitable debt; but there is no distinction now between a legal & an equitable debt. I should be contravening the very object of the Jud. Acts if I was to hold otherwise. If we could not now attach an equitable debt sitting here, we might as well be under the ancient regime. The debt need not be due, as the words of R. S. C., Ord. 45, r. 2, are "debts owing or accruing." As, however, the garnishee disputes his liability, I will order a special case to be stated for determining the question under Ord. 45, r. 5 (QUAIN, J.).—WILSON v. DUNDAS & STEVENSON, [1875] W. N. 232; Bitt. Prac. Cas. 48; 1 Char. Cham. Cas. 124.

**2079. — . Under void settlement.]—**Money in the hands of a trustee under a settlement cannot be attached under R. S. C., Ord. 45, or C. L. P. Act, 1854 (c. 125), as an equitable debt due from such trustee to the settlor, notwithstanding the fact of the settlement being void as against creditors under 13 Eliz., c. 5.—VYSE v. BROWN (1884), 13 Q. B. D. 199; Cab. & El. 223; 48 J. P. 151; 33 W. R. 168.

*Annotation*:—*Reid*. Glegg v. Bromley (1911), 81 L. J. K. B. 334.

**2080. — .]**—RUNTZ v. LONGBOURNE (1892), 8 T. L. R. 568.

*Annotation*:—*Reid*. *Re* Lee, *Ex p.* Grunwaldt, [1920] 2 K. B. 200.

**2081. — . Failure of purpose of trust.]—**Pltf., as execution creditor, applied to attach money in the hands of debts., the garnishees. The money had been deposited by the judgment debtor with debts. for a special purpose that had failed. Debts. claimed that the judgment debtor was indebted to them for law costs in a larger sum

428.—CAN.

**2077 i. Persons in fiduciary capacity—Trustees.]—**Where P. held certain money in trust to be applied at his discretion for the benefit of W., the ct., at the instance of a judgment creditor of W. ordered the money to be attached in execution.—CAIRNCROSS v. VANDER WESTHUIZEN (1913), C. P. D. 639.—S. AF.

**r. — Curator of intestate estates.]—**A creditor of a deceased person whose estate is being administered by the curator of estates of deceased persons may not institute proceedings by way of attachment against the curator.—BALLHAUSEN v. MITCHELL (1898), 23 V. L. R. 629.—AUS.

**s. — Officer representing the Crown.]—**Garnishee proceedings do not lie to attach moneys in the hands of an officer representing the Sovereign.—R. v. BRISBANE JJ., *Ex p.* QUEENSLAND TREASURER (1901), 11 Q. L. J. 77.—AUS.

**t. — Liquor Control Board.]—**The Liquor Control Board appointed by the Govt. of B. C. is not a body corporate either actually or by implication. It is part of the public

than that deposited with them, & that they would be entitled to counterclaim for the amount due to them:—*Held*: since, on the failure of the special purpose for which it was deposited with defts., the money remained in their hands subject to a trust to repay it to the judgment debtor, they could not have set up their claim to costs in answer to a demand for the return of the money, & therefore, it was a debt due from them to the judgment debtor which could be attached.—*STUMORE v. CAMPBELL & Co.*, [1892] 1 Q. B. 314; 61 L. J. Q. B. 463; 66 L. T. 218; 40 W. R. 101; 8 T. L. R. 99; 36 Sol. Jo. 90, C. A.

*Annotations*:—*Distd. Runtz v. Longbourne* (1892), 8 T. L. R. 568. *Mentd. Levi v. Anglo-Continental Gold Reefs of Rhodesia*, [1902] 2 K. B. 481; *Kinnaird v. Field*, [1905] 2 Ch. 361; *Sharpe v. Haggith* (1912), 106 L. T. 13.

*See, also*, No. 2057, *ante*; & generally, TRUSTS & TRUSTEES; SETTLEMENTS.

**2082. — Receiver appointed by court.]**—A judgment creditor cannot, without leave of this ct., attach money in the hands of its receiver, which have been directed to be paid by him to the judgment debtor. A judgment creditor, who had recovered moneys of the judgment debtor in the hands of a receiver, under an order of a ct. of law, was ordered to repay it, & he was directed, together with the receiver, who had not resisted the payment to him, to pay the costs of the application.

A party interested may apply at once to prevent a receiver applying the moneys in his hands in a manner contrary to the directions of the ct., & need not wait until he passes his account.—*DE WINTON v. BRECON CORPN.* (No. 2) (1860), 28 Beav. 200; 2 L. T. 787; 6 Jur. N. S. 1046; 8 W. R. 385; 54 E. R. 342.

*Annotation*:—*Refd. Re Greensill* (1872), L. R. 8 C. P. 24.

*See, generally*, RECEIVERS.

**2083. — Treasurer of corporation.]**—Where on an order to attach debts, the ct. cannot clearly, beyond all doubt, see that the garnishee is not liable to attachment, they will not set aside the order without allowing the judgment creditor to proceed against him by writ. So held where the order was made against the garnishee only as the treasurer of a corp'n.—*SEYMOUR v. BRECON CORPN.* (1860), 29 L. J. Ex. 243.

**2084. — Police authorities—Money found on**

service & is merely the agent of the Govt. in carrying out the provisions of the Act & the Board is not within the purview of Attachment of Debts Act, R. S. B. C., 1911, c. 14.—*CALLOW v. HICK*, [1923] 2 D. L. R. 1185; 32 B. C. R. 71.—*CAN.*

**a. — Executors.]**—An order upon exors. to pay a simple contract debt, pursuant to an attaching order, was refused. The attaching order was also at the same time discharged.—*WINTON v. MILLER* (1863), 10 C. L. J. O. S.

**b. — Sheriff—Proceeds of execution.]**—Money made by a sheriff under an execution is attachable in his hands for the debt of the execution.—*WINTON v. MILLER* (1866), 3 P. R. 385.—*CAN.*

**c. Debtor of garnishee.]**—A judgment creditor obtained a garnishee order attaching moneys in the hands of M. which M. owed to the judgment debtor. Subsequently, the garnishee order being unsatisfied the judgment creditor applied under Ord. XLV., r. 1 to attach moneys in the hands of R. which R. owed to M. the garnishee:—*Held*: the moneys in the hands of R. could not be attached. Ord. XLV., r. 1, applies only to moneys due & owing to the debtor under a judgment or order.—*McKENZIE & Co. v. WALKER* (1891),

17 V. L. R. 221.—*AUS.*

**d. Foreign corporation.]**—A debt due from a foreign corp'n., though having an agent & doing business within this province, cannot be garnished.—*RANNEY v. MORROW* (1876), 16 N. B. R. (3 Pug.) 270.—*CAN.*

**e. —.]**—*CANADA COTTON CO. v. PARMALIE* (1889), 13 P. R. 308.—*CAN.*

**f. —.]**—*PARKER v. ODETTE* (1894), 16 P. R. 69.—*CAN.*

**g. —.]**—*BOSWELL v. PIPER* (1896), 17 P. R. 257.—*CAN.*

**h. Maker of promissory note.]**—What is to be garnished is not the note itself, but the money payable thereunder. Therefore the maker of the note, & not the person holding it for the judgment debtor, should be made garnishee.—*EXLEY v. DEY* (1893), 15 P. R. 353.—*CAN.*

**k. Garnishee out of the jurisdiction.]**—The primary creditor & the primary debtor resided within the jurisdiction, but the garnishee resided in B. C., & did not carry on business in Ontario. The debtor disputed the jurisdiction, & the judge refused to proceed:—*Held*: the judge was right.—*WILSON v. POSTLE* (1901), 21 C. L. T. 382; 2 O. L. R. 203.—*CAN.*

**l. —.]**—Moneys earned & payable

prisoner.]—Money in the possession of a prisoner, which is taken possession of by the police upon his apprehension, & retained by them after his conviction, does not render the police debtors to the prisoner, & is not a debt due from them to the prisoner which can be attached by a judgment creditor of the prisoner by garnishee proceedings under R. S. C., 1883, Ord. 45, r. 1.—*BICE v. JARVIS* (1885), 49 J. P. 264; *sub nom. Re JERVIS*, 1 T. L. R. 306, D. C.

— **Partners in firm.]**—*See* R. S. C., Ord. 48A.

**Personal representatives.]**—*See* EXECUTORS.

**Trustees of married women's property**

**Restrained from anticipation.]**—*See* HUSBAND & WIFE.

**Bankruptcy officials.]**—*See* BANKRUPTCY, Vol. IV., pp. 486, 500, Nos. 4368, 4501.

— **In winding up of companies.]**—*See* COMPANIES, Vol. X., pp. 881, 1000, 1013, Nos. 5988, 6945, 7037.

— **Registrar of county court.]**—*See* COUNTY COURTS, Vol. XIII., p. 517, No. 672.

— **Bankers.]**—*See* BANKERS, Vol. III., p. 185, No. 364.

### SUB-SECT. 3.—TO WHAT DEBTS APPLICABLE.

*a*

**2085. What constitutes a debt—General rule.]**—In order that R. S. C., Ord. 45, r. 1, may operate, it is necessary that the existence of the relation of creditor & debtor should be established as between the judgment debtor & another person, & the rule only applies when it is shown that some individual person is indebted to the judgment debtor (*STIRLING, L.J.*).

Where some officer of the ct. is under a duty to the ct. to distribute money which is in his hands in a particular way, there is no relation of debtor & creditor established between him & the person entitled to all or some part of the money in his hands. He is an officer of the ct. & his duty is to the ct., & no debt is created which can be the subject-matter of attachment by means of a garnishee order. That principle has been applied to liquidators, & trustees in bkpcy., & to registrars

in another province are not subject to garnishment under Attachment of Debts Act, R. S. S., 1920.—*MARLOW v. YAGER & CANADIAN PACIFIC RY. CO.* (1922), 67 D. L. R. 770; 15 Sask. L. R. 371.—*CAN.*

**m. —.]**—*GOPAL v. LAVET* (1883), 1. L. R. 12 Bom. 45, n.—*IND.*

**n. —.]**—*RANGO JAIRAM v. BAL-KRISHNA VITHAL* (1887), 1. L. R. 12 Bom. 44.—*IND.*

**o. —.]**—*MARTYN v. KELLY* (1871), 1. R. 5 C. L. 404.—*IR.*

### PART V. SECT. 1, SUB-SECT. 3.—A.

**p. What constitutes a debt—Money in hands of court officer.]**—Money in hands of an officer of the ct. cannot be attached under garnishee proceedings, not being a "debt."—*CUMMINGS v. COOKE* (1867), 7 N. S. W. S. C. R. 17.—*AUS.*

**q. —.]**—Money found upon an accused person under commitment for trial & detained by the police authorities does not, unless demanded by the accused, constitute a debt owing or accruing from the police authorities to the prisoner, & cannot be attached in the hands of the police.—*BARKER v. BREMNER* 17 V. L. R. 643.—*AUS.*

**r. —.]**—A judgment debtor



*Sect. 1.—Attachment of debts—Garnishee order:*  
*Sub-sect. 3, A.]*

of county cts. (COLLINS, L.J.).—SPENCE v. COLEMAN, [1901] 2 K. B. 199; 70 L. J. K. B. 632; 84 L. T. 703; 49 W. R. 516; 17 T. L. R. 469; 45 Sol. Jo. 483, C. A.

**2086. — Conditional debt not sufficient.]**—(1) A "debt due or accruing" to a judgment debtor & therefore capable of being attached by a garnishee order under R. S. C., 1875, Ord. 45, r. 3, must be an absolute & not merely a conditional debt. Thus, where, after notice to treat by a railway co. to a landowner, the purchase-money has been fixed by the verdict of a jury & judgment of the sheriff under Lands Clauses Act, 1845 (c. 18), ss. 49, 50, the purchase-money cannot be attached by a garnishee order nisi served upon the co. by a judgment creditor of the landowner after the verdict but before the execution or tender of a conveyance; for the proceedings under the above sects. do not of themselves create an absolute debt due from the co. to the landowner, his right to the purchase-money being conditional upon the execution or tender of a conveyance. Accordingly, in a case where the landowner has brought an action & obtained judgment against the co. for specific performance of the statutory contract:—*Held*: the purchase-money could not be attached by garnishee orders nisi served upon the co., some before & others after the commencement of the action, notwithstanding that a good title had been shown, nor even by a garnishee order served after the execution of the conveyance when the money had been paid into ct. by the co. under the judgment, the money not being "a debt in the hands" of the garnishee within R. S. C., Ord. 45, r. 3.

(2) The provisions of R. S. C., Ord. 45, r. 8, as to payment or execution being a valid discharge to the garnishee, are inapplicable to a debt due to the judgment debtor that is conditional only.—HOWELL v. METROPOLITAN DISTRICT RY. CO.

obtained a judgment & by virtue of a warrant issued thereunder a police constable recovered a sum of money & forwarded the same to the clerk of petty sessions at M. The judgment creditor obtained a garnishee order nisi attaching such moneys:—*Held*: the money so held by the clerk of petty sessions could be attached, & the order should be made absolute.—RYAN v. GRANT (1900), 26 V. L. R. 380.—AUS.

**s. — Partnership—Action for account.]**—The action was brought to have a partnership dissolved & for an account & payment:—*Held*: the action was not for a debt or liquidated demand, & the garnishee summons was set aside.—CICOGNIA v. MCHEATHER, 22 C. L. T. Occ. N. 309.—CAN.

**t. — —.]**—P. McD. entered into a written contract with defts. to execute certain work for them, & verbally agreed to give A. McD. an interest in the contract. A. McD. did not sign the contract & afterwards drew money on it under the authority of P. McD., & apparently as his agent. Upon a writ to attach a sum of money due upon the contract, in a suit by plffs. v. P. McD.:—*Held*: it was not a partnership debt, & therefore was attachable against P. McD.—BESCOBY v. HAMILTON WATER COMRS. (1859), 9 C. P. 81.—CAN.

**a. — Claim assigned.]**—To an action on the common counts defts. pleaded that before suit plff. assigned the claim to G.; that H. recovered judgment against G. & obtained an order to attach all debts owing by deft. to G. to answer the judgment & this debt then became bound in defts.' hands to answer the judgment:—*Held*: the

debt was not attachable as by law due to G.—ARTHUR v. CLOUGH (1859), 17 U. C. R. 302.—CAN.

**b. — Debt not attached — Before action brought for its recovery.]**—MCKAY v. TAIT (1861), 11 C. P. 72.—CAN.

**c. — Damages.]**—The sum to be garnished was money awarded, of which part was for work done under a contract, & the remainder for damages sustained by having the work taken out of the execution debtor's hands:—*Held*: as the latter was not a debt until the award was made, only the attaching orders, after the award would bind it, & not those before it.—TATE v. TORONTO CORPN. (1862), 3 P. R. 181.—CAN.

**d. — —.]**—Claims for unliquidated damages cannot be attached before judgment, by which alone they become debts.—BANK OF TORONTO v. BURTON (1867), 4 P. R. 56.—CAN.

**e. — —.]**—A verdict against an insurance co. for unliquidated damages, even although not moved against, & which the co. had promised to pay without entry of judgment, cannot be attached until it becomes a debt by judgment.—BOYD v. HAYNES (1869), 5 P. R. 15.—CAN.

**f. — —.]**—The claim for a debtor to compensation for misrepresentation in obtaining a patent of land, is not liable to be seized, attached, or sequestered before the amount is determined by decrees or otherwise.—ROBERTS v. CITY OF TORONTO (1869), 16 Gr. 236.—CAN.

**g. — —.]**—Damages become a debt by a judgment, & they become

(1881), 19 Ch. D. 508; 51 L. J. Ch. 158; 45 L. T. 707; 30 W. R. 100.

*Annotation:—Generally, Mentd. Capell v. G. W. Ry. (1882), 9 Q. B. D. 459.*

**2087. Liability under indemnity—Covenant to pay successful party's costs.]**—A bond of indemnity being given to pltf. by a third party against the costs in an action, & pltf. having failed in the action, & the bond become forfeited:—*Qu.*: whether such a debt is within the meaning of C. L. P. Act, 1854 (c. 125), s. 64, which the third party, as garnishee, can be ordered to pay to deft. for costs in that action.—COURTIS v. JOHNSON, *Re* DIAMOND, GARNISHEE (1855), 24 L. T. 263.

**2088. Legacy in hands of executors.]**—A legacy in the hands of an exor. is not the subject of attachment under C. L. P. Act, 1854 (c. 125), even though the exor. has promised to pay it over if ordered so to do. There must be such an account stated as would sustain an action, in order to constitute the legacy a legal debt in the hands of a legal debtor.—M'DOWALL v. HOLLISTER (1855), 3 C. L. R. 933; 25 L. T. O. S. 185; 3 W. R. 522.

*See, further, EXECUTORS.*

**2089. Money payable to judgment debtor—By officer of court.]**—DE WINTON v. BRECON CORPN. (No. 2), No. 2082, *ante*.

**2090. — —.]**—An order having been made for the attachment of the surplus of a bkpt.'s estate against the official assignee of the Ct. of Bkpcy. as garnishee under C. L. P. Act, 1854 (c. 125), s. 61:—*Held*: such order was invalid, there being no "debt" that could be attached within that Act.—*Re* GREENSILL (1872), L. R. 8 C. P. 24; *sub nom.* HUNTER v. GREENSILL, FITZGERALD v. SAME, PAGET, GARNISHEE, 42 L. J. C. P. 55; 27 L. T. 827; 37 J. P. 215; 21 W. R. 263.

**2091. — —.]**—The proceeds of a judgment paid into the county ct. are not attachable by means of a garnishee summons at the suit of a third person as "a debt," due from the registrar of the ct. to the judgment debtor.—DOLPHIN v. LAYTON

a debt equally by agreement between the parties which fixes the amount, & which amount deft. agrees to pay, & a garnishee summons may be issued in such a case under Rule 505 (Sask.).—LLOYD v. ASHDOWN (1915), 32 W. L. R. 11; 8 Sask. L. R. 135.—CAN.

**h. — —.]**—GRAHAM v. BOURQUE (1903), 6 O. L. R. 700; 24 C. L. T. Occ. N. 54; 2 O. W. R. 1182.—CAN.

**k. — —.]**—WHEELER v. MCLEAN (1919), 27 B. C. R. 448.—CAN.

**l. — Revocable gift.]**—Money was sent by a father to his son, the judgment debtor, as a gift, through a bank. Before any communication by the bank to the judgment debtor, the execution creditor obtained an attaching order & summons on the bank to pay over:—*Held*: the amount could not be attached. *Semble*: the father might revoke the gift, & therefore it was not a debt.—CAISSE v. THARP (1870), 5 P. R. 265.—CAN.

**m. — Money order to be paid—Under judgment.]**—COTTON v. VANSITTART (1873), 6 P. R. 96.—CAN.

**n. — Money deposited by officer of railway company—In bank in name of employer—Whether bank & employer debtor & creditor.]**—M., assistant superintendent of a railway co., deposited in his own name for safe keeping with I. & Co., private bankers, money known to belong to the co.:—*Held*: the relation of debtor & creditor existed between I. & Co. & the railway co., & the debt could be attached by a creditor of the latter.—RUEL v. CONSOLIDATED EUROPEAN & NORTH

(1879), 4 C. P. D. 130; 48 L. J. Q. B. 426; 43 J. P. 623; 27 W. R. 786, D. C.

*Annotation*:—**Reid**. *Prout v. Gregory* (1889), 24 Q. B. D. 281.

**2092.** ——. *—*.]—A dividend distributable in a bkpcy. cannot be attached in the hands of the official receiver to answer a judgment obtained against the creditor to whom it is so distributable. Under the provisions of Bkpcy. Act, 1883 (c. 52), s. 125, the estate of a deceased person, who had died insolvent, was being administered in bkpcy., & deft. was a creditor of deceased in the administration. Pltf. having obtained a judgment against deft. sought to attach a sum of money in the hands of the garnishee who was the official receiver in whom the deceased debtor's property had vested, the money which it was so sought to attach being money payable to deft. as a dividend under the administration:—*Held*: the express directions of Bkpcy. Act, 1883 (c. 52), were not to be overridden by an order of the ct., & a dividend distributable by the official receiver could not be treated as a debt due from him to deft. as a creditor of the deceased insolvent.—**PROUT v. GREGORY** (1889), 24 Q. B. D. 281; 59 L. J. Q. B. 118; 61 L. T. 696; 38 W. R. 204; 7 Morr. 1, D. C.

**2093.** ——. *—*.]—**SPENCE v. COLEMAN**, No. 2085, *ante*.

**2094.** ——. *—*.]—Judgment having been recovered against deft., pltf. obtained a garnishee order attaching all debts owing or accruing due from a co. in voluntary liquidation to deft., who was a creditor of the co., execution not to issue without further order. Subsequently the liquidator of the co. had in his hands a dividend in the winding up due to deft. On an application by pltf. for leave to issue execution on the garnishee order:—*Held*: leave should be given to issue execution against the

co. unless the liquidator paid the dividend to pltf.—**KLAUBER v. WEILL** (1901), 17 T. L. R. 344.

*Annotation*:—**Consd.** *Spence v. Coleman*, [1901] 2 K. B. 199.

**2095.** ——. *—*.]—**Money found on prisoner by police constable.**—**BICE v. JARVIS**, No. 2084, *ante*.

**2096.** ——. *By receiver of estate.*]—*Re COWANS' ESTATE*, **RAPIER v. WRIGHT**, No 2057, *ante*.

**2097.** ——. *By mortgagor.*]—M. mortgaged a leasehold to W., & then to B. A judgment creditor of B. obtained a garnishee order against M. After this W. sold the property under a power of sale, & an action was brought to distribute the surplus proceeds:—*Held*: the judgment creditor had no claim against the surplus proceeds of sale, for a garnishee order had not the effect of transferring the debt due from the garnishee with the benefit of the securities for it, & to treat the garnishee order as affecting the land before execution would conflict with the provisions of Judgments Act, 1864 (c. 112).—**CHATTERTON v. WATNEY** (1881), 17 Ch. D. 259; 50 L. J. Ch. 535; 44 L. T. 391; 29 W. R. 573, C. A.

*Annotations*:—**Folld.** *Re Combined Weighing & Advertising Machine Co.* (1889), 43 Ch. D. 99. **Reid**. *Webb v. Stenton* (1883), 52 L. J. Q. B. 584; *Rogers v. Whiteley* (1889), 23 Q. B. D. 236; *Pritchett & Young v. English & Colonial Syndicate* (No. 2) (1899), 43 Sol. Jo. 602; *Gelisse v. Taylor*, [1905] 2 K. B. 658.

**2098.** ——. *By solicitor—Absconded judgment debtor—Previous payment to wife.*]—**JONES v. WILLIAMS, GITTENS & Co.** (1887), 4 T. L. R. 25, C. A.

**2099.** ——. *Under Stock Exchange transactions.*]—Where money had been deposited by a judgment debtor with a stockbroker as cover for any loss upon speculations in stocks & shares, such money cannot be attached by the judgment creditor as money owing or accruing from the stockbroker

**AMERICAN RY. CO.** (1876), 16 N. B. R. (3 Pug.) 481.—**CAN.**

*o.* ——. *Discretionary interest in an estate.*]—E. conveyed real & personal estate to B. upon trust to convert the same into money & pay debts, etc., & as to the balance remaining, upon trust to pay the same to R., son of E., or if B. should see fit he might invest the same in the purchase of a homestead & convey the same to R. in fee:—*Held*: there was no debt due from B. to R. which could be garnished by the creditors of R.—**MCKINDSEY v. ARMSTRONG** (1884), 10 A. R. 17.—**CAN.**

*p.* ——. *Bets on horse racing.*]—Pltf. were judgment creditors of R. P. made certain bets with the garnishee on the result of the English Epsom Derby, which he won. Pltf. attached the amounts so due, & the garnishee declared in ct. that they owed the money & intended to pay the bets:—*Held*: a judgment creditor has the right to seize in the hands of third parties the amount of bets which they have lost to the deft. & which they are ready & willing to pay.—**MCGIBBON & BRAND** (1884), 7 L. N. 228.—**CAN.**

*q.* ——. *Building contract—Default.*]—M. contracted with H. to erect a house, for which he was to receive \$1,225; \$300 when the frame was up, \$300 when the building was wholly enclosed, & the balance when the work was all completed. The building was to be completed on or before Feb. 3, 1884. M. went on with the work & received the two sums of \$300, but he had not completed the building on the date. He, however, continued the work till after Apr. 1, when, the building being still unfinished, H. entered, & took possession, & completed it. M. C. having a judgment against M., obtained & served an attaching order & garnishing summons on H., the garnishee, on Mar. 15, 1884:—*Held*:

at the time of serving the attaching order no debt existed according to the terms of the contract, & no promise to pay had arisen by implication, & therefore there was nothing upon which the attaching order could operate.—**MCCRANEY v. MCLEOD** (1885), 10 P. R. 539.—**CAN.**

*r.* ——. *Legacy of share of residuary estate.*]—**DEMPSTER v. ELLIOTT** (1890), 22 N. S. R. 442.—**CAN.**

*s.* ——. *Claim under insurance policy.*]—A claim under an insurance policy for a loss, the amount of which has been settled & adjusted, is not a debt which can be attached under R. S. O., 1887, c. 51, s. 178.—**SIMPSON v. CHASE** (1891), 14 P. R. 280.—**CAN.**

*t.* ——. *Interest as tenant by curtesy.*]—A judgment debtor, having a supposed interest as tenant by the curtesy in certain land, which was not & never had been claimed by him, joined in a conveyance thereof by his daughter to a purchaser, in which it was recited that he was entitled to that estate. A judgment creditor of his thereupon attempted to garnish the purchase-money in the hands of the solr. who acted for the daughter, the latter claiming the whole of the purchase money, while the judgment debtor now expressly disclaimed any interest therein, he having joined in the conveyance at the instance of the solr. for the purchaser, who was also the solr. for the judgment creditor:—*Held*: the money in the hands of the daughter's solr. could not be garnished by the judgment creditor.—**PALMER v. LOVETT** (1892), 14 P. R. 415.—**CAN.**

*u.* ——. *Taxes—For school purposes.*]—**CANADA PERMANENT LOAN & SAVINGS CO. v. EAST SELKIRK SCHOOL DISTRICT** (1893), 9 Man. L. R. 331.—**CAN.**

*v.* ——. *Taxes are not a debt, & are, therefore, not attachable*

under garnishee proceedings.—**ROYAL BANK v. HODGSON**, [1917] 3 W. W. R. 255; 36 D. L. R. 799.—**CAN.**

*w.* ——. *Monies in treasurer's hands—Municipal debt.*]—The treasurer of a municipality is not, as such, a "third person indebted or liable" to it within Garnishment Act, R. S. M., c. 64, s. 8, & its funds in his hands cannot be attached to answer a debt of the municipality.—**LONDON & CANADIAN LOAN & AGENCY CO. v. MORRIS RURAL MUNICIPALITY** (1894), 9 Man. L. R. 431.—**CAN.**

*x.* ——. *Sum due on a contingency.*]—A sum of money payable under a building contract as soon as the building shall be finished is not attachable before the performance of the condition, as not being a debt.—**GRAY v. HOFFAR** (1896), 5 B. C. R. 56.—**CAN.**

*y.* ——. *Money in hands of receiver.*]—Money in the hands of a receiver is not a debt due from him to the persons interested in the estate, & cannot be attached by garnishing process.—**GRAY v. PURDY** (1897), 5 B. C. R. 241.—**CAN.**

*z.* ——. *Option in insurance company—To rebuild premises—Or pay money.*]—Where a policy of fire insurance contained a condition giving an option to the co. to replace the destroyed property instead of paying the insurance money, if they should so decide within a certain time, a garnishing order would be of no avail, if served before the expiration of that time, as an attachment of the insurance money since it would not then be certain that any pecuniary liability would ever arise under the policy.—**LAKE OF THE WOODS MILLING CO. v. COLLIN** (1900), 13 Man. L. R. 154; 20 C. L. T. Occ. N. 285.—**CAN.**

*aa.* ——. *School allowance.*]—A sum of money due to a school teacher, as a subsidy payable out of the fund



**Sect. 1.—Attachment of debts—Garnishee order:**  
**Sub-sect. 3, A. & B.]**

to the judgment debtor as long as the transactions in stocks & shares are open.—*HUTT v. SHAW* (1887), 3 T. L. R. 354, C. A.

*Annotation*:—*Apld. Roberts v. Jones* (1892), 61 L. J. Q. B. 523.

**2100. — Under prior garnishee order in his favour.]—***COOPER v. LAWSON* (1889), 6 T. L. R. 34.

*Compare Nos. 2185, 2186, post.*

**— Under verdict in other action.]—***See No. 10, ante, Nos. 2109, 2118, post.*

**— As fees, salary, pension, etc.]—***See Sub-sect. 3, J., post.*

**2101. Notice to treat—Lands Clauses Consolidation Act, 1845 (c. 18).]**—A mere notice to treat [under above Act], upon which nothing has been done does not constitute "a debt owing or accruing," which can be attached under R. S. C., Ord. 45, r. 2, of Jud. Act, 1875 (c. 77).

The affidavit on which the order was granted does not show a "debt owing or accruing" within R. S. C., Ord. 45, r. 2. All it does show is that at some time or other something may become due from the Metropolitan Board of Works to the judgment debtor. It is like a claim for unliquidated damages & nothing that can be accurately described as a debt (*DENMAN, J.*).—*RICHARDSON v. ELMIT* (1876), 2 C. P. D. 9; 36 L. T. 58.

*Compare No. 2086, ante.*

**2102. Cheque given to satisfy debt—Subsequent order not to pay.]—**A garnishee order was made under R. S. C., Ord. 45, r. 2, attaching a debt. At the time the order was made the garnishees had given the judgment debtor a cheque for the

amount of the debt. Upon service of the order on the garnishees they stopped payment of the cheque at the bank, the cheque not having been presented:—*Held*: upon the cheque being stopped it was as if it had never been given, & there was therefore an existing debt capable of being attached, & the garnishee order was effectual.—*COHEN v. HALE* (1878), 3 Q. B. D. 371; 47 L. J. Q. B. 496; 39 L. T. 35; 26 W. R. 680, D. C.

*Annotations*:—*Consd. Elwell v. Jackson* (1884), Cab. & El. 362; *Elliott v. Crutchley*, [1903] 2 K. B. 476; *Mears v. Western Canada Pulp & Paper Co.*, [1905] 2 Ch. 353.

**2103. — But not presented.]—**When a debtor draws a cheque in payment of a debt, which cheque is duly honoured & paid, there is no debt owing or accruing from debtor to creditor between the giving of the cheque & payment thereof. There is no duty upon the debtor who is served with a garnishee order *nisi* between such dates to stop payment of the cheque.—*ELWELL v. JACKSON* (1885), 1 T. L. R. 454, C. A.; *affg.* (1884), 1 Cab. & El. 362.

*Annotation*:—*Reid. Edmunds v. Edmunds*, [1904] P. 362.

**2104. Under bill of exchange.]—***HYAM v. FREEMAN* (1890), 35 Sol. Jo. 87.

**B. Debt Owing or Accruing.**

*See R. S. C., Ord. 45, r. 2.*

**2105. Meaning of.]—**Under C. L. P. Act, 1854, s. 61, an order may be made not only attaching an accruing debt in the hands of the garnishee, but also an order for payment of the accruing debt when it shall become payable by the garnishee to the judgment creditor. It is not necessary to wait till the debt has become actually payable before making the order for payment.

appropriated by the legislature as allowance to institutions & superior schools being money due by the govt. of the province, & not money due as the salary of a public officer, is not seizable in the hands of the govt. under a writ of attachment by garnishment.—*BEAUCHEMIN v. FOURNIER* (1901), Q. R. 20 S. C. 272.—*CAN.*

**h. — Right of assignee — To select cash surrender value.]—***FISKEN v. MARSHALL* (1905), 6 O. W. R. 611; 10 O. L. R. 552.—*CAN.*

**k. — Money received by agents — Under special authority.]—**Where special agents of a co. receive money from a co. & dispose of it in accordance with their special authority, they cannot be considered as any longer indebted to the co. so that a creditor of the co. can have a remedy against them or any of them by way of garnishment.—*BROWN v. FIDELITY OIL & GAS CO., LTD., & MACDONALD*, [1917] 2 W. W. R. 951; 35 D. L. R. 750.—*CAN.*

**l. — Vendor paid from share of crop.]—**If under an agreement for sale of land the purchaser is to deliver the year's crop of the land to an elevator in the joint names of the vendor & purchaser & one-half the proceeds are to be paid to the vendor & applied on account of the purchase-price, & the purchaser sells the crop & on receiving the proceeds applies it all to his own use, the vendor's claim for one-half the amount thereof is for a "debt."—*BENNEFIELD v. BIRDSELL*, [1919] 1 W. W. R. 991; 50 D. L. R. 34.—*CAN.*

**m. — Balance of purchase-money.]—**Pltf. sued to recover the balance owing to him as vendor under an agreement for sale of land, & took garnishment proceedings. The agreement provided that "in consideration whereof & on payment of all the said sum of money with interest as aforesaid in manner aforesaid, the vendor doth

covenant to convey the parcel of land by transfer prepared by the vendor's solrs. at the expense of the purchaser":—*Held*: pltf.'s claim was for a "debt."—*BARSI v. FARCAS & NADGE*, [1923] 3 D. L. R. 788; 3 W. W. R. 839.—*CAN.*

**n. — Claim to recover value of goods—Under bill of sale—Made to defraud creditors.]—**A statement of claim alleged that a bill of sale was made with intent to defraud creditors & that by a certain judgment of the ct. it had been found & declared that the bill of sale was granted & taken by debts. with such intent & that it was fraudulent & void as against pltf. & other creditors of the grantor, & alleged that an action had accrued to pltf. under 13 Eliz., c. 5, & claimed judgment against each of debts. for the amount of the value of the goods conveyed, the moneys recovered to be as to one half thereof to the use of the Crown, & as to the other half to the use of pltf.:—*Held*: the claim was one of "debt" on which a garnishee summons could be issued.—*CONNORS v. EGLI & BARTSCH*, [1923] 4 D. L. R. 1199; 3 W. W. R. 999.—*CAN.*

**o. — Presentment from grand jury.]—**This amount of a presentment from the grand jury, in the hands of the treasurer of the county, does not constitute a debt against which a garnishee order can be obtained.—*GERAGHTY v. SHARKEY* (1857), 30 L. T. O. S. 204.—*IR.*

**p. — Verdict in trespass action.]—**A verdict in an action of trespass upon which no judgment has been entered, is not a debt which can be attached.—*SHAW v. SHAW* (1868), 18 L. T. 420.—*IR.*

**q. — Promissory note not due.]—**A promissory note not yet due does not constitute a debt within the meaning of C. L. P. Act, 1856, s. 63, which can be attached to answer a judgment debt.—*PYNE v. KINNA* (1877), 1 L. R. 11 C. L. 40.—*IR.*

**r. — Salary to become due.]—**D. & M. were in receipt of a monthly salary from the S. A. R., due & payable on the first of each month for services rendered during the preceding month. On Aug. 29 a rule was granted attaching in execution of a judgment moneys due or to become due to them in the hands of the S. A. R.:—*Held*: on the return day of the rule, as no debt was due to them on Aug. 29, & as they had no claim then in existence other than a mere *spes*, there was nothing capable of attachment, & therefore the rule must be discharged.—*GOLDBERG & ADLER v. BLUMBERG* (1910), T. L. 242.—*S. AF.*

**s. Power of court — Garnishment of purchase-money—Vendor's lien.]—**The ct. has no power in garnishee proceedings to give effect to vendor's lien for purchase-money or to order the purchaser to pay over the purchase-money to the creditor of the vendor.—*GENGE v. WACHTER* (1899), 4 Terr. L. R. 122; 20 C. L. T. Occ. N. 158.—*CAN.*

**t. Costs awarded to judgment debtor—Subject to solicitor's lien.]—**Costs awarded upon an interlocutory application are subject to the lien of the solicitor for the party to whom they are given & cannot be attached by a judgment creditor of the party to the prejudice of the lien.—*CORMICK v. RONAYNE* (1888), 22 L. R. Ir. 140.—*IR.*

**u. Whether judgment creditor may garnish—Moneys of other judgment creditors—In sheriff's official account.]—**Although after execution of process the relation of debtor & creditor arises between a sheriff & a judgment creditor, the said private creditor will not be allowed to garnish moneys of judgment creditors placed to credit of the Sheriff's official account in the bank.—*STEBBINS, SPINNING & WALKER v. WILLIAMS & SEARS* (1914), 29 W. L. R. 448; 7 W. W. R. 141; 20 D. L. R. 275; 20 B. C. R. 240.—*CAN.*

In this, as in other cases, there are two things, the order for attachment & the order for payment.

It is evident that the legislature had in view both present debt & future debt, *debita in presenti, solvenda in futuro*, for it speaks in the earlier part of the section of "debts owing & accruing." Therefore it is clear that the attachment was good. But in the latter part of the section the language is altered. It speaks merely of "the debt due." Now it is quite clear that the garnishee cannot be bound to pay his debt before it is due; so that we must read "the debt due" as meaning either the debt when due, or the debt then due. If the former reading be the correct one, then the present order was quite right; if the latter, then it was premature. I have come to the conclusion that the true construction is that there is power to make an order against the garnishee for payment of his debts as & when they become payable, instead of making a fresh order as each falls due.

It is obviously just that if a cross debt were due to the garnishee at the date of the attachment there should be a right of set-off in his favour, & I should strive hard to give effect to it if I could, though there would be difficulties in the way. But [counsel] goes further, & maintains the right to set off debts accruing after the attachment. For this I see no ground (BLACKBURN, J.).—TAPP v. JONES (1875), L. R. 10 Q. B. 591; 44 L. J. Q. B. 127; 33 L. T. 201; 23 W. R. 694.

*Annotations*:—**Consd.** *Re Cowans' Estate*, *Rapier v. Wright* (1880), 14 Ch. D. 638. **Folld.** *Webb v. Stenton* (1883), 11 Q. B. D. 518. **Refd.** *Hall v. Pritchett* (1877), 37 L. T. 671; *Edmunds v. Edmunds*, [1904] P. 362.

**2106.** — As to ascertained income—Payable by trustees.]—*Re COWANS' ESTATE*, *RAPIER v. WRIGHT*, No. 2057, *ante*.

**2107.** — — — — —.]—The income arising from a trust fund & payable half-yearly to the *cestui que trust* is not a debt "owing or accruing" within the meaning of R. S. C., Ord. 45, r. 2, & cannot be attached before it has actually come into the hands of the trustees.—*WEBB v. STENTON* (1883), 11 Q. B. D. 518; 52 L. J. Q. B. 584; *sub nom. Re HATTON*, *WEBB v. STENTON*, 49 L. T. 432, C. A.

*Annotations*:—**Consd.** *Booth v. Trail* (1883), 12 Q. B. D. 8. **Apld.** *Macdonald v. Tacquah Gold Mines Co.* (1884), 13 Q. B. D. 535; *Wilmot v. Alton* (1896), 74 L. T. 813. **Consd.** *Re Greenwood*, *Sutcliffe v. Gledhill*, [1901] 1 Ch. 887. **Refd.** *Barnett v. Eastman* (1898), 67 L. J. Q. B. 517; *Sutton, Carden v. Goodrich* (1899), 15 T. L. R. 397; *Wells v. Wells* (1914), 30 T. L. R. 437.

#### PART V. SECT. 1, SUB-SECT. 3.—B.

**2109 i.** *Debt in existence—Payable at future date.*]—An attachable debt is one *debitum in presenti* even if only *solvendum in futuro*.—*MACPHERSON FRUIT CO. v. HAYDEN* (1905), 2 W. L. R. 427.—**CAN.**

**2109 ii.** — — — — —.]—It appeared that debt's salary was \$900 a year, payable monthly at the end of each month:—*Held*: there was no debt due, as the month's salary was not payable until the end of the month.—*FALLIS v. WILSON* (1907), 9 O. W. R. 418; 13 O. L. R. 595.—**CAN.**

**2109 iii.** — — — — —.]—Money payable under a negotiable promissory note is not attachable by garnishment proceedings before its maturity.—*HAISTED v. MERSCHMANN* (1908), 18 Man. L. R. 103.—**CAN.**

**2109 iv.** — — — — —.]—Defts. purchased land from R., & owed him \$1,000 on the purchase, for which sum they had given a cheque to a bank manager, to hold at their order until they ascertained that R. had a good title to the land. On Mar. 24, 1909, pltf., a creditor of R., served on defts. an order attaching the sum of \$1,000 as due from them to R. At this date the cheque was J.—VOL. XXI.

still in the hands of the bank manager, & was subject to defts.' order, & the sum of \$1,000, though due to R., was not yet payable by him:—*Held*: the debt was garnishable.—*GROSS v. MIHM & DUNDAS* (1910), 15 W. L. R. 172.—**CAN.**

**2109 v.** — — — — —.]—Deft. had earned \$1,300 under a contract for paving streets in S. Execution creditors desired to attach this money. The municipality held the money as security for a guarantee by deft. to keep said pavement in repair during a specified term:—*Held*: the money was a *debitum in presenti* which could be reached by ordinary process of attachment.—*MANUFACTURERS LUMBER CO. v. PIGEON* (1910), 17 O. W. R. 691; 2 O. W. N. 341; 22 O. L. R. 378.—**CAN.**

**2109 vi.** — — — — —.]—*HEWARD MILLING CO. v. BARRETT* (1909), 11 W. L. R. 136.—**CAN.**

**2109 vii.** — — — — —.]—A debt due by a third party, but not payable until a future day may be attached.—*SPARKS v. YOUNGE* (1858), 8 L. C. L. R. 251.—**IR.**

**2110 i.** — — — — — *By instalments.*]—A purchaser of land from deft., under an agreement providing for payment by successive annual instalments,

**2108.** — — — — —.]—Under a direction to pay to a legatee so much of the "income as would not, although the same were payable to him, be by his act or default or by operation or process of law so disposed of as to prevent his personal enjoyment thereof," followed by a gift over, each instalment of income vests in the legatee at the moment when it accrues due, or is in the hands of the trustees ready for application. If at that moment the legatee has not been deprived of the enjoyment of it he is entitled to receive it, so that it can be attached by a garnishee order, & the gift over does not take effect.—*Re SAMPSON*, *SAMPSON v. SAMPSON*, [1896] 1 Ch. 630; 65 L. J. Ch. 406; 74 L. T. 246; 44 W. R. 557; 40 Sol. Jo. 353.

*Annotations*:—**Refd.** *Re Greenwood*, *Sutcliffe v. Gledhill*, [1901] 1 Ch. 887. **Mentd.** *Durran v. Durran* (1904), 91 L. T. 187; *Re Goulder*, *Goulder v. Goulder* (1905), 53 W. R. 531; *Re Jenkins*, *Williams v. Jenkins*, [1915] 1 Ch. 46.

**2109. Debt in existence—Payable at future date.**]—The garnishee clauses in C. I. P. Act, 1851 (c. 125), ss. 60, 67, apply only where there is an existing debt due from the garnishee to the judgment debtor, though the time of payment may be postponed. Therefore the ct. refused a rule to attach the amount for which the judgment debtor had obtained a verdict against a third person, in an action for unliquidated damages, no judgment having been yet signed, & the amount therefore not being a debt.—*JONES v. THOMPSON* (1858), E. B. & E. 63; 27 L. J. Q. B. 234; 31 L. T. O. S. 80; 4 Jur. N. S. 338; 6 W. R. 443; 120 E. R. 430.

*Annotations*:—**Folld.** *Dresser v. Johns* (1859), 6 C. B. N. S. 429; *Shaw v. Shaw* (1868), 18 L. T. 420; *Hall v. Pritchett* (1877), 3 Q. B. D. 215; *Webb v. Stenton* (1883), 11 Q. B. D. 518. **Apld.** *Re Hatton*, *Webb v. Stenton* (1883), 49 L. T. 432; *Wilmot v. Alton* (1896), 74 L. T. 813. **Refd.** *Edmunds v. Edmunds*, [1904] P. 362. **Mentd.** *R. v. Hopkins & Ferguson*, [1896] 1 Q. B. 652.

**2110.** — — — — — *By instalments.*]—*TAPP v. JONES*, No. 2105, *ante*.

**2111.** — — — — —.]—*WILSON v. DUNDAS & STEVENSON*, No. 2078, *ante*.

**2112.** — — — — — *Fees of registrar of births & deaths.*]—(1) The fees earned by a registrar in respect of births & deaths actually registered, are debts accruing due so as to be attachable before the accounts have been vouched or time for payment has arrived.

(2) If a garnishee has already made payment to the judgment debtor by cheque before notice of a

cannot escape liability under a garnishing order, served upon him in a suit by a creditor of deft. by subsequently assigning his interest in the land to another person & procuring the latter to assume liability for the remaining instalments; & although none of the instalments are due when the order is served, yet they are all covered by it to the extent necessary to satisfy pltf.'s claim.—*SMITH v. VAN BUREN* (1907), 6 W. L. R. 12; 17 Man. L. R. 49.—**CAN.**

**2110 ii.** — — — — —.]—*EMPIRE SASH & DOOR CO. v. MCGREEVY* (1912), 22 W. L. R. 372; 22 Man. L. R. 676; 3 W. W. R. 128; 8 D. L. R. 27.—**CAN.**

**2110 iii.** — — — — —.]—Where work was contracted to be done for a price payable by instalments during its progress, & at the sight of an architect, who was appointed arbiter in case of dispute between the employer & the contractors, & an instalment had been sent, for behoof of a contractor, to the architect, who returned it to the employer, with a request that he would send it direct to the contractor:—*Held*: the instalment was liable to arrestment by a creditor of the contractor.—*FIELD & ALLAN v. GORDON* (1872), 11 Macph. (Ct. of Sess.) 132; 45 Sc. Jur. 82.—**SCOT.**



**Sect. 1.—Attachment of debts—Garnishee order:**  
**Sub-sect. 3, B., C. & D.]**

garnishee order *nisi*, he is, upon receiving notice, under no legal obligation to stop payment of the cheque.—**EDMUNDS v. EDMUNDS**, [1904] P. 362; 73 L. J. P. 97; 91 L. T. 568.

**Annotations:**—As to (1) **Reid**. **Glegg v. Bromley** (1911), 81 L. J. K. B. 334; **Wells v. Wells** (1914), 30 T. L. R. 437.

**See, further**, Sub-sect. 3, *post*.

**Compare** No. 2166, *post*.

**2113. — At date of service of order—Necessity for.]**—(1) A judgment creditor obtained a garnishee order *nisi* under the C. L. P. Act, 1854, against the exors. of P., as debtor of the judgment debtor. At that time P.'s estate was being administered in the Ct. of Ch., & after the service of the garnishee order the exors. paid the personal estate in their hands into ct., & a sufficient sum to answer P.'s debt to the judgment debtor was carried to the separate account of the judgment debtor in the suit. The judgment debtor afterwards filed a petition for liquidation & obtained an injunction restraining the judgment creditor from proceeding with his garnishee order. The trustee in the liquidation then applied in the suit for payment to him of the sum standing to the separate account of the judgment debtor:—**Held**: there was no debt owing to the judgment debtor in the hands of the exors. of P. at the time when they were served with the garnishee order, within C. L. P. Act, 1854, ss. 61 & 62, & consequently the judgment creditor had no charge on the fund in ct.

(2) If a garnishee order is made against the exors. of a debtor of the judgment debtor, it ought to appear on the face of it that they are sought to be charged as exors. (**MELLISH, L.J.**).—**STEVENS v. PHILIPS** (1875), 10 Ch. App. 417; 41 L. J. Ch. 689; 23 W. R. 716, L. J.J.

**Annotations:**—As to (2) **Consd. Re Watt, Ex p., Joselyne** (1878), 8 Ch. D. 327. **Generally, Mentd. Re London Cotton Mills Co., Re Brander** (1876), 25 W. R. 109.

**2115 i. Possibility of becoming due—Not sufficient.]**—The only kind of liability which may be attached under Queen's Bench Act, 1895, ss. 741, 742, is a purely pecuniary one, & must be absolute & not dependent upon a condition which may or may not be fulfilled; & therefore, where a policy of fire insurance contained a condition giving an option to the company to replace the destroyed property instead of paying the insurance money, if they should so decide within a certain time, a garnishing order would be of no avail, if served before the expiration of that time, as an attachment of the insurance money since it would not then be certain that any pecuniary liability would ever arise under the policy.—**LAKE OF THE WOODS MILLING CO. v. COLLIN** (1900), 13 Man. L. R. 154; 20 C. L. T. Occ. N. 285.—**CAN.**

**2115 ii. — — —.]**—An attaching order cannot be made upon proof that if things go well the garnishee will become indebted to the judgment debtor.—**RAT PORTAGE LUMBER CO. v. HARRY** (1917), 40 O. L. R. 322; 39 D. L. R. 425.—**CAN.**

**2120 i. Claim under insurance policy—No award made.]**—A garnishee order was made Apr. 7, at the instance of plff., attaching an amount alleged to be payable to deft. under a policy of insurance. On application by the agent of the co. for delay, on the ground that the loss was not admitted & that he wished to get instructions from his co., an order was made that the garnishee should not be required to repay the money until the further order of the ct., & that in the meantime the debt should remain attached. On Oct. 11, the co., having in the meantime admitted the debt & paid it over

to the assignee of the claimant, the judge made an order *nisi* for the payment of the money to the judgment creditor which he afterwards made absolute:—**Held**: the policy was not attachable under the garnishee order issued in Apr., & that nothing had afterwards occurred to alter the legal relations of the parties.—**POPHAM v. CAHOON** (1882), 15 N. S. R. (3 R. & G.) 277.—**CAN.**

**2120 ii. — — —.]**—Moneys due or owing from an insurance co. to a policy holder although unadjusted are garnishable under the enlarged provisions of Con. R. 935.—**CANADA COTTON CO. v. PARMALIE** (1889), 13 P. R. 308.—**CAN.**

**2120 iii. — — —.]**—The judgment debtor, who was insured under an accident policy, having met with an accident, gave the required notice, & furnished the necessary proofs of claim. After the proofs of claim had been received at the head office, a copy of an attaching order was served upon the local agent:—**Held**: there was an attachable debt due by the co. to the judgment debtor within 48 Vict. c. 4, s. 1.—**SEAMAN v. SEAMAN**, 25 C. L. T. Occ. N. 109.—**CAN.**

**b. Surplus money after mortgage sale—Before completion of sale.]**—A building society held a mtge. against the property of E. Default having been made in payment, the property was sold on Feb. 26, 1876, & bid in by M. for \$545. The purchaser on the day of sale paid \$55.00 & on Mar. 3 following he paid the balance. The amount due the society, including expenses, was \$344.47. An attaching order was obtained & served on the society, on Mar. 1, at the instance of F., a creditor of E.:—**Held**: as there was not when the order was served any

**2114. — Whether material—When order nisi served.]**—**KELLY v. RIDER** (1895), 11 T. L. R. 206.

**2115. Possibility of becoming due—Not sufficient.]**—**RICHARDSON v. ELMIT**, No. 2101, *ante*.

**2116. — — —.]**—**HOWELL v. METROPOLITAN DISTRICT RY. CO.**, No. 2086, *ante*.

**2117. Verdict for judgment debtor in other action—Time at which debt becomes due.]**—**JONES v. THOMPSON**, No. 2109, *ante*.

**2118. — — —.]**—A mere verdict in an action of contract for unliquidated damages is not a "debt owing or accruing," so as to be attachable under C. L. P. Act, 1854 (c. 125), s. 61. A. obtained a verdict against B. for £100 on Feb. 21, but judgment was not signed until Mar. 8. On Mar. 4, C., who had an unsatisfied judgment against A., obtained an order *nisi* under C. L. P. Act, 1854 (c. 125), s. 61, to attach the £100 in the hands of B., upon which an absolute order was made on the 11th:—**Held**: the order was invalid, there being no debt "owing or accruing" when the order *nisi* was obtained.—**DRESSER v. JOHNS** (1859), 6 C. B. N. S. 429; 28 L. J. C. P. 281; 5 Jur. N. S. 1262; 141 E. R. 524.

**Annotation:**—**Reid. Horsley v. Cox** (1869), 4 Ch. App. 92.

**2119. — — — Judgment not entered.]**—**HOLTBY v. HODGSON**, No. 10, *ante*.

**2120. Claim under insurance policy—No award made—At time of order.]**—A claim on a fire policy having been made against an insurance co. for unliquidated damages, plff., a judgment creditor for the assured for £127, duly served an *ex p.* garnishee order, under R. S. C., Ord. 45, r. 1, on the co., attaching all debts owing or accruing from them to the assured. The co. did not appear to show cause against it, & the order was made absolute. An award on the claim was afterwards made of £248 due to the assured, who assigned it to trustees for his creditors. Plff. demanded payment under his garnishee order of £127 out of the sum payable

"debt or sum of money due or owing to E. from the society, F. was not entitled to judgment against the garnishee."—**FARMER v. ELLICE** (1876), 16 N. B. R. (3 Pug.) 486.—**CAN.**

**c. Bribery of member of legislature—Bribe handed to Speaker—To await decision of House—Form of issue.]**—Deft., a member of the Legislative Assembly, received a sum of money from a person as an inducement or bribe to influence him in his course in the Assembly, which he handed to the Speaker to wait the action of the House with regard to the alleged bribery. Plffs., judgment creditors of deft., issued an order attaching all debts due from the Speaker to deft., claiming that the money so handed to him became a debt payable to deft. The ct., without expressing any opinion on the merits, directed an issue to be tried, as to the garnishee's indebtedness. The form of the issue was subsequently settled by the registrar, namely, whether at the date of the service upon the garnishee of the attaching order, there was any debt due or accruing due from the garnishee to deft.:—**Held**: sufficient.—**STUART v. MCKIM** (1885), 8 O. R. 739.—**CAN.**

**d. Contract for sale of real estate—Agreement to account for excess—On resale of property.]**—Where A. has sold & conveyed land to B. under an agreement that if B. could at any time resell the property for a larger amount he would account to A. for the excess, there is nothing upon which to base a garnishing order at the instance of a creditor of A., as there is neither any debt owing or accruing from the garnishee to the debtor, nor any claim or demand arising out of trust or contract which could be made available

by the co., & threatened them with execution, & the trustees claiming the £248, the co. took out an interpleader summons on which an order was made directing the sum of £127 to be paid into ct., & an issue to be tried as to whether that sum was the property of pltf. or the trustees:—*Held*: although no attachable debt was in existence at the date of the garnishee order, yet it, not having been set aside, entitled pltf. to issue execution for £127, & the interpleader order was wrong.

It is clear that the claim of the judgment debtor against the insurance co., which resulted in an award in his favour on Dec. 14, 1883, for £248 2s. 11d. was not at the date of the garnishee order in Apr. 1883, an attachable debt. It was not a debt either present or accruing. It was a mere claim for unliquidated damages & was not the subject of attachment in the hands of the insurance co. (WILLIAMS, J.).—*RANDALL v. LITHGOW* (1884), 12 Q. B. D. 525; 53 L. J. Q. B. 518; 50 L. T. 587; 32 W. R. 794.

*Annotations*:—*Apld.* *Vinall v. De Pass*, [1892] A. C. 90. *Refd.* *Harris v. Beauchamp* (2) (1894), 63 L. J. Q. B. 480.

### C. Part of Debt.

**2121. Discretion of court.**—A garnishee order nisi which attached all debts owing or accruing due from the garnishee to the judgment debtor was served on the garnishee who had in his hands as banker moneys belonging to the judgment debtor exceeding the amount of the judgment debt. The judgment debtor having brought an action against the garnishee for refusing to honour cheques which the judgment debtor drew

on the balance over & above the amount of the debt:—*Held*: an order made in these terms attached the whole of the moneys; the garnishee was right in dishonouring the cheques, & no action lay.

*Semble*: the operation of such an order may be restricted by the ct. or a judge to such an amount of the debts owing by the garnishee as will satisfy the judgment debt.

The effect of an order attaching "all debts" owing or accruing due by him to the judgment debtor is to make the garnishee custodian for the ct. of the whole funds attached; & he cannot, except at his own peril, part with any of those funds without the sanction of the ct. . . . When the attachment has been made in these terms it is within the power of the ct. to restrict its operation to such an amount of the debts owing by the garnishee as will satisfy the judgment debt (LORD WATSON).—*ROGERS v. WHITELEY*, [1892] A. C. 118; 61 L. J. Q. B. 512; 66 L. T. 303; 8 T. L. R. 418, II. 1.

*Annotations*:—*Consd.* *Geisse v. Taylor*, [1905] 2 K. B. 658; *Galbraith v. Grimshaw & Baxter*, [1910] 1 K. B. 339. *Refd.* *Yates v. Terry* (1902), 86 L. T. 133; *Edmunds v. Edmunds*, [1901] P. 362; *Joachimson v. Swiss Bank Corp.*, [1921] 3 K. B. 110. *Mentd.* *Re Greenwood*, *Sutcliffe v. Gledhill*, [1901] 1 Ch. 887.

### D. Certain or Ascertainable Amount.

**2122. Costs of action—Indemnity in respect of.**—The cost of proceedings by writ of garnishment under C. L. P. Act, 1854 (c. 125), s. 64, are in the discretion of the ct.; but if liberty is given to issue the writ, without any order as to costs, the

by equitable execution.—*McFADDEN v. KERR* (1899), 12 Man. L. R. 487.—*CAN.*

**e. Where fraud alleged—What issue directed.**—*MILLAR v. THOMPSON* (1900), 19 P. R. 294.—*CAN.*

**f. — Jurisdiction of county court.**—A county ct. has no jurisdiction to make an order in garnishee proceedings attaching & prohibiting the payment over of moneys owing or accruing due from the garnishee to a person other than the primary debtor, upon the allegation that such moneys would, when paid over, be held by such other person in trust for debtor in consequence of some transaction alleged to be fraudulent & void as against the creditors of debtor.—*ADAMS v. MONTGOMERY* (1908), 18 Man. L. R. 22.—*CAN.*

**g. Interest of residuary legatee.**—*Held*: a residuary legatee's interest was not such a debt as could be attached.—*HUNSBERRY v. KRATZ* (1903), 23 C. L. T. Occ. N. 185; 5 O. L. R. 635; 2 O. W. R. 448.—*CAN.*

**h. Gratuitous bailee of parcel of goods—No pre-existing debt between him & judgment debtor.**—Upon the affidavit of the judgment creditor & the examination of the garnishee, it appeared that pltf. had a judgment against deft., & on May 12, 1908, issued a garnishee summons against the garnishee upon an affidavit stating that he was informed & believed that a certain poke containing gold dust had been shipped to him for deft., but the garnishee while admitting that he had the poke swore he did not know what it contained. It was argued that if this parcel had contained currency it would be garnishable & that gold dust should not be differently treated:—*Held*: the garnishee here was a gratuitous bailee of a parcel of goods; no pre-existing debt existed between him & the judgment debtor; the goods in question were not garnishable.—*BARNARD v. FREEMAN* (1908), 8 W. L. R. 721.—*CAN.*

**k. Where entry of judgment**

—Where judgment has been recovered by pltf. in an action against deft., but the entry of judgment has been stayed, there is no debt due & owing from deft. to pltf. which can be attached.—*SCULLY v. MADIGAN* (1913), 24 O. W. R. 368; 4 O. W. N. 981, 1003.—*CAN.*

**l. Mortgage in name of employee of company—For company's convenience—Mortgage directed to be paid to plaintiff—As trustee.**—B., as an employee of a co. & for the co.'s convenience, took a transfer of land, intended to be transferred to the co., in his own name, & executed a mtge. upon the land to D., to raise money for the co.'s purposes, & on the same day filed with the mtgee.'s agents an order directing that the money so raised be paid to pltf. as trustee for the co. B. was indebted to deft. in a large amount, for which deft. had obtained judgment. Deft. caused a garnishee summons to be served upon mtgee.'s agents on July 16, the date on which the mtge. was registered. On July 20 the agents paid the mtge. monies into ct. D.'s practice was to require his agents to deposit the duly registered mtge. with his bank, upon which the necessary funds were transferred to their credit, & in this case it was done on July 20:—*Held*: the money was not being raised for the benefit of B. personally, & there was no debt due or accruing due from the garnishee to B., as contemplated by Rules 648 or 649 (Alta.), & especially was this so on the date of the service of the garnishee summons.—*BAILEY v. IMPERIAL BANK* (1916), 33 W. L. R. 387; 9 W. W. R. 945.—*CAN.*

**m. Dividend in hands of official liquidator.**—A garnishee order will not be given to attach a dividend in the hands of the official liquidator of a joint stock co. which is being wound up in bkpcy.—*DAWSON v. MALLEY* (1867), 1 L. R. 1 C. L. 207.—*IR.*

**n. Compensation for criminal injury.**—A decree for compensation for criminal injury does not create a debt directly payable to appt., but merely imposes the duty to levy the amount,

& when levied to hand it over. Before the amount is levied it is not the subject-matter of garnishee.—*SULLIVAN v. GILTRAP* (1902), 36 I. L. T. 26.—*IR.*

**o. Price of goods sold on credit.** Where goods are sold on credit the price thereof is subject to attachment in the hands of the vendee under an execution against the vendor.—*MALZARD v. HUIE, REED & CO.* (1817), 1 Nfld. L. R. 42.—*NFLD.*

**p. Cheque drawn in favour of judgment debtor.**—A cheque, drawn in favour of the judgment debtor in the hands of the garnishee, is liable to attachment.—*BYRNE v. NOWLAN* (1864), 5 Nfld. L. R. 33.—*NFLD.*

### PART V. SECT. 1, SUB-SECT. 3.—C.

**q. General rule.**—A primary creditor can garnish part of a debt due by a third person to the primary debtor for which, as between the primary debtor & the garnishee, a suit could not be maintained in the division ct. by reason of the amount being in excess of the jurisdiction.—*Re MEAD v. CREEARY* (1881), 32 C. P. 1.—*CAN.*

**r. —.**—Neither sect. 4 nor any other provision of Creditors' Relief Act extends the effect of a garnishee summons, so as to make it bind the whole sum in the hands of the garnishee, where it is more than sufficient to answer the claim of the garnishing creditor & therefore, deft. has a right to deal with the fund subject to the claim of that creditor.—*STACEY LUMBER CO. v. CAZIER* (1914), 28 W. L. R. 945; 6 W. W. R. 1382; 17 D. L. R. 823; 8 Alta. L. R. 59.—*CAN.*

### PART V. SECT. 1, SUB-SECT. 3.—D.

**s. General rule—Attachment of Debts Act, 1904.**—Above Act, 1904, contemplates the attachment of a definite, ascertained amount, & a mtgor. suing for an account of moneys received by a mtgee. in possession cannot make the affidavit required by the statute as to the "actual amount



*Sect. 1.—Attachment of debts—Garnishee order :  
Sub-sect. 3, D., E. & F.]*

successful party is entitled to them. C., at the request of D., commenced an action, in which C. had no interest, against I., upon D. giving C. a bond whereby D. bound himself to C. in the penal sum of £200 subject to the condition that if D. should pay to I., deft. in the action, such costs as C., plff. in the action, should in due course of law be liable to pay in case he should discontinue, become nonsuit, or a verdict should pass against him, such costs to be first taxed, or in case of a judgment obtained by deft. for his costs of defence; & also should permit C. during the pendency of the action, or of any liability to him arising therefrom, to retain & apply any of D.'s moneys that might come into C.'s hands towards the discharge of any costs or liabilities which C. might be put to or incur by reason of his permitting the action to be carried on in his name, or from any injury to him thereby from the default or omission of D. to pay the same, the bond should be void, etc. C. was nonsuited in the action, & I. had judgment to recover his costs:—*Held*: D.'s liability under the bond to pay such costs did not constitute a "debt" within the garnishee clauses of C. L. P. Act, 1854 (c. 125), & could not be attached as such by the judgment creditor.

The penalty of the bond stands only to secure the performance of the condition, & I agree that if the bond had been conditioned for the payment of a sum certain, or a sum capable of being ascertained without the intervention of a jury, the statute would apply; but in this case the amount of deft.'s liability must be assessed by a jury (PARKE, B.).

The action failed, & Johnson had judgment for

of the debt."—RICHARDS v. WOOD (1906), 12 B. C. R. 182.—CAN.

t. *Costs of action—Subject to taxation.*—By a decree of the M. R. it was ordered that plff. F. do pay to deft. W. his costs of the action. By the decree of the Ct. of Appeal in the same case the action was dismissed with costs to be paid by F. to deft. S. when taxed. W.'s costs were taxed. S. was indebted to F. in a sum for rent, & W. obtained an order that the debt be attached for W.'s costs unless within ten days cause be shown to the contrary. When this order was obtained S.'s costs had not been taxed but they were taxed & certified before it was made absolute:—*Held*: the order nisi had attached the debt & it was ordered to be paid to W.'s administrators.—FITZPATRICK v. WARING (1883), 13 L. R. Ir. 2.—IR.

a. *Unascertained sum—Money due under award.*—A debt is garnishable where it consists of money due under an award & decree of the Ct. of chancery, although the full amount is not ascertained by reason of the costs not having been taxed. When the amount in such a case is finally ascertained, execution may be issued against the garnishee, although he still disputes his liability.—*Re SATO v. HUBBARD* (1881), 5 P. R. 445.—CAN.

b. ——— *When award pending.*—Under Civil Procedure Code, s. 205, sums to be attached must not be inchoate, but existing & definite, & although liquidated demands in their nature definite & certain, though *sub lite* & unproved, may be seized, a mere expectancy or a mere right of suit cannot be attached. The attachment must operate at the time of attachment, & not be anticipatory, so as to fasten on some future state of property in which the suit may result. A claim which may accrue under a pending award cannot be sold in

his costs. The bond provides that in that event D. should pay to Johnson those costs, & the question is whether this bond can be said to be an instrument under which a debt is due to the judgment debtor, so as to be capable of being attached. It is not. If the bond had been for the payment by D. to C. of a sum of money, there is no doubt that might have been attached by Johnson. But this is in no sense of the word a debt between C. & D. It is a covenant by D. with C. to pay Johnson the amount of his costs (PLATT, B.).—JOHNSON v. DIAMOND (1855), 11 Exch. 73; 3 C. L. R. 1010; 24 L. J. Ex. 217; 25 L. T. O. S. 85; 1 Jur. N. S. 938; 3 W. R. 407; 156 E. R. 750; *subsequent proceedings*, 11 Exch. 431.

2123. *Costs in equity—Uncertain amount.*—A judgment creditor obtained an order under C. L. P. Act, 1854 (c. 125), attaching all debts owing from the garnishee to the judgment debtor, & a second order directing the garnishee to pay to the judgment creditor the debt due from him, the garnishee, to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment debt. At the time of these orders the garnishee was indebted to the judgment debtor in respect of, amongst other matters, certain costs in equity to an amount not then ascertained. The amount was afterwards ascertained & ordered to be paid by a decree of this Ct.:—*Held*: this debt being equitable & not ascertained at the time, was not within the Act, & not affected by the common law orders.—CLARK v. PERRY (1855), 26 L. T. O. S. 46; 1 Jur. N. S. 992; 3 W. R. 366; *on appeal*, 3 W. R. 387, L. JJ.

*See, now*, No. 2057, *ante*.

*Compare* Nos. 10, 2109, 2118, 2120, *ante*.

execution.—SYUD TUFFAZAL HOSSEIN KHAN v. RAGHUNATH PRASAD (1871), 7 B. L. R. 186; 14 Moo. Ind. App. 40.—IND.

c. ——— *Fire insurance moneys.*—Fire insurance moneys are not attachable by garnishee until amount of liability is ascertained.—HART v. EDMONTON LAUNDRY CO., COLONIAL ASSURANCE CO., GARNISHEE (1909), 2 Alta. L. R. 130.—CAN.

d. ———.—BROOKLER v. SECURITY NATIONAL INSURANCE CO. OF CANADA (1915), 31 W. L. R. 460; 8 W. W. R. 861.—CAN.

e. ——— *Legacy.*—An order may be made attaching the amount, if any, coming to a judgment debtor as residuary legatee under a will, although it is undetermined whether anything, & if anything, how much, is due to him.—MCLEAN v. BRUCE (1891), 14 P. R. 190.—CAN.

f. ——— *Unliquidated damages.*—A claim for unliquidated damages can not be attached before judgment obtained upon it.—GWYNNE v. REES (1858), 2 P. R. 282.—CAN.

g. ———.—*Ex p.* DEARBORN (1892), 31 N. B. R. 363.—CAN.

h. ———.—The right to proceed under R. 759 of King's Bench Act for the attachment of debts before judgment is confined to cases in which the amount of plff.'s claim can be definitely ascertained at the time the action is brought & the rule does not apply where the claim is for unliquidated damages whether arising for tort or breach of contract.—HART v. DUBRULE (1910), 20 Man. L. R. 234.—CAN.

i. ———.—Where a person has a claim for damages against another which the latter admits, but there is no agreement between them fixing the amount thereof, the claim is not an ascertained debt or liquidated amount &, therefore, cannot support a garnishee

summons.—MACFARLAND v. OWEN, [1917] 3 W. W. R. 371.—CAN.

j. ———.—A garnishee summons was set aside on the ground that the claim was not for a liquidated demand.—BOLEN v. VARRO, [1923] 1 W. W. R. 340.—CAN.

m. ——— *Money payable on exercise of option.*—The expression "such claims & demands as could be available under equitable executions," in Attachment of Debts Act, s. 4, refers only to ascertained debts. Therefore moneys which will be payable if the holder of an option decides to exercise it are not attachable.—RYALL v. NELSON, SPERRY & WHITE, GARNISHEES, [1917] 3 W. W. R. 647.—CAN.

n. ———.—Plffs., who had a judgment against H., obtained an order attaching all debts owing or accruing due from a railway co. & a bank to H., & served the order on both garnishees:—*Held*: an application for payment to the judgment creditors of an unascertained sum said to be due by the bank to H. was properly dismissed.—RAT PORTAGE LUMBER CO. v. HARTY (1917), 40 O. L. R. 322; 39 D. L. R. 425.—CAN.

o. ——— *Partnership debt.*—An uncertain sum which may or may not be payable by one member to another of a partnership, not shown to have been wound up, cannot be attached or sold in execution of a decree.—DWARIKA MOHUN DAS v. LUCKHIMONI DAS (1887), 1 L. R. 14 Cal. 384.—IND.

p. ———.—Where money is due by an agent or vendee to his principal or vendor, the principal's or vendor's claim against his agent or vendee may be attached & sold in execution of a decree against the principal or vendor as a debt under Code of Civil Procedure, s. 266, & it is not necessary that the exact amount due to the principal or vendor should be ascertained prior to attachment & sale.—MAHMO DAS v. RAMJI

*E. Legally Enforceable by Judgment Debtor.***Jointly with others.]—**See Sub-sect. 3, C., *ante*.

**2124. General rule.]—**By the terms of the mtge. deed to B. the relation of debtor & creditor was established between M. & B., but in order to meet the view of the statute [C. L. P. Act, 1854 (c. 125)] the debt to be attached must be not merely a debt which there is a legal right to recover, it must be a debt, the payment of which can be effectually enforced (BACON, V.-C.).—CHATTERTON *v.* WATNEY (1881), 16 Ch. D. 378; 50 L. J. Ch. 227; 44 L. T. 53; 29 W. R. 373; *affd.*, 17 Ch. D. 259, C. A.

*Annotations:—***Consd.** Webb *v.* Stenton (1883), 52 L. J. Q. B. 584. **Refd.** *Re* Combined Weighing & Advertising Machine Co. (1889), 43 Ch. D. 99; Rogers *v.* Whiteley (1889), 23 Q. B. D. 236; Pritchett & Young *v.* English & Colonial Syndicate (No. 2) (1899), 43 Sol. Jo. 602; Geisse *v.* Taylor, [1905] 2 K. B. 658.

**2125. Covenant by garnishee with judgment debtor—To pay judgment creditor's costs.]—**JOHNSON *v.* DIAMOND, No. 2122, *ante*.

**2126. Promise by garnishee as executor—To pay legacy—Conditions necessary to enforcement.]—**M'DOWALL *v.* HOLLISTER, No. 2088, *ante*.

*See, generally, EXECUTORS.*

**2127. By action at law.]—***Qu.*: whether an attachment issued out of the Lord Mayor's Ct. of moneys of the debtor in the hands of persons resident out of the city, is effectual.

A foreign attachment can only affect moneys for which the debtor himself could maintain an action at the time of the attachment.

I am of opinion, independently of any question how far a foreign attachment affects debts out of the city of London, that this attachment did not affect any moneys except such as W. was entitled to, that is, to recover which he could have maintained an action (LORD ROMILLY, M.R.).—WEBSTER *v.* WEBSTER (1862), 31 Beav. 393; 31 L. J. Ch. 655; 6 L. T. 11; 8 Jur. N. S. 1047; 10 W. R. 503; 54 E. R. 1191.

*Annotations:—***Refd.** Addison *v.* Cox (1872), 42 L. J. Ch. 291. **Mentd.** Somerset *v.* Cox (1865), 33 Beav. 634; McCreagh *v.* Cox & Ford (1923), 92 L. J. K. B. 855.

**2128. —.]—**Defts. raised money by the issue of capital stock to complete a portion of their line. By an arrangement between defts. & the D. Ry. Co., confirmed by an Act of Parliament, the line was worked by the latter co., who provided & paid to defts. half-yearly a sum of money for the payment of interest on the stock. Judgment having been recovered by pltf. against defts. & one of the half-yearly instalments being due:—**Held:** it could be attached in the hands of the D. Ry. Co. as a debt under C. L. P. Act, 1854 (c. 125), s. 61.

The money is due upon the contract between

(1894), 1 L. R. 16 All. 286.—

**q. —.]—**The ct. will grant a garnishee order to attach a debt the amount of which is unascertained.—DANIEL *v.* M'CARTHY (1857), 7 L. C. L. R. 261.—IR.

**PART V. SECT. 1, SUB-SECT. 3.—E.**

**21241. General rule.]—**A debt in order to be garnishable must be enforceable by principal debt. & if there are any rights or equities affecting the garnished debt as between him & the garnishee the garnisher can attach the debt only subject to such rights or equities.—GWIN *v.* BACKUS & DRAPER, 1122; 14 Sask. L. R. 668.—CAN.

**r. Amount of acceptance of bill of exchange.]—**On an application for an order for a garnishee to pay over to the judgment creditor the amount of an acceptance due by him to judgment

debtor, it should be shown that at the date of the order, if made, the acceptance is in the hands or under the control of the judgment debtor, & not in the hands of some innocent third party.—MELLISH *v.* BUFFALO, BRANTFORD & GODERICH RY. CO. (1857), 2 C. L. J. O. S. 230.—CAN.

**s. Long service bonus.]—**K. was recommended for a bonus in consideration of long & good services. Before payment to K., the money was attached in execution of a decree obtained against him by J.:—**Held:** the money was not at K.'s disposal, & he could not have enforced payment. The money was therefore not liable to attachment in execution of a decree against him.—JANKI DAS *v.* EAST INDIAN RY. CO. (1884), 1 L. R. 6 All. 634.—IND.

**PART V. SECT. 1, SUB-SECT. 3.—F.**

**2131 i. Beneficial interest in debt—Must be in debtor.]—**It appeared that debt. was owed by a garnishee a certain

the Dover Co. & the Sevenoaks Co., & if the money is due from the Dover Co. to the Sevenoaks Co. by the agreement, & according to the course of practice applicable, an action might be brought (HUDDLESTON, B.).—BOUCH *v.* SEVENOAKS RY. CO. (1879), 4 Ex. D. 133; 48 L. J. Q. B. 338; 40 L. T. 560; 27 W. R. 507.

*Annotation:—***Mentd.** Clifford *v.* Imperial Brazilian Natal & Nova Cruz Ry. & Gibbs (1888), 60 L. T. 60.

**2129. —.]—**A. mortgaged leaseholds by underlease to B., to secure £800. A. subsequently agreed to sell the leaseholds to C. for £900. C. paid a deposit of £30, & agreed to pay the balance of the purchase-money payable on a given day. By the agreement £800 of the purchase-money was to be left on mtge. of the property sold. The same solrs. acted for A., B., & C., throughout the matter. A. executed an assignment of the leaseholds to C., & C. entered into possession thereof:—**Held:** A. was entitled to the £70 balance of purchase-money from C., although no surrender had been obtained of B.'s underlease.

Everything had been done by Tuxhill under the agreement of Mar. 5 to entitle him to be paid the £70 balance of the purchase-money, payable by Mrs. Shield to him under that agreement. There was, therefore, an attachable debt of that amount on May 12 (DENMAN, J.).—OWENS *v.* SHIELD (1884), 1 Cab. & El. 356.

*F. Due to Judgment Debtor in Own Right.*

**2130. General rule.]—**KENNETT *v.* WESTMINSTER IMPROVEMENT COMRS., No. 2056, *ante*.

**2131. Beneficial interest in debt—Must be in debtor.]—**Where, in garnishee proceedings, there is reasonable suspicion that money sought to be attached does not belong to the judgment debtor, but is trust money, the judge has jurisdiction over the matter, even though no suggestion has been made by the garnishee under R. S. C., Ord. 45, r. 6, that the money belongs to some third person, & can order an issue to be tried whether or not the money is trust money.

The judge also has power, under Ord. 45, r. 7, to make such an order.—ROBERTS *v.* DEATH (1881), 8 Q. B. D. 319; 51 L. J. Q. B. 15; 46 L. T. 216; 30 W. R. 76, C. A.

*Annotation:—***Consd.** Martin *v.* Nadel, [1906] 2 K. B. 26.

**2132. —.]—**A garnishee order under R. S. C., Ord. 45, binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order *nisi* was obtained & served; consequently it is postponed to a prior equitable assignment of the debt, even in the absence of

sum of money stipulated to be paid & to become due on a certain date. A warrant of attachment was laid in the garnishee's hands & notice given him to keep the fund attached, to abide the order of the ct. Notwithstanding the warrant & notice the garnishee paid & accounted to debt. for the amount due, & contended that the money could not be attached for the reason that at the time the warrant was laid in his hands debt. had not then a "present interest & disposing power," & could only affect monies due by him to debt. at the time of the receipt of the warrant:—**Held:** debt. had a "present interest" in the sum payable as he retained an equitable interest in the property sold, of which the money attached was part of the purchase; & he had a "disposing power" over it as he might at any time have assigned his interest in the same.—SMITH *v.* PENNELL & DALEY (1874), 6 Nfld. L. R. 25.—NFLD.



*Sect. 1.—Attachment of debts—Garnishee order:*  
*Sub-sect. 3, F., G. & H.]*

notice.—*Re* GENERAL HORTICULTURAL CO., *Ex p.* WHITEHOUSE (1886), 32 Ch. D. 512; 55 L. J. Ch. 608; 54 L. T. 898; 34 W. R. 681.

*Annotations:—Apld.* Badeley v. Consolidated Bank (1886), 34 Ch. D. 536. *Consd.* Davis v. Freethy (1890), 24 Q. B. D. 519. *Refd.* Robson v. Smith, [1895] 2 Ch. 118; *Re* Anglesey, De Galve v. Gardner, [1903] 2 Ch. 727; Vacuum Oil Co. v. Ellis, [1914] 1 K. B. 693.

**2133.** ———. ———.]—Pltf. advanced money to a contractor to enable him to carry out a contract with a railway co. for the construction of a railway, & the parties executed a deed by which the contractor assigned to pltf. all his machinery, plant, etc., & all shares & debentures he might receive from the co. to secure the repayment of the loan. The deed contained the following provisions: that pltf. should receive 10 per cent. interest on the money advanced & 10 per cent. of the net profits of the contract; that the contractor should apply all the moneys advanced in carrying on the works; that if the contractor should become bkpt., pltf. might enter & complete the works; that pltf. might sell the property in case of default, but that he should not sell the shares or debentures within twelve months after the completion of the contract; that in calculating the net profits the contractor should be allowed to draw out £1,000 a year for his services. Letters passed between pltf. & the contractor in which the money advanced was spoken of as "capital" & "working capital," & expressions were used showing that both parties had a common interest in the works:—*Held*: a creditor could only attach by a garnishee order such property of his debtor as the debtor could deal with properly, & without violation of the rights of other persons, & therefore, an equitable charge, obtained before a garnishee order, took priority of the order, even where no notice of the charge was given.—*BADELEY v. CONSOLIDATED BANK* (1888), 38 Ch. D. 238; 57 L. J. Ch. 468; 59 L. T. 419; 36 W. R. 745, C. A.

*Annotations:—Consd.* Gray v. Stone & Funnell (1893), 69 L. T. 282; Cole v. Eley (1894), 70 L. T. 892. *Refd.* Davis v. Freethy (1890), 24 Q. B. D. 519; *Re* Anglesey, De Galve v. Gardner, [1903] 2 Ch. 727; Vacuum Oil Co. v. Ellis, [1914] 1 K. B. 693. *Mentd.* *Re* Whiteley, *Ex p.* Smith (1892), 66 L. T. 291; Davis v. Davis, [1894] 1 Ch. 393; King v. Whitchelov (1895), 64 L. J. Q. B. 801; Norton v. Yates, [1906] 1 K. B. 112; *Re* Beard, *Ex p.* Trustee, [1915] H. B. R. 191.

**2134 i.** *Debt due as joint creditor—Whether attachable.*—A debt owing to two cannot be attached to satisfy a claim against one of them only.—*Re* SMART v. MILLER (1866), 3 P. R. 385.—**CAN.**

**2134 ii.** ———. ———.]—A debt due to a judgment debtor jointly with another person cannot be attached.—*PARKER v. ODETTE* (1894), 18 P. R. 69.—**CAN.**

**2134 iii.** ———. ———.]—*Held*: assuming the liability of the debts, upon the covenant in the chattel mtge. was a joint one, there was no reason why a debt due to one of two joint debtors might not be attached.—*NOHREN v. AUTEN & MARKHAM* (1910), 15 W. L. R. 417; 3 Alta. L. R. 310.—**CAN.**

**2134 iv.** ———. ———.]—A debt to be attachable, must be a debt due to the judgment debtor alone & where it is due to him only jointly with another person it cannot be attached.—*LEKAS v. ZAPPAS* (1913), 23 W. L. R. 560; 3 W. W. R. 1148; 10 D. L. R. 646; 6 Sask. L. R. 197.—**CAN.**

**t.** *Debt due to judgment debtor's wife.*—*Held*: the debt alleged in the bill being under a bond to the wife of M., the judgment debtor, & not to M. himself, was not such a claim as could be garnished under C. L. P. Act.—*ST. MICHAEL'S COLLEGE v.* (1879), 26 Gr. 216.—**CAN.**

**2134. Debt due as joint creditor—Whether attachable.**—The debt, legal or equitable, owing by a garnishee to a judgment debtor, which can be attached to answer the judgment debt, must be a debt due to such judgment debtor alone, & where it is only due to him jointly with another person it cannot be so attached.—*MACDONALD v. TACQUAH GOLD MINES CO.* (1884), 13 Q. B. D. 535; 53 L. J. Q. B. 376; 51 L. T. 210; 32 W. R. 760, C. A.

*Annotation:—Apld.* Beasley v. Roney, [1891] 1 Q. B. 509.

**2135.** ———. ———.]—In an action brought by husband & wife as co-pltfs. in respect of personal injuries to the wife, the jury awarded damages to the wife & a sum to the husband for expenses, & the whole amount recovered was paid into the hands of their solr.:—*Held*: the amount awarded to the wife was her separate property within Married Women's Property Act, 1882 (c. 75), s. 5, & therefore a garnishee order attaching the whole of the money in the hands of the solr. to answer a judgment debt of the husband was invalid.—*BEASLEY v. RONEY*, [1891] 1 Q. B. 509; 60 L. J. Q. B. 408; 65 L. T. 153; 55 J. P. 566; 39 W. R. 415, D. C.

**2136. Joint judgment debtors—Debts due to one or more.**—On a joint judgment against several, a debt due to any one or more of the judgment debtors may be attached in the hands of a garnishee, under C. L. P. Act, 1854 (c. 125), s. 61.—*MILLER v. MYNN* (1859), 1 E. & E. 1075; 28 L. J. Q. B. 324; 33 L. T. O. S. 184; 5 Jur. N. S. 1257; 7 W. R. 524; 120 E. R. 1213; *previous proceedings*, 1 F. & F. 563.

*Annotations:—Refd.* Goodman v. Robinson, Brown, Janson, Garnishees (1886), 55 L. T. 811; White & Pill v. Stenning (1911), 80 L. J. K. B. 1124.

**2137.** ———. ———. **By other judgment debtor.**—A. sued C. as extrix. jointly with B. & four others, & recovered judgment against them; & then under the judgment attached a debt owing by B. to C.'s testator, which B. paid:—*Held*: the attachment of the debt was void, & payment of it by B. could not be set off in an action at the suit of C. as extrix. against B. to recover it.

*Qu.*: whether, a joint judgment having been obtained against several debtors, debts due from one to another of them can be attached under C. L. P. Act, 1854 (c. 125).—*CHAPMAN v. CALLIS* (1862), 6 L. T. 282.

**a. Insurance money.**—The judgment debtor was insured under an accident policy in a co. incorporated under a Dominion statute, having its head office at T., represented in the province of P. E. I. by a local agent, who had authority to solicit applications & forward them to the head office of the co. for approval. The insured, having met with an accident, gave the required notice, & furnished the necessary proofs of claim to the co. according to the conditions in the policy. After the proofs of claim had been received at the head office, a copy of an attaching order was served upon the local agent in P. E. I.:—*Held*: there was an attachable debt due by the co. to the judgment debtor within 48 Vict. c. 4, s. 1.—*SEAMAN v. SEAMAN*, 25 C. L. T. Occ. N. 109.—**CAN.**

**b.** ———.]—Pltf. sought to attach as a debt due the husband, a sum of money deposited in a chartered bank by a married woman in her own name. The evidence showed that the money in question, in whole or in part, was obtained from profits earned in carrying on the business of the husband during his absence, & it appeared that it was received by the wife & deposited in her own name, by arrangement with the husband, for the purpose of

protecting it against the creditors of the husband:—*Held*: the amount in question was not a debt due by the wife to the husband, & therefore not attachable under garnishee proceedings by the husband's judgment creditor.—*ST. CHARLES v. ANDREA* (1907), 41 N. S. R. 190.—**CAN.**

**c. Money payable to auctioneer.**—*Held*: money payable to an auctioneer by purchasers of goods entrusted to him for auction could not be attached by the creditors of the auctioneer, except as to such an amount as the judgment debtor had a disposing power over which he could exercise for his own benefit.—*SMITH v. ALLAHABAD BANK, LTD.* (1901), 1 L. R. 23 All. 135.—**IND.**

**d. Credits due to railway pany.**—An agreement was entered into between the E. railway co. & the I. railway co., under which the line of the former co. was worked by the latter co. A garnishee order was obtained by a judgment creditor of the E. co. to attach a sum of money in the hands of the I. co., which consisted of tolls received on the former co.'s line & which the I. co. admitted they owed to the E. co. On motion by a debenture mtgee. of the tolls of the E. co. to discharge that order:—*Held*: he could not intervene so as to

*G. Debts Due to Judgment Debtor in Representative Capacity.*

**As executor or administrator.]—See EXECUTORS.**  
**As trustee.]—See TRUSTS & TRUSTEES.**

*H. Debts Assigned by Judgment Debtor.*

**2138. General rule.]—**An order upon a garnishee, under C. L. P. Act, 1854 (c. 125), has no operation upon debts of which the judgment debtor has already divested himself by assignment.—*HIRSCH v. COATES* (1856), 18 C. B. 757; 25 L. J. C. P. 315; 27 L. T. O. S. 202; 4 W. R. 656; 139 E. R. 1568.

**Annotations:—***Reid. Newman v. Rook* (1858), 4 C. B. N. S. 434; *Re General Horticultural Co., Ex p. Whitehouse* (1886), 32 Ch. D. 512; *Davis v. Freethy* (1890), 24 Q. B. D. 519. **Mentd.** *Cole v. Eley* (1894), 70 L. T. 892.

**2139. Equitable assignment.]—**W. & S. by deed assigned to P. all moneys to which they might become entitled from a certain railway co., upon trust to secure the due payment of the sum of £5,000 advanced by P., “& also of all other sums which might thereafter become due from W. & S. to the said P., whether in respect of principal, interest, discount, commissions, or otherwise howsoever.” The £5,000 mentioned in the deed

was paid off, but P. was afterwards compelled to pay £5,000 under a guarantee for W. & S. Appls., as execution creditors, afterwards attached a sum of money due from the railway co. to W. & S. P. had given notice of the assignment to the railway co.:—*Held*: the deed of assignment included not only advances made by P. to W. & S., but also money paid by him under his guarantee for them, & was not affected by subsequent letters offering additional security for the guarantee.

It is admitted that about £5,000 was due from the railway co. to W. & S., & the question is whether appls. were entitled to attach that amount; that depends upon whether P., who claimed under an equitable assignment, was entitled to the amount due from the co. (*per Cur.*).—*DUMBELL v. ISLE OF MAN RY. CO.* (1880), 42 L. T. 745, P. C.

**2140. Under revocable mandate—No revocation made.]—**Deft., a judgment debtor, had previous to judgment assigned to a third party a sum of money under a deed of arrangement, under which the third party was to retain from the sum so assigned rent due to himself, & to hold the balance for the benefit of deft.’s creditors. The arrange-

prevent a judgment creditor of the co. attaching that sum under C. L. P. Act, 1856, s. 63.—*SWINEY v. ENNISKILLEN, BUNDORAN & SLIGO RY. CO.* (1868), 1 L. R. 2 C. L. 338.—**IR.**

**PART V. SECT. 1, SUB-SECT. 3.—H.**

**2138 i. General rule.]—**A debt duly assigned to another is not garnishable, & the attaching order will be set aside. *MACAULAY v. RUMBALL* (1869), 19 C. P. 284.—**CAN.**

**2138 ii. —.]—**An attaching order will not operate upon debts of which the judgment debtor has divested himself by assignment, even though the assignment may be void as against creditors under 13 Eliz., c. 5.—*Ex p. BLACK* (1899), 34 N. B. R. 638.—**CAN.**

**2138 iii. —.]—**Pltf. had obtained a garnishee order attaching a debt alleged to be due to deft. by a county council, & calling on the county council to show cause why it should not be paid to pltf. This order was served on the county council. Prior to the date of the order the debt had been assigned for value by debtor to third parties, & notice of the assignment given to the county council. Owing to a mistake on the part of the secretary of the county council, no cause was shown against the conditional order & it was made absolute:—*Held*: the ct. had jurisdiction to set aside the absolute order, & in the circumstances, it should be set aside.—*O’BRIEN v. KILLEEN*, [1914] 2 I. R. 63.—**IR.**

**2139 i. Equitable assignment.]—**An equitable assignment of money before a judgment is sufficient to bar a subsequent garnishment.—*KEITH v. BUTLER & FOSTER* (1866), 1 Q. S. C. R. 141.—**AUS.**

**2139 ii. —.]—**The judgment debtor, through his sub-contractors, delivered to the garnishees certain railway ties, & gave the sub-contractors an order on the garnishees for all moneys coming to him therefrom. Subsequently, but before the garnishees had notice of this order, they were served with the attaching order in this case:—*Held*: the order in favour of the sub-contractors operated as an assignment of the fund to them, although there was no notice of it to the garnishees.—*BROWN v. MCGUFFIN* (1870), 5 P. R. 231.—**CAN.**

**2139 iii. —.]—**Previous to the garnishee process being issued, C. had drawn an order requesting defts. to pay all sums coming due to him under the engineer’s monthly certificate, to

one K., but there was no evidence of any indebtedness of C. to K.:—*Held*: this was not such an equitable assignment as would prevent the garnishee process from operating on the fund.—*FITZRANDOLPH v. SHANLY* (1881), 14 N. S. R. (2 R. & G.) 199; 1 C. L. T. 705.—**CAN.**

**2139 iv. —.]—***BROWN v. THOMAS* (1907), 5 W. L. R. 332.—**CAN.**

**2139 v. —.]—**A power of attorney authorising the attorney to collect a sum of money does not *per se* operate as an equitable assignment of the fund; if, however, it appears from all the surrounding circumstances that it was the intention of the parties that the fund should be assigned, an equitable assignment is established.—*TRADERS BANK v. MCKAY* (1909), 2 Alta. L. R. 31.—**CAN.**

**2139 vi. —.]—***COPPEY v. LEAR* (1910), 15 W. L. R. 354.—**CAN.**

**2139 vii. —.]—**An assignment of a chose in action, if valid, takes precedence of & has priority over a subsequent attachment by way of garnishment.—*CASE THRESHER MACHINE CO. v. SING* (1912), 21 W. L. R. 278.—**CAN.**

**2139 viii. —.]—**Defts. served garnishee summonses upon the B. L. Co., & on the same day, but later, the L. Co. received notice from pltf. of a prior assignment:—*Held*: although the notice was not received until a time subsequent to the serving of the garnishee summons, yet the equitable interest in the property had passed under the assignment.—*IMPERIAL BANK v. WESTERN SUPPLY & EQUIPMENT CO.* (1918), 39 D. L. R. 803.—**CAN.**

**2139 ix. —.]—**S., a creditor of the estate of a deceased person which was being administered by the ct., gave a power of attorney to his solrs. to receive all moneys coming to him under the decree, & by a letter authorised them, after satisfying their own claims out of the money to be received, to pay the balance to pltf. The solrs., in the presence of pltf., agreed to draw the money & pay pltf. The fund in ct. to the credit of S., having been ascertained, was afterwards attached by defts., judgment creditors of S., & paid out of ct. to defts.:—*Held*: S. had made a valid equitable assignment to pltf., & defts. were bound to refund to pltf. the moneys paid out of ct. to them.—*SHAIR MULL v. SINGARAVELU* (1883), 1 L. R. 6 Mad. 294.—**IND.**

**e. — Made orally—Validity of.]**

—An oral equitable assignment of a chose in action is valid, & takes priority of a subsequent attaching order of the debt so assigned.—*TODD v. PHOENIX & UNITED FIRE INSURANCE CO.* (1894), 3 B. C. R. 302.—**CAN.**

**f. — What constitutes.]—**In Nova Scotia book debts cannot be sold under execution & the act of the judgment debtor in allowing such sale does not constitute an equitable assignment of such debts to the purchaser.—*MOORE v. ROPER* (1905), 35 S. C. R. 533.—**CAN.**

**g. — Letter moneys.]—**A letter assigning moneys must be shown to have been communicated to the assignee before it will be held to constitute an equitable assignment.—*STARR CO. OF CANADA, LTD. v. MERRILL*, [1922] 3 W. W. R. 926; 70 D. L. R. 557.—**CAN.**

**h. — The garnishee had given deft. a promissory note. Afterwards & whilst the note was in the possession of deft. a warrant was laid in the garnishee’s hands. Subsequently the note was indorsed by deft. to a third party who notified the garnishee:—Held: the instrument was nothing more than acknowledgement—the debt was still subsisting, & prior to the attachment there had been no equitable assignment & the attachment must stand.—JILLARD v. PENDIKONSKY (1880), 6 Nfld. L. R. 253.—**NFLD.****

**i. Instructed agents to dispose of goods & to hand over the proceeds to N. The agents sold the goods & retained the proceeds. P., a judgment creditor of R., attached these proceeds. In the garnishee proceedings N. claimed the moneys:—Held: the authority given by R. to the agents was not a cession, nor did the facts disclose a cession.—PIRBHAY RAMJEE v. RODGERS (1921), 42 N. L. R. 53.—**S. AF.****

**l. Necessity for notice of assignment.]—**Although an order is not intended to operate upon debts already assigned, yet, where the assignees had neglected to give the garnishee precise & distinct notice of the assignment, & his attorney stood by whilst such order was made, & the garnishee had paid the debt to the judgment creditor, the ct. relieved the garnishee from further proceedings taken at the instance of the assignee in the name of the judgment debtor.—*Re JONES, Ex p. KELLY* (1858), 7 C. P. 149.—**CAN.**

**m. —.]—**Where the assignee of



*Sect. 1.—Attachment of debts—Garnishee order:  
Sub-sect. 3, H., I. & J.]*

ment was communicated to deft.'s local creditors, but not to pltf., the judgment creditor. Pltf. sought under a garnishee order to attach the sum so held by the third party:—*Held*: (1) no trust had been created by the assignment for the benefit of the creditors generally; (2) the mandate of the debtor was revocable, but, no revocation having been made by the debtor, there was no debt, legal or equitable, owing or accruing which could be the subject of attachment under R. S. C., 1883, Ord. 45, r. 1.—*ROBERTS v. JONES* (1892), 61 L. J. Q. B. 523; 68 L. T. 617; 40 W. R. 573, D. C.

*See, also, CHOSSES IN ACTION*, Vol. VIII., pp. 428, 432, 455, 477, 487, Nos. 70, 94, 281, 467, 471, 558. *Priorities.*—*See Sub-sect. 7, post.*

*I. Rent.*

**2141. Already due.]**—Rent is a debt which may be attached under C. L. P. Act, 1854 (c. 125), s. 61, which enacts that, where judgment has been recovered & is still unsatisfied, & any third person is indebted to the judgment debtor, a judge may order that "all debts owing or accruing" from such third person to the judgment debtor shall be attached to answer the judgment debt.—*MITCHELL v. LEE* (1867), L. R. 2 Q. B. 259; 8 B. & S. 92; 36 L. J. Q. B. 154; 15 L. T. 502; 15 W. R. 337.

**2142. Not due.]**—Notwithstanding Apportionment Act, 1870 (c. 35), s. 2, rent cannot, before it is payable, be attached under a garnishee order as a debt owing or accruing due.—*BARNETT v. EASTMAN* (1898), 67 L. J. Q. B. 517.

*Annotation*:—*Refd.* Edmunds v. Edmunds, [1904] P. 362.

a chose in action has not given the debtor express notice in writing as required by Ord. 61 he cannot avail himself of Ord. 43.—*O'DONNELL v. SMITH* (1891), 23 N. S. R. 208.—**CAN.**

**n.** —.]—The fact that the creditor has assigned the debt to a third person, though there be no notice of the assignment to debtor, is a good answer to an attaching order, as the attaching creditor can only take that which debtor can lawfully part with, having regard to the rights of others.—*GRAY v. HOFFAR* (1896), 5 B. C. R. 56.—**CAN.**

**o. Validity of assignment—How raised.]**—Judgment was recovered by B. & Co. against deft., against whom pltf. afterwards likewise recovered judgment. B. & Co. first & pltf. afterwards put a *fi. fa.* against deft.'s goods into the hands of the sheriff, who returned pltf.'s writ *nulla bona*. Pltf. then obtained an order for deft.'s examination, & very shortly after being served with it, deft. assigned his book debts, accounts, & claims to B. & Co. A few days after pltf. obtained the usual order to attach debts due to deft., but no summons was shown calling on the garnishees to pay. B. & Co. applied to set aside the order:—*Held*: they had no right to intervene in the cause, & they could not raise the question of the validity of the assignment to them on such an application.—*RITTINGER v. MCDOUGALL* (1861), 10 C. P. 395.—**CAN.**

**p. Assignment before Farm Implements Act, 1915.]**—An assignment, before the passing of Farm Implements Act, 1915, s. 19, of moneys to be earned by a threshing-machine is good as against an attachment, under a garnishee summons after the date of the enactment of money owing to the purchaser.—*CANADIAN BANK OF COMMERCE v. NELSON*, [1917] 3 W. W. R. 190.—**CAN.**

**q. Voluntary assignment—Trust fund.]**—A voluntary assignment of a fund in trust to cover moneys taken from a trust account in a bank made in good faith with the intention of the parties carried out, could be attacked by an attaching creditor of the assignor.—*BANK OF HAMILTON v. BEACH* (1918), 37 D. L. R. 801.—**CAN.**

**PART V. SECT. 1, SUB-SECT. 3. — I.**

**2141 i. Already due.]**—Where a judgment creditor garnished rents accruing due from several tenants to the judgment debtors before any of the gale days had arrived:—*Held*: he was entitled to payment over upon the gale days of the proportion of the rents which had accrued due on the day of service of the attaching order.—*MASSIE v. TORONTO PRINTING CO.* (1887), 12 P. R. 12.—**CAN.**

**2141 ii.** —.]—*McDONALD v. SULLIVAN* (1903), 5 O. L. R. 87; 23 C. L. T. Occ. N. 45; 1 O. W. R. 784.—**CAN.**

**2141 iii.** —.]—Rent due from the Govt. of Manitoba is subject to garnishment under Garnishment Act, c. 77, s. 2.—*ELLIOTT v. FORRESTER*, [1918] 2 W. W. R. 220.—**CAN.**

**r.** — *Effect of distress.]*—While a distress continues the landlord cannot sue for the debt, & therefore such debt cannot be attached in the tenants' hands by a creditor of the landlord.—*HOYES v. CREERY* (FRATERNAL ORDER OF EAGLES), [1918] 1 W. W. R. 873; 24 B. C. R. 505; 39 D. L. R. 516.—**CAN.**

**2142 i. Not due.]**—Rent cannot, before it is payable, be attached under a garnishee order as a debt owing or accruing due.—*MORSE TOWN v. LYONE, MOFFATT, GARNISHEE*, [1917] 3 W. W. R. 351; 10 Sask. L. R. 357; 37 D. L. R. 600.—**CAN.**

*J. In respect of Wages, Salaries, Pensions, Allowances, etc.*

**2143. Wages—Wages Attachment Abolition Act, 1870 (c. 30)—Application of Act.]**—The salary of a secretary to a co. amounting to £200 a year is not "wages" of a "servant" within Wages Attachment Abolition Act, 1870 (c. 30), & is therefore not exempted from attachment by that Act.—*GORDON v. JENNINGS* (1882), 9 Q. B. D. 45; 51 L. J. Q. B. 417; 46 L. T. 534; 46 J. P. 519; 30 W. R. 704, D. C.

*Annotations*:—*Mentd.* *Lee v. Parkes* (1884), 28 Sol. Jo. 617; *Horwood v. Millar's Timber & Trading Co.*, [1916] 2 K. B. 44; *Moriarty v. Regent's Garage & Engineering Co.*, [1921] 1 K. B. 423; *Re Rosse, Parsons v. Rosse* (1923), 93 L. J. Ch. 8.

**2144.** — — — —.]—A sum already accrued due to a retired police constable, in respect of his superannuation allowance under 11 & 12 Vict. c. 14, may be attached in execution.

*Semble*: Wages Attachment Abolition Act, 1870 (c. 30), only applies to inferior cts. of record & not to the High Ct. of Justice.—*BOOTH v. TRAIL* (1883), 12 Q. B. D. 8; 53 L. J. Q. B. 24; 32 W. R. 122; *sub nom. Re HAYSON, BOOTH v. TRAIL*, 49 L. T. 471, D. C.

**2145.** — — — —.]—*MARKS v. BOOTH* (1891), 90 L. T. Jo. 302.

**2146. Superannuation allowance—Civil servant.]**—A superannuation allowance awarded by a resolution of the ct. of directors, pursuant to 53 Geo. 3, c. 155, s. 93, to a retired civil servant of the East India Co., is not a "debt" that is attachable under C. L. P. Act, 1854 (c. 125), s. 61.—*INNES v. EAST INDIA CO.* (1856), 17 C. B. 351; 25 L. J. C. P. 154; 26 L. T. O. S. 221; 2 Jur. N. S. 189; 4 W. R. 245; 139 E. R. 1108.

*Annotations*:—*Expld. & Distd.* *Marchant v. Lee Conservancy*

**2142 ii.** —.]—Rent accruing but not yet payable cannot be attached in the division ct.—*CHRISTIE v. CASEY*, 15 C. L. T. Occ. N. 13.—**CAN.**

**2142 iii.** —.]—Future rents & profits that may become due to a ghatwal cannot, as such, be attached in execution of a decree against him.—*UDOY KUMARI GHATWALIN v. HARI RAM SHANA* (1901), 1 L. R. 28 Cal. 483.—**IND.**

**s. Crop reserved by way of rent.]**—A claim for a certain portion of a crop reserved by way of rent is a claim for a debt, & a garnishee summons may therefore issue thereon.—*BEAUBRIER v. LLOYD*, [1918] 1 W. W. R. 772; 13 Alta. L. R. 47; 39 D. L. R. 439.—**CAN.**

**PART V. SECT. 1, SUB-SECT. 3. — J.**

**t. Wages—Mariners.]**—Seamen's wages are exempt from attachment.—*HYNES v. FEEHAN* (1863), 4 Nfld. L. R. 750.—**NFLD.**

**a.** — — — — *"Half Lay" engagement.*—Deft. S. went on a fishing voyage on a schooner with H., who was master & part owner. Deft. was engaged on the "half lay," which meant that one-half the fish caught went to the vessel, & the other half, subject to certain expenses of the voyage, was divided among the crew. H. agreed to buy the share of S. for \$125. Under the arrangement which governed the voyage, H. was to sell the fish & settle with all parties interested. The money due from H. to S. for his share was garnisheed as a debt:—*Held*: the share of S. on the voyage was to be regarded as wages & was exempt from attachment.—*SWINEHAMMER v. SAWLER* (1895), 27 N. S. R. (15 R. & G.) 448.—**CAN.**

.]—The wages of the master of a steamboat are not exempt

Board (1873), L. R. 8 Exch. 290. **Distd. Re Hayson, Booth v. Trail** (1883), 49 L. T. 471. **Consd. Wells v. Wells** (1914), 30 T. L. R. 437. **Refd. Re Keely, Ex p. Hawker** (1872), 20 W. R. 322; **Lucas v. Harris** (1886), Q. B. D. 127.

**Police constable.]** — **Booth v. Trail** No. 2144, *ante*.

*See, also*, Police Act, 1890 (c. 45), s. 7 (1); & generally, **POLICE**.

**2148. Salary—Secretary of company.]** — **Gordon v. Jennings**, No. 2143, *ante*.

**2149. — Medical officer.]** — The salary of a medical or other officer cannot, before it is actually payable, be attached by a garnishee order under C. C. R., 1875, for it is not "a debt due, owing or accruing" to the judgment debtor. — **Hall v. Pritchett** (1877), 3 Q. B. D. 215; 47 L. J. Q. B. 15; 37 L. T. 671; 26 W. R. 95, D. C.

**Mentd.** **Fellows v. Thornton** (1884), 54 L. J. Q. B. 279; **Wilnot v. Alton** (1896), 74 L. T. 813.

**2150. — Clerk.]** — **Marks v. Booth** (1891), 90 L. T. Jo. 302.

**2151. — Music hall artist—Construction of contract.]** — S., a music hall artiste, was indebted to M. in the sum of £31 18s. 4d., for which amount & costs judgment was obtained against him. For the week beginning May 15, S. was engaged to give a week's performance at Liverpool at a salary of £180 per week. On May 17 a garnishee order *nisi* was obtained by M. against S.'s employers to attach the proportion of salary alleged to be due to S. for the performances already given by him that week, the affidavit upon which the application was based stating that the garnishees were indebted to S. in the sum of £100 or thereabouts. By the terms of S.'s agreement his engagement was expressed to be for one week, commencing May 15, at a salary of £180 per week. Clause 8 provided that "In case the artiste shall except through illness . . . or accident . . . fail to perform at any performance the artiste shall pay to the management as & for liquidated damages a sum equal to the sum which the artiste would have received for such performance in addition to costs incurred by the management through the default of the artiste. . . ." Clause 12 provided that "No salary shall be paid for

from attachment. — **N. A. T. & T. Co. v. Seaton** (1905), 2 W. L. R. 559. — **CAN.**

**c. — .]** — Unless the debt sued for or in respect of which the judgment was recovered has been contracted for board & lodging, the wages or salary of a mechanic, workman, etc., shall not be liable to seizure or attachment unless exceeding the rate of \$75 per month. — **Gordon v. Seabrooke** (1905), 2 W. L. R. 105. — **CAN.**

**d. — Private servant.]** — The wages of a private servant cannot be attached in whole or in part before they become due & a debt exists. — **Ayya-vayar v. Virasami Mudal** (1897), 1 L. R. 21 Mad. 393. — **IND.**

**2149 i. Salary—Medical officer.]** — The salary of a physician of a municipal corpn., holding his appointment at their will, at an annual salary, payable quarterly, cannot be attached. — **Shanly v. Moor** (1863), 3 P. R. 223. — **CAN.**

**2149 ii. — .]** — A medical health officer is not an employee of the municipal corpn. within R. S. O., 1877, c. 47, s. 125, & his salary is not exempt from attachment. — **Re Macfie v. Hutchinson** (1887), 12 P. R. 167. — **CAN.**

**e. — Public officer.]** — The garnishee provisions of C. L. P. Act, do not apply to the Crown or to public officers, in respect of moneys due by the Crown to the judgment debtor. — **Attorney-General v. Bland** (1868), 5 W. W. &

**216. — AUS.**

**f. — Police magistrate.]** — The salary of a police magistrate appointed by the Crown, but paid by a municipality, cannot, on grounds of public policy, be attached. — **Central Bank of Canada v. Ellis** (1893), 20 A. R. 361. — **CAN.**

**g. — .]** — Deft. was the servant of a corpn. of a town, engaged by the month at \$60 per month, payable at the end of each month. The garnishees were served at 3 p.m. on the 31st of the month & having filed a statement under r. 390, claiming that the debt was not attachable, an appointment was granted for the summary determination of the question: — **Held**: since this was an attachable debt it could not be garnishee since the month's salary in question was contingent upon deft. completing his month's service. — **Main v. McInnis** (1901), 4 Terr. L. R. 517. — **CAN.**

**h. — .]** — A sergeant in the R. N. W. M. P. is a public officer &, as such, his remuneration is not assignable or subject to any form of execution on the ground of public policy. — **Horbs v. Howell** (1914), 29 W. L. R. 650; 7 W. W. R. 256. — **CAN.**

**Liquor Control Board created under Govt. Liquor Act, 1921 (c. 30), is by implication created a corpn.: & moneys owing by it for salary to an employee may be attached under Attachment of Debts Act. — Callow v. Hick, [1922] 3 W. W. R. 1007; 70 D. L. R. 568. — CAN.**

days upon which the theatre is closed by reason of national mourning. . . ." "No salary shall be payable for any performance at which the artiste may not appear through illness or his own default. . . ." Clause 16 provided (*inter alia*): "If the artiste shall commit any breach of any of the terms & conditions of this contract or of the rules, the management . . . may forthwith determine this contract, & the artiste shall have no claim upon them for salary, other than a proportion for performances played, expenses, costs, or otherwise." In an issue directed by the master it was contended on behalf of the garnishees that upon the construction of the contract the salary payable to S. did not become due until the expiration of the week for which he was engaged, & consequently was not liable to attachment before that time. It was contended for the judgment creditor that clauses 8, 12 & 16 of the agreement showed that, although the salary was payable weekly, it was contemplated that the artiste should be taken to have earned his salary at the end of each performance. The master made the garnishee order absolute: — **Held**: the decision of the master was wrong, & there was no debt due to S. which was liable to attachment until the expiration of his week's engagement. — **Mapleson v. Sears** (1911), 105 L. T. 639; 28 T. L. R. 30; 56 Sol. Jo. 51, D. C.

**2152. — Member of Parliament.]** — Resp., a bkpt. on his own petition, was elected Member of Parliament for an Irish constituency, & received the £400 a year voted to be paid to Members of Parliament by resolution of the House of Commons. Applt., as the official assignee in his bkpcy., obtained an order in the King's Bench, Bkpcy., Ireland, that resp., should out of his Parliamentary salary, pay £200 a year to applt. for the benefit of his creditors: — **Held**: the payment to Members was not in the nature of a dole, & was attachable for the benefit of creditors. — **Hollinshead v. Hazleton**, [1916] 1 A. C. 428; 85 L. J. P. C. 60; 114 L. T. 292; 32 T. L. R. 177; 60 Sol. Jo. 139; [1916] H. B. R. 85, H. L. **Annotation: — Mentd.** **Hamilton v. Caldwell** (1919), 88 L. J. P. C. 173.

**l. — On half-pay.]** — A moiety of the salary of a public officer drawing half-pay, exceeding £20 per month, on sick leave is liable to attachment. — **Beard v. Egerton** (1883), 1 L. R. 6 Mad. 179. — **IND.**

**m. — Indian Staff Corps Officer.]** — An officer of the Indian Staff Corps is a "public officer." His pay is, therefore, subject to attachment in execution of a decree against him, but the operation of the attachment must be restricted to pay received from the Indian Govt. — **Calcutta Trades Assocn. v. Ryland** (1896), 1 L. R. 24 Calc. 102; 1 C. W. N. 138. — **IND.**

**n. — .]** — The civil ets. may attach one moiety of the salary of an officer in the Indian Staff Corps. — **Watson v. Lloyd** (1901), 1 L. R. 25 Mad. 402. — **IND.**

**o. — .]** — A British officer in the Indian Army is a "Public Officer" within Civil Procedure Code, 1908, s. 2 (17), & as such public officer is liable to have half his pay or salary attached. — **Kering Rupchand & Co. v. Murray** (1918), 1 L. R. 43 Bom. 716. — **IND.**

— Where an order had been presented to the accountant in a public office for an official's salary, which was lying to his credit in the office but had not been paid, it was afterwards attached by laying a warrant in the hands of the party having the custody of the same. —



*Sect. 1.—Attachment of debts—Garnishee order: ; sub-sect. 4.]*

**2153. Pay of naval officer—On active service.]—**The pay of a surgeon in Her Majesty's navy who is in active service cannot be assigned, & therefore cannot be attached for costs.—*APTHORPE v. APTHORPE* (1887), 12 P. D. 192; 57 L. T. 518; 35 W. R. 728; 3 T. L. R. 619, C. A.

*Compare CHOSSES IN ACTION*, Vol. VIII., p. 437, Nos. 142, 146, 148.

**2154. Fees—Registrar of births & deaths.]—***EDMUNDS v. EDMUNDS*, No. 2112, *ante*.

**2155. — Counsel.]—**Fees owing to counsel are not "debts" & cannot be attached or garnished as such. Where a wife had commenced proceedings for a divorce against her husband, who was a barrister, & had obtained an order for payment of alimony *pendente lite*, & that order had not been obeyed:—*Held*: fees due to the husband, which had been received by a firm of solrs. & not paid over, were not debts & could not therefore be attached under a garnishee order obtained by the wife against the solrs.—*WELLS v. WELLS*, [1914] P. 157; 83 L. J. P. 81; 111 L. T. 399; 30 T. L. R. 545; 58 Sol. Jo. 555, C. A.

*Annotation:—Mentd. Re Wigzell, Ex p. Hart*, [1921] 2 K. B. 835.

**2156. — Panel doctor.]—**(1) An insurance committee, acting under National Insurance Acts, 1911 (c. 55), & 1913 (c. 37), & the regulations made thereunder, entered into agreements with the panel doctors of their district by which the whole amounts received by the committee from the National Insurance Comrs. were to be pooled & distributed among the panel doctors in accordance with a scale of fees; the total amount available for medical benefit so received by the committee was to be the limit of their liability to the panel doctors; & if the total pool was insufficient to meet all the proper charges of the panel doctors in accordance with the scale there was to be a *pro rata* reduction for each doctor; & on the other hand if it should be in excess of the amount required the balance was to be distributed among the panel doctors:—*Held*: where a panel doctor

had done work under his agreement with the insurance committee, & the committee had received funds in respect of medical benefit from the National Insurance Comrs., there was a debt owing or accruing from the insurance committee to the panel doctor which might be attached under R. S. C., Ord. 45, r. 1, notwithstanding a matter of calculation the exact share payable to him might not yet have been ascertained.

(2) Where a garnishee issue is tried by a judge without a jury & the judge finds that there is a debt owing or accruing, but refers it to the master to ascertain the amount with an order for payment of the amount so found to be due, an appeal from the finding of the master lies to the Divisional Ct. & not direct to the Ct. of Appeal.—*O'DRISCOLL v. MANCHESTER INSURANCE COMMITTEE*, [1915] 3 K. B. 499; 85 L. J. K. B. 83; 113 L. T. 683; 79 J. P. 553; 31 T. L. R. 532; 59 Sol. Jo. 597; 13 L. G. R. 1156, C. A.

*Annotation:—Mentd. Joachimson v. Swiss Bank Corpn.* [1921] 3 K. B. 110.

**2157. Pension—Military officer—Indian army.]—**The pension of an officer of Her Majesty's forces, being by Army Act, 1881 (c. 58), s. 141, made inalienable by the voluntary act of the person entitled to it, cannot be taken in execution, even though such pension be given solely in respect of past services, & the officer cannot again be called upon to serve:—*Held*: an order appointing a receiver of such pensions was bad.

Both debts. are retired staff officers of the Indian army, & are entitled to pensions under Indian Pensions Act, 1871 (c. xxiii). . . . By sects. 11 & 12, the pensions of debts. are expressly made not assignable; nor can they be in any manner taken in execution in India (*LINDLEY, L.J.*).—*LUCAS v. HARRIS* (1886), 18 Q. B. D. 127; 56 L. J. Q. B. 15; 55 L. T. 658; 51 J. P. 261; 35 W. R. 112; 3 T. L. R. 106, C. A.

*Annotations:—Expld. Crowe v. Price* (1889), 22 Q. B. D. 429; *Holmes v. Mittage* (1893), 9 T. L. R. 217. *Distd. Re Saunders, Ex p. Saunders*, [1895] 2 Q. B. 424. *Expld. Hollinshead v. Hazleton*, [1916] 1 A. C. 428. *Refd. Apthorpe v. Apthorpe* (1887), 57 L. T. 518; *Jones v. Coventry*, [1909] 2 K. B. 1029. *Mentd. Harris v. Beauchamp*, [1894] 1 Q. B. 801; *Minter v. Kent, Sussex*

*WALSH v. MYRICK* (1882), 6 Nfld. L. R. 450.—**NFLD.**

**q. ———.]—**The assignment of the future salary of an official in the public service is contrary to law. Consequently a warrant of attachment laid against the same after it becomes due binds the amount of such salary as against such assignment.—*STEIN BROTHERS v. GRAHAM* (1897), 8 Nfld. L. R. 17.—**NFLD.**

**r. ———.]—**An employee of the Department of Public Works, whose wages were payable monthly, assigned, on Dec. 23, the wages due to him at the end of the month. The order of assignment was presented to the Department. On Dec. 30, he gave a second order to the same creditor with the same object. The said order was left at the residence of the Minister. On the said Dec. 30, a warrant was laid in the Department under a writ of attachment issued at the instance of a second creditor. On Jan. 2, a second warrant under the said writ was laid in the said Department. Upon garnishee proceedings being taken the amount due by the Department to the said employee was directed to be paid into ct. Upon an application by pltf. for the payment out to him of the money so paid in:—*Held*: the money was attached under the warrant, & it should be paid out to pltf.—*BREMNER v. BARNES* (1900), 8 Nfld. L. R. 353.—**NFLD.**

**s. ——— Teacher.] — FRASER v.**

*MCARTHUR* (1879), 12 N. S. R. (3 R. & C.) 498.—**CAN.**

**t. ———.]—**The contract of a teacher in the common schools for the performance of his duties being made with the trustees of the section in which he is employed, his salary is not exempted from attachment for debt under the principle of cases applicable to officers employed in the public services, but as the amount coming to such a teacher for salary cannot be reached by ordinary legal execution or garnishee process, a receiver will be appointed where necessary by way of equitable execution.—*FISHER v. COOK* (1899), 32 N. S. R. 226.—**CAN.**

**a. ——— Agreement in fraud of creditors.]—**A contract by which the wife of an insolvent is to receive from a third person for services to be rendered by her husband a certain salary & a part of the profits of the business of the third person, is void as being made in fraud of creditors. Accordingly the creditors of the husband can seize in execution or attach the salary due under such contract.—*ORSALI v. AUBRY* (1903), Q. R. 24 S. C. 320.—**CAN.**

**b. ——— Deputy-registrar.]—***GARAND v. MANCOTEL* (1908), 6 E. L. R. 180.—**CAN.**

**c. ——— Railway official.]—**Salaries or other debts due from the Railway Co. to any of its servants can be attached in satisfaction of a small

cause Ct. decree.—*Re HOLLOCK* (1868), 2 B. L. R. A. C. 108; 10 W. R. 447.—**IND.**

**d. ———.]—***HALL & DE BEER & SLADE v. HALL* (1916), T. P. D. 372.—**S. AF.**

**e. ——— Military officer.]—**The pay of a military officer cannot be attached in the hands of the paymaster in the execution of a decree where no provision for its stoppage has been made in the decree.—*BANSI LAL v. MERCER* (1875), 7 N. W. 331.—**IND.**

**f. ———.]—**The attachment by a civil ct. of a moiety of the monthly salary of a debtor subject to military law, not exceeding Rs.20, is legal.—*VIRAGAVA v. RAMUDU* (1885), 1 L. R. 9 Mad. 170.—**IND.**

**g. ——— Lawyer's clerk—Whether liable to attachment in advance.]—**Where a decree-holder applied on Nov. 18, 1907, for attachment of the judgment debtor's salary for Nov. & the succeeding months, the judgment debtor being a lawyer's clerk:—*Held*: the unearned salary of a private servant in whole or in part was not liable to attachment in advance.—*DEVI PRASAD v. LEWIS* (1909), 1 L. R. 31 All. 304.—**IND.**

**h. ——— Government employees.]—***BOYLAN v. BLOXSOME* (1892), 11 N. Z. L. R. 49.—**N.Z.**

**k. Pensions—Stipendiary magistrate.]—**Deft., under the provisions of N. S. Acts, of 1895, c. 43, was

& General Land Soc.-(1895), 72 L. T. 186; *Re Goudie, Ex p. Official Receiver v. Strand* (1896), 3 Mans. 224; *Tilling v. Blyth*, [1899] 1 Q. B. 557.

**2158.** — — — — —.] — Deft., who was a retired officer of the Army, was entitled to retired pay in respect of past services. The retired pay was payable quarterly, & on each occasion a form of pay warrant had to be filled in & signed by deft., which contained a declaration that he was entitled to retired pay at a certain rate for the last quarter, followed by the words "received of H.M. Paymaster-General this      day of      , 190   the sum of      pounds, being the amount of retired pay due for the period stated in the above declaration." At the end of the form were the words "This receipt must be presented for payment by a London banker but may be negotiated in the country or abroad, & is to be left by the banker at the Paymaster-General's office one day for examination." Deft. opened an account at a bank for the sole purpose of collecting his retired pay, no other moneys being paid into this account, & he drew against this account by cheques in the ordinary way. On Jan. 1, 1909, the sum of £6 13s. 8d. was standing to his credit at the bank, this sum being the balance of the retired pay previously received by him from the Paymaster-General & on that day a pay warrant in the form given above, duly filled in & signed, for the sum of £17 12s. 6d., being the amount of his retired pay due to him on that day for the preceding quarter, was handed by him to the bank for collection & the bank at once credited his account with the amount. On the same day, after the amount had been so credited, a garnishee order *nisi* was served on the bank, at the instance of a judgment creditor of deft., attaching all debts owing or accruing due from the bank to deft. to answer the judgment debt. The pay warrant was paid by the Paymaster-General on Jan. 7. Deft. contended that both the above sums were protected from execution by Army Act, 1881

entitled to a pension of a \$1,000 *per annum*, during his life, to be assessed annually, upon the ratepayers of the city of Halifax, & to be paid out of the city revenue. The pension was given in consideration of services which had been rendered by deft., as stipendiary magistrate of the city, on his retirement from that office, when his official connection with the city ceased. Deft. was not liable to be called upon to perform any further duty for the city, either official or personal. There was nothing in the Act under which provision for payment of the pension was made, prescribing the time & mode of payment to deft., nor was there anything to prevent him from assigning it:—*Held*: the garnishee process was not applicable.—*IMPERIAL BANK OF CANADA v. MORTON* (1897), 29 N. S. R. 368.—CAN.

**1.** — — — — —.] — *Police officer.*—Pltf., the wife of a retired member of the Toronto police force, & entitled to interim alimony under an order theretofore made, applied to be appointed receiver of moneys to which deft., her husband, would become entitled as a pension, under the rules of the Police Benefit Fund, a friendly society incorporated under R. S. O., 1897, c. 211, on application by him before the Benefit Fund committee, which application, however, he had not yet made:—*Held*: pltf. was not entitled to succeed, for, whereas arrears of pension constituted a debt which might be attached by garnishee proceedings, unearned pension could not be reached either by that procedure or by the appointment of a receiver.—*STANLEY v. SLEMIN* (1903), 7 O. L. R. 67, 24 C. L. T. 57; 2 O. CAN.

**m.** — — — — —.] — *For political services.*—On Sept. 28, 1877, an application was made for the enforcement of a money decree by attachment (*inter alia*) of a political pension enjoyed by defts. A notice was issued on the same day to defts., calling upon them to show cause why the decree should not be executed. Defts., accordingly, appeared on the day fixed, & contended that the pension was no longer attachable:—*Held*: a *bonâ fide* application for enforcement of a decree in a particular way, coupled with an order of the ct., in furtherance of that object, as much constituted a proceeding in execution commenced & pending as the actual issue of a warrant of attachment.—*VIDYARAM v. CHANDRA SIEKHARRAM* (1879), 1 L. R. 4 Bom. 163.—IND.

**n.** — — — — —.] — *MUTHUSAMI NAIDU v. ALAGIA MANAVALA SIMMALA RAJA* (1902), 1 L. R. 26 Mad. 423.—IND.

**o.** — — — — —.] — *Sum remaining unpaid at pensioner's death.*—A person to whom a political pension was being paid died; & at the date of his decease a sum of money was due to him in this respect, but remained, unpaid, in the hands of the collector of the district. On an attempt being made to attach the fund in execution proceedings:—*Held*: the fund was not liable to attachment.—*VALIA THAMBURATTI v. ANUJANI KUNHUNNI* (1902), 1 L. R. 26 Mad. 69.—IND.

**p.** — — — — —.] — *Arrears attachable.*—In case of pensions not exempted from attachment under Civil Procedure Code, Act X. of 1877, s. 266, it is only arrears in respect thereof actually accrued due that are attachable in execution of a decree.—*BHOYRUB CHUNDER ROY v.*

(c. 58), s. 141:—*Held*: the £6 13s. 8d. had lost its character of retired pay as it had been received from the Paymaster-General at the time when the garnishee order was served & was therefore liable to attachment, & the £17 12s. 6d. was not liable to attachment, notwithstanding that the amount had been placed by the bank to deft.'s credit, as it retained its character of retired pay until it had been paid by the Paymaster-General.—*JONES & Co. v. COVENTRY*, [1909] 2 K. B. 1029; 79 L. J. K. B. 41; 101 L. T. 281; 25 T. L. R. 736; 53 Sol. Jo. 734, D. C.

**2159. Annuity—Widow.**—Pltf. had recovered judgment against deft. in an action of detinue, which judgment still remained unsatisfied. Deft., under the will of her deceased husband, was entitled to an annuity for the maintenance of herself & her infant son:—*Held*: the annuity was attachable in the hands of the trustees in whom it was vested, subject to an inquiry as to the proportion to be allowed for the maintenance of the son.—*NASH v. PEASE* (1878), 47 L. J. Q. B. 766, D. C.

*Annotation*:—*Reid. Macdonald v. Tacquah Gold Mines Co.* (1884), 13 Q. B. D. 535.

For assignment of salaries, pensions, allowances, etc., see CHOSIES IN ACTION, Vol. VIII., pp. 436–441, Nos. 133–176.

#### K. Debts under Banking Accounts.

See BANKERS, Vol. III., pp. 176, 177, Nos. 316–321.

#### SUB-SECT. 4.—APPLICATION FOR GARNISHEE ORDER.

See R. S. C., Ord. 45, r. 1, & Appendix B., Form 25.

After six years from judgment—Necessity for leave of court.]—See Part II., Sect. 5, sub-sect. 1, B., *ante*.

#### 2160. Affidavit in support—Form of—Omission

MADHUB CHUNDER SEN (1880), 6 C. L. R. 19.—IND.

**q.** — — — — —.] — *Civil servants.*—The bar in Civil Procedure Code, s. 266, to the attachment of gratuities allowed by Govt. to its ex-servants, military & civil, is not limited to such gratuities as are allowed to "pensioners," but applies to a gratuity granted in consideration of past services.—*BAWAN DAS v. MUL CHAND* (1884), 1 L. R. 6 All. 173.—IND.

**r.** *Army officer—Sale of commission.*—The proceeds of the sale of the commission of an officer in the army are liable, while in the hands of the army agents, to whom they have been transferred by the Horse Guards, to be attached by an order under the garnishee sect. of C. L. P. Amendment Act (Ireland), 1856.—*POWER v. KENNY* (1860), 2 L. T. 93.—IR.

**s.** *Gratuity—Public official.*—A gratuity to a person who, having been an employee in the public service, has been constrained to retire from ill-health, awarded by Lords Comrs. of the Treasury, is not attachable by process of law to answer a judgment recovered against such employee.—*TIMOTHY v. DAY*, [1908] 2 L. R. 26; 40 L. L. T. 263.—IR.

#### PART V. SECT. 1, SUB-SECT. 4.

**t.** *Affidavit in support—Contents of.*—The omission to state in terms that the action is pending in an affidavit on which a garnishing order is made, is a fatal objection to the order.—*SHOREY v. BAKER, CITY OF LONDON*



*Sect. 1. — Attachment of debts — Garnishee order :  
Sub-sects. 4 & 5, A. & B.]*

**of amount of debt.]**—*LUCY v. WOOD*, [1884] W. N. 58; Bitt. Rep. in Ch. 24.

**Annotations:**—*Refd.* *Coren v. Barne* (1889), 60 L. T. 303; *De Pass v. Capital & Industries Corp.*, [1891] 1 Q. B. 216.

**2161. — — — — — “Information & belief” as to debt.]**—On an application for a garnishee order under R. S. C., Ord. 45, r. 1, it is sufficient for the affidavit to state that the deponent is informed & believes that the garnishee is indebted to the judgment debtor.—*COREN v. BARNE* (1889), 22 Q. B. D. 249; 58 L. J. Q. B. 384; 60 L. T. 303; 37 W. R. 415, D. C.

**Annotation:**—*Refd.* *Vinall v. De Pass* (1892), 61 L. J. Q. B. 507.

**2162. — — — — — Source of information disclosed.]**—*BANK, LTD. v. F*— (1887), 32 Sol. Jo. 151.

**2163. — — — — — Particular debt specified.]**—In an affidavit in support of an application for a garnishee order under R. S. C., Ord. 45, r. 1, the deponent need not swear positively to the existence

of a debt due from the garnishee to the judgment debtor; it is sufficient if he states his information & belief as to the existence of a debt.

In an affidavit in support of an application for a garnishee order the deponent stated his information & belief that a specific debt was due from the garnishee to the judgment debtor. The garnishee in his affidavit denied that he owed that debt, but he declined to deny that he owed any debt.—*Held*: an order for payment was rightly made upon the garnishee.—*VINALL v. DE PASS*, [1892] A. C. 90; 61 L. J. Q. B. 507; 66 L. T. 422; 8 T. L. R. 387, H. L.; *affg.* S. C. *sub nom.* *DE PASS v. CAPITAL & INDUSTRIES CORPN.*, [1891] 1 Q. B. 216, C. A.

**Annotation:**—*Mentd.* *Lagos v. Grunwaldt*, [1910] 1 K. B. 41.

*See, generally, EVIDENCE.*

**2164. — — — — — Who may make—On behalf of company.]**—*BANK, LTD. v. F*— (1887), 32 Sol. Jo. 151.

**2165. — — — — —.]**—*LIMMER ASPHALTE PAVING CO., LTD. v. F*— (1888), 32 Sol. Jo. 439.

*INSURANCE CO., GARNISHEES* (1884), 1 Man. L. R. 282.—**CAN.**

**a. — — — — —.]**—An affidavit for a garnishing order must either state positively that the garnishee is indebted or liable to debt, or it must follow the exact wording of the amending statute, 46 Vict. c. 49, s. 12, that deponent “has reason to believe.” It is not sufficient to state that deponent is “informed & verily believes.”—*GRANT v. KELLY, BLANCHARD, GARNISHEE* (1884), 2 Man. L. R. 222.—**CAN.**

**b. — — — — —.]**—An affidavit upon which a garnishing order issued stated that the garnishees reside, not that they are, within the jurisdiction:—*Held*: sufficient.—*HAMILTON v. McDONALD* (1885), 2 Man. L. R. 114.—**CAN.**

**c. — — — — —.]**—The greatest strictness is required as to the material upon which a garnishing order before judgment is obtained. The omission of the words “after making all just allowances” is fatal.—*NAGENGAST v. MILLER* (1885), 3 Man. L. R. 241.—**CAN.**

**d. — — — — —.]**—An affidavit for a garnishing order stated: “I have reason to believe that the City of Winnipeg is indebted to, liable to, or under some obligation to debts.”—*Held*: sufficient.—*ST. BONIFACE v. KELLY, WINNIPEG (CITY) GARNISHEES* (1885), 2 Man. L. R. 219.—**CAN.**

**e. — — — — —.]**—An affidavit, on which a garnishing order was obtained, stated that: “I have reason to believe that G., as the Clerk of the Executive Council of Manitoba, is indebted or liable to M., one of the above-named judgment debtors, in the sum of \$200”; but omitted to state that the garnishee “is within the jurisdiction of the ct.”—*Held*: the affidavit was defective, & the order issued on it was a nullity.—*FRENCH v. MARTIN* (1892), 8 Man. L. R. 362.—**CAN.**

**f. — — — — —.]**—The affidavit leading to a garnishee summons must verify pltf.’s cause of action, & a garnishee is entitled to question the validity of the proceedings at the hearing.—*HARRIS v. HARRIS* (1901), 8 B. C. R. 307.—**CAN.**

**g. — — — — —.]**—*ADDISON v. DICKSON* (1907), 7 W. L. R. 291.—**CAN.**

**h. — — — — —.]**—In an action in which pltf. sued debts acting under the name of the Strathcona Hockey Club, pltf. made the Canadian Bank of Commerce garnishees. By error of pltf.’s solr. the copy of the garnishing summons did not bear the name of the

clerk of the ct., but the place where his name should be signed on the original was left blank in the copy. On an application by the garnishees to have the service set aside:—*Held*: the omission did not justify a setting aside of the service.—*MILNER v. MARRIOT* (1908), 7 W. L. R. 793.—**CAN.**

**k. — — — — —.]**—Before judgment, the affidavit of one of pltf.’s solrs. was filed, in which he swore that he had a full & personal knowledge of the matters deposed to, & that the two debts, & each of them, were justly & truly indebted to pltf. in the named sum, being the amount due to pltf. for principal money & interest on a chattel mtge., & that he, the deponent, was informed & verily believed that each of the proposed garnishees, named persons, was justly & truly indebted to debt. M., & that each was within the jurisdiction of the ct. By the statement of claim pltf. alleged that each of debts. covenanted to pay to pltf., under a certain chattel mtge., the amount mentioned in the affidavit:—*Held*: the affidavit was sufficient in point of form to sustain garnishee summonses issued thereon.—*NOHREN v. AUTEN & MARKHAM* (1910), 15 W. L. R. 417; 3 Alta. L. R. 310.—**CAN.**

**l. — — — — —.]**—A garnishee summons should not be set aside on the ground that the allegations in the affidavit as to the indebtedness of the garnishee to debt. are merely upon information & belief, & the grounds of such belief are not set forth in the affidavit.—*STEWART & MATTHEWS CO. v. ROSS* (1911), 17 W. L. R. 179; 4 Sask. L. R. 409.—**CAN.**

**m. — — — — —.]**—*Co., LTD. & PRINCE EDWARD ISLAND MUTUAL FIRE INSURANCE CO.* (1912), 12 E. L. R. 83.—**CAN.**

**n. — — — — —.]**—The omission to endorse on the affidavit leading to the issue of a garnishee summons a statement showing on whose behalf it was filed is a mere irregularity curable by amendment.—*HART v. GREER* (No. 2) (1915), 33 W. L. R. 41; 9 W. W. R. 709.—**CAN.**

**o. — — — — —.]**—The affidavit upon which the garnishee order was obtained did not show that the co. was within the jurisdiction:—*Held*: the order was void.—*TAYLOR v. TUCKER* (1916), 49 N. S. R. 469.—**CAN.**

**p. — — — — —.]**—When an affidavit for a garnishee summons does not comply with Rule 648, there is no jurisdiction conferred on the clerk to

issue the summons, & if he issues it under such circumstances the case is not one of a defect which can be cured under Rule 273.—*BEAUBIER v. LLOYD*, [1918] 1 W. W. R. 772; 13 Alta. L. R. 47; 39 D. L. R. 439.—**CAN.**

**q. — — — — —.]**—The statement in the affidavit filed for the issue of a garnishee summons that “debt. herein is justly & truly indebted to pltf. in the sum of \$2,474.37, as shown by the statement of claim filed,” is not sufficient to show the nature of the claim.—*GEFFEN v. LAVIN*, [1919] 2 W. W. R. 491.—**CAN.**

**r. — — — — —.]**—In the affidavit filed for the issue of a garnishee summons a reference to the amount claimed as “being the amount due by debt. to pltf. for salary, goods sold & delivered, promissory notes & other claims of liquidated amounts as per statement of claim filed herein”:—*Held*: not to show the nature of the claim.—*SCOTT v. CHASE CREEK LUMBER CO., LTD.*, [1921] 2 W. W. R. 773.—**CAN.**

**s. — — — — —.]**—The affidavit required by Rule 648 to obtain the issue of a garnishee summons must give not only the nature of the information on which is founded the belief of the garnishee’s indebtedness to debt., but also the source of that information.—*ADAMS v. ADAMS, JANETT & ADAMS*, [1921] 3 W. W. R. 540.—**CAN.**

**t. — — — — —.]**—In the affidavit filed to support a garnishee summons, failure to name the garnishee, to state that he is within Alberta, to give the grounds of information & belief as to his indebtedness to debt. or judgment debtor, are omissions going to the ct.’s jurisdiction to grant the summons & are fatal to its issue.—*MENAB v. COWARD, HY-GRADE COAL CO., LTD., GARNISHEE*, [1921] 3 W. W. R. 359.—**CAN.**

**aa. — — — — —.]**—*NORTH AMERICAN LOAN CO. v. MAH TEN* (1922), 31 B. C. R. 133.—**CAN.**

**bb. — — — — —.]**—An affidavit for the issue of a garnishee summons may sufficiently comply with Rule 648 in giving the grounds of deponent’s “information & belief” as to the garnishee’s indebtedness to debt. without naming any person as the source of deponent’s information.—*ADAMS v. ADAMS, JANETT & ADAMS*, [1922] 1 W. W. R. 47; 62 D. L. R. 721; 17 Alta. L. R. 109.—**CAN.**

**cc. — — — — —.]**—In his affidavit in support of a garnishee summons issued in a district ct. action, pltf. swore (*inter alia*), as follows: “To

**2166. — Time for making—Whether debt must be due.]**—ANON., [1876] W. N. 9; Ritt. Prac. Cas. 82.

*See, also, Sub-sect. 3, B., ante.*

**When garnishee within jurisdiction.]**—*See* R. S. C., Ord. 45, r. 1, Appendix B., Form 25.

**2167. Against partnership firm.]**—WALKER v. ROOKE, No. 2076, *ante*.

*See, generally, PARTNERSHIP; PLEADING.*

#### SUB-SECT. 5.—ORDER NISI.

##### A. Discretion to Make.

**2163. General rule—Discretion of court.**

KENNETT v. WESTMINSTER IMPROVEMENT COMRS., No. 2056, *ante*.

**2169. Circumstances influencing court—Liability to pay second time—Garnishee a foreign corporation.]**—A garnishee order should not be made to attach a debt due from the garnishee to the judgment debtor where payment under the order will not be a valid discharge to the garnishee as against the judgment debtor of the amount paid under the order. Therefore, where a foreign corpn. having its head office abroad & a branch office in London owed a debt contracted abroad to a foreign resident abroad who became a debtor on a judgment recovered against him in England:—*Held*: a garnishee order should not be made to attach the debt due from the foreign corpn. to the judgment debtor, because that debt would still remain due & payable abroad notwithstanding payment in England under a garnishee order.

Garnishee proceedings are a process of execution & part of the *lex fori*, & as such, not recognised by the law of nations (VAUGHAN WILLIAMS, L.J.).

The debt was a chose in action situate abroad (STIRLING, L.J.).—MARTIN v. NADEL, [1906] 2 K. B. 26; 75 L. J. K. B. 620; 95 L. T. 16; 54 W. R. 525; 22 T. L. R. 561, C. A.

*Annotation*:—Distd. Swiss Bank Corpn. v. Boehmische Industrial Bank, [1923] 1 K. B. 673.

**2170. — Garnishee a British corporation.]**—Judgment having been recovered against

a foreign corpn., who submitted to the jurisdiction, a garnishee summons was issued to attach a debt due from a London bank to the foreign corpn.:—*Held*: the judgment creditors were entitled to have an order *nisi* made absolute, inasmuch as payment under a garnishee order operated as a discharge of the amount paid & was recognised by international law as having that effect, & consequently there was no real risk of the garnishees being obliged to pay the debt over again to the foreign corpn., & there was therefore nothing inequitable in making the order absolute.—SWISS BANK CORPN. v. BOEHMISCHE INDUSTRIAL BANK, [1923] 1 K. B. 673; 92 L. J. K. B. 600; 128 L. T. 809; 39 T. L. R. 179; 67 Sol. Jo. 423, C. A.

**2171. Discretion to restrict order—To amount sufficient for judgment debt.]**—ROGERS v. WHITELEY, No. 2121, *ante*.

##### B. Service.

**2172. Necessity for.]**—To an action for work & labour, etc., deft. pleaded that B. recovered a judgment against pltf., & being such judgment creditor, applied for & obtained an order under C. L. P. Act, 1854 (c. 125), s. 61, that the debt due from the now deft. to pltf. should be attached to answer the judgment so recovered against pltf. by B., the debt was still unsatisfied, & that the order still remained in force:—*Held*: (1) a bad plea, for not alleging that the order was served upon, or notice thereof given to, the garnishee; (2) recourse could not be had to the replication for the purpose of curing the defect in the plea.

*Qu.*: as to the effect of an order duly served, as to binding the debt in the hands of the garnishee.—LOCKWOOD v. NASH (1856), 18 C. B. 536; 139 E. R. 1479.

**2173. Irregular service—Subsequent ratification—Effect during interval.]**—A garnishee summons was issued addressed to John B., his real name being Henry B., & was served on his son. On his neglecting to attend an application was made for execution against him under C. L. P. Act, 1854 (c. 125), s. 61, & the judge refused the

the best of my information & belief the above-named garnishee is indebted to the said deft. & is within the jurisdiction of this honourable ct. The grounds of my belief are: the garnishee is indebted to deft. for certain threshing which deft. did for the garnishee":—*Held*: the affidavit was not sufficient on the ground that it stated that the garnishee was within "the jurisdiction of this honourable ct.," instead of stating that he "is within Alberta."—THOMES v. WESTCOTT & WESTCOTT, [1922] 2 W. W. R. 727; 66 D. L. R. 250.—CAN.

**d. —.**—An affidavit in support of an application to garnishee a bank under Attachment of Debts Act, gave the address of the garnishee as "Vancouver, B.C." without further description:—*Held*: in the case of banks incorporated by Act of Parliament, the address was a substantial compliance with the Act.—VOLANSKY v. NAT BELL LIQUORS, LTD. (1922), 30 B. C. R. 558.—CAN.

**e. —.**—Who may make.]—An order to attach should not be made without an affidavit either of pltf. or his attorney, stating the indebtedness of the garnishee.—BOYD v. HAYNES (1869), 5 P. R. 15.—CAN.

**f. —.**—An affidavit for an attaching order must be made by the execution creditor or his attorney, & an affidavit made by a managing clerk is insufficient.—BUILDER v. KERR (1878), 7 P. R. 323.—CAN.

affidavit on which to obtain an attaching order may be made by the attorney of the judgment creditor or by a partner of the attorney.—*Re SATO v. HUBBARD* (1881), 8 P. R. 445.—CAN.

**h. —.**—An affidavit for a garnishing order must be made by pltf. himself, or by his attorney, or by some one in pltf.'s employment, conducting his business, & in that way having a knowledge of his affairs.—LEE v. SUMNER (1885), 2 Man. L. R. 191.—CAN.

**k. Notice of—To judgment debtor—Whether necessary.]**—Notice of an application to garnish should always be given to the judgment debtor.—FERGUSON v. CARMAN (1866), 26 U. C. R. 26.—CAN.

**l. Garnishee summons—On what based.]**—A garnishee summons may be issued based on a default summons as well as on an ordinary summons.—JOWETT v. WATTS (1903), 10 B. C. R. 172.—CAN.

#### PART V. SECT. 1, SUB-SECT. 5.—B.

**m. General rule.]**—Service of an order *nisi* for attachment of a debt binds the debt in the hands of the garnishee, & the order absolute operates as security until discharged by payment.—*Re MCMECKAN, Ex p. OLIVER* (1896), 22 V. L. R. 271.—AUS.

**n. —.**—The service of a garnishee attaching order binds the debt

due by the garnishee, but does not transfer to pltf. the securities held for the debt or give any right to take advantage of the position of the debtor in respect of such securities.—ABELL v. ALLAN (1887), 5 Man. L. R. 25.—CAN.

**o. Irregular service—Whether curable by consent of parties.]**—A mere irregularity in the service might be waived by deft., but the absence of the sheriff's return is a defect which renders the subsequent proceedings void, & cannot be cured by any act or consent of the opposite party.—BLACK v. SHAW (1862), 1 P. E. I. 194.—CAN.

**p. —.**—An attaching order had been served by leaving a copy at the store & residence of the garnishee. Service of a summons to pay over was accepted for him by a practising attorney, & this summons, with such acceptance indorsed, was afterwards served in the same way as the order. On the return of it, another attorney appeared for the garnishee, & objected that the acceptance was without authority, & the service insufficient:—*Held*: personal service of the summons & order was not indispensable.—WARD v. VANCE (1863), 3 P. R. 130.—CAN.

**q. —.**—The garnishees, though partners, resided in different places out of the jurisdiction of the division ct., & but one of them was served. No order was made dispensing with



1.—*Attachment of debts—Garnishee order:* |  
*Sub-sect. 5, B., C. & D. (a).]*

order; a fresh summons was then taken out in the proper name, & personally served. In the interval between the two summonses Henry B. paid the amount of his debt to the official assignee under the judgment debtor's insolvency:—*Held*: an application for execution under sect. 63 would be refused, a judge of this ct. having adjudicated in the matter, on which adjudication the garnishee had acted.—*COOPER v. BRAYNE* (1858), 27 L. J. Ex. 446; *sub nom. SURRIDGE v. COOPER, COOPER v. BRAYNE*, 31 L. T. O. S. 265.

*Annotation*:—*Reid. Robson v. Smith*, [1895] 2 Ch. 118.

*Time within which effected.*—*See R. S. C., Ord. 45, r. 1.*

2174. ——— *After debt due.*—*MARKS v. BOOTH* (1891), 90 L. T. Jo. 302.

*Manner of service.*—*See R. S. C., Ord. 67, r. 2.*

*C. Effect Before Service.*

2175. *No charge created—Preventing payment to judgment debtor.*—*COOPER v. BRAYNE*, No. 2173, *ante*.

2176. ——— *—*—*ELWELL v. JACKSON*, No. 2103, *ante*.

2177. ——— *—*—*EDMUNDS v. EDMUNDS*, No. 2112, *ante*.

2178. ——— *—*— On Dec. 4, 1878, the solrs. of G. obtained after service on him an order on summons, charging all sums in the hands of H. & payable to G. on taking the partnership accounts, with their costs, charges & expenses of or in reference to two actions instituted to obtain a dissolution of the partnership between H. & G. & to take the partnership accounts. The order made in the actions was forthwith served on H. It was not intituled in the matter of Solicitors Act, 1860 (c. 127), or in the matter of the solrs. themselves. On Dec. 5, a garnishee order *nisi*, under R. S. C., Ord. 45, r. 2, was served on H., attaching all moneys in his hands then due or thereafter to become due to G. As the result of taking the partnership accounts a sum was found due to G. which was in H.'s hands:—*Held*: (1) independently of Solicitors Act, 1860 (c. 127), G.'s solrs. had a lien on the property recovered by them in the actions belonging to G., enforceable by an order in the actions, & such lien could not be displaced by any equitable charge given by G.; (2) until service the garnishee order *nisi* did not bind the moneys in the hands of H.; (3) at the date of the service of the order no debt was due by H. to G., & inasmuch as the charging order had been first served, G.'s solrs. had thereby obtained priority.—*HAMER v. GILES, GILES v. HAMER* (1879), 11 Ch. D. 942; 48 L. J. Ch. 508; 41 L. T. 270; 27 W. R. 834.

*Annotations*:—*Generally, Mentd. Austin v. Jackson* (1879), 11 Ch. D. 942; *Potter v. Jackson* (1880), 13 Ch. D. 845;

service on the other. The division ct. judge gave judgment against both in their absence:—*Held*: the prohibition might be supported on this ground.—*CLARKE v. MACDONALD* (1883), 4 O. R. 310.—*CAN.*

*r. Whether order can be served—Outside the jurisdiction.*—The garnishee order required by P. E. I. Garnishment Act, s. 12, may be validly served on the primary debtor while he is outside the jurisdiction of the ct.—*DAVIDSON v. WILKINSON & CHANDLER* (1913), 12 E. L. R. 412.—*CAN.*

*s. On whom served—Order attaching police constable's pay—Corporation treasurer.*—On a motion to make absolute an order attaching all debts due by a municipal corpn. to deft.,

a police constable, which was issued on Feb. 27, & served on the treasurer of the corpn. on the afternoon of the same day, it appeared that deft.'s salary was \$900 a year, payable monthly at the end of each month:—*Held*: although deft. was not a servant of the corpn., the treasurer was the proper person to serve.—*FALLIS v. WILSON* (1907), 9 O. W. R. 418; 13 O. L. R. 595.—*CAN.*

**PART V. SECT. 1, SUB-SECT. 5.—C.**

*t. Payment by garnishee—Before service—Effect of.*—Payment by a garnishee, before service of a conditional order, though after notice of it, by telegraph or otherwise, is cause against making the order absolute, unless the conditional order expressly

*Jackson v. Smith, Ex p. Digby* (1884), 53 L. J. Ch. 972; *Rosher v. Crannis* (1890), 63 L. T. 272; *Ross v. White*, [1894] 3 Ch. 326.

2179. ——— *Payment to wife of absconded debtor.*—*JONES v. WILLIAMS, GITTENS & Co.*, (1887), 4 T. L. R. 25, C. A.

*Discharge of garnishee by payment.*—*See Sub-sect. 8, post.*

*D. Effect After Service.*

*(a) In General.*

2180. *As charge on debt.*—*HAMER v. GILES, GILES v. HAMER*, No. 2178, *ante*.

2181. ——— *Extent of operation.*—*Re GENERAL HORTICULTURAL CO., Ex p. WHITEHOUSE*, No. 2132, *ante*.

2182. ——— *Judgment debt less than amount garnished—What debt attached.*—*ROGERS v. WHITELEY*, No. 2121, *ante*.

2183. ——— *To money paid into court.*—Money in the hands of deft. was attached under a garnishee order to satisfy a judgment debt. The judgment debtor assigned to pltf. the balance of the amount in the hands of deft., & notice was given of the assignment. Subsequently a garnishee order was served on deft. with respect to another judgment debt. Deft. thereupon paid the amount of the first judgment debt into ct., & the balance of the money in his hands he paid into ct. under the second garnishee order. In an action by pltf. to recover the amount of the balance:—*Held*: (1) when the first garnishee order had been satisfied by payment into ct., the assignment took effect as to the balance in the hands of deft.; (2) the money should have been paid to pltf., & he was entitled to recover the amount.—*YATES v. TERRY*, [1902] 1 K. B. 527; 71 L. J. K. B. 282; 86 L. T. 133; 50 W. R. 21; 18 T. L. R. 262, C. A.

2184. ——— *Contrast to order absolute.*—(1) In Jan. 1906, a limited co. issued to pltf. a mtge. debenture creating a first charge by way of floating security over all the property for the time being of the co. On June 15, 1906, deft. obtained judgment against the co., & served a garnishee order *nisi* on a bank in respect of a sum of money standing to the credit of the co. in the books of the bank. On June 25, the garnishee order was made absolute. On June 29, a receiver of the assets of the co. was appointed on behalf of pltf. under the powers contained in his debenture. An interpleader issue having been directed to determine whether pltf. or deft. was entitled to the money:—*Held*: a garnishee order absolute did not transfer to the garnisher the property in the garnished debt, & consequently the fact that the receiver was not appointed until after the garnishee order had been made absolute was immaterial, & pltf. was therefore entitled to the money in priority to deft.

directs that the debt shall be attached by the notice.—*O'DONOVAN v. DILLON* (1889), 24 L. R. Ir. 442.—*IR.*

**PART V. SECT. 1, SUB-SECT. 5.—D. (a).**

*a. General rule.*—A judgment creditor cannot attach or garnish by a suit in equity a debt for which he has not obtained an attaching order at law. But, after obtaining & serving such order, if a remedy in equity is needed for the realisation of the debt so attached, the creditor is entitled to file a bill for the purpose.—*BLAKE v. JARVIS* (1870), 16 Gr. 295; 17 Gr. 201.—*CAN.*

*b. Liability of garnishee—Construction of Common Law Procedure Act*

(2) It is necessary to recall what a garnishee order absolute really is. It does not give any further effect to the charge upon the debt which was created by the order *nisi*. The order *nisi* bound the debt in the hands of the bank, & although it is called an order *nisi*, it is in fact the order which creates the charge, once for all, & not merely conditionally (WALTON, J.).—CAIRNEY v. BACK, [1906] 2 K. B. 746; 75 L. J. K. B. 1014; 96 L. T. 111; 22 T. L. R. 776; 50 Sol. Jo. 697; 14 Mans. 58.

*Annotations*:—As to (1) *Refd.* Evans v. Rival Granite Quarries, [1910] 2 K. B. 979; Sinnott v. Bowden, [1912] 2 Ch. 414.

**2185. Position of judgment creditor—Rights conferred by order.**—(1) A garnishee order does not create, as between the garnishor & garnishee, any debt either at law or in equity. Accordingly, a person who has obtained a garnishee order absolute directing a co. to pay to him a debt due by them to a creditor of his against whom he had recovered judgment, does not thereby himself become a creditor of the co., & is not, therefore, entitled to petition for the winding up of the co., on failure by them to obey the order.

(2) The question is what is the meaning of the words "bind the debt in his hands"? It has been argued that it amounts to a transfer of the debt, but the whole scheme of the order is inconsistent with its being a transfer of the debt. There is no transfer. The garnishee order, therefore, does not make the garnishor a creditor of the garnishee. The order gives the garnishor certain statutory rights; it enables the garnishor to say to the garnishee "You shall not pay to your creditor the money which you owe him," & to give a valid receipt & discharge for the money. It enables him, in the event of the money not being paid, to obtain execution (FRY, L.J.).

(3) The garnishee order is no assignment to any extent of the debt due by the garnishee to the debtor of the garnishor. It merely gives the garnishor a lien upon that debt (COTTON, L.J.).—

& ADVERTISING MACHINE

99; 59 L. J. Ch. 26; 61

L. T. 582; 38 W. R. 67; 6 T. L. R. 7; 1 Meg. C. A.

*Annotations*:—As to (1) *Consd.* Pritchett v. English & Colonial Syndicate, [1899] 2 Q. B. 428. *Apld.* Cairney v. Back, [1906] 2 K. B. 746; Norton v. Yates, [1906] 1 K. B. 112. *Refd.* *Re* Greenwood, Sutcliffe v. Gledhill (1901), 70 L. J. Ch. 326; *Re* Montgomery Moore Ship Collision Doors Syndicate (1903), 72 L. J. Ch. 624; Geisse v. Taylor, [1905] 2 K. B. 658; Sinnott v. Bowden, [1912] 2 Ch. 414; *Re* Steel Wing Co., [1921] 1 Ch. 349. As to (2) *Consd.* Norton v. Yates, [1906] 1 K. B. 112. As to (3) *Refd.* *Re* Anglesey, De Galve v. Gardner, [1903] 2 Ch. 727.

**2186. Position of garnishee—Opportunity to dispute debt.**—(1) A judgment creditor, who before the filing of a liquidation petition by his debtor, has obtained a garnishee order *nisi* attaching debts due to debtor, is a secured creditor within Bkpcy. Act, 1869 (c. 71), ss. 12, 16, & is, therefore, entitled to the attached debts as against the trustee in the liquidation, even though they did not become actually payable until after the commencement of the liquidation.

(2) The attached debts are absolutely bound as against the judgment debtor; the order is an

order *nisi* only for the purpose of enabling the garnishee to show that he owes no debt to debtor (JAMES, L.J.).

(3) The moment the order of attachment was served upon the garnishee, the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor. The garnishee could then only pay his debt to the judgment creditor of his original debtor (JAMES, L.J.).—*Re* WATT, *Ex p.* JOSELYNE (1878), 8 Ch. D. 327; 47 L. J. Bcy. 91; 38 L. T. 661; 26 W. R. 645, C. A.

*Annotations*:—As to (1) *Refd.* *Re* Hutchinson, *Ex p.* Hutchinson (1885), 16 Q. B. D. 515; Butler v. Wearing (1886), 17 Q. B. D. 182. As to (2) *Consd.* *Re* Hoare, *Ex p.* Nelson (1880), 14 Ch. D. 41. *Refd.* Hamer v. Giles, Gilles v. Hamer (1879), 11 Ch. D. 942. As to (3) *Consd.* *Re* Curtoys, *Ex p.* Pillers (1880), 50 L. J. Ch. 691. *Expld.* Chatterton v. Watney (1881), 17 Ch. D. 259. *Consd.* Geisse v. Taylor, [1905] 2 K. B. 658. *Expld.* Norton v. Yates, [1906] 1 K. B. 112. *Refd.* Sinnott v. Bowden (1912), 81 L. J. Ch. 832.

**2187. — Custodian for court—Of all funds attached.**—ROGERS v. WHITELEY, No. 2121, *ante*.

**2188. — — — — —.**—The effect of the service of a garnishee order *nisi* is to make the garnishee "custodian for the ct. of the whole funds attached." The service of such an order is a sufficient demand by operation of law to satisfy any right a banker may have as between himself & his customer to a demand before payment of money standing to the credit of the current account (BANKS, L.J.).

The service of the order *nisi* binds the debt in favour of the judgment creditor (ATKIN, L.J.).—JOACHIMSON v. SWISS BANK CORPN., [1921] 3 K. B. 110; 90 L. J. K. B. 973; 125 L. T. 338; 37 T. L. R. 534; 65 Sol. Jo. 434; 26 Com. Cas. 196, C. A.

*Annotations*:—*Mentd.* Admiralty Comrs. v. National Provincial & Union Bank of England (1922), 38 T. L. R. 492; *Re* British American Continental Bank, Credit General Liegeois' Claim, [1922] 2 Ch. 589; Prosperity v. Glasgow Bank (1923), 39 T. L. R. 372; Tournier v. National Provincial & Union Bank of England, [1924] 1 K. B. 461.

**2189. Relation of debtor & creditor—Between garnishee & judgment creditor—Whether constituted.**—*Re* WATT, *Ex p.* JOSELYNE, No. 2186, *ante*.

**2190. — — — — —.**—CHATTERTON v. WATNEY, No. 2097, *ante*.

**2191. — — — — —.**—*Re* COMBINED WEIGHING & ADVERTISING MACHINE CO., No. 2185, *ante*.

**2192. — — — — —.**—In 1903, a limited co. issued a series of debentures creating the usual first charge "by way of floating security" on "all real & personal property now or any time hereafter belonging to the co." On Jan. 17, 1905, Y. & Co. obtained judgment against the co., & on the same day they obtained & served on T. & Sons a garnishee order *nisi* for a debt of £323 owing by that firm to the co. On Jan. 19, a receiver & manager of the co. was appointed in a debentureholder's action. Notice of this appointment was served on Y. & Co. on Jan. 20. The debt of £134 having been claimed by both the judgment creditor & the receiver the money was paid into ct. On an interpleader issue to determine the question of priority:—*Held*: (1) as service of a garnishee order *nisi* did not operate as an

(Victoria), 1865, s. 215.]—WILSON v. TRAILL (1869), 21 L. T. 510.—AUS.

c. Assignment before attaching order.]—An order to pay over was made upon a summons of which the judgment debtor had no notice. It appeared, on motion to rescind such order, that the debt had been assigned before the order, of which the garnishees had notice before the summons was served

on them, to which they did not appear, & before they paid over the money under the order. The order was rescinded, with costs to be paid by the judgment creditor, who was also aware of the assignment.—FERGUSON v. CARMAN (1866), 26 U. C. R. 26.—CAN.

d. Balance in bank before service of order.—Applied to meet bill.—After service of order.]—Pltf. commenced

this action on Nov. 18, 1909, & issued a garnishee summons against a bank, which was served upon the bank on that day. On Nov. 17, deft. had a balance to his credit in the bank of \$756.20; but the bank held a promissory note of deft. for \$700, maturing on Dec. 13; & on that day, Nov. 17, the bank charged the note to deft.'s account, allowing a rebate for the



*Sect. 1.—Attachment of debts—Garnishee order: Sub-sect. 5, D. (a), (b), (c) & (d); sub-sect. 6, C. (a).]*

assignment in equity or amount to a transfer of the debt, the right of the garnishor was subject to such rights & equities as already existed over this particular debt as the property of the co.; (2) at the time the garnishee order was served there was an existing charge on this property by virtue of the floating security created by the debentures, which was capable of becoming a specific charge when the debenture-holders intervened &, consequently, the receiver was entitled to the money now in ct. in priority to the judgment creditor.—*NORTON v. YATES*, [1906] 1 K. B. 112; 75 L. J. K. B. 252; 54 W. R. 183; 50 Sol. Jo. 95.

*Annotations:—As to (1) Apld. Cairney v. Back*, [1906] 2 K. B. 746. *As to (2) Consd. Sinnott v. Bowden*, [1912] 2 Ch. 414. *Refd. Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

**2193. Rights of judgment debtor barred—To payment of debt.]—***Re WATT, Ex p. JOSELYNE*, No. 2186, *ante*.

**2194. As demand from banker—Of money in current account.]—***JOACHIMSON v. SWISS BANK CORPN.*, No. 2188, *ante*.

#### (b) Stay of Proceedings.

*See Part II., Sect. 1., sub-sect. 1, ante.*

#### Forfeiture.

**2195. Forfeiture clause in will—Annuity.]—***BATES v. BATES*, [1884] W. N. 129; 19 L. J. N. C. 67.

*Annotations:—N.F. Sutton, Carden v. Goodrich* (1899), 80 L. T. 765; *Re Greenwood, Sutcliffe v. Gledhill*, [1901] 1 Ch. 887.

**2196. ——— Date of garnishee order—After payment of income due.]—***Re SAMPSON, SAMPSON v. SAMPSON*, No. 2108, *ante*.

**2197. ——— ———.]—**Under a will the income of a certain sum was to be paid to L. G. "during his life or until . . . he shall do or suffer anything whereby the income, if payable to him absolutely, or any part thereof, would become vested in any other person":—*Held*: no forfeiture resulted from a garnishee order absolute attaching dividends accrued due in the hands of the trustees.—*SUTTON, CARDEN & Co. v. GOODRICH* (1899), 80 L. T. 765; 15 T. L. R. 397.

*Annotation:—Folld. Re Greenwood, Sutcliffe v. Gledhill*, [1901] 1 Ch. 887.

**2198. ——— ———.]—**By will personalty was bequeathed in trust to pay the income to A. for life "or until he attempts to alien, charge or anticipate the same . . . or until any other event happens whereby, if the same were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof," & then over. A judgment creditor of A. served the trustees, who had accrued income in their hands,

days it had to run, & thus, if this was effective, reducing debt's balance to \$30. This was done without the knowledge or consent of debt.:—*Held*: the garnishee summons effectively attached the whole sum of \$756.20.—*MCCREADY v. ALBERTA CLOTHING CO.* (1910), 13 W. L. R. 680; 3 Alta. L. R. 67.—*CAN.*

#### PART V. SECT. 1, SUB-SECT. 6.—A.

**e. Whether non-appearance is an admission of liability.]—**Non-appearance of a fire insurance co. to a garnishee summons is not such an admission of liability as will convert the claim into a debt.—*HARRIS v. EDMONTON LAUNDRY CO., COLONIAL ASSURANCE CO., GARNISHEE* (1909), 2 Alta. L. R. 130.—*CAN.*

**f. ———.]—**Where the garnishee does not appear to the garnishee summons, his default should be taken as an admission that he owes debt. an amount equal to pltf.'s claim.—*DICKSON v. VAN HUMMELL* (1914), 27 W. L. R. 642; 16 D. L. R. 774; 7 Sask. L. R. 88.—*CAN.*

**g. ——— Presumption rebuttable.]—**Default in appearance on the part of a garnishee raises a presumption of liability, but only as far as the garnishor creditor is concerned, & such presumption is rebuttable upon an application to set aside the judgment by explanation of the failure to appear & proof that in fact no debt was due or accruing due to the debtor when the summons was issued.—*SHIERMAN v.*

with a garnishee order:—*Held*: the garnishee order did not operate as a forfeiture of A.'s life interest.—*Re GREENWOOD, SUTCLIFFE v. GLEDHILL*, [1901] 1 Ch. 887; 70 L. J. Ch. 326; 84 L. T. 118; 49 W. R. 461.

*Annotation:—Mentd. Durran v. Durran* (1904), 91 L. T. 187.

#### (d) In Bankruptcy and Winding Up.

*See* BANKRUPTCY, Vol. IV., pp. 87, 90, 165, Nos. 784–787, 818, 1540; Vol. V., pp. 640, 813, 835, Nos. 5752, 5753, 6924, 6926, 6927, 6928, 7069, 7070.

*See* COMPANIES, Vol. X., pp. 761, 762, 763, 890, 947, Nos. 4763, 4764, 4768–4771, 6059, 6481, 6482.

#### SUB-SECT. 6.—PROCEEDINGS SUBSEQUENT TO ORDER NISI.

##### A. On Failure of Garnishee to Attend.

*See* R. S. C., Ord. 45, r. 3.

**2199. Order made absolute—Validity of—No debt in existence at date of order nisi.]—***RANDALL v. THGOW*, No. 2120,

##### B. Where Garnishee Attends.

###### (a) Dispute as to Liability.

*See* R. S. C., Ord. 45, rr. 3, 5.

**2200. Denial of debt—Affidavit of denial—Sufficiency—Denial of existence of any debt.]—***VINALL v. DE PASS*,

**2201. Claim of set off—Debt due to garnishee—From judgment creditor.]—**Under the garnishee clauses of C. L. P. Act, 1854 (c. 125), the garnishee is bound to pay the amount due by him to the judgment debtor irrespectively of any debts which may be owing to him, the garnishee, by the judgment creditor.—*SAMPSON v. SEATON RY. CO.* (1874), L. R. 10 Q. B. 28; 44 L. J. Q. B. 31; 31 L. T. 672; 23 W. R. 212.

*Annotation:—Refd. Tapp v. Jones* (1875), 23 W. R. 694.

**2202. ——— From judgment debtor—Only at date of attachment.]—***TAPP v. JONES*, No. 2105, *ante*.

**2203. ——— Debtor's right only as trustee for judgment creditor.]—**A garnishee cannot set off against a judgment creditor a debt due to him, the garnishee, from the judgment debtor, if the garnishee was aware from the commencement of the transaction, which resulted in his becoming indebted to the judgment debtor, that the judgment debtor's right to such debt, could only be as trustee for the judgment creditor.—*FITT v. BRYANT* (1883), 1 Cab. & El. 194.

**2204. ——— Debt for costs.]—**A garnishee can set off against a judgment creditor costs incurred by him, but not paid at the time the issue is directed, against which the judgment debtor is bound to indemnify the garnishee.—*RYMILL v. WANDSWORTH DISTRICT BOARD* (1883), 1 Cab. & El. 92.

*HARRIS & CRASKE* (1915), 8 W. W. R. 514; 8 Sask. L. R. 165.—*CAN.*

#### PART V. SECT. 1, SUB-SECT. 6.—B. (a).

**h. Denial of debt—Open only to garnishee.]—**The only party who had power to dispute the indebtedness of the garnishee to the judgment creditor is the garnishee himself.—*DEMPSTER v. ELLIOTT* (1890), 22 N. S. R. 422.—*CAN.*

**k. Right of defendant to appear.]—**Though a debt. cannot show cause against a conditional order made on a garnishee to pay money alleged to be due to debt., yet, if served with the order, he is entitled to appear on the motion to make it absolute, & to inform

**2205. Counterclaim against judgment debtor.**  
STUMORE v. CAMPBELL & Co., No. 2081, *ante*.

**2206. Claim by third party—Duty of garnishee to inform court—Lien for costs.]—THE LEADER, No. 2236, *post*.**

(b) *Proceedings to determine Liability.*

See R. S. C., Ord. 45, rr. 4, 6.

**2207. Dispute as to liability to be well grounded.]**  
—To entitle the garnishee to a writ under C. L. P. Act, 1864 (c. 125), s. 64, he must satisfy the ct. or judge that he has a real ground for disputing his liability for the debt.—NEWMAN v. ROOK (1858), 4 C. B. N. S. 434; 23 J. P. 296; 140 E. R. 1153.

**2208. Issue directed—Discretion of judge to order.]—**Under C. L. P. Act, 1854 (c. 125), s. 64, it is discretionary in the judge to order, if the garnishee disputes his liability, that the judgment creditor shall be at liberty to proceed against the garnishee by writ.

*Qu.*: whether if the judge decline to make such an order, the ct. will review his decision, unless by consent. *Semble*: they may do so; but they will not make the order unless such facts are shown as raise a reasonable ground for supposing that the judgment creditor is entitled to execution.

Where, the matter having been referred to the ct. by the judge, the attorney of the judgment creditor had, after judgment, taken an assignment from the garnishee of a debt growing due, & which had been paid before the application, there being nothing to show that the assignment & the payment under it were not *bonâ fide*, the ct. refused to make an order.—WISE v. BIRKENSHAW (1860), 29 L. J. Ex. 240; 2 L. T. 223; 8 W. R. 420.

**2209. ——— Jurisdiction of judge—No suggestion by garnishee—Debt alleged to be trust money.]—**ROBERTS v. DEATH, No. 2131, *ante*.

**2210. ——— Refusal by creditor—Attachment order dismissed—With costs.]—**Where, in a

the ct. by affidavit of such facts as may be material.—LOVELY v. WHITE (1883), 12 L. R. Ir. 381.—IR.

PART V. SECT. 1, SUB-SECT. 6.—  
B. (b).

1. *Admission of indebtedness by garnishee—Issue as to amount.]—*On service of garnishee orders the garnishees admitted a debt owing to the judgment debtor, but asked the protection of the ct. as against mechanics lien-holders claiming the fund. Thereupon, an order was made directing the garnishee to pay the fund into ct. to abide the determination of an issue between the attaching creditors & the lien-holders. In this issue the lien-holders failed, & proceeded upon their liens against the property.—*Held*: the garnishees were not estopped from requiring an issue between themselves & the attaching creditors to ascertain what, if anything, was owing by the garnishees to the judgment debtor at the time of the service of the garnishee orders.—GABRIELE & POWER v. JACKSON MINES, LTD. (1907), 6 W. L. R. 324.—CAN.

m. *Denial of liability—By defendant or garnishee—Issue to be tried.]—*It is very doubtful if a debt., or a garnishee, has the right to have a garnishee summons set aside on an application based merely on the ground that there is no debt due from the garnishee to debt. The remedy contemplated when there is no debt due debt. by the garnishee is not by setting aside the garnishee summons which is properly issued, but the trial of an issue either summarily or otherwise as the circumstances of the case may

J.—VOL. XXI.

demand.—HALLSON v. BROUNSTEIN & BROUNSTEIN, [1923] 3 W. W. R. 835.—CAN.

n. *Claim by third party—Power of court to direct issue.]—*Where proceedings are taken to garnish a debt which is claimed by a third party as assignee, there is no power to direct an interpleader issue to try the validity of the alleged assignment.—KERR v. FULLERTON (1861), 3 P. R. 19.—CAN.

o. ——— *Remedy of garnishee.]—*Where, on an application for a garnishee order, the debt alleged to be due to the judgment debtor was claimed by a third person, & on such ground the garnishee disputed his liability to pay it over.—*Held*: in the absence of any power to direct an interpleader issue, or summon such third person before the ct., the issue of a writ under C. L. P. Act, s. 291, was the proper course to adopt, & the garnishee, where there were rival claimants for the debt, might file a bill in equity calling upon the parties to interplead.—SPENCER v. CONLEY (1876), 26 C. P. 274.—CAN.

p. ——— *Garnishee's right to appeal.]—*The garnishees had the right to appeal against an order directing the trial of an issue between the judgment creditors & a claimant of the moneys attached.—CANADA COTTON CO. v. PARMALEE (1889), 13 P. R. 308.—CAN.

q. ———.]—Where a garnishee disputes his liability to a judgment debtor, the ct. has no power to order execution against him, but will direct an issue to try the same, & where the garnishee's alleged indebtedness is to

garnishment proceeding under C. L. P. Act, 1854 (c. 125), the garnishee disputes his liability, & the judgment creditor declines to proceed by writ under sect. 64, the garnishee is entitled to have the attachment order dismissed with costs.—WINTLE v. WILLIAMS (1858), 3 H. & N. 288; 27 L. J. Ex. 311; 157 E. R. 480; *sub nom. Re SMITH, WINDLE v. WILLIAMS*, 6 W. R. 501.

**2211. ——— Appeal from order—When court will entertain.]—**WISE v. BIRKENSHAW, No. 2208, *ante*.

**2212. ——— Decision by master—Appeal to divisional court.]—**An appeal lies under R. S. C., Ord. 40, r. 6, to a div. ct. from the decision of a master upon the trial of an issue ordered by him under R. S. C., Ord. 44, r. 4, in garnishee proceedings.—BLAIR v. CLARK, [1908] 2 K. B. 518; 77 L. J. K. B. 647; 99 L. T. 172; 52 Sol. Jo. 498, D. C.

*Annotations*:—**Consd.** Cox v. Bowen, [1911] 2 K. B. 611. **Refd.** Mason v. Bolton's Library, [1913] 1 K. B. 83.

See, now, R. S. C., Ord. 51, r. 22A.

**2213. Special case stated.]—**WILSON v. DUNDAS & STEVENSON, No. 2078, *ante*.

**2214. Summary decision by judge in chambers—By consent—Decision final.]—**Where, upon an attachment, under a garnishee order by a judgment creditor, of moneys due to the judgment debtor, a third party claims such moneys for a debt due to him from the judgment debtor, & consents to a judge at chambers deciding the issue summarily between him & the judgment creditor, instead of asking, under R. S. C., Ord. 45, r. 7, for an issue to be tried in the usual way, such decision of the judge is final, & cannot be appealed against by such third party.—EADE v. WINNER & SON (1878), 47 L. J. Q. B. 584, D. C.

C. *Order Absolute.*

(a) *Effect of Order.*

**2215. Contrasted with effect of order nisi.]—**CAIRNEY v. BACK, No. 2184, *ante*.

a third party, such party must be summoned, & if necessary, an issue ordered to try his liability to the judgment debtor.—MOUNT ROYAL MILLING CO. v. KWONG MAN YUEN & LEAMY (1892), 2 B. C. R. 171.—CAN.

r. ———.]—Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor & his employers, the garnishees, whereby a third person had been substituted for debtor as the servant of the garnishees, & money paid to such third person, while debtor continued to do the work:—*Held*: the judgment creditor was entitled to have an issue directed, to which the third person should be a party, to determine whether there was at the time of the service of the attaching order any debt due or accruing from the garnishees to debtor.—MILLAR v. THOMPSON (1900), 19 P. R. 294.—CAN.

s. ———.]—Where it is contended that the debt sought to be attached is due from the garnishee to a third person, Attachment of Debts Act, s. 12, provides that "the garnishee or any person claiming to be interested" may make a suggestion to that effect. The phrase "any person claiming to be interested" includes the third party.—HALLSON v. BROUNSTEIN & BROUNSTEIN, [1923] 3 W. W. R. 835.—CAN.

PART V. SECT. 1, SUB-SECT. 6.—  
C. (a).

**2215 i. Contrasted with effect of order nisi.]—**SALAMAN v. DONOVAN (1860), 2 L. T. 92.—IR.

t. *Effect of service of order.]—*A

T T



*Sect. 1.—Attachment of debts—Garnishee order:*  
*Sub-sect. 6, C. (a), (b) & (c) & D.; sub-sect. 7.]*

**2216. Right of garnishor—To be made co-plaintiff against garnishee—Garnishee a judgment debtor.]—**A garnishee order was made absolute in favour of judgment creditors of W. attaching a judgment debt recovered by W. against S.:—*Held*: this was a devolution of estate by operation of law within R. S. C., Ord. 50, r. 2, & that the judgment creditors of W. were entitled to be added as co-pltfs. in the action of W. against S., but not to have the conduct of the action.—*WALLIS v. SMITH* (1882), 51 L. J. Ch. 577; 46 L. T. 473.

**2217. Debt due by garnishee—Not transferred to garnishor.]—***CAIRNEY v. BACK*, No. 2184, *ante*.

*Compare Nos. 2121, 2186, 2188, ante.*

judgment creditor does not, properly speaking, become a creditor of the garnishee by service of an attaching order upon the latter.—*WARDROPE v. CANADIAN PACIFIC RY. CO.* (1884), 7 O. R. 321.—**CAN.**

**a. —.]—**A garnishee order binds only so much of the debt owing to debtor from a third party as debtor can honestly deal with at the time the garnishee order *nisi* is obtained & served.—*BEATY v. HACKETT* (1892), 14 P. R. 395.—**CAN.**

**b. —.]—***McKINNON v. COFFIN* (1906), 2 E. L. R. 176.—**CAN.**

**c. —.]—**A garnishee order only binds the attached debt to the extent to which the judgment debtor himself can deal with it.—*O'CONNOR v. IRELAND*, [1897] 2 L. R. 150.—**IR.**

**d. —.]—**An order of attachment binds moneys attached in the hands of the garnishee subject to existing liens & charges.—*GUTHRIE & LARNACH WOODWARE CO. v. MORGAN* (1883), 1 N. Z. L. R. 356 (S. C.).—**N.Z.**

**e. To whom payment directed.]—***ONTARIO BANK v. HAGGART* (1888), 5 Man. L. R. 204.—**CAN.**

**f. Whether garnishee must obey.]—***HARRIS v. CORDINGLEY & MOISONS BANK* (1899), Q. R. 16 S. C. 501.—**CAN.**

**g. —.]—**Pltfs., by a garnishee order, attached moneys in the hands of the garnishees owing to defts. Defts. had previously assigned to trustees for bondholders all the profits & income of the concern, & the trustees therefore claimed the moneys as against pltfs. The deed of assignment provided that defts. might use the income assigned in carrying on their business until default in payment of the bonds, & pltfs.' claim was for goods required by defts. in the ordinary course of their business:—*Held*: defts., if the moneys attached had come to their hands, might properly have applied them in payment of pltfs.' claim.—*NATIONAL ELECTRIC MANUFACTURING CO. v. MANITOBA ELECTRIC & GAS LIGHT CO.* (1893), 9 Man. L. R. 212.—**CAN.**

**PART V. SECT. 1, SUB-SECT. 6.—**  
**C. (b).**

**h. Order made by mutual mistake.]—**Where a garnishee order has been made upon a mistake of fact, the party paying thereunder cannot recover unless the order has been set aside before action brought.—*PARTIDGE v. NATIONAL INSURANCE CO. OF AUSTRALASIA* (1876), 2 V. L. R. 203.—**AUS.**

**k. Collusion between judgment creditor & debtor.]—**The exor. of the garnishee having on affidavit denied the debt, & imputed collusion between the judgment creditor & debtor, which was not denied, the attaching order was rescinded.—*WARD v. VANCE* (1863), 3 P. R. 210.—**CAN.**

**l. Order in excess of debt.]—**Where it was discovered that the order was for too much, it was rescinded,

except as to the proper sum.—*SESSIONS v. STRACHAN* (1864), 23 U. C. R. 492.—**CAN.**

**m. Garnishees not suable in the province.]—**Application by deft. to set aside a garnishing order. The debt alleged to be due by the garnishees was in respect of a life insurance policy. The insurance co., the garnishees, had no office in the province. L. & K. acted as its agents in Winnipeg, having power merely to receive applications for insurance. The premiums & the amount insured in case of death were payable at Montreal:—*Held*: as the insurance co. could not be sued in this province, the garnishing order should be discharged.—*McARTHUR v. MACDONNEL* (1884), 1 Man. L. R. 334.—**CAN.**

**n. Jurisdiction of county court.]—**A county ct. judge has power not only to grant a garnishee attaching order in a Q. B. case, but also to set the order aside if improperly issued.—*THOMPSON v. WALLACE* (1886), 3 Man. L. R. 686.—**CAN.**

**o. — Garnishee outside jurisdiction.]—**A county ct. judge has power to set aside a garnishing order made in a Q. B. action. A garnishing order was set aside upon it appearing that the garnishee did not reside within the jurisdiction.—*DICK v. HUGHES* (1888), 5 Man. L. R. 259.—**CAN.**

**p. Hearsay evidence—Affidavit based on information & belief.]—**Where it appeared that a garnishee order had been set aside on the strength of an affidavit of the partner of deft.'s attorney based on information & belief:—*Held*: as the application to set aside the garnishee order was one that affected & disposed of the rights of the parties & was not merely interlocutory, it should not be granted on the material put in, which was mere hearsay evidence.—*BRAUN v. DAVIS* (1894), 11 Man. L. R. 539.—**CAN.**

**q. —.]—**Deft. made application to set aside a garnishee summons on the grounds that the affidavit filed on the application for such garnishee summons was issued upon insufficient evidence:—*Held*: since the amendment of the Judicature Ordinance in 1897 an affidavit on information & belief is sufficient & the grounds of belief need not be given.—*ADDISON v. DICKSON* (1907), 7 W. L. R. 291.—**CAN.**

**r. Affidavit not in prescribed form.]—**Application to set aside attaching order. The affidavit on which this order had been obtained stated that defts. were "jointly" instead of "justly" indebted after making all "deductions" instead of "discounts" as in the form required. The rule says the affidavit may be in the prescribed form or "to the like effect":—*Held*: this will cover "deductions," but not "jointly," although the latter was a typewriter's mistake. Attaching order set aside.—*JOHNSON v. CHALMERS* (1909), 12 W. L. R. 506.—**CAN.**

**(b) Setting Aside Order.**

**2218. Order made by mutual mistake—Money ordered to be repaid.]—***MOORE v. PEACHEY* (1892), 8 T. L. R. 406; 36 Sol. Jo. 324, C. A.

*Annotation*:—*Folld. Marshall v. James*, [1905] 1 Ch. 432.

**2219. —.]—**A garnishee order, made upon evidence afterwards proved to be mistaken, may be set aside although it has been made absolute & has been acted upon.—*MARSHALL v. JAMES*, [1905] 1 Ch. 432; 74 L. J. Ch. 279; 92 L. T. 681; 53 W. R. 363; 49 Sol. Jo. 259.

**2220. On subsequent acceptance of issue by defendant.]—**A garnishee order absolute, regularly made, was set aside on the facts, deft. having, by accepting an issue after the order absolute, pre-

**s. Claim not disputed.]—**Deft. co. went into voluntary liquidation on Dec. 7. Pltf. served a garnishee summons on an insurance co. to attach certain insurance moneys under a loss to defts., but there had been no adjustment of the loss. On Dec. 10 an order was obtained staying all actions. The claim against the insurance co. was one for damages, & not one of debt. The garnishee did not dispute the claim:—*Held*: the liquidator was entitled to apply to set aside the summons.—*HARTT v. EDMONTON LAUNDRY CO., COLONIAL ASSURANCE CO., GARNISHEE* (1909), 10 W. L. R. 664; 2 Alta. L. R. 130.—**CAN.**

**t. Judgment by default—Letter mislaid by clerk of court.]—**A garnishee applied to set aside a judgment entered against him for default of appearance. As it appeared his letter to the clerk of the ct. advising that notes in question were not due for some time had been mislaid by the clerk:—*Held*: he should be allowed in to defend on terms.—*HUNTER v. COLLINS* (1909), 11 W. L. R. 85.—**CAN.**

**aa. Affidavits not complying with rules.]—**A garnishee summons & subsequent proceedings founded thereon were set aside because the affidavits on which the summons was granted did not comply with rule 384.—*IMPERIAL BANK OF CANADA v. MILLER* (1910), 13 W. L. R. 260.—**CAN.**

**bb. —.]—**To comply with rule 384 the affidavit must be made by pltf. or his advocate or agent, & the affidavit of a student in the office of pltf.'s solr. is not a foundation for a summons:—*Held*: deft. was entitled to have the garnishee summons set aside, although he himself, in his summons to set aside the garnishee summons, had not set out his objections, as required by rule 540. Rule 384 refers only to motions to set aside for irregularity; & it is doubtful whether it applies to a defect which is more than an irregularity.—*MOHR v. PARKS* (1910), 15 W. L. R. 250.—**CAN.**

**cc. Service irregular—Knowledge of party.]—**Where a garnishee summons has been served on a deft. after the expiry of the time limited for such service & the garnishee pays over the garnished money to pltf.'s solr. with full knowledge of the irregularity in the service, he cannot afterwards rely upon the irregularity in an attempt to have the garnishee summons set aside.—*McKAY v. PROHAR* (No. 2), [1922] 3 W. W. R. 639; 70 D. L. R. 92.—**CAN.**

**dd. Debt assigned by debtor—Notice given to garnishee—No cause shown by mistake.]—**Pltf. had obtained a garnishee order attaching a debt alleged to be due to deft. by a county council, & calling on the county council to show cause why it should not be paid to pltf. This order was served on the county council. Prior to the date of the order the debt had been assigned for value by deft. to third parties, &

cluded himself from relying on the point.—*BURRELL & SONS v. READ* (1894), 11 T. L. R. 36, C. A.

(c) *Appeal from Order.*

See R. S. C., Ord. 54, r. 21, & generally, PRACTICE.

**2221. Time for appeal—Extension granted—Order made under mistake.**—*MOORE v. PEACHEY* (1892), 8 T. L. R. 406; 36 Sol. Jo. 324, C. A.

*Annotation*:—*Mentd. Marshall v. James*, [1905] 1 Ch. 432.

**2222. To what court—Appeal from judge at chambers—Affirming order absolute by master—Judicature Act, 1894 (c. 16), sect. 1, ss. 4.**—An appeal from an order of the judge at chambers affirming an order of the master making absolute a garnishee order is a matter of practice & procedure within sect. 1, sub-sect. 4, of the Jud. Act, 1894 (c. 16), s. 1 (4), & the appeal therefore lies to the Ct. of Appeal, & not to the Div. Ct.—*HOCKLEY v. ANSAH* (1896), 44 W. R. 666; 12 T. L. R. 499; 40 Sol. Jo. 622, D. C.

**Order of county court.**—See COUNTY COURTS, Vol. XIII., p. 526, No. 783.

*D. Enforcing Payment.*

**2223. By action—When allowed—Discretion of court.**—*WISE v. BIRKENSHAW*, No. 2208, ante.

**2224. ——— Collusion by garnishee & judgment debtor.**—While an action is pending against the garnishee, the ct. will not without evidence of collusion between him & the judgment debtor, grant a writ against the garnishee under C. L. P. Act, 1854 (c. 125), s. 61.—*Re CLATTON, RICHARDSON v. GREAVES* (1861), 10 W. R. 45.

**2225. ——— Not recoverable by execution.**—An action for debt will lie on a garnishee order, but should not be resorted to if the amount can be recovered by execution under R. S. C., Ord. 45, r. 3. A garnishee order absolute had been obtained, under Ord. 45, r. 3, against a limited co. having property abroad, but none in this country on which execution could be levied:—*Held*: under Ord. 42, r. 24, the garnishor could maintain an action on the garnishee order for the debt thereby ordered to be paid to him by the co., the garnishees, with a view to his presenting a petition, as a judgment creditor for winding up the co.

If the judgment creditor does obtain payment from the garnishee in obedience to a judgment or under execution on it, the payment will discharge the garnishee as if the payment had been made

notice of the assignment given to the county council. Owing to a mistake on the part of the secretary of the county council, no cause was shown against the conditional order & it was made absolute:—*Held*: the ct. has jurisdiction to set aside the absolute order, in the circumstances, it should be set aside.—*O'BRIEN v. KILLEEN*, [1914] 2 I. R. 63.—IR.

**PART V. SECT. 1, SUB-SECT. 6.—**  
C. (c).

**e. Application for new trial—Time for.**—A judge of a division ct. has power in garnishment proceedings when the justice of the case requires it, to grant a new trial after the lapse of fourteen days.—*Re MCLEAN v. MCLEOD* (1871), 5 P. R. 467.—CAN.

**f. ———.**—Division Cts. Act, R. S. O., 1887 (c. 51), s. 145, as to applying for a new trial within fourteen days, does not apply to a garnishee.—*HOBSON v. SHANNON* (1895), 27 O. R. 115.—CAN.

**g. Whether garnishee party to cause**—43 Vict. c. 8, s. 17 (O).—*CAMERON v. ALLEN* (1883), 10 P. R. 192.—CAN.

*Order of county court.*—

Under County Ct. Act, R. S. O. 1887 (c. 47), s. 42, an appeal lies to the ct. of appeal from the order or judgment of a county ct. disposing of an issue directed by an order made in an action in such county ct. upon a garnishing application; & claimant, pltf., in the issue, though not a party to the original action, may be applt.—*HENDERSON v. ROGERS* (1893), 15 P. R. 241.—CAN.

**k. Application to vary order setting aside garnishee summons—Acted on—Does not preclude plaintiff from appealing.**—The fact that pltf. had applied to vary the order setting aside the garnishee summons & had acted on it as amended:—*Held*: not to preclude him from appealing from the order.—*THOMES v. WESTCOTT & WESTCOTT*, [1922] 2 W. W. R. 727; 66 D. L. R. 250.—CAN.

**l. Where no appeal lies—Attachment of decree held by debtor against third party.**—L. & another held a money decree against S. In execution thereof they attached a mtge. decree held by S. against one D. They next applied for the sale of the mtge. decree, which they had attached in execution of their own money decree. To this D. objected that the decree has been already satisfied. His objection was disallowed,

without action (LINDLEY, M.R.).—*PRITCHETT v. ENGLISH & COLONIAL SYNDICATE*, [1899] 2 Q. B. 428; 68 L. J. Q. B. 801; 81 L. T. 206; 47 W. R. 577; 43 Sol. Jo. 602, C. A.

*Annotations*:—*Refd. Furber v. Taylor*, [1900] 2 Q. B. 719; *Geisse v. Taylor*, [1905] 2 K. B. 658; *Savill v. Dalton*, [1915] 3 K. B. 174.

**2226. By execution.**—A judgment creditor obtained a garnishee order attaching a debt due to his debtor. After the order was made absolute, but before execution levied, the judgment debtor became bkpt. The judgment creditor then issued execution against the garnishee. The garnishee applied to set the execution aside. The assignees in bkpey. had notice of all the proceedings, & declined to make any claim:—*Held*: the execution would not be set aside.—*EUROPEAN BANK, LTD. v. FOX, Ex p. GENERAL ESTATES CO., LTD.* (1866), L. R. 2 Q. B. 85, n.; 15 L. T. 288; *sub nom. EUROPEAN BANK v. FOX, Ex p. BRITISH MERCANTILE BANK*, 15 W. R. 158.

**2227. ———.**—*RANDALL v. LITHGOW*, No. 2120, ante.

See R. S. C., Ord. 45, rr. 3, 6.

**By bankruptcy proceedings.**—See BANKRUPTCY, Vol. IV., pp. 87, 88, Nos. 784, 785, 792.

SUB-SECT. 7.—PRIORITIES.

**Effect in bankruptcy.**—See, now, Bpkey. Act, 1914 (c. 59), ss. 40, 41; BANKRUPTCY, Vol. V., pp. 808 *et seq.*

**2228. Against general lien—Of solicitor.**—The general lien of an attorney on a judgment, for costs due from his client, does not prevail over an attachment under the garnishee clauses of the C. L. P. Act, 1854 (c. 125).—*HOUGH v. EDWARDS* (1856), 1 H. & N. 171; 26 L. J. Ex. 54; 2 Jur. N. S. 814; 156 E. R. 1164.

*Annotations*:—*Consd. Cole v. Eley*, [1894] 2 Q. B. 180. *Refd. North v. Stewart* (1890), 15 App. Cas. 452; *Re Knight, Knight v. Gardner*, [1892] 2 Ch. 368.

**2229. Against particular lien—Of solicitor.**—An order obtained under C. L. P. Act, 1854 (c. 125), s. 61, attaching a fund in the hands of a garnishee to answer a judgment debt, will not displace the prior lien for costs of a solr. who has given notice to the garnishee. *Qu.*: if he had not given notice.

S. & W. acted as attorneys for P., pltf., in an

& on appeal by D. from the order disallowing the objection:—*Held*: no appeal would lie.—*ISHRI DAT v. MEWA LAL* (1904), 1 L. R. 26 All. 136.—IND.

**PART V. SECT. 1, SUB-SECT. 6.—D.**

**m. As & when debts become payable—Power of court to make order.**—There is power to make an order against the garnishee for payment of his debts, as & when they become payable, instead of making a fresh order as each falls due.—*FRASER v. MCARTHUR* (1879), 12 N. S. R. (3 R. & C.) 498.—CAN.

**n. By committal—County court judge presiding in division court.**—The county ct. judge, presiding in a division ct., has no power to commit a garnishee for default in making payments pursuant to an order after judgment.—*Re DOWLER v. DUFFY* (1897), 29 O. R. 40.—CAN.

**PART V. SECT. 1, SUB-SECT. 7.**

**2229 i. Against particular lien—Of solicitor.**—An attorney's lien for costs as between him & his client, the judgment debtor, will not be allowed to stand in the way of an attachment.—



*Sect. 1.—Attachment of debts—Garnishee order: Sub-sects. 7 & 8.]*

action for damages, & also as his solrs. in a suit instituted against him in equity to restrain the proceedings in the action. The ct. made an order in the suit, directing payment to P. of a gross sum for damages & costs:—*Held*: S. & W. had a lien upon the fund for their costs, both in the action & in the suit.—*SYMPSON v. PROTHERO* (1857), 26 L. J. Ch. 671; 29 L. T. O. S. 325; 3 Jur. N. S. 711; 5 W. R. 814.

*Annotations*:—*Consd.* The Leader (1868), L. R. 2 A. & E. 314; *Birchall v. Pugin* (1875), L. R. 10 C. P. 397. *Refd.* *Mercer v. Graves* (1872), 41 L. J. Q. B. 212; *Cole v. Eley* (1894), 70 L. T. 892.

**2230.** ———.]—If the judgment debtor receives a debt which has been attached, from the garnishee, with notice of the lien of the judgment debtor's attorney, he will be liable to repay it to the attorney.—*EISDELL v. CONINGHAM* (1859), 28 L. J. Ex. 213.

*Annotations*:—*Consd.* *Birchall v. Pugin* (1875), L. R. 10 C. P. 397. *Refd.* *Mercer v. Graves* (1872), 41 L. J. Q. B. 212; *Robson v. Smith*, [1895] 2 Ch. 118.

**2231.** ———.]—Deft. having recovered a sum of money in an action brought by him against M., B., deft.'s attorney in that action, had taken out a summons for an order charging his costs in such action upon the sum recovered. Pltf. afterwards, having recovered judgment in his action against deft., obtained an *ex p.* garnishee order attaching the sum recovered by deft. against M. in execution.

Under these circumstances the parties came before a judge at chambers, claiming to have a charging order on the judgment debt as property recovered within Solicitors Act, 1860 (c. 127), s. 28, & pltf. claiming an order on M. to pay the sum attached to him. The judge made an order in favour of B.:—*Held*: he was right in so doing; the sum recovered was property within the sect., & the attorney was entitled to priority.—*BIRCHALL v. PUGIN* (1875), L. R. 10 C. P. 397; 44 L. J. C. P. 278; 23 W. R. 923; *sub nom.* *BURCHELL v. PUGIN*, 32 L. T. 495.

*Annotations*:—*Folld.* *Shippey v. Grey* (1880), 49 L. J. Q. B. 524. *Refd.* *Charlton v. Charlton* (1883), 49 L. T. 267; *Cole v. Eley*, [1894] 2 Q. B. 180; *Smelting Co. of Australia v. I. R. Comrs.*, [1896] 2 Q. B. 179; *Farrant v. Caley* (1924), 68 Sol. Jo. 898. *Mentd.* *The Marie Gartz* (No. 2), [1920] P. 460.

*BANK OF UPPER CANADA v. WALLACE* (1858), 2 P. R. 352.—**CAN.**

**2229 ii.** ———.]—An attorney's lien for costs as between him & his client, the judgment debtor, will not be allowed to stand in the way of an attachment.—*R. v. BENSON* (1858), 2 P. R. 350.—**CAN.**

**2229 iii.** ———.]—An award for an amount, together with costs, having been made in favour of a party, the costs were taxed by consent, & the amount promised to be paid to the solr. of the party ordered to receive such costs. A garnishee order was subsequently obtained by a third party, under which the amount awarded & the costs were paid over to such third party, with notice, however, of the solr.'s lien for the costs. In these circumstances a motion made to stay proceedings to enforce payment of the costs under the award, at the instance of the solr. to whom they were payable, was refused with costs.—*MCLEAN v. BEATTY* (circa 1860), 1 Ch. Ch. 138.—**CAN.**

**2229 iv.** ———.]—On a motion on behalf of pltf. for an attachment of all debts due deft. by M., a lien for his costs was set up by the attorney who had entered the judgment for deft. against M., but no notice had been given by the attorney to M., nor had any effort

been made by him to secure his costs:—*Held*: the claim of the attorney could not prevail over the attachment.—*COOK v. BLISS* (1876), 10 N. S. R. (1 R. & C.) 299.—**CAN.**

**2229 v.** ———.]—In garnishee proceedings a ct. will, as against the attaching creditor, protect an attorney's lien for costs of the action or suit in which, or by which, the debt attached has been recovered, where the garnishee has notice of the lien.—*CANADIAN BANK OF COMMERCE v. CROUCH* (1881), 8 P. R. 437.—**CAN.**

**2229 vi.** ———.]—Costs are decreed to be paid by C. to A. or B. his solr. An attachment is delivered to the sheriff. C., who has a demand against A., issues a sequestration for it, pays the costs to the sheriff, & lodges the sequestration with the sheriff. *Scmble*: if the money be paid into ct., B.'s lien for costs will prevail over C.'s sequestration.—*WILLIAMS v. REEVES* (1861), 12 L. Ch. R. 173.—**IR.**

*o. Priority by order of service.*—Several judgment creditors proceeding against same garnishee are entitled in the order in which their attaching orders are served, not ratably.—*TATE v. TORONTO CORPN.* (1862), 3 P. R. 181.—**CAN.**

—.]—A garnishee order was

**2232.** ———.]—Pltfs. were the solrs. for W. in an action in which he recovered a sum of money. Deft. was a judgment creditor of W. & obtained *ex parte*, on the day that judgment was signed in the above action, a garnishee order attaching all debts due to W. On the taxation of costs on the same day pltf. for the first time learned of deft.'s claim, & then gave notice to deft. in the action in which W. was pltf., of their claim of lien, & within five days applied for an order declaring that they were entitled to a charge on the money recovered by W.:—*Held*: (1) pltf. had a lien for their costs on the sum recovered by W. & they were entitled to the order sought for; (2) the garnishee order obtained by deft. did not take priority over that lien.—*SHIPPEY v. GREY* (1880), 49 L. J. Q. B. 524; 42 L. T. 673; 28 W. R. 877, C. A.

*Annotations*:—*As to* (1) *Folld.* *Dallow v. Garrold* (1884), 14 Q. B. D. 543. *Apld.* *Cole v. Eley*, [1894] 2 Q. B. 180. *Refd.* *Charlton v. Charlton* (1883), 49 L. T. 267; *Watts v. Hetley* (1899), 44 Sol. Jo. 134. *As to* (2) *Folld.* *Dallow v. Garrold* (1884), 14 Q. B. D. 543. *Apld.* *Re Suffield & Watts, Ex p. Brown* (1888), 20 Q. B. D. 693. *Refd.* *Cole v. Eley*, [1894] 2 Q. B. 180.

**2233.** ———.]—The proceeds of a *fi. fa.*, issued on behalf of a successful pltf. in an action, were attached in the hands of the sheriff by a garnishee summons from a county ct. to answer a judgment obtained against pltf. in that ct. Pltf.'s solr. in the action, who had received notice of the service of the garnishee summons, subsequently obtained an order under Solicitor's Act, 1860 (c. 127), s. 28, charging the fund recovered with costs of the action remaining due to him:—*Held*: such order was rightly made & the solr.'s claim was entitled to priority over the claim of the judgment creditor of pltf. under the garnishee summons.—*DALLOW v. GARROLD* (1884), 14 Q. B. D. 543; 54 L. J. Q. B. 76; 52 L. T. 210; 33 W. R. 219; 1 T. L. R. 114, C. A.

*Annotations*:—*Apld.* *Re Suffield & Watts, Ex p. Brown* (1888), 20 Q. B. D. 693. *Refd.* *Cole v. Eley* (1894), 38 Sol. Jo. 533; *The Paris*, [1896] P. 77; *Watts v. Hetley* (1899), 44 Sol. Jo. 134; *Re Deakin, Ex p. Daniell*, [1900] 2 Q. B. 489; *The Marie Gartz* (No. 2), [1920] P. 460.

**2234.** ———.]—*SCOTT v. PEAK HILL GOLD-FIELDS, LTD.* (1908), *Times*, Nov. 16, C. A.

**2235.** ——— *Of proctor.*—A proctor's lien on a fund in ct. is not affected by a garnishee order, & he is entitled to be paid his costs in priority

taken out in the first suit in the county ct. at E., & served on sheriff's bailiff at E. & the deputy sheriff at W. In the second suit a garnishee order issued out of the Ct. of Q. B. was served on the sheriff personally, subsequently to the service effected in the first suit. Pltf. in the first suit took out a summons to settle the priorities:—*Held*: service on the deputy sheriff in his office during office hours was good service on the sheriff, & an order so served had precedence over an order subsequently served on the sheriff.—*BEACH v. GRAVES, DOMINION TYPE CO. v. GRAVES* (1884), 1 Man. L. R. 26.—**CAN.**

*q. ——— Officers of bank.*—Interpleader proceedings were taken by the Bank of Nova Scotia to determine the priority of attaching process served on it by two creditors of an absconding debtor. Under Jud. Act, process may be served on a corpn. by serving same on the principal officer thereof or on the clerk or secretary. One of the creditors served the president & secretary of the bank at its head office. The other creditor, before making any service in same manner, & before the service of the first-mentioned creditor, served the process on the manager of the branch of the bank in which the absconding debtor's money was deposited, & he contended that he thereby acquired

to the claim of the holder of the garnishee order.—**THE JEFF DAVIS** (1867), L. R. 2 A. & E. 1; 17 L. T. 151; 2 Mar. L. C. 555.

*Annotations*:—**Apld.** *The Heinrich* (1872), L. R. 3 A. & E. 505; *Birchall v. Pugin* (1875), L. R. 10 C. P. 397. **Distd.** *The Livietta* (1883), 8 P. D. 209.

**2236.** ———.]—Pltf. having obtained a decree for payment by debt. of a sum of money for costs, debt. under the authority of two garnishee orders paid part of the sum to judgment creditors of pltf. No notice had been given to pltf.'s proctor previous to the application, for the garnishee orders, nor was the existence of the proctor's lien mentioned to the judge who made the orders:—*Held*: debt. was still liable to pay the costs decreed.—**THE LEADER** (1868), L. R. 2 A. & E. 314; 37 L. J. Adm. 57; 18 L. T. 767; 17 W. R. 61; 3 Mar. L. C. 118.

*Annotation*:—**Refd.** *Watts v. Hetley* (1899), 44 Sol. Jo. 134.

**2237. Against prior equitable charge.**]—**BACKHOUSE v. SIDDLE**, No. 1448, *ante*.

**2238.** ——— **Though no notice given.**]—**BADELEY v. CONSOLIDATED BANK**, No. 2133, *ante*.

—.]—*See CHANCES IN ACTION*, Vol. VIII., p. 477, Nos. 467–471.

**2239. Against statutory rights of mortgagee.**]—A mtgee.'s statutory rights are not displaced by a garnishee order *nisi*.—**SINNOTT v. BOWDEN**, [1912] 2 Ch. 414; 81 L. J. Ch. 832; 107 L. T. 609; 28 T. L. R. 594; 6 B. W. C. C. N. 157.

*Annotation*:—**Mentd.** *Matthey v. Curling*, [1922] 2 A. C. 180.

**2240. Against mortgagee—Receiver appointed—No notice of appointment given to tenant of mortgaged property.**]—Land in the occupation of a tenant at a rent was in 1908 with other properties mortgaged by the owner thereof to a second mtgee., subject to a first mtge. In Mar. 1911, the first mtge. became vested in the tenant, who at the same time received notice of the second mtge. In Apr. 1911, the second mtgee. under the Conveyancing Act, 1881 (c. 41), appointed a receiver of the properties comprised in his mtge., & notice of the appointment was given to the mtgor. The second mtgee. instructed the receiver to take no steps without further instructions. The receiver accordingly took no further steps & no

priority:—*Held*: priority must be given to the first service on the president at the head office.—**KINSMAN v. UNDERDONK**, 22 C. L. T. Occ. N. 262.—**CAN.**

**r.** ———.]—The right of a judgment creditor to an order for payment into ct. by a garnishee & payment out to himself after having served an attaching order on the garnishee is not affected by attaching orders subsequently served on the garnishee.—**SLINGER v. DAVIS** (1914), 20 B. C. R. 447.—**CAN.**

**s.** ——— **Whether order made in Chancery—Gives it priority.**]—**FRENCH v. BALFE** (1857), 11 L. Ch. R. 63; 9 Ir. Jur. 299; 10 Ir. Jur. 48.—**IR.**

**t. Against assignment by primary debtor for benefit of creditors.**]—An assignment for the benefit of creditors by a primary debtor after a garnishing summons has been duly served upon him, & the garnishee, & judgment has been obtained thereon against debtor, does not intercept or take precedence of the attachment of the debt, & the primary creditor may obtain judgment against, & enforce payment thereof by, the garnishee.—**WOOD v. JOSELIN** (1890), 18 A. R. 59.—**CAN.**

*obtaining first order.*]

(1902), 9 B. C. R. 30.—**CAN.**

*nst. workmen's wages.*]—**& Workmen's Act**, R. S. M.

1902 (c. 14), s. 4, making a proprietor directly liable for payment of the wages of workmen employed by a contractor doing any work for him, effects what may be termed a statutory assignment to the workmen, to the amount of their unpaid wages, of the moneys payable by the proprietor to the contractor, so that the workmen are entitled to priority over the claims of creditors holding garnishing or other orders against the proprietor in respect of such moneys, & such creditors are entitled to be paid out of any balance in the order in which notices of their several claims were given to the proprietor.—**BRYSON v. ROSSER MUNICIPALITY** (1909), 18 Man. L. R. 658.—**CAN.**

**c. Against foreign claimants.**]—

Deft. a resident of Winnipeg, made three contracts with the garnishees for the construction of certain buildings, in the provinces of Ontario, Manitoba & Alberta. Payment under each contract was to be made in instalments as the work progressed, & on the certificate of the engineer of garnishees. Pltfs. obtained judgment against deft., & a garnishee order against garnishees in Manitoba in May, 1911, for \$4,765.47, & garnishees paid into ct. \$2,430.42, admitted due to deft. by them on all three contracts. Subsequently certain other creditors took proceedings against deft. in Alberta, & at the date of these

further instructions were ever in fact given to him. No notice of the appointment was either then or at any subsequent time given to the tenant. In July, 1911, pltfs. recovered judgment against the mtgor. in the county ct. for a sum of money and on Mar. 25, 1912, the judgment being unsatisfied, pltfs. served a garnishee summons in the county ct. on the tenant to show cause why he should not pay to them the half-year's rent due from him on that date. On Mar. 28, 1912, the second mtgee. served notice on the tenant to pay the rent to him. The receiver did not demand payment of the rent from the tenant, nor was he a party to the garnishee proceedings. The tenant, after deducting the interest due to him upon his mortgage, paid the balance of the rent into Ct.:—*Held*: the notice by the second mtgee. to the tenant to pay the rent to him was inoperative, & pltfs. were entitled as against the second mtgee. to the balance of the rent due from the tenant.—**VACUUM OIL CO., LTD. v. ELLIS**, [1914] 1 K. B. 693; 83 L. J. K. B. 479; 110 L. T. 181, C. A.

**2241.** ——— **Receiver appointed subsequent to garnishee order.**]—**PENNINGTON v. CAVE** (1917), 144 L. T. Jo. 112, D. C.

**Against debenture holders.**]—*See COMPANIES*, Vol. X., pp. 762, 763, Nos. 4768–4771.

#### SUB-SECT. 8. -DISCHARGE OF GARNISHEE.

*See R. S. C., Ord. 45, r. 7.*

**2242. By payment—Under order of court.**]—A. sold goods to B., to be paid for by bills of exchange at certain future periods. Before the bills were due C. recovered a judgment against A., & obtained a judge's order under C. L. P. Act, 1854 (c. 125), for attachment of the debt due from B. to A., & to show cause why B. should not pay C. the debt due from B. to A. Upon this order being served on B., he gave C. a promissory note payable by instalments for the amount of the debt due to A. No further proceedings were taken under the attachment. A. afterwards became bkpt.:—*Held*: the debt due from B. to A. was not discharged by the promissory note

proceedings, had not yet obtained judgment. This was an interpleader motion, & the Alberta creditors came in as parties, & claimed to share in the proceeds of the moneys paid in:—*Held*: pltfs. entitled to whole of fund in ct. with costs as against other claimants.—**EMPIRE SASH & DOOR CO. v. MCGREEVY** (1912), 22 W. L. R. 372; 8 D. L. R. 27; 22 Man. L. R. 676; 3 W. W. R. 128.—**CAN.**

#### PART V. SECT. 1, SUB-SECT. 8.

**2242 i. By payment—Under order of court.**]—Under the garnishee clauses in C. L. P. Act (P. R. I.), an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor, & payment by the garnishee of the amount to the judgment creditor of the payee, in pursuance of a judge's order, is a valid discharge.—**ROBLEE v. RANKIN** (1884), 11 S. C. R. 137.—**CAN.**

**d. As against solicitor holding lien.**]—Upon the application of a solr., having a lien in respect of a debt attached, the attaching order will be discharged as against him. But the party against whom such an order has been made is not entitled to its discharge on the ground of the existence of the lien in favour of his solr.—**COTTON v. VANSITTART** (1873), 6 P. R. 96.—**CAN.**

**e. Payment into court—Without**



*Sect. 1.—Attachment of debts—Garnishee order: Sub-sects. 8 & 9. Sect. 2: Sub-sect. 1.]*

given by B. to C., & consequently A.'s assignees were entitled to recover it from B.

*Semble:* payment by the garnishee to the judgment creditor upon notice of the attachment is no discharge of the debt due from the garnishee to the judgment debtor, but there must be a judge's order for payment.—*TURNER v. JONES* (1857), 1 H. & N. 878; 26 L. J. Ex. 262; 28 L. T. O. S. 341; 5 W. R. 318; 156 E. R. 1457.

*Annotations:*—*Consd.* *Wood v. Dunn* (1866), L. R. 2 Q. B. 73. *Refd.* *Lowe v. Blakemore* (1875), L. R. 10 Q. B. 485.

**2243.** ———.]—A garnishee order cannot be reviewed by the Admlty. Ct.; & therefore the payment under a garnishee order of costs pronounced due to a successful party by decree of the ct. is satisfaction of the decree, even as against the party's proctor claiming his lien.—*THE OLIVE* (1859), Sw. 423; 5 Jur. N. S. 445; 166 E. R. 1197.

*Annotations:*—*Distd.* *The Leader* (1868), L. R. 2 A. & E. 314. *Refd.* *The Jeff Davis* (1867), L. R. 2 A. & E. 1.

**2244.** ———.]—In an action by plffs. as trustees, under a deed of assignment according to Bkpcy. Act, 1861 (c. 134), to recover a debt due from defts. to the assignor, it was alleged & admitted upon the record that a garnishee order for payment of the debt was served upon defts. before they had notice of the deed, & before the registration of it, & that they paid the debt to the judgment creditor in order to avoid execution, & because they could not otherwise avoid it:—*Held:* this payment was a good defence to the action, as being compulsory, & under the sanction of a ct. of competent authority.—*WOOD v. DUNN* (1866), L. R. 2 Q. B. 73; 7 B. & S. 94; 36 L. J. Q. B. 27; 15 L. T. 411; 15 W. R. 180, Ex. Ch.

*Annotations:*—*Follid.* *Turnbull v. Robertson* (1878), 47 L. J. Q. B. 294. *Consd.* *Martin v. Nadel*, [1906] 2 K. B. 26. *Refd.* *European Bank v. Fox* (1866), 15 L. T. 288; *Barnfather v. Barrow, Barrow, Page & Draper* (1877), 37 L. T. 231; *Cronmire v. Mac Colla* (1893), 9 T. L. R. 549. *Mentd.* *London Corpn. v. Cox* (1867), L. R. 2 H. L. 239; *Ponsford, Baker v. Union of London & Smith's Bank*, [1906] 2 Ch. 444; *Ranson v. Platt*, [1911] 2 K. B. 291.

**2245.** ———.]—Payment into ct. by a garnishee under a judge's order is a payment within C. L. P. Act, 1854 (c. 125), s. 65, & discharges the garnishee; & subsequent execution of a composition deed by the debtor will not prevent the creditor being entitled to the money so paid into ct. A. having signed judgment against B., a solr., obtained a garnishee order against C., who owed B. a bill of costs; C. obtained further time for taxing the bill on payment into ct. of £25. B. subsequently, & before the taxation was complete, executed a composition deed & gave notice to C. not to pay the amount of the bill to A. The bill when taxed was found to exceed £25. On an application by C. for the repayment to him out of ct. of the £25:—*Held:* the payment into ct. was within the above sect., & discharged C. as against B., & A. was entitled to the £25.—*CULVERHOUSE v. WICKENS* (1868), L. R. 3 C. P. 295; 37 L. J. C. P. 107; 17 L. T. 478; 16 W. R. 402.

*judge's order.*]—Payment into ct. by garnishee upon mere notice of the attachment without a judge's order directing him to do so is not a bar to an action brought against him by his creditor.—*TURNER v. JONES* (1857), 2 P. E. L. 461.—*CAN.*

**1.** ———. *After action brought.*—On Aug. 5, 1899, a creditor of pltf. issued a summons out of a division ct. claiming \$61 from pltf. & claiming to

attach moneys in the hands of deft., as garnishee to answer pltf.'s debt, & served it on both primary debtor & garnishee on the day of its issue. On Aug. 17, this action was brought in a county ct. to recover \$133.40. On Aug. 28, the garnishee (deft. in this action) paid \$57.50 into the division ct. On Sept. 6, judgment was given in the division ct. for the primary creditor against the primary debtor (pltf. in

**2246.** ———. *Order made without notice of lien of third party.*]—*THE LEADER*, No. 2236, *ante*.

**2247.** ———.]—A., having recovered judgment in a county ct. against B. for a sum of £18, the judgment debtor obtained judgment in an action in the superior ct. against C. for £44. A. thereupon on July 5 served a garnishee summons in the county ct. on C., attaching all debts due from C. to B. On July 7, B. issued execution against C. for the amount of his judgment debt & costs, & the sheriff, on the same day, seized goods of C. to satisfy the amount. C. thereupon, after offering to pay to the sheriff the amount due from him to B., deducting the amount of B.'s judgment debt to A. mentioned in the garnishee summons, of which he gave the sheriff written notice, paid the whole amount under protest. Upon the hearing of the garnishee summons the county ct. judge refused to make any order against C.:—*Held:* C. having been compelled by process of law to pay the debt, though after service of the garnishee summons, was discharged; & it was not his duty to have applied at chambers for an order to relieve him from the execution.—*TURNBULL v. ROBERTSON* (1878), 47 L. J. Q. B. 294; 38 L. T. 389; 42 J. P. 440; 26 W. R. 557.

*Annotations:*—*Refd.* *Cronmire v. Mac Colla* (1893), 9 T. L. R. 549; *Robson v. Smith*, [1895] 2 Ch. 118.

**2248.** ———.]—No payment but a payment made by compulsion of law can discharge a garnishee from his original liability to his creditor.—*LONDON CORPN. v. LONDON JOINT STOCK BANK* (1881), 6 App. Cas. 393; 50 L. J. Q. B. 594; 45 L. T. 81; 29 W. R. 870, H. L.; *affg.* *S. C. sub nom. LONDON JOINT STOCK BANK v. LONDON CORPN.* (1880), 5 C. P. D. 494, C. A. (1875), 1 C. P. D. 1.

*Annotations:*—*Refd.* *Robson v. Smith* (1895), 72 L. T. 559; *Martin v. Nadel*, [1906] 2 K. B. 26. *Mentd.* *St. Leonard's, Shoreditch, Grdns. v. Franklin* (1878), 47 L. J. Q. B. 727; *Re Price, Ex p. Sear* (1881), 17 Ch. D. 74; *Vickers v. Stevens & Conception Gold Mining Co.* (1881), 44 L. T. 679; *R. v. Tyler & International Commercial Co.*, [1891] 2 Q. B. 588.

**2249.** ———.]—*ROBSON v. SMITH*, No. 2049, *ante*.

**2250.** ———.]—*PRITCHETT v. ENGLISH & COLONIAL SYNDICATE*, No. 2225, *ante*.

**2251.** ———. *Debt owed to foreign corporation.*]—*SWISS BANK CORPN. v. BOEHMISCHE INDUSTRIAL BANK*, No. 2170, *ante*.

*Compare* No. 2169, *ante*.

— *Before service of order nisi.*]—*See* Subsect. 5, C., *ante*.

**2252.** ———. *Where debt conditional only.*]—*HOWELL v. METROPOLITAN DISTRICT RY. Co.*, No. 2086, *ante*.

**2253.** ———. *To creditor of bankrupt—No discharge.*]—Where a debtor commits an act of bkpcy., & judgment is subsequently obtained against him by a creditor who obtains a garnishee order nisi attaching a debt due to the judgment debtor, the garnishee order nisi does not justify the garnishee in forthwith paying the debt to the judgment creditor, & if he does so, the debt will still form part of the judgment-debtor's estate by virtue of the relation back of the title of the trustee in bkpcy. to the act of bkpcy. The ct. will in such a case order the garnishee, upon an applica-

this action) for \$64 & against the garnishee for \$57.50. On Oct. 5, pltf. delivered his statement of claim for the whole \$113.40:—*Held:* the service of the summons was no bar to this action; the defence that deft. was discharged as to \$57.50 by his payment into the division ct. was a defence which did not arise until the payment was made & judgment given in the division ct., & was consequently

by the trustee, to pay the amount of the attached debt to the trustee.—*Re WEBSTER, Ex p. OFFICIAL RECEIVER*, [1907] 1 K. B. 623; 76 L. J. K. B. 380; 96 L. T. 332; 23 T. L. R. 275; 51 Sol. Jo. 230; 14 Mans. 20.

## SUB-SECT. 9.—COSTS.

*See, now*, R. S. C., Ord. 45, r. 9.

**2254. Discretion of court.]**—*JOHNSON v. DIAMOND*, No. 2122, *ante*.

**2255. —.]**—Pltf. having obtained judgment & being unable to obtain payment of his debt, obtained under R. S. C., Ord. 42, r. 32, an order to have the debtor examined as to his means. The debtor on his examination admitted having a retiring pension & a balance at his bankers; pltf. then obtained a garnishee order against the bankers & by that means recovered part of his debt. He then applied for his costs of the examination proceedings & of the garnishee proceedings. The master refused to make any order on the ground as was stated, by affidavit, that the practice in the Q. B. Div. was to treat such proceedings as a luxury the costs of which pltf. could not throw on debt. Pltf. appealed; the judge in chambers dismissed the appeal, as was stated on the same ground, & refused leave to appeal; pltf. applied to the Ct. of Appeal who gave leave & he then appealed against the order in chambers: *Held*: as by the express terms of the Jud. Act, 1873 (c. 66), s. 49, no appeal will lie from any order as to costs which are left to the discretion of the ct. except by leave of the judge making such order & the costs in question were by the terms of R. S. C., Ord. 43, r. 34, & Ord. 45, r. 9, in the discretion of the judge the appeal must be dismissed, though the ct. stated their inability to understand the practice alleged to exist in the Q. B. Div. that examination of debtor as to his means & proceedings to attach debts due to him were luxuries the costs of which debtor ought not to be called on to pay.—*ADLINGTON v. CONYNTHAM*, [1898] 2 Q. B. 492; 67 L. J. Q. B. 926; 79 L. T. 232, C. A.

**2256. Writ issued without order as to costs—Successful party entitled.]**—*JOHNSON v. DIAMOND*, No. 2122, *ante*.

**2257. Judgment creditor refusing to proceed—Garnishee entitled to costs.]**—*WINTLE v. WILLIAMS*, No. 2210, *ante*.

**2258. Costs of abortive proceedings.]**—Where, under an order directing an account of what was due to a party in respect of costs of proceedings taken by him to enforce a judgment in the Exch. Div., the taxing master to whom the bill of costs was referred disallowed the costs of certain abortive garnishee summonses. On a summons to review the taxation:—*Held*: (1) the taxing master was not precluded by the form of order from disallowing any costs that he thought proper, & that, under

R. S. C., 1875, Ord. 6, r. 26, he was bound to do so; (2) the costs in question were properly disallowed.—*SIMMONS v. STORER* (1880), 14 Ch. D. 154; 49 L. J. Ch. 121; 42 L. T. 291; 28 W. R. 408, C. A.

**2259. No appeal except by leave of judge.]**—*ADLINGTON v. CONYNTHAM*, No. 2255, *ante*.

**2260. Set off of costs—Against judgment debt—Judgments between same parties—In different actions.]**—In an action in the High Ct. against the treasurer, secretary, & other members of a club upon their joint & several agreements to repay money advanced to the club, pltf. signed judgment for the debt & costs amounting to £84 6s. against the treasurer in default of appearance, & afterwards obtained judgment with costs against the secretary in a county ct. to which the action was remitted. There was a debt of £48 due to the treasurer from the club, which had a sum of money exceeding that amount deposited in a bank in the names of the secretary, the treasurer, & another person. Pltf. obtained a garnishee order at chambers for the payment of £48 of this sum to him, but on the appeal of the secretary the Ct. of Appeal discharged the garnishee order so far as it purported to attach the fund, & directed pltf. to pay the secretary's costs of the garnishee proceedings. Pltf. claimed to set off a proportionate amount of his judgment against the secretary in the county ct. against the costs of the garnishee proceedings due from him to the secretary:—*Held*: he was not entitled to do so under R. S. C., Ord. 45, rr. 14 & 27 (21), since those rules only applied to a set off as between the same parties in the same action; nor was he entitled to do so under the equitable jurisdiction of the ct. since that jurisdiction was never exercised where the judgments, although between the same parties, were between them in different capacities.—*DAVID v. REES*, [1904] 2 K. B. 435; 73 L. J. K. B. 729; 91 L. T. 244; 52 W. R. 579; 20 T. L. R. 577; 48 Sol. Jo. 603, C. A. *Annotations*:—*Refd.* *Bake v. French*, [1907] 1 Ch. 428; *Reid v. Copper*, [1915] 2 K. B. 147; *Puddephatt v. Leith* (No. 2), [1916] 2 Ch. 168.

**2261. —. —. —. In different capacities.]**—*DAVID v. REES*, No. 2260, *ante*.

## SECT. 2. CHARGING ORDERS ON STOCKS, SHARES, ETC.

## SUB-SECT. 1.—IN GENERAL.

**Charging orders on partner's interest in partnership property.]**—*See* Partnership Act, 1890 (c. 39), s. 23; R. S. C., Ord. 46, rr. 1A, 1B.

**2262. Nature of process.]**—No order charging stock under Judgments Act, 1838 (c. 110), will be made absolute where the judgment debtor has died before the order *nisi* has been obtained.

An order *nisi*, charging certain stock standing in the name of a judgment debtor, had been made absolute at chambers, although it was in evidence

a defence arising after action brought; & such payment & judgment could not have relation back to the time of the service of the summons.—*PICKA v. TINS* (1900), 19 P. R. 109.—*CAN.*

*filing of dispute note.]*

as to his liability, may apply Attachment of Debts Act, s. 15, for of the garnishee order,

to an issue arising out of garnishment proceedings is out of the jurisdiction, there is power under Rule 375 to order security for costs.—*CANADIAN BANK OF COMMERCE v. MIDDLETON* (1887), 12 P. R. 121.—*CAN.*

**k. —.]**—In an issue between a judgment creditor & a garnishee as to the liability of the latter to the judgment debtor:—*Held*: there was power to order security for costs.—*EDWARDS v. EDWARDS* (1888), 12 P. R. 583.—*CAN.*

**l. In small debt cases.]**—As between party & party in garnishee proceedings in small debt suits, the only costs taxable are those set out

in the Small Debt Tariff.—*GREAT WEST LIFE ASSURANCE CO. v. WHITCHELOW* (1912), 1 W. W. R. 401.—*CAN.*

**m. —.]**—Garnishee proceedings in a small debt action must be considered as proceedings in the original action & the costs thereof taxed on the small debt scale.—*CHAMBERS v. CORBEAU, IMPERIAL BANK OF CANADA, GARNISHEE*, [1920] 1 W. W. R. 715.—*CAN.*

## PART V. SECT. 2, SUB-SECT. 1.

**2262 i. Nature of process.]**—A charging order absolute is a ct. order which may be made by a judge sitting in

## PART V. SECT. 1, SUB-SECT. 9.

**for costs—Party out of**  
Where one of the parties



2.—*Charging orders on stocks, shares, &c.*:  
*Sub-sec's. 1, 2, 3 & 4.]*

that at the time the order *nisi* had been obtained the judgment debtor was dead. Deft.'s extrix. now appealed against the order:—*Held*: the order must be rescinded, as a charging order, under above Act, was merely in lieu of the old remedy of arrest by mesne process, & was only co-extensive with such remedy, & therefore could not be put in force where the judgment debtor had died before the order *nisi* had been obtained.—*FINNEY v. HINDE* (1879), 4 Q. B. D. 102; 48 L. J. Q. B. 275; 40 L. T. 193; 27 W. R. 413, D. C.

*Annotations*:—*Expld.* *Stewart v. Rhodes*, [1900] 1 Ch. 386.  
*Refd.* *Re Hutchinson, Ex p. Plowden* (1885), 54 L. T. 302.

SUB-SECT. 2.—BY WHOM MADE.

**2263. Judge in chambers.]**—*BROWN v. BAMFORD*, No. 2326, *post*.

**2264. Probate Division.]**—Matrimonial Causes Act, 1857 (c. 85), s. 52, does not transfer to the ct. for divorce the powers of the Ct. of Ch., which are ancillary to the enforcement of its decrees, but only those powers which are necessary for the direct enforcement of them, such as writs of execution & process in contempt. Hence the power given to the Ct. of Ch. by Judgments Act, 1838 (c. 110), ss. 14, 18, on the application of a judgment creditor to make a charging order on stock standing in the name of, or beneficially belonging to, the judgment debtor, cannot be exercised by the judge of the ct. for divorce.—*CLARKE v. CLARKE* (1873), L. R. 3 P. & D. 57; 42 L. J. P. & M. 72; 28 L. T. 911; 21 W. R. 776.

*Annotations*:—*Refd.* *Heath v. Heath* (1874), 22 W. R. 266; *Oliver v. Lowther* (1880), 42 L. T. 47.

**2265. Judge of King's Bench Division—Cash standing to credit of debtor in Chancery Division.]**—*BRERETON v. EDWARDS*, No. 2314, *post*.

**2266. Registrar in bankruptcy.]**—A debtor, against whom a receiving order had been made, paid money into ct. to satisfy his debts in full. The receiving order was then rescinded by an order which directed the official receiver after paying the debts & deducting his costs, charges & expenses to pay the balance in his hands to the debtor. A subsequent unsatisfied judgment creditor applied to the registrar in bkpcy. for a charging order upon the balance of the fund in the hands of the official receiver:—*Held*: the registrar had jurisdiction to make the order.—*Re PRIOR, Ex p. PRIOR*, [1921] 3 K. B. 333; 90 L. J. K. B. 1222, C. A.; *subsequent proceedings, sub nom. Re PRIOR, Ex p. TRUSTEE*, [1922] B. & C. R. 1, C. A.

SUB-SECT. 3.—IN RESPECT OF WHAT JUDGMENTS OR ORDERS.

**2267. Must be for ascertained sum—Sum to be found due on taking an account.]**—A decree for

chambers.—*BOYLAN v. BLOXSOME* (1892), 11 N. Z. L. R. 49.—N. Z.

n. — *How obtained.]*—A charging order under 3 & 4 Vict. c. 105, s. 23, can only be obtained by a petition.—*HODGENS v. HODGENS* (1877), 11 L. R. Eq. 439.—IR.

o. — *Equity to set-off—Existing between garnishee & judgment debtor.*—A charging order is subject to any equity to a set-off which may exist between the garnishee & the judgment debtor, although the amount the garnishee is entitled to set-off is not ascertained at the date of the charging order being made absolute.—*NATHAN v. ELL* (1886), 4 N. Z. L. R. 316 (S. C.).

p. — *Stakes upon a horse race.]*—A charging order absolute cannot be made against stakes upon a horse-race in the hands of a racing club, because no action can be brought or maintained for them.—*PATTERSON v. WOLLAND* (1915), 34 N. Z. L. R. 746.—N. Z.

PART V. SECT. 2, SUB-SECT. 2.

q. *District court judge.]*—A district ct. judge has jurisdiction to make a charging order.—*BIGELOW & KINSMAN v. WESTMAN*, [1921] 3 W. W. R. 148.—CAN.

r. *Money in hands of receiver—Attachment of.]*—An attachment of money

payment of what shall be found due to pltf. upon an account directed by the decree does not entitle him to a charging order under Judgments Act, 1838 (c. 110), s. 18.—*CHADWICK v. HOLT* (1856), 8 De G. M. & G. 584; 26 L. J. Ch. 76; 27 L. T. O. S. 286; 2 Jur. N. S. 918; 4 W. R. 791; 44 E. R. 515, L. JJ.

*Annotation*:—*Consd.* *Clarke v. Clarke* (1873), L. R. 3 P. & D. 57.

**2268. ———.]**—A decree was made in the suit of *W. v. T.*, declaring pltf. entitled to one-fifth share of the proceeds of the sale of certain personal property which had been received by defts., & directing an account of what was due to pltf., & ordering defts. to pay to them what should be found due, together with the costs of the suit. Part of the proceeds of the sale had been previously paid into ct. in another suit of *H. v. T.* against the same defts., & by a decree in that suit had been ordered to be paid to defts. As soon as the decree in *W. v. T.* had been pronounced, & before it was drawn up, pltf. obtained an order *ex parte* for a charging order *nisi* against defts. charging the fund in ct. in *H. v. T.*, & for a stop order in the meantime. On defts. showing cause against the order:—*Held*: (1) the specific sum due to pltf. not being ascertained, nor the costs taxed, the charging order was irregular, & must be discharged (2) the ct. could not grant a stop order until pltf., by some independent proceedings, had established their right to attach the fund in ct. in the suit of *H. v. T.*—*WIDGERY v. TEPPER, HALL v. TEPPER* (1877), 6 Ch. D. 364; 37 L. T. 297; 25 W. R. 872, C. A.

**2269. ——— Costs prior to taxation.]**—Where pltf.'s bill had been dismissed with costs, an order *nisi* charging railway shares belonging to pltf. with the amount of deft.'s costs when taxed was made before taxation upon the application of deft.—*BURNS v. IRVING* (1876), 3 Ch. D. 291; 46 L. J. Ch. 423; 34 L. T. 752; 25 W. R. 66; 3 Char. Pr. Cas. 385.

**2270. ———.]**—*WIDGERY v. TEPPER, HALL v. TEPPER*, No. 2268, *ante*.

**2271. ——— Sum payable at future date.]**—Upon judgment in an action declaring that deft. is liable to pay to pltf. a certain sum & decreeing payment to be made on or before that day three months pltf. is at once entitled under Judgments Act, 1838 (c. 110), s. 14, to obtain a charging order upon stock & shares standing in the name of deft.—*BAGNALL v. CARLTON* (1877), 6 Ch. D. 130; 47 L. J. Ch. 51; 36 L. T. 730; 26 W. R. 71.

**2272. ——— Instalment in arrear.]**—*WOODHAM SMITH v. EDWARDS*, No. 263, *ante*.

**2273. Decree directing payment into court.]**—A decree directing payment to the credit of the cause, does not constitute pltf. a judgment creditor of deft. under Judgments Act, 1838 (c. 110).—*WARD v. SHAKESHAFT* (1860), 1 Drew & Sm. 269; 2 L. T. 203; 8 W. R. 335; 62 E. R. 381.

*Annotation*:—*Refd.* *Taylor v. Roe*, [1894] 1 Ch. 413.

in the hands of the receiver made without previous permission or sanction of the ct. for such attachment is improper & irregular, & the ct. will refuse to recognise it.—*MAHOMMED ZOHURUDDEEN v. MAHOMMED NOOROOD-DEEN* (1893), 1 L. R. 21 Cal. 85.—IND.

PART V. SECT. 2, SUB-SECT. 3.

s. *Judgment obtained by wife dum sola.]*—To obtain a charging order it is not necessary that the judgment should be revived. Therefore the ct. granted the order on the petition of husband & wife on a judgment obtained by the wife *dum sola* without its having been revived.—*IRWIN v. NESBIT* (1848), 13 L. R. 125.—IR.

## SUB-SECT. 4.—IN WHAT CASES ORDERS MAY BE MADE.

**2274. Municipal corporation—Funds in court proceeds of sale of advowson.]**—By a decree, made on the hearing of an information against a corpn., debts. were ordered to pay the relator his costs of such information. An advowson belonging to the corpn. had been sold, under the powers of Municipal Corporation Act, 1835 (c. 76), & the amount of the proceeds stood to the credit of the corpn. at the Bank of England :—*Held* : the relator was entitled to have a charging order for the amount of these costs upon this fund.—*A.-G. v. THETFORD CORPN.* (1860), 2 L. T. 370 ; 24 J. P. 611 ; 8 W. R. 467.

**2275. Married woman—Property settled without power of anticipation.]**—Married Women's Property Act, 1870 (c. 93), s. 12, extends to property settled to the separate use of a married woman without power of anticipation. After the passing of the Act, & on the same day on which a marriage took place, but subsequently thereto, judgment was entered up against the wife for a debt incurred previously to the marriage. The judgment creditors subsequently obtained a charging order on the wife's interest in a fund in ct., to the income of which the wife was entitled, for her separate use, without power to anticipation :—*Held* : the charging order constituted a valid incumbrance on the fund.—*SANGER v. SANGER* (1871), L. R. 11 Eq. 470 ; 40 L. J. Ch. 372 ; 24 L. T. 649 ; 19 W. R. 792. *Annotations* :—*Mentd.* *Re Hedgely, Small v. Hedgely* (1886), 34 Ch. D. 379 ; *Axford v. Reid* (1889), 22 Q. B. D. 548.

**2276. ———.]**—A married woman having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mtge. of such property, concealing the restraint upon anticipation. The mtgee. obtained a judgment against her for the amount lent, & a charging order to charge her next accruing dividend :—*Held* : such charging order must be discharged, for in no case & by no device could the restraint upon anticipation be evaded.—*STANLEY v. STANLEY* (1878), 7 Ch. D. 589 ; 47 L. J. Ch. 256 ; 37 L. T. 777 ; 26 W. R. 310.

*Annotations* :—*Consd.* *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559. *Refd.* *Re Glanvill, Ellis v. Johnson* (1886), 31 Ch. D. 532. *Mentd.* *Cahill v. Cahill* (1883), 8 App. Cas. 420 ; *Hyde v. Hyde* (1888), 13 P. D. 166 ; *Bateman v. Faber*, [1898] 1 Ch. 144.

**2277. ———.]**—Where, before Married Women's Property Act, 1882 (c. 75), came into operation, a fund was settled on a married woman, & the settlement contained the usual clause against anticipation :—*Held* : sect. 19 of the Act, not being retrospective, did not allow a judgment creditor to obtain a charging order on this fund, even although the debts were contracted by the married woman before the settlement was made & were for her maintenance, & were secured to the judgment creditor by a charge made by her on the property

so settled.—*SMITH v. WHITLOCK* (1886), 55 L. J. Q. B. 286 ; 34 W. R. 414 ; 2 T. L. R. 411, D. C.

*See, generally, HUSBAND & WIFE.*

**2278. Infant—Debt for which infant not legally liable.]**—A charging order under Judgments Act, 1838 (c. 110), ss. 14, 15, has no greater effect than an instrument of charge executed by the judgment debtor would have had. Accordingly, where D., after the passing of Infants Relief Act, 1874 (c. 62), obtained judgment by default against O. for a debt which was in fact for money lent by him to O. during O.'s infancy, & D. subsequently obtained a charging order upon a fund in ct. belonging to O. :—*Held* : inasmuch as the debt on which the judgment & charging order were founded was void, the charging order was inoperative.—*Re ONSLOW'S TRUSTS* (1875), L. R. 20 Eq. 677 ; 44 L. J. Ch. 628. *Annotation* :—*Expld.* *Re Leavesley*, [1891] 2 Ch. 1.

**2279. Lunatic—Right of creditor to order on specified part of fund.]**—On an application at chambers, under Judgments Acts, 1838 (c. 110), & 1840 (c. 82), by the judgment creditor of a debtor found lunatic by inquisition, for a charging order on funds standing in the books of the Paymaster-General of Ch. Div. to the credit of the debtor, who was described in such books as " a person of unsound mind," the judge ordered that " so much of debt.'s interest in the fund so standing as aforesaid should stand charged with the payment of the . . . amount due on the judgment as the Lords Justices sitting in lunacy might deem applicable to payment of the judgment debt " :—*Held* : the Acts gave the judge no power to make an order providing that the amount to be charged should be determined by the Lords Justices, & the creditor was entitled to an unconditional order on a specified amount of the fund.—*HORNE v. POUNTAIN* (1889), 23 Q. B. D. 264 ; 58 L. J. Q. B. 413 ; 61 L. T. 510 ; 54 J. P. 37 ; 38 W. R. 240, D. C.

*Annotations* :—*Consd.* *Re Leavesley*, [1891] 2 Ch. 1 ; *Re Plenderleith*, [1893] 3 Ch. 332. *Mentd.* *Re Farnham* (No. 1) (1896), 3 Mans. 109.

**2280. ——— Debts incurred before lunacy.]**—The effect of a charging order made by a judge in favour of a judgment creditor under Judgments Act, 1838 (c. 110), does not depend upon the capacity of the judgment debtor to give a valid charge, but upon the validity of the judgment ; & the sect. 14 of that Act, & the proviso in Judgments Act, 1840 (c. 82), s. 1, must be read as meaning that the judgment creditor is to have the same remedies, & the order of the judge the same effect, as if the judgment debtor had made a valid & effective charge in favour of the judgment creditor.

Creditors of a lunatic, whose debts were incurred before the lunacy, after the lunacy obtained judgments against him, & also orders charging a fund in ct. in the lunacy with the amounts of their respective judgments, which orders were not in

## PART V. SECT. 2, SUB-SECT. 4.

**t. General rule.]**—A charging order should not be granted except in respect of an ascertained sum &, therefore, should not include an unspecified amount of costs.—*MILLER-MORSE HARDWARE CO., LTD. v. SMART*, [1917] 3 W. W. R. 1113 ; 10 Sask. L. R. 409 ; 38 D. L. R. 171.—*CAN.*

**a. ——— Stock—Where appointment of receiver will not reach.]**—Stock standing in the name of a judgment debtor cannot be reached by the appointment of a receiver, but a receiver may be appointed of the dividends. To reach the stock itself an order charging it may be granted upon notice of motion.—*LEHANE v. PORTEUS*, [1917] 2 W. W. R. 560.—*CAN.*

**b. ——— Where existing writ issued**

**& leviable.]**—*DONOHUE v. MULLARKEY* (1886), 18 L. R. Ir. 425.—*IR.*

**2275 i. Married woman—Property settled without power of anticipation.]**—Property settled by an ante-nuptial settlement to the separate use of a woman married before the coming into operation of Married Women's Property Act, with restraint on anticipation, cannot be made the subject of a charging order in aid of a judgment against such married woman after the coming into operation of the Act.—*HUTCHINGS v. CUNNINGHAM* (1871), 2 V. R. (Law) 236.—*AUS.*

**2275 ii. ———.]**—Where a married woman was entitled during the joint lives of herself & her husband to the interest of certain stock to her sole & separate use with a non-anticipation clause & there were certain limitations

over as to the principal in favour of herself & her husband, the ct. upon petition by a creditor who had obtained a judgment against the husband & wife made an order charging the stock without prejudice to her right of receiving the interest during her coverture.—*CARTER v. MAHON* (1841), 11 & K. 342.—*IR.*

**c. Shares in mining company—Held by debtor on behalf of another.]**—Shares in a mining co. & registered on the co.'s books in the name of a judgment debtor are not the subject of a charging order where the shares are held by the judgment debtor on behalf of another person.—*PRYOR v. POWELL* (1898), 23 V. L. R. 512.—*AUS.*

**d. Election—Deposit by candidate.]**—The deposit of \$200 made by M., a candidate at an election, was



**Sect. 2.—Charging orders on stocks, shares, etc.:**  
**Sub-sects. 4 & 5, A. & B. (a) & (b).]**

terms enforceable until the death of the lunatic or further order. The lunatic died insolvent, & upon an application by his administratrix for payment out of the fund:—*Held*: the charging orders were valid & effective, & the judgment creditors were entitled to be paid the several amounts due thereon respectively out of the fund before transfer of any part thereof to the administratrix.—*Re LEAVESLEY*, [1891] 2 Ch. 1; 60 L. J. Ch. 385; 64 L. T. 269; 39 W. R. 276, C. A.  
*Annotation*:—*Reid. Re Plenderleith*, [1893] 3 Ch. 332.

**2281. — Prior right of lunatic to be maintained.]**—Creditors of a lunatic not so found by inquisition obtained charging orders on a fund in ct. The master approved a scheme for the maintenance of the lunatic which would gradually exhaust the capital of the fund:—*Held*: a proper allowance should be made for the maintenance of a lunatic, though the effect be to destroy the creditors' security; & the creditors were not entitled to impound so much of the capital as was sufficient to satisfy their claims.—*Re PLENDERLEITH*, [1893] 3 Ch. 332; 62 L. J. Ch. 993; 69 L. T. 325; 58 J. P. 161; 42 W. R. 224; 37 Sol. Jo. 699; 2 R. 625, C. A.

*Annotations*:—*Consd. Re Clarke*, [1898] 1 Ch. 336. *Expld. Re Brown, Llewellyn v. Brown*, [1900] 1 Ch. 489. *Reid. Re Winkle* (1894), 63 L. J. Ch. 541. *Mentd. Re Farnham* (1896), 74 L. T. 214; *Davies v. Thomas* (1900), 83 L. T. 11.

**2282. — — —.]**—The rule of administration in lunacy that the obligations of a lunatic are postponed to the needs of the lunatic does not affect funds in the High Ct.

A judgment creditor of a lunatic obtained a charging order on funds of the lunatic in ct.:—*Held*: the balance only of the funds, after satisfying the charge, should be transferred to lunacy.—*Re BROWN, LLEWELLYN v. BROWN*, [1900] 1 Ch. 489; 69 L. J. Ch. 234; 82 L. T. 83; 61 J. P. 327; 48 W. R. 461.

*See, generally, LUNATICS.*

**2283. Defaulting member of Stock Exchange—Funds assigned to official assignee.]**—The rules of the Stock Exchange operate to effect an assignment of all the assets of a member of the Stock Exchange declared a defaulter to the official assignee of the Stock Exchange; & that assignment, unless invalidated in bkpcy. proceedings against the defaulter, is valid as against persons who are not, as well as those who are, members of the Stock Exchange.—*LOMAS v. GRAVES & Co.*, [1904] 2 K. B. 557; 73 L. J. K. B. 803; 91 L. T. 616; 20 T. L. R. 657, C. A.

*Annotation*:—*Reid. Re Halstead, Ex p. Richardson*, [1917] 1 K. B. 695.

*See, generally, STOCK EXCHANGE.*

**Executor or administrator.]—See EXECUTORS.**

**SUB-SECT. 5.—WHAT STOCKS, ETC., MAY BE CHARGED.**

**A. Government Stocks, Funds, etc.**

**2284. Government stock.]**—Cts. of equity will carry into execution their orders & decrees for costs

by charging the Govt. stock of the debtor under the provisions of Judgments Act, 1838 (c. 110); & for that purpose, it is not necessary to give further proof of application for payment than is contained in the notice of the intended application to make the order for the charge absolute.—*BLAKE v. WHITE* (1839), 3 Y. & C. Ex. 434; 3 Jur. 749; 160 E. R. 772.

**2285. East India annuity.]**—The East India Co. granted to deft. a pension in consideration of his distressed state & the services of his father:—*Held*: this could not be charged with a judgment debt by a judge's order under Judgments Act, 1838 (c. 110), ss. 14, 15.—*MORRIS v. MANESTY* (1845), 7 Q. B. 674; 14 L. J. Q. B. 285; 5 L. T. O. S. 240; 9 Jur. 1034; 115 E. R. 643.

*Annotation*:—*Reid. Witham v. Lynch* (1847), 1 Exch. 391.

**2286. Annuity payable out of suitor's fund.]**—A judge at chambers having made an order under Judgments Act, 1838 (c. 110), s. 14, & Judgments Act, 1840 (c. 82), s. 1, charging an annuity payable out of the "suitor's fund," by order of the Lord Chancellor, in pursuance of 46 Geo. 3, c. 128, the ct. considering it doubtful whether or no the judge's order was valid, refused to set it aside, as, by so doing they would deprive the party of the right of appeal.—*WITHAM v. LYNCH* (1847), 1 Exch. 391; 17 L. J. Ex. 13; 10 L. T. O. S. 168; 11 J. P. Jo. 821; 151 E. R. 166.

*Annotations*:—*Consd. Robinson v. Burbidge* (1850), 9 C. B. 289. *Reid. Graham v. Connell* (1850), 1 L. M. & P. 438.

**2287. Government annuity.]**—A judgment debtor was entitled, as sole exor. & legatee under the will of D., to the arrears of a Govt. annuity granted for the life of D. He was also entitled as such exor. & legatee to a Govt. annuity in the name of D., but granted for his own life:—*Held*: neither the arrears nor the annuity were chargeable under Judgments Act, 1838 (c. 110), s. 14.—*TAYLOR v. TURNBULL* (1859), 4 H. & N. 495; 33 L. T. O. S. 152; 157 E. R. 933.

**2288. Fund in court.]**—A ct. of equity has no jurisdiction under Judgments Act, 1838 (c. 110), s. 14, to order moneys invested in the name of the Accountant-General to stand charged with a judgment debt recovered at law against the part entitled to such funds.—*MILES v. PRESLAND* (1840), 2 Beav. 300; 48 E. R. 1196; *sub nom. Re COE*, *MILES v. PRESLAND*, 4 My. & Cr. 431, L. C.

*Annotation*:—*Consd. Clarke v. Clarke* (1873), L. R. 3 P. & D. 57.

**2289. — Paid under sequestration order.]**—Under a sequestration against A. for contempt sums had been paid into ct. & invested. A. had been ordered to pay certain costs to pltf., which, as A. was out of jurisdiction, they had been unable to obtain. Upon a petition by pltf., the ct. charged the sum standing to the sequestration account, with the amount of these costs.—*WESTBY v. WESTBY* (1852), 5 De G. & Sm. 516; 19 L. T. O. S. 243; 16 Jur. 945; 64 E. R. 1223.

*Annotation*:—*Reid. Clarke v. Clarke* (1873), L. R. 3 P. & D. 57.

**2290. — —.]**—*BRERETON v. EDWARDS*, No. 2314, *post*.

**2291. — —.]**—*TOWNEND v. JONES* (1889), 5 T. L. R. 609, D. C.

paid into ct. by the clerk of the Executive Council under a garnishing order issued in a suit against M. This order was afterwards set aside. Afterwards H., who had a judgment against M., applied for a charging order:—*Held*: the money could not be charged.—*HOWE v. MARTIN* (1892), 8 Man. L. R. 533.—**CAN.**

**e. Money lodged in court.—In the name of a master.]**—Pltf. has such an

interest in money lodged in the name of the master of the ct. to the credit of the cause that the money so lodged may be made the subject of a charging order.—*ADAMS v. GILLEN* (1875), L. R. 9 C. L. 148.—**IR.**

**f. — —.]**—Where deft. in an action in the K. B. Div. pays money into ct. denying liability, a judgment creditor of pltf.'s may obtain an order charging pltf.'s interest, if any, in

such money.—*HOGG (JAMES) SONS & Co., LTD. v. McCLUGHIN* (1920), 54 L. L. T. 192.—**IR.**

**PART V. SECT. 2, SUB-SECT. 5.—A. g. Government stock — Judgment de bonis testatoris—Against debtor as personal representative.]**—The ct. refused to attach, at the instance of a judgment creditor, on a judgment *de bonis testatoris* against an extrix.,

**2292. — Proceeds of goods seized in prize.]—**In action (a) goods belonging to claimants were condemned as lawful prize. In action (b) goods belonging to the same claimants were ordered to be released subject to the payment by claimants of the costs of the proceedings. In action (a) claimants had given security for the Crown's costs, but the amount of the security was insufficient to cover such costs, & the Crown therefore applied for a charging order for the balance against the proceeds of the goods ordered to be released in action (b):—*Held*: goods ordered to be released in prize are not subject to execution at the suit of a creditor under municipal law; & no charging order should be made against the proceeds in action (b) for the balance of the Crown's costs in action (a).—*THE ORANJE NASSAU*, [1921] P. 190; 90 L. J. P. 257; 37 T. L. R. 493.

### B. Public Companies.

#### (a) In General.

**2293. What is a public company—Banking company.]—**Deft. held shares in U. Bank, & judgment having been obtained in an action against him, a judge at chambers made an order, under Judgments Act, 1838 (c. 110), s. 14, charging such shares with the judgment debt. On application to set aside such order, it appeared that the bank consisted of a great number of shareholders, & was carried on pursuant to the terms of a deed of settlement, by which it was provided that the shares should not be transferred except by the consent of the directors, & also that if any order or decree was made against any proprietor by which his shares became charged, they were to be forfeited to the co. The co. was not registered under 7 & 8 Vict. c. 110, but was entitled to sue & be sued by a public officer under 7 & 8 Vict. c. 113, s. 47, & County Bankers Act, 1826 (c. 46):—*Held*: it being doubtful whether the co. was a public co. or not, the order ought not to be set aside.—*GRAHAM v. CONNELL* (1850), 1 L. M. & P. 438; 19 L. J. Ex. 361; 15 L. T. O. S. 282.

*Annotations*:—*Apld.* *Nicholls v. Rosewarne* (1859), 6 C. B. N. S. 480. *Consd.* *Ex p. Holden* (1863), 13 C. B. N. S. 641.

**2294. — — —.]—**A banking co-partnership which made returns to the Stamp Office pursuant to County Bankers Act, 1826 (c. 46):—*Held*: to be a public co. not incorporated within Judgments Act, 1838 (c. 110), s. 14.—*MACINTYRE v. CONNELL* (1851), 1 Sim. N. S. 225; 20 L. J. Ch. 284; 17 L. T. O. S. 197; 18 L. T. O. S. 24; 15 Jur. 529; 61 E. R. 87.

*Annotations*:—*Consd.* *Nicholls v. Rosewarne* (1859), 6 C. B. N. S. 480. *Refd.* *Re Lysaght*, *Lysaght v. Lysaght*, [1898] 1 Ch. 115; *Re White*, *Theobald v. White*, [1913] 1 Ch. 231.

**2295. — Mining company on cost-book principle.]—***NICHOLLS v. ROSEWARNE*, No. 2300, *post*.

**2296. What are funds of a public company—Not money paid for land.]—***ROBINSON v. PEACE* (1838), 7 Dowl. 93; 2 Jur. 896.

*Annotations*:—*Refd.* *France v. Campbell*, *Winter v. Campbell* (1841), 9 Dowl. 914; *Wood v. Wood* (1843), 4 Q. B. 397; *Watts v. Jefferyes* (1851), 3 Mac. & G. 422; *Brereton v. Edwards* (1888), 21 Q. B. D. 488.

funds lodged by her in that capacity in the bank of the judgment creditor. A charging order will not be made against Govt. stock, standing in the name of a judgment debtor, upon a judgment *de bonis testatoris* obtained against debtor as administratrix.—*H. v. DAVENPORT* (1872), 21 W. R. 3.—*IR.*

### PART V. SECT. 2, SUB-SECT. 5.—B. (a).

**h. What is a public company—**

*Whether syndicate for working mine.]—*Syndicate for working a mine held a partnership & not a public company whose shares could be charged by a charging order.—*SCHACFER v. R* (1899), 25 V. L. R. 254.—*AUS.*

**k. Shares in public company—Where equitably mortgaged.]—**Shares in a public co., standing in the name of a judgment debtor, will be charged with the payment of the judgment debt, notwithstanding the existence

**2297. What are “stocks & shares”—Not debentures.]—**Debentures of a co. are not “stock or shares” of, or in a co. within R. S. O., Ord. 46, r. 1, or Judgments Act, 1838 (c. 110), s. 14, & therefore they cannot be made the subject of a charging order under that rule & sect.—*SELLAR v. BRIGHT (CHARLES) & CO., LTD.*, [1904] 2 K. B. 146; 73 L. J. K. B. 613; 91 L. T. 9; 52 W. R. 563; 20 T. L. R. 586; 48 Sol. Jo. 571, C. A.

(b) “*Standing in his own Name in his own Right.*”

*See* Judgments Act, 1838 (c. 110), s. 14.

**2298. Meaning of—Distinguished from cases of director's qualification shares.]—***Seem*: the words “in his own right” have not the same meaning for the purpose of a charging order under Judgments Act, 1838 (c. 110), s. 14, as they have for the purpose of a qualification clause in arts. of assocn. In the former case beneficial interest is required.—*SUTTON v. ENGLISH & COLONIAL PRODUCE CO.*, [1902] 2 Ch. 502; 71 L. J. Ch. 685; 87 L. T. 438; 50 W. R. 571; 18 T. L. R. 647; 10 Mans. 101.

*Annotation*:—*Refd.* *Boschoek Proprietary Co. v. Fuke*, [1906] 1 Ch.

**2299. Shares registered in name of debtor—Certificate deposited as security.]—**Deft., a registered owner of shares in a joint-stock co., deposited the certificate with E. as a security for money advanced. Deft. afterwards borrowed a further sum from an insurance office, & executed to C. one of his sureties on that occasion, with the consent of E. who was the other surety, a transfer of the shares, accompanied by a declaration of the terms of the transfer, & delivered both instruments to C. The money not having been paid to the insurance office, they claimed it from E. & C. when C. requested the insurance office to transfer the shares into his name, which they refused to do, on the ground that they had been previously served with a judge's order *nisi* to charge the shares:—*Held*: the shares were properly charged as shares standing in deft.'s name “in his own right” within Judgments Act, 1838 (c. 110), s. 14.—*FULLER v. EARLE* (1852), 7 Exch. 796; 21 L. J. Ex. 314; 155 E. R. 1172.

*Annotations*:—*Consd.* *Nicholls v. Rosewarne* (1859), 28 L. J. C. P. 273; *Gill v. Continental Gas Union Co.* (1872), 41 L. J. Ex. 176.

**2300. — — — Though sold & transfer accepted by vendee.]—**(1) *Qu.*: whether a mining co. on the cost-book principle is a “public co.” within Judgments Act, 1838 (c. 110), s. 14, so as to make shares therein liable to be charged with a judgment debt. An order under the statute having been made by a judge at chambers, the ct. confirmed it, on the ground that by setting it aside they would preclude the judgment creditor from taking the opinion of a ct. of appeal.

(2) *Qu.*: whether one who has sold his shares in such a co., & whose vendee has accepted the transfer, but has not caused it to be registered, is a person having shares “standing in his name in his own right” within the statute.—*NICHOLLS v. ROSEWARNE* (1859), 6 C. B. N. S. 480; 28

of an equitable mtge. affecting same.—*DUNSTER v. GLENGALL (EARL)* (1851), 4 Ir. Jur. 20.—*IR.*

### PART V. SECT. 2, SUB-SECT. 5.—B. (b).

1. 1 & 2 Vict. c. 110.—*Where not applicable.]—*Above Act if in force in this Province, authorises the issuing of a charging order against stocks standing in the name of debtor “in his own right or in the name of any person in trust for him,” but does not apply



*Sect. 2.—Charging orders on stocks, shares, &c.*  
*sect. 5, B. (b) & (c); sub-sect. 6, A.]*

L. J. C. P. 273; 5 Jur. N. S. 1266; 7 W. R. 612; 141 E. R. 544.

*Annotations:—As to (1) Consd. Flunster v. M'Clelland (1860), 8 C. B. N. S. 357. Refd. Baker v. Tynte (1860), 6 Jur. N. S. 1192; Ex p. Holden (1863), 13 C. B. N. S. 641.*

**2301. ——— No beneficial interest in debtor.]—**Pltf. having obtained a charging order under Judgments Act, 1838 (c. 110), s. 14, a share standing in the name of deft. in a co., limited, the ct. refused an application to rescind the order made by deft. on the ground that the shares were held by him in trust for a third person.—**CRAGG v. TAYLOR** (1866), L. R. 1 Exch. 148; 4 H. & C. 158; 35 L. J. Ex. 92; 13 L. T. 756; 12 Jur. N. S. 320; 14 W. R. 399.

*Annotations:—Consd. Gill v. Continental Gas Union Co. (1872), 41 L. J. Ex. 176; Re Blakeley Ordnance Co., Coates's Case (1876), 35 L. T. 617; Cooper v. Griffin, [1892] 1 Q. B. 740.*

**2302. ———.]—**In an action under Judgments Act, 1838 (c. 110), s. 15, against a co. for permitting the transfer of shares after notice of a charging order *nisi*, & before the making of it absolute, it is a good answer to show that the judgment debtor in whose name the shares stood had no beneficial interest in them.—**GILL v. CONTINENTAL GAS CO.** (1872), L. R. 7 Exch. 332; 41 L. J. Ex. 176; 27 L. T. 424; 21 W. R. 111.

*Annotations:—Refd. Gray v. Stone & Funnell (1893), 69 L. T. 282. Mentd. Wood v. Wood (1874), L. R. 9 Exch. 190; Edison General Electric Co. v. Westminster & Vancouver Tram. Co., [1897] A. C. 193.*

**2303. ———.]—**C. transferred £1,000 stock of L. Co. into the name of his son without any consideration, & merely to qualify him as a director of that co., to be transferred to C. on request, which was ultimately done. C. received the dividends on the stock. The son was a contributory to B. Co., to whom he owed £3,000. The official liquidator of that co. gave notice to L. Co. of his intention to move for an injunction to restrain the son, as owner of the stock, & that co. from dealing with it. Thereupon the official liquidator of B. Co. was informed of the true facts as to the ownership of the stock. The official liquidator of B. Co. immediately afterwards obtained a charging order against the £1,000 stock in L. Co.:—**Held**: that order must be discharged, not only on the ground of the notice, but also because the stock was not standing in the name of the son of C. "in his own right."—**Re BLAKELY ORDNANCE CO., LTD., COATES'S CASE** (1876), 46 L. J. Ch. 367; 35 L. T. 617; 25 W. R. 111.

*Annotation:—Appld. Cooper v. Griffin, [1892] 1 Q. B. 740.*

**2304. ———.]—**A judgment creditor cannot obtain a charging order under Judgments Act, 1838 (c. 110), s. 14, charging shares standing in the name of the judgment debtor, where the judgment debtor is merely a trustee of such shares, which have been transferred to him solely as a qualification for the position of director, & in which he has no beneficial ownership, beneficial ownership in the debtor being essential to a charging order under the sect.—**COOPER v. GRIFFIN**, [1892] 1 Q. B. 740;

where such stocks have been fraudulently assigned in order to avoid execution.—**CAFFREY v. PHELPS** (1876), 24 Gr. 344.—**CAN.**

#### PART V. SECT. 2, SUB-SECT. 5.— B. (c).

*m. Stock held in trust for another.]—*When it was sought, under 3 & 4 Vict. c. 105, to obtain an order to make judgments charges upon bank stock standing in the names of the exors. of testator, who had left a legacy of £5,000 to deft., but it not appearing

satisfactorily, upon affidavit, that the stock was clearly applicable to the purposes of the motion; the ct. refused to grant the order.—**ANON.** (1842), 2 Leg. Rep. 296.—**IR.**

*n. ———.]—*Two sums of stock were decreed to be paid to M. as extrix. of H. M. was also a legatee under H.'s will but there had been no decree or order ascertaining that any part of the stock was due to her personally. B. to whom costs were due by M. in her personal capacity sought by motion in the cause to obtain a charging order

61 L. J. Q. B. 563; 66 L. T. 660; 40 W. R. 420; 8 T. L. R. 404; 36 Sol. Jo. 325, C. A.

*Annotations:—Folld. Howard v. Sadler, [1893] 1 Q. B. 1. Consd. Sutton v. English & Colonial Produce Co., [1902] 2 Ch. 502.*

**2305. ———.]—**A director of a railway co., incorporated by an Act providing that the qualification of a director should be the possession in his own right of a certain number of shares, sold his shares; but his name remained on the register as the person entitled to the shares & he continued to act as a director. A judgment creditor of the director having applied for a charging order on the shares under Judgments Act, 1838 (c. 110), s. 14:—**Held**: the director might have possession of the shares in his own right without being the beneficial owner, & a charging order could not be made.—**HOWARD v. SADLER**, [1893] 1 Q. B. 1; 68 L. T. 120; 41 W. R. 126; 37 Sol. Jo. 49; 5 R. 45, D. C.

*Annotation:—Consd. Sutton v. English & Colonial Produce Co., [1902] 2 Ch. 502.*

(c) "In the Name of any Person in Trust for him."

*Sec Judgments Act, 1838 (c. 110), s. 14; Judgments Act, 1840 (c. 82), s. 1.*

**2306. Contingent interest.]—**The contingent reversionary life interest of a judgment debtor in the surplus, if any, of stock standing in the name of trustees, & assigned by him to another set of trustees on trust to sell it & pay his debts to a named amount, with a resulting trust, as to the surplus after such payment (subject to the present life interest of another person therein), in favour of the debtor, is chargeable under Judgments Act, 1838 (c. 110), s. 14, & Judgments Act, 1840 (c. 82), s. 1, notwithstanding the doubtful nature of the interest & the uncertainty as to its extent.—**BAKER v. TYNTE** (1860), 2 E. & E. 897; 29 L. J. Q. B. 233; 6 Jur. N. S. 1192; 121 E. R. 335.

*Annotation:—Refd. Cragg v. Taylor (1867), L. R. 2 Exch. 131.*

**2307. ———.]—**Deft., being possessed of shares in a public co., transferred them to B., as a security for a debt. Subsequently he assigned them, subject to B.'s debt, to trustees upon trust to repay a loan which had been made to him by his brother & to apply the surplus for the benefit at the trustees' discretion, of his wife, his children, or himself. There were other trusts for the benefit of his wife & children, & an ultimate trust on his wife's decease & in case no child attained the age of twenty-one or being a daughter married before that age to deft. & his assigns:—**Held**: he had an "interest" in the shares capable of being charged under Judgments Act, 1838 (c. 110), s. 14, & Judgments Act, 1840 (c. 82), s. 1.—**CRAGG v. TAYLOR** (1867), L. R. 2 Exch. 131; 36 L. J. Ex. 63; 15 L. T. 584.

*Annotations:—Distd. Dixon v. Wrench (1869), L. R. 4 Exch. 154; South Western Loan Co. v. Robertson (1881), 8 Q. B. D. 17. Consd. Bolland v. Young, [1904] 2 K. B. 824. Refd. Ideal Bedding Co. v. Holland, [1907] 2 Ch. 157.*

**2308. Effect of imperative trust for sale—Debtor entitled to proceeds.]—**Testatrix gave her whole

against the stock so decreed to be paid to M.:—**Held**: M. had not such an interest in the stock in ct. as that it could be charged by an order.—**HODGENS v. HODGENS** (1877), 11 L. R. Eq. 439.—**IR.**

*o. Shares held in trust for mortgagee—Cannot be attached for debt of mortgagor.]—*The owner of an equitable interest in bank shares having mtged. them, they are standing in the name of the legal owners in trust for the mtgee. & not in trust for the mtgor., & therefore cannot be attached to

estate & effects, which included stock & shares, to trustees, on trust to pay debts & legacies, & as to the residue of her estate & effects, upon trust for deft. & two other persons; & she directed her trustees to pay the legacies so soon after her decease as her means could be judiciously converted into cash, & in any event not later than twelve months after her decease. A charging order having been made upon the stock & shares, to the extent of deft.'s interest therein, in favour of a judgment creditor:—*Held*: deft. having no interest in the stock & shares, but only an interest in their produce after performance of the prior trusts, they could not be charged with his judgment debt under Judgments Act, 1838 (c. 110), s. 14, or Judgments Act, 1840 (c. 82), s. 1.—*DIXON v. WRENCH* (1869), 1 L. R. 4 Exch. 154; 38 L. J. Ex. 113; 20 L. T. 492; 17 W. R. 591.

*Annotations*:—*Distd.* *South Western Loan Co. v. Robertson* (1881), 8 Q. B. D. 17. *Consd.* *Bolland v. Young*, [1904] 2 K. B. 824. *Distd.* *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157. *Refd.* *Wicks v. Shanks* (1892), 67 L. T. 609; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727.

**2309.** —.]—A voluntary settlement in favour of his wife & child by an insolvent settlor of his equitable reversionary interest in personal estate comprising stocks & shares not subject to an imperative trust for sale:—*Held*: void, under 13 Eliz. c. 5, as against the creditors of the settlor, on the ground that it “delayed, hindered, or defrauded” plffs., who were judgment creditors suing on behalf of themselves & all other creditors, from obtaining a charging order upon the stocks & shares under Judgments Act, 1838 (c. 110), s. 14.—*IDEAL BEDDING CO., LTD. v. HOLLAND*, [1907] 2 Ch. 157; 76 L. J. Ch. 441; 96 L. T. 774; 23 T. L. R. 467; 14 Mans. 113.

**2310. Stock held in trust for debtor & others.**—An order was made under Judgments Act, 1838 (c. 110), s. 13, & Judgments Act, 1840 (c. 82), charging a judgment debtor's interest in the dividends on certain bank stock. It appeared that by the terms of a will certain property, including this stock, was bequeathed to trustees on trust as to one moiety thereof for testatrix's niece, & as to the other moiety in trust to pay the income thereof to her nephew, the judgment debtor, for life, or until he should attempt to alien or charge the same, & upon his interest determining, there were limitations over in favour of his wife for life, & after her death in favour of his children, with an ultimate remainder in the event of the failure of the preceding trusts to the judgment debtor absolutely. At the time when the charging order was made, there was a dividend on the stock accrued due, but which the trustees had not yet received from the bank:—*Held*: (1) the fact that the stock stood in the name of the trustees in trust for another, besides the judgment debtor, did not prevent its being stock “standing in the name of any person in trust for him” within Judgments Act, 1838 (c. 110), s. 14; (2) the accrued dividend & the ultimate remainder to the judgment debtor after failure of the preceding trusts constituted a sufficient chargeable interest, whatever might have been the case with regard to the interest determinable on alienation, if that had stood alone; & the order was therefore rightly made, the trustees being responsible, upon its being made, for the due

application of the fund according to the legal effect of the order, whatever it might be.—*SOUTH WESTERN LOAN CO. v. ROBERTSON* (1881), 8 Q. B. D. 17; 51 L. J. Q. B. 79; 46 L. T. 427; 30 W. R. 102, D. C.

*Annotation*:—*Generally, Refd.* *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157.

**2311.** —.]—An American lady, who died in 1903, left a will by which she appointed two persons her exors. & trustees with regard to all moneys, bonds, bankers' balances, securities, & property carried on account, or held in custody on her behalf by her bankers or attorneys in England at her death, & she directed her exors. & trustees to collect & gather together all such residue of her estate in England at her death, both principal & interest, capital & income & to invest & reinvest, as from time to time might be prudent, & to manage the whole fund; & she further directed them to accumulate the income of the fund for the period of six years after her death, & at the end of that period to apply the accumulations of income in a certain manner, & to divide the capital of her estate then in their custody & control into three equal parts, one of which was to be paid to & to become the sole property of a person named in the will, against whom a judgment had been recovered in the High Ct. The funds subject to the trusts of the will had been invested in Transvaal Govt. stock:—*Held*: the judgment debtor had an interest in the stock which might be charged with the amount of the judgment debt under Judgments Act, 1840 (c. 82).—*BOLLAND v. YOUNG*, [1904] 2 K. B. 824; 73 L. J. K. B. 1030; 91 L. T. 746; 53 W. R. 67, C. A.

*Annotation*:—*Refd.* *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157.

#### SUB-SECT. 6.—PROCEDURE TO OBTAIN ORDER.

##### A. Order Nisi.

**2312. Application for order—To whom made.**—An application for a charging order, under Judgments Act, 1838 (c. 110), & Judgment Act, 1840 (c. 82), upon a fund in ct. need not be made to the judge in whose ct. the suit or matter is, in which the fund is standing, nor is it material that the order is entitled as in a revived cause, although made before the order of revivor has been served on deft.—*HASTINGS (MARQUIS) v. BEAVAN* (1862), 4 De G. F. & J. 316; 31 L. J. Ch. 546; 5 L. T. 734; 10 W. R. 206; 45 E. R. 1205, L. J.

**2313.** —.]—*HOPEWELL v. BARNES*, No. 2371, *post*.

**2314.** —.]—(1) A charging order may be made by a judge of the Q. B. Div. upon cash standing to the credit of the debtor in the Ch. Div. in the name of the Paymaster-General.

(2) Such an order may be made *ex parte*, & in order to give effect to it it is not necessary to obtain a stop order or to obtain the appointment of a receiver: but notice given to the Paymaster-General will be sufficient to secure priority.

(3) A charging order *nisi*, when it is afterwards made absolute, takes effect from the date of the order *nisi*.—*BRERETON v. EDWARDS* (1888), 21 Q. B. D. 488; 60 L. T. 5; 37 W. R. 47, C. A.

*Annotations*:—*As to* (1) *Appl. Re Prior, Ex p. Prior*, [1921]

answer a judgment debt owed by the

his residuary legatee; subsequently the Ct. of Chancery, upon the consent of deft. as exor., ordered a transfer of the stock to the trustees of testator's settlements, & that the dividends should be paid to deft.; a charging order, at the instance of a judgment creditor, having been made upon deft.'s interest in the stock:—*Held*: the

order of the Ct. of Chancery afforded evidence, as against deft., that testator's debts had been paid & his assets administered, & deft. had such an interest in the stock as could be attached by the charging order.—*M'DONOGH v. DAVIES* (1875), 1 L. R. 9 C. L. 300.—*IR.*

**B. Stock held in trust for debtor.**—Testator constituted railway stock an auxiliary fund to secure the jointure of his widow, & without specifically bequeathing the stock, appointed deft.



**Sect. 2.—Charging orders on stocks, shares, etc.:**  
**Sub-sect. 6, A. & B.; sub-sect. 7.]**

3 K. B. 333. *Generally, Rejd.* Drew v. Lewis, *Ex p.* Martin (1891), 60 L. J. Q. B. 264; Bright v. Sellar (1903), 89 L. T. 137; The Diogo, [1920] P. 425.

**2315. — How made—Ex parte.]**—BREKETON v. EDWARDS, No. 2314, *ante*.

**2316. Form of order—Day certain to show cause.]**—It is no objection to an order *nisi* to charge stock, pursuant to Judgments Act, 1838 (c. 110), ss. 14, 15, that it calls upon the judgment debtor to show cause on a day certain.—ROBINSON v. BURBIDGE (1850), 9 C. B. 289; 1 L. M. & P. 94; 19 L. J. C. P. 242; 14 L. T. O. S. 465; 137 E. R. 904.

*Annotation:—Mentd.* Stokes v. Grissell (1854), 14 C. B. 118.

**2317. —.]**—Charging order for costs, which had been directed to be paid, made belonging to the party by whom the costs were to be paid. The form of the *ex parte* order was to show cause on the first seal after two clear days from the service of the order with an interim injunction to restrain transfer.—BLOXAM v. HOPKINSON (1859), 7 W. R. 606.

*See, now, R. S. C., Appendix K., No. 27.*

**2318. Service of order—Debtor outside jurisdiction.]**—Where it was stated that the judgment debtor was out of the jurisdiction of the ct., the ct. declined to make an order affecting his interests without notice being previously served upon him.—JOSEPH v. TYNDALL (1843), 13 L. J. Ch. 23; 2 L. T. O. S. 116.

**2319. — Upon solicitor of party sought to be charged at last address.]**—A charging order *nisi* was served upon the solr. & the brother, & at the last address of the person whose property was to be charged:—*Held*: it was sufficiently served without any order for substituted service.—*Re* PARAGON MINING Co. (1861), 5 L. T. 578; 8 Jur. N. S. 11; 10 W. R. 76.

**2320. Costs of obtaining order—When money paid.]**—A charging order *nisi* was obtained under Judgments Act, 1838 (c. 110), on stock belonging to B., who thereupon paid the amount, but disputed his liability to pay the costs of obtaining the order. On the day for showing cause, the case was mentioned:—*Held*: B. was liable to pay the costs of both applications.—STANLEY v. BOND (1844), 8 Beav. 50; 14 L. J. Ch. 51; 4 L. T. O. S. 91; 50 E. R. 20.

*Annotations:—Rejd.* Westby v. Westby (1852), 19 L. T. O. S. 243; Clarke v. Clarke (1873), L. R. 3 P. & D. 57.

**2321. Application to discharge order—Jurisdiction of court to entertain.]**—(1) The ct. has no jurisdiction to entertain an appeal against an order *nisi* for a *distringas* upon stock, made by a judge under Judgments Act, 1838 (c. 110), s. 14.

(2) *Qu.*: if they have any in the case of an order absolute.—BALDWIN v. TIMBRELL (1812), 6 Jur. 488.

**2322. —.]**—A master having once granted a charging order *nisi* upon shares in a public co. upon an *ex parte* application under Judgments Act, 1838 (c. 110), ss. 14, 15, is *functus officio*, &, except by consent, has no jurisdiction to discharge it.—MITCHELL v. DE VESEY (1892), 67 L. T. 53.

*See, also, Nos. 2326–2330, post.*

*See, now, R. S. C., Ord. 54, r. 12.*

**B. Order Absolute.**

**2323. When order nisi made absolute—Discretion of court—Shares of no value.]**—Under

Judgments Act, 1838 (c. 110), s. 1, which says that “it shall be lawful” for a judge to make a charging order upon shares belonging to a judgment debtor, the judge has a discretion whether he will make such an order or not, & he may refuse to make an order upon the ground that the shares are of no value.—WICKS v. SHANKS (1892), 67 L. T. 609, 9 T. L. R. 49; 4 R. 117, C. A.

**2324. — Proceedings pending by creditors against trustees holding stock.]**—A charging order under Judgments Act, 1838 (c. 110), s. 14, will be made absolute notwithstanding proceedings against the trustees of the fund by creditors & there being no other fund for payment of costs.—SMITH v. YOUNG (1860), 2 F. & F. 376.

**2325. — Debtor dead at time of order nisi.]**—FINNEY v. HINDE, No. 2262, *ante*.

**2326. Review of order—Jurisdiction of court to entertain.]**—A judge at chambers only, & not the ct., has authority, under Judgments Act, 1838 (c. 110), s. 14, to make an order to charge a fund with the payment of money recovered by a judgment: if he makes an absolute order, the ct. has jurisdiction to set it aside if wrongly made; but if he only makes an order *nisi*, the ct. has no authority to entertain the question, although the judge expresses his desire to refer it to the ct.—BROWN v. BAMFORD (1841), 9 M. & W. 42; 11 L. J. Ex. 53; 152 E. R. 19.

*Annotations:—Rejd.* Fowler v. Churchill (1843), 11 M. & W. 57; Morris v. Manesty (1845), 7 Q. B. 674; Witham v. Lynch (1847), 1 Exch. 391.

**2327. —.]**—BALDWIN v. TIMBRELL, No. 2321, *ante*.

**2328. —.]**—The ct. refused to discharge a judge's order made under Judgments Act, 1838 (c. 110), s. 14, to charge stock standing in the names of trustees for debt. The stock had been transferred into the names of the trustees by a deed of settlement made pursuant to an order of the Ct. of Ch. *Qu.*: whether a ct. of common law had jurisdiction to interfere in the matter.—ROGERS v. HOLLOWAY (1843), 5 Man. & G. 292; 6 Scott, N. R. 274; 12 L. J. C. P. 182; 7 Jur. 932; 134 E. R. 576.

*Annotation:—Apld.* Cragg v. Taylor (1866), L. R. 1 Exch. 148.

**2329. —.]**—An application, under Judgments Act, 1838 (c. 110), s. 15, that a charging order, made under sects. 14 & 15, should be discharged cannot be entertained after the order has been made absolute.

A charging order having been made upon share standing in the name of a judgment debtor, the father or the debtor applied, after the order had been made absolute, that it might be discharged on the ground that the shares were in fact his:—*Held*: there was no power to entertain the application, “such order” [in sect. 15] meaning the order *nisi* & not the order absolute.—JEFFRYES v. REYNOLDS (1882), 52 L. J. Q. B. 55; *sub nom* JEFFRYES v. REYNOLDS, *Ex p.* REYNOLDS, 41 L. T. 358, D. C.

*Annotations:—Folld.* Drew v. Willis, *Ex p.* Martin, [1891] 1 Q. B. 450. *Distd.* Brain v. Herrick (1894), 10 R. 171.

**2330. —.]**—Where a charging order *nisi*, under Judgments Act, 1838 (c. 110), ss. 14, 15 has become absolute, the statute gives no power to rescind it.—DREW v. WILLIS, *Ex p.* MARTIN [1891] 1 Q. B. 450; *sub nom.* DREW v. LEWIS *Ex p.* MARTIN, 60 L. J. Q. B. 264; 64 L. T. 760; 55 J. P. 373; 39 W. R. 310; 7 T. L. R. 312, C. A. *Annotation:—Distd.* Brain v. Herrick (1894), 10 R. 171.

**PART V. SECT. 2, SUB-SECT. 6.—A.**

**2323. When order nisi made absolute—Discretion of court—Shares of no value.]**—The charging order made *ex p.* is conditional only; & the ct. to direct service of it out of the jurisdiction.—*Re* GETHIN, *Ex p.* NIXON (1875), 9 L. R. Eq. 512.—

**2331. Judgment set aside—Order founded on it set aside.]**—Where a charging order has been obtained upon a judgment which has since been set aside, the charging order must be set aside at the instance of the judgment debtor.—*BRAIN v. HERRICK* (1894), 10 R. 171, D. C.

*See, also*, No. 2278, *ante*.

**2332. Operation of order—From date of order nisi.]**—(1) A creditor recovered judgment against his debtor & issued a *fi. fa.* Shortly afterwards the debtor died. The creditor entered a suggestion on the record, entitling him to have execution against the extrix., & obtained a charging order *nisi* upon shares belonging to the debtor. After the order *nisi* had been obtained, but on the same day, a decree was made for administration of the debtor's estate. The order *nisi* not having been made absolute, *pltf.* in the administration suit applied for an injunction to restrain further proceedings by the judgment creditor:—*Held*: injunction ought not to be granted.

(2) A charging order, when made absolute, operates from the making of the order *nisi*.—*HAY v. BARRY* (1868), 3 Ch. App. 452; 37 L. J. Ch. 723; 18 L. T. 491; 16 W. R. 654, L. J.

*Annotations*:—*As to* (1) *Consd.* *Stewart v. Rhodes*, [1900] 1 Ch. 386. *Refd.* *Re Imperial Steam & Household Coal Co.* (1868), 37 L. J. Ch. 517; *Hewat v. Davenport* (1872), 21 W. R. 78; *Finney v. Hinde* (1879), 48 L. J. Q. B. 275; *Re Womersley, Etheridge v. Womersley* (1885), 29 Ch. D. 557; *Re Bell, Carter v. Stadden* (1886), 54 L. T. 370; *Re O'Shea's Settlement, Courage v. O'Shea*, [1895] 1 Ch. 325; *Re Thomas, Sutton, Carden v. Thomas* (1912), 81 L. J. Ch. 603. *As to* (2) *Folld.* *Brereton v. Edwards* (1888), 21 Q. B. D. 488. *Refd.* *Re Hutchinson, Ex p. Hutchinson* (1885), 16 Q. B. D. 515.

**2333.** ———.] —*BRERETON v. EDWARDS*, No. 2

#### SUB-SECT. 7.—EFFECT OF ORDER.

**2334. Equivalent to valid & effective charge made by debtor.]**—*Re LEAVESLEY*, No. 2280, *ante*.

**2335. Whether "execution against goods of a debtor"**—*Bankruptcy Act*, 1883 (c. 52), s. 45.]—The words "an execution against the goods of a debtor" in above sect. do not include a charging order *nisi* under *Judgments Act*, 1838 (c. 110), s. 14.—*Re HUTCHINSON, Ex p. PLOWDEN* (1885), 55 L. J. Q. B. 582; 54 L. T. 302; 34 W. R. 475; 3 Morr. 19.

**2336. Whether ground for setting aside bankruptcy notice—Bankruptcy Act, 1883 (c. 52), s. 4 (1) (g).]—A bkpcy. notice under above sub-sect. will not be set aside because the creditor who served the notice has during the seven days of its pendency obtained a charging order under *Judgments Act*, 1838 (c. 110), s. 14, upon shares belonging to debtor.—*Re SEDGWICK, Ex p. McMURDO* (1888), 60 L. T. 9; 37 W. R. 72; 5 T. L. R. 4; *sub nom.* *Re SEDGWICK, Ex p. SEDGWICK*, 5 Morr. 262, C. A.**

*Annotations*:—*Refd.* *Re Dennis, Ex p. Dennis* (1888), 60 L. T. 318; *Re Lupton, Ex p. Lupton* (1911), 55 Sol. Jo. 717; *Re Renison, Ex p. Greaves*, [1913] 2 K. B. 300. *—* *Re Wilson, Ex p. Jones* (1916), 85 L. J. K. B.

**2337. Whether protected transaction in bankruptcy—Bankruptcy Act, 1883 (c. 52), s. 49.]—A charging order, under *Judgments Act*, 1838 (c. 110), s. 14, upon stock or shares or money in ct. belonging to a judgment debtor, is not a "transaction" protected by *Bkpcy. Act*, 1883 (c. 52), s. 49. Such an order has not for all purposes the same effect as if it had been voluntarily given by the judgment**

debtor.—*Re O'SHEA'S SETTLEMENT, COURAGE v. O'SHEA*, [1895] 1 Ch. 325; 64 L. J. Ch. 263; 71 L. T. 827; 43 W. R. 232; 39 Sol. Jo. 168; 2 Mans. 4; 12 R. 70, C. A.

*Annotations*:—*Apld.* *Wild v. Southwood*, [1897] 1 Q. B. 317; *Hosack v. Robins*, [1918] 2 Ch. 339.

**2338.** ———.]—A charging order under *Partnership Act*, 1890 (c. 39), s. 23 upon a judgment debtor's interest in a partnership, being a proceeding *in invitum* is not a "transaction" protected by *Bkpcy. Act*, 1883 (c. 52), s. 49.—*WILD v. SOUTHWOOD*, [1897] 1 Q. B. 317; 66 L. J. Q. B. 166; 75 L. T. 388; 45 W. R. 224; 41 Sol. Jo. 67; 3 Mans. 303.

**2339. Whether "transaction for value"—Bankruptcy Act, 1914 (c. 59), s. 47 (1).]—A charging order absolute obtained on an application under *Judgments Act*, 1838 (c. 110), s. 14, on after-acquired property of a bkpt., consisting of shares in a co., is not a "transaction for value" within the proposition laid down in *Cohen v. Mitchell* (1890), 25 Q. B. Div. 262, & now embodied in *Bkpcy. Act*, 1914 (c. 59), s. 47 (1), & is therefore not valid & effective against the trustee in bkpcy. as a protected transaction.—*HOSACK v. ROBINS* (No. 2), [1918] 2 Ch. 339; 87 L. J. Ch. 545; 119 L. T. 522; 62 Sol. Jo. 681; [1918-19] B. & C. R. 54, C. A.**

**2340. Whether determination of life interest—Subject to defeasance.]**—A charging order, under *Judgments Act*, 1838 (c. 110), s. 14, creates such an incumbrance as will determine a life interest, limited to a person until he executes some assignment or act whereby the interest may be incumbered.—*MONTEFIORE v. BEHRENS* (1865), L. R. 1 Eq. 171; 35 Beav. 95; 55 E. R. 830.

*Annotations*:—*Mentd.* *Mackintosh v. Pogose*, [1895] 1 Ch. 505; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

**2341.** ———.]—Under a settlement the dividends of the trust fund were payable to B. for his life, or until he should assign or incumber the same, "or until he should do or suffer any act" whereby the dividends should become payable to another person. A judgment creditor of B. obtained a charging order against the trust fund:—*Held*: under the words "shall suffer any act," a forfeiture had accrued of B.'s life interest.—*ROFFEY v. BENT* (1867), L. R. 3 Eq. 759.

*Annotations*:—*Refd.* *Sutton, Carden v. Goodrich* (1899), 80 L. T. 765. *Mentd.* *Re Throckmorton, Ex p. Eyston* (1877), 7 Ch. D. 145.

**2342. Right of creditor to protect interest in stock charged—By other proceedings.]**—(1) After the order, obtained by a judgment creditor, for charging the interest of his debtor in Govt. stock, standing in the name of trustees, has been made absolute, under *Judgments Act*, 1838 (c. 110), s. 15, the Bank of England is still bound to pay the dividends to the trustees, being the legal hands to receive them; & the trustees are to apply the dividends according to the equitable interests of the parties.

(2) *Semble*: a judgment creditor who has obtained an order charging the interest of his debtor in Govt. stock may, in a proper case, sustain a suit for the intermediate protection of the interest which he has so acquired, notwithstanding the six months prescribed by *Judgments Act*, 1838 (c. 110), s. 14, have not expired.—*BRISTED v. WILKINS* (1843), 3 Hare, 235; 67 E. R. 369.

*Annotation*:—*Generally, Mentd.* *Hague v. Dandeson* (1848), 2 Exch. 741.

**2343.** ———.]—The proviso contained in



*Sect. 2.—Charging orders on stocks, shares, etc.: Sub-sects. 7 & 8.]*

Judgments Act, 1838 (c. 110), s. 14, that no proceeding shall be taken to have the benefit of the charge created under that sect. until after the expiration of six calendar months from the date of the charging order does not prevent the creditor from obtaining a stop order to restrain the debtor from receiving dividends of stock accruing within the six months.

The correct construction of the proviso is, that although no steps can be taken to enforce immediate payment of the debt by realising the security, yet that the judgment creditor may, in the meantime, by force of the order, prevent the security given him by the statute from being defeated or diminished *pro tanto*, by stopping payment to the debtor of part of his security.—*WATTS v. JEFFERYES* (1851), 3 Mac. & G. 372; 20 L. J. Ch. 659; 17 L. T. O. S. 281; 15 Jur. 783; 42 E. R. 305. L. C.

*Annotations:—Consd.* Yescombe v. Landor (1859), 28 Beav. 80. *Refd.* Courtoy v. Vincent (1852), 15 Beav. 486; Partridge v. Foster (1864), 34 Beav. 1; Brereton v. Edwards (1888), 21 Q. B. D. 226.

**2344.** ———. ———.]—(1) Where a judgment creditor has obtained a charging order absolute upon the contingent equitable interest of a judgment debtor in Govt. & Bank of England stock, standing in the name of a trustee, the bank is compellable to transfer the respective stocks at the direction of the trustee, notwithstanding that notice of the charging order has been served upon the bank.

(2) The judgment creditor can protect his rights by giving notice to the trustee & by issuing a notice in lieu of *distringas* upon the bank.—*ADAM v. BANK OF ENGLAND* (1908), 52 Sol. Jo. 682.

**2345. Stock standing in name of trustees—Right of trustees to receive dividends.]—***BRISTED v. WILKINS*, No. 2342, *ante*.

**2346.** ———. ———.]—Notwithstanding an order absolute under Judgments Act, 1838 (c. 110), ss. 14, 15, charging stock in the names of trustees, the Bank of England is bound to pay the dividend to the trustees, who are liable in equity for its proper distribution.—*FOWLER v. CHURCHILL* (1843), 2 Dowl. N. S. 767; 11 M. & W. 323; 12 L. J. Ex. 233; 152 E. R. 827; *sub nom.* *CHURCHILL v. BANK OF ENGLAND*, 7 Jur. 353.

*Annotations:—Consd.* South Western Loan Co. v. Robertson (1881), 8 Q. B. D. 17. *Mentd.* Hague v. Dandeson (1848), 17 L. J. Ex. 269.

**2347.** ———. **Right of trustees to call for transfer Interest of debtor contingent.]—***ADAM v. BANK OF ENGLAND*, No. 2344, *ante*.

#### SUB-SECT. 8.—PRIORITIES.

**2348. How far rights of prior incumbrancers affected.]—**(1) Stock standing in the Accountant-General's name to the separate account of a party against whom a judgment debt has been recovered, may be charged, under Judgments Act, 1838 (c. 110), with the debt; but the charging order must be made, not by a judge in equity, but by a judge at common law; & although such order, in terms, charges the stock, it affects only the interest of the debtor in the stock, &, therefore, does not interfere with the rights of prior incumbrancers.

(2) A ct. of equity will make a stop order, as auxiliary to the charging order.

(3) A party applying for a stop order on a fund in ct., must take the order subject to & after satisfaction of, all the prior claims upon the fund; or he must serve all the parties having such prior claims with the petition.—*HULKES v. DAY* (1840), 10 Sim. 41; 10 L. J. Ch. 21; 4 Jur. 1125; 59 E. R. 527.

*Annotation:—As to* (1) *Refd.* *Watts v. Porter* (1854), 23 L. T. O. S. 228.

**2349.** ———. **Whether notice of prior incumbrance necessary.]—**Testator devised his real & personal estate to trustees on trust for sale & directed them to pay a share of the produce to A., & a suit was instituted for the administration of his estate. By a deed dated Dec. 1844, A. assigned his share to B. to secure advances, & B. immediately gave notice of the assignment to the trustees. By an order in the cause in June, 1845, the real estate was ordered to be sold & the produce paid into ct. & invested; & a sum of stock in respect of the purchase-money was afterwards carried to the credit of the cause. In Apr. 1846, C. obtained judgment against A., & by a judge's order the stock was ordered to stand charged with the amount for which judgment was obtained. The order was filed in the Accountant-General's office in Nov. 1848, at which time no other order had been filed:—*Held*: C. had not priority over B.—*BREARCLIFF v. DORRINGTON* (1850), 4 De G. & Sm. 122; 19 L. J. Ch. 331; 16 L. T. O. S. 62; 14 Jur. 1101; 64 E. R. 762.

*Annotations:—Consd.* *Watts v. Porter* (1854), 3 E. & B. 743; *Livesey v. Harding* (1856), 23 Beav. 141. *Refd.* *Kinderley v. Jervis* (1856), 22 Beav. 1.

**2350.** ———. ———.]—A., an attorney, employed by B. to invest money, lent it to C. on an agreement, by which C. as a security, charged his interest in £5,000 consols, standing in the names of trustees in trust for C. A. neglected to give notice to the trustees. A judgment creditor of C. subsequently to this loan, obtained a charging order under Judgments Act, 1838 (c. 110), s. 14, notice of which was given to the trustees. C. obtained the benefit of the insolvent Act. B. brought an action against A. for negligence; on the trial, the judge directed the jury, in estimating the damages, to consider that, as no notice had been given to C.'s trustees of the charge in favour of B., the subsequent charge created by the judge's order had priority over it. On a rule for a new trial:—*Held*: the direction was correct, & the judgment creditor had the same rights as a subsequent incumbrancer without notice, & was, therefore, to be preferred in equity to A.—*WATTS v. PORTER* (1854), 3 E. & B. 743; 2 C. L. R. 1553; 23 L. J. Q. B. 345; 23 L. T. O. S. 228; 1 Jur. N. S. 133; 118 E. R. 1319.

*Annotations:—Consd.* *Beavan v. Oxford* (1856), 6 De G. M. & G. 507; *Kinderley v. Jervis* (1856), 22 Beav. 1; *Scott v. Hastings* (1858), 4 K. & J. 633; *Crow v. Robinson* (1868), L. R. 3 C. P. 264; *Pickering v. Ilfracombe Ry.* (1868), L. R. 3 C. P. 235. *Refd.* *Nicholls v. Rosewarne* (1859), 6 C. B. N. S. 480; *Baker v. Tynte* (1860), 2 E. & E. 897; *Benham v. Keane* (1861), 1 John. & H. 685; *Gill v. Continental Union Gas Co.* (1872), L. R. 7 Exch. 332; *Punchard v. Tomkins* (1882), 31 W. R. 286; *Re General Horticultural Co., Ex p. Whitehouse* (1886), 32 Ch. D. 512; *Re Leavesley*, [1891] 2 Ch. 1; *Vacuum Oil Co. v. Ellis*, [1914] 1 K. B. 693. *Mentd.* *Hirsch v. Coates* (1856), 18 C. B. 757; *Croft v. Lumley* (1858), 6 H. L. Cas. 672; *Whistler v. Forster* (1863), 14 C. B. N. S. 248.

**2351.** ———. ———.]—*WARBURTON v. HILL, STENT v. WICKENS*, No. 2359, *post*.

**2352.** ———. ———.]—A judgment creditor will

**PART V. SECT. 2, SUB-SECT. 8.**  
*r. Money in hands of Postmaster-General—Assignment of debt prior*

*to charging order.]—*Pltf. obtained judgment against deft. & a charging order nisi was made & served on the Postmaster-General charging moneys

due to deft. under a mail contract. £152 10s. 8d. was paid into ct. by the Postmaster-General. Deft. had prior to the judgment & charging order nisi

be postponed to a subsequent mtgee. of an equitable interest in stock notwithstanding such creditor has, since the mtge., but before notice thereof to the trustee of the fund obtained under Judgment Act, 1838 (c. 110), s. 14, an order charging the fund. In such a case the rule in *Dearle v. Hall* (1828), 3 Russ. 1, does not apply in favour of the judgment creditor.—*SCOTT v. HASTINGS* (LORD) (1858), 4 K. & J. 633; 5 Jur. N. S. 240; 6 W. R. 862; 70 E. R. 263.

*Annotations*:—*Reid*. *Haly v. Barry* (1868), 3 Ch. App. 452; *Gill v. Continental Gas Union* (1872), 41 L. J. Ex. 176; *Arden v. Arden* (1885), 29 Ch. D. 702; *Re Bell, Carter v. Stadden* (1886), 54 L. T. 370; *Re Leavesley*, [1891] 2 Ch. 1; *Gray v. Stone & Funnell* (1893), 69 L. T. 282; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727. *Mentd.* *Punchard v. Tomkins* (1882), 31 W. R. 286.

**2353.** —.—.]—A judgment creditor cannot, by obtaining a charging order upon money in ct. belonging to his debtor, obtain priority over a previous mtgee.

Under the will of testator, who died in Aug. 1879, G. was entitled to a share in the residue of testator's real & personal estate. Subsequently to making his will testator had become a lunatic. There was at the date of testator's death a sum of £10,000 in the hands of the Paymaster-General, in the matter of the lunacy, which belonged to testator. In Dec. 1879, G. mortgaged his share to M., & notice of this mtge. was immediately given to the trustees of the will. In 1880 an action was commenced for the administration of testator's estate, & subsequently the £10,000 was transferred from the lunacy to the credit of the cause. In 1881 S. obtained judgment against G. In 1883 he obtained a charging order *nisi* upon the share of G. in the money in ct., which was made absolute by an order shortly afterwards. S. claimed priority over M. on the ground that the charging order was a stop order on the fund in ct., & that M. had not obtained any order:—*Held*: a judgment creditor was not in the position of a mtgee.; he simply took under his process such interest as the debtor might happen to have; he was subject to all prior charges, legal & equitable, whether he knew of them or not, & could not by a charging order obtain priority over them; & therefore the charge obtained by S. was subject to the previous mtge. to M.—*Re BELL, CARTER v. STADDEN* (1886), 54 L. T. 370; 34 W. R. 363; 2 T. L. R. 366.

*Annotation*:—*Reid*. *Brereton v. Edwards* (1888), 21 Q. B. D. 226.

**2354.** —.—.]—*Re LEAVESLEY*, No. 2280, *ante*.

**2355.** —.—.]—*GRAY v. STONE & FUNNELL* (1893), 69 L. T. 282; 9 T. L. R. 583; 3 R. 692.

**2356.** —.— *Receiver appointed by prior incumbrancer.*—An order obtained by a judgment creditor appointing a receiver by way of equitable execution operates as an injunction to restrain the judgment debtor from himself receiving moneys over which the receiver is appointed, & prevents him from dealing with the moneys to the prejudice of the execution creditor. It also prevents any subsequent judgment creditor from gaining priority over the creditor obtaining the order, if at the date when obtained the property of the judgment debtor cannot be taken in execution or made available by any other legal process. Accordingly, charging orders & stop orders upon a judgment debtor's share in a testator's residuary estate represented by a fund in ct. will not confer priority

over a previous judgment debt in respect of which an order appointing a receiver of the debtor's interest was obtained at a time when, owing either to there being no fund in ct. or to the residue not having been then ascertained, no other method of taking in execution the judgment debtor's share was open to the judgment creditor.—*Re ANGLESEY (MARQUIS), DE GALVE (COUNTESS) v. GARDNER*, [1903] 2 Ch. 727; 72 L. J. Ch. 782; 89 L. T. 584; 52 W. R. 124; 19 T. L. R. 719.

*Annotations*:—*Consd.* *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157; *Singer v. Fry* (1915), 84 L. J. K. B. 2025.

**2357.** *Postponed to solicitor's lien for costs.*—A judgment debt will not defeat the equity attaching to a solr.'s lien for costs, notwithstanding the judgment creditor has obtained a charging order before the solr.—*HAYMES v. COOPER, COOPER v. JENKINS* (1864), 33 Beav. 431; 3 New Rep. 627; 33 L. J. Ch. 488; 10 L. T. 87; 10 Jur. N. S. 303; 12 W. R. 539; 55 E. R. 435.

*Annotations*:—*Consd.* *Dallow v. Garrold* (1884), 14 Q. B. D. 543. *Reid*. *Re Suffield & Watts, Ex p. Brown* (1888), 20 Q. B. D. 693; *Cole v. Eley*, [1894] 2 Q. B. 180. *Mentd.* *The Heinrich* (1872), L. R. 3 A. & E. 505; *Re Born, Curnock v. Born*, [1900] 2 Ch. 433.

**2358.** —.—.]—Pltfs. in a suit mortgaged their interests in the estate, the subject of the suit, to two of defts. The mtge. was sent to the solr. of pltfs. for his perusal & approval on their behalf, & he sanctioned their executing it. Nothing was said by either party about any claim by pltfs.' solr. for the costs of suit. The solr. afterwards obtained a charging order for them under Solicitors Act, 1860 (c. 127), s. 28, on the interests of pltfs.:—*Held*: as the mtgees. had notice of the suit, they must be presumed to have known the rights of the solr. of pltfs. & his charge ought not to be postponed to the mtge. he not having been guilty of any misrepresentation or concealment.—*FAITHFUL v. EWEN* (1878), 7 Ch. D. 495; 47 L. J. Ch. 457; 37 L. T. 805; 26 W. R. 270, C. A.

*Annotations*:—*Apld.* *Shippey v. Grey* (1880), 49 L. J. Q. B. 524. *Consd.* *Charlton v. Charlton* (1883), 49 L. T. 267; *Re Suffield & Watts, Ex p. Brown* (1888), 20 Q. B. D. 693; *Cole v. Eley*, [1894] 2 Q. B. 350. *Reid*. *Hamer v. Giles, Giles v. Hamer* (1879), 11 Ch. D. 942; *Dallow v. Garrold* (1884), 14 Q. B. D. 543; *Pierson v. Knutsford Estates Co.* (1884), 13 Q. B. D. 666; *The Paris*, [1896] P. 77. *Mentd.* *Re Knight, Knight v. Gardner*, [1892] 2 Ch. 368.

*See, generally*, SOLICITORS.

**2359.** *Moneys in hands of Paymaster-General—Effect of notice of charging order.*—If a person, having notice of a previous assignment of a trust fund, take an assignment to himself of the same fund, he cannot obtain priority over the previous assign, whether the trustee had notice or not; & therefore if a judgment creditor at the time of making his charging order absolute have similar notice he is likewise unable to obtain priority.

Where the fund is standing in the name of the Accountant-General the practice of the office is to enter a memorandum of every charging order left at the office; but such notice is not treated as any restraint, nor as equivalent to a stop order. No entry is made of notice of any other assignment. The Accountant-General is not a trustee of the funds committed to him, but merely the agent of the ct. The trustees who have paid the fund into ct. are the trustees of it until the ct. has in some way dealt with it, & then the ct. becomes the trustee. Therefore notice to the Accountant-General of an assignment of funds in his hands is of no avail against a stop order afterwards obtained by a subsequent purchaser

assigned to one S. part of the moneys due under the mail contract. The contract between deft. & the Crown prohibited the assignment of moneys

due thereunder without the consent of the Postmaster-General, & made forfeiture of moneys due under the contract the penalty for breach of the

prohibition. On motion to make the charging order absolute:—*Held*: the assignment had priority over the claim of the judgment creditor.—*HODDER*



**Sect. 2.—Charging orders on stocks, shares, etc.:**  
**Sub-sects. 8 & 9. Sect. 3: Sub-sects. 1 & 2,**  
**A., B. & C.]**

without notice.—**WARBURTON v. HILL, STENT v. WICKENS** (1854), Kay, 470; 2 Eq. Rep. 441; 23 L. J. Ch. 633; 2 W. R. 365; 69 E. R. 199; *sub nom.* **WARBURTON v. HILL, Ex p. PERRIN & GUILDFORD**, 23 L. T. O. S. 57.

**Annotations:—****Consd.** **Haly v. Barry** (1868), 3 Ch. App. 452. **Refd.** **Thompson v. Tomkins** (1862), 2 Drew. & Sm. 8; **Mutual Life Assce. Soc. v. Langley** (1884), 26 Ch. D. 686; **Brereton v. Edwards** (1888), 21 Q. B. D. 488; **Mack v. Postle**, [1894] 2 Ch. 449. **Mentd.** *Re* **Hamilton's Windsor Ironworks, Ex p. Pitman & Edwards** (1879), 12 Ch. D. 707.

**2360. ———.]—BRERETON v. EDWARDS**, No. 2314, *ante*.

#### SUB-SECT. 9.—ENFORCEMENT OF ORDER.

**2361. Petition for payment out of court—All parties interested must consent.]—**On a petition by a judgment creditor of a party to a suit, who had obtained a charging order on a fund in ct., to which the party was entitled, the ct. refused to order the fund to be paid to petitioner without the party's consent.—**WHITFIELD v. PRICKETT, Ex p. BROOKES** (1842), 13 Sim. 259; 12 L. J. Ch. 84; 60 E. R. 101.

**2362. ———.]—PEARSE v. BROOKE**, [1870] W. N. 216.

**2363. Sale—No power to order in action in which judgment obtained.]—**Pltf. having recovered judgment in an action, obtained an order absolute under R. S. C., Ord. 46, charging shares of debt. in a co. with the payment of the judgment debt & interest, & then applied to the ct. for an order for sale of the shares:—**Held**: Jud. Act, 1873 (c. 66), s. 24, did not give the ct. jurisdiction to order the sale.—**LEGGOTT v. WESTERN** (1884), 12 Q. B. D. 287; 53 L. J. Q. B. 316; *sub nom.* **LEGGOTT v. WESTERN**, 32 W. R. 460.

**Annotations:—****Folld.** **Kolchmann v. Meurice**, [1903] 1 K. B. 534. **Consd.** **Hosack v. Robins**, [1917] 1 Ch. 142. **Refd.** *Re* **Sedgwick, Ex p. McMurdo** (1888), 60 L. T. 9.

**2364. ———.]—**(1) Where an order has been made charging a judgment debtor's interests in shares with the amount due on the judgment under Judgment Act, 1838 (c. 110), that order cannot, under Jud. Act, 1873 (c. 66), s. 24, be enforced by an order made in the original action.

(2) Leave cannot be given for service of a writ out of the jurisdiction under R. S. C., Ord. 11, r. 1 (e), in an action to enforce such a charging order.—**KOLCHMANN v. MEURICE**, [1903] 1 K. B. 534; 72 L. J. K. B. 289; 88 L. T. 369; 51 W. R. 356; 19 T. L. R. 254; 47 Sol. Jo. 295, C. A.

**Annotations:—***As to* (1) **Refd.** **Hosack v. Robins**, [1917] 1 Ch. 142. *As to* (2) **Apld.** **Hughes v. Oxenham**, [1913] 1 Ch. 254.

**2365. ——— Separate action for—Originating summons.]—****COHEN v. BEADELL** (1891), 91 L. T. Jo. 250.

**2366. ———.]—D'Auvergne v. COOPER**, [1899] W. N. 256.

**Annotation:—****Refd.** **Hosack v. Robins**, [1917] 1 Ch. 332.

**2367. ———.]—**In Feb. 1916, defts. bought shares subject to a charging order obtained by pltf. before the war. On June 27, 1916, pltf., without obtaining leave under Courts (Emergency Powers) Acts, 1914 to 1916, issued a summons to enforce the charging order against defts. by sale

of the shares:—**Held**: pltf. being in the position of a mtgee. under the charging order was really applying for his proper remedy of "sale in lieu of foreclosure," & as his charging order was before the war, leave was necessary under Courts (Emergency Powers) Act, 1914 (c. 78), s. 1 (1) (b), as amended by Courts (Emergency Powers) (No. 2) Act, 1916 (c. 18), s. 1 (1) (b), although defts. had only acquired the shares after the war.—**HOSACK v. ROBINS**, [1917] 1 Ch. 332; 86 L. J. Ch. 282; 115 L. T. 879; 61 Sol. Jo. 267, C. A.

**2368. Foreclosure—Separate action for—Originating summons.]—****RICKETTS v. RICKETTS**, [1891] W. N. 29.

**2369. Service of process out of jurisdiction—Power to order.]—**R. S. C., 1883, Ord. 11, r. 1 (e), does not apply to the case of an action to enforce a charge obtained on shares under Judgments Act, 1838 (c. 110), s. 14, & consequently leave cannot be obtained to issue a writ for service out of the jurisdiction in such an action.—**MORITY v. STEPHAN** (1888), 58 L. T. 850; 36 W. R. 779.

**Annotation:—****Folld.** **Kolchmann v. Meurice** (1903), 51 W. R. 356.

**2370. ———.]—****KOLCHMANN v. MEURICE**, No. 2364, *ante*.

*See, now*, R. S. C., Ord. 11, rr. 1 (h), 8A.

#### SECT. 3.—STOP ORDERS.

##### SUB-SECT. 1.—IN GENERAL.

**2371. Whether charging order must be first obtained—In division in which judgment obtained.]—**It is no longer necessary, as a preliminary to obtaining a stop order on a fund standing in ct. to the credit of the Ch. Div. of the High Ct. of Justice, by a person who has a judgment in an action in another division of the High Ct., that he should obtain a charging order in that division.—**HOPEWELL v. BARNES** (1876), 1 Ch. D. 630; 24 W. R. 629; *sub nom.* *Re* **PRINCE, HOPEWELL v. BARNES**, 33 L. T. 777.

**2372. ———.]—**(1) A judgment creditor may obtain a stop order upon a fund in ct. to the credit of an action in the Ch. Div., without any charging order obtained in the division where the judgment was recovered.

(2) Stop order granted upon a fund of a specified amount not actually in ct., but to be paid in to the credit of an action under an order of the ct.—**SHAW v. HUDSON** (1879), 48 L. J. Ch. 689.

**2373. Omission to obtain order—Liability of Paymaster-General.]—****JONES v. JONES** (1879), [1901] 1 Ch. 464, n.; 70 L. J. Ch. 272, n.; 84 L. T. 109, n.; 49 W. R. 342, n.

**Annotations:—****Folld.** **Bath v. Bath** (1901), 70 L. J. Ch. 270. **Expld.** *Re* **Williams' S. E.**, [1910] 2 Ch. 481.

**2374. ———.]—**The words "guilty of any default" in Court of Chancery Funds Act, 1872 (c. 44), s. 5, point to some act of misfeasance or carelessness attributable to the Paymaster-General himself or to those under his discretion & superintendence. Consequently, where a person entitled to a fund in ct. has not obtained a stop order on the fund, & it has been paid out to a wrong person, the Paymaster-General is not guilty of default within the sect., & the Treasury cannot be called upon to replace the fund in ct. out of the

& **TOLLEY, LTD. v. CORNES**, [1923] N. Z. L. R. 876.—N.Z.

#### PART V. SECT. 3, SUB-SECT. 1.

**a. Whether obtainable—After garnishee order.]—**The fact that judg-

ment creditor has obtained a garnishee order, will not enable the ct. to grant a stop order.—**PURKISS v. MORRISON** (circa 1865), 2 Ch. Ch. 117.—CAN.

t. — Before recovery of judg-

ment.]—A stop order cannot be issued before the recovery of judgment.—**CANADIAN MOLINE PLOW Co. v. CLEMENT** (1906), 6 Terr. L. R. 252; 5 W. L. R. 32.—CAN.

Consolidated Fund.—*BATH v. BATH*, [1901] 1 Ch. 460; 70 L. J. Ch. 270; 84 L. T. 107; 49 W. R. 341; 17 T. L. R. 196; 45 Sol. Jo. 239; *affd.* (1902), 71 L. J. Ch. 500, C. A.  
*Annotation* :—*Expld. Re Williams' S. E.*, [1910] 2 Ch. 481.

## SUB-SECT. 2.—THE APPLICATION.

## A. Who may Apply.

**2375. Solicitor—On funds standing to credit of client.**—If a decree has been obtained in a cause, & has for a long time been prevented from being worked out by the obstinate conduct of some of defts., the solr. of pltf. is entitled to have a stop order on funds in ct. to the credit of pltf. in the cause, if another solr. is likely to be employed by pltf.—*HOBSON v. SHEARWOOD* (1845), 8 Beav. 486; 5 L. T. O. S. 19; 50 E. R. 191.

**2376. Person not party to suit.**—By the decree a sum in ct. was directed to be paid to pltf. A person, not a party to the suit, claiming a portion of it as against pltf., applied for a stop order, & having shown a sufficient *prima facie* case, the ct. ordered the fund to be retained, on the terms of his filing a bill within ten days to establish his right.—*FEISTEL v. KING'S COLLEGE, CAMBRIDGE* (1848), 11 Beav. 254; 11 L. T. O. S. 430; 50 E. R. 814.

*Annotation* :—*Reid. Newton v. Askew* (1848), 12 L. T. O. S. 210.

**2377. Assignee of next of kin of lunatic.**—Order, in the nature of a stop order, granted on the application of the assignee of the interest of the sole next of kin of a lunatic.—*Re MOORE* (1849), 1 Mac. & G. 103; 41 E. R. 1201, L. C.

**2378.** —.—Order, in the nature of a stop order, granted on the application of the assignees of the interest of the sole next of kin of a lunatic, but dispensing with notice to the assignees of any applications in the matter, except those respecting payments to the next of kin.—*Re PIGOTT* (1851), 3 Mac. & G. 268; 42 E. R. 264, L. C.

*Annotation* :—*Overd. Re Wilkinson* (1874), 10 Ch. App. 73. I think the order in *Re Pigott* was made *per incuriam*; according to the present practice in lunacy no such order is ever made or will be made (JAMES, L.J.).

**2379.** —.—The ct. will not make an order in the nature of a stop order on the estate of a lunatic in favour of an assignee of the next of kin, *Re Pigott*, No. 2378, *ante*, *overd.*—*Re WILKINSON* (1874), 10 Ch. App. 73; 44 L. J. Ch. 328; 23 W. R. 51, L. JJ.

*See, generally, LUNATICS.*

**2380. Assignee of reversionary interest in trust fund—After payment into court by trustees—Though notice given to trustees.**—Where the assignee of a reversionary interest in a trust fund gives notice of his assignment to the trustee, & the trustee afterwards pays the fund into ct. under Trustee Relief Act, 1847 (c. 96), setting out in his affidavit the notice so given to him, the assignee should also obtain a stop order.—*Re MILLER'S TRUSTS* (1858), 6 W. R. 238.

## B. How Application Made.

**2381. By summons in chambers.**—Stop orders must in future be made upon summons in chambers.—*EDMONSTON v. HARRISON* (1853), 20 L. T. O. S. 216; 1 W. R. 140.

**2382.** —.—A stop order upon a fund in ct. may be obtained by summons in chambers without the consent of the assignor or person to be affected thereby. The alleged rule that such order must be applied for by petition in ct. is not founded on authority.—*WRENCH v. WYNNE* (1869), 38 L. J. Ch. 235; 17 W. R. 198.

*Annotation* :—*Reid. Wellesley v. Mornington* (1871), 41 L. J. Ch. 776.

**2383.** —.—An application for a stop order should be by summons in chambers, even though the mtgor, does not concur.—*WALSH v. WASON* (1874), 30 L. T. 743; 22 W. R. 676.

**2384. By petition.**—A. was entitled to a sum of stock carried over to his account in a suit. B., a judgment creditor of A., obtained a judge's order under Judgments Act, 1838 (c. 110), charging the stock, & then filed a claim against A. & served him with it. The claim was brought on, & A. did not appear.—*Held*: B. could not obtain the stock without a petition to be presented in the suit, but it was not necessary to serve A. with the petition.—*REECE v. TAYLOR* (1852), 5 De G. & Sm. 480; 21 L. J. Ch. 463; 19 L. T. O. S. 213; 64 E. R. 1207.

**2385.** —.—If no previous application.—A petition is the proper means of obtaining a stop order on a fund paid into ct. under the Trustee Relief Act, 1847 (c. 96), where the fund is over £300, & the application is the first which has been made in the matter of the fund.—*Re DAY'S TRUSTS* (1883), 49 L. T. 499.

*Annotation* :—*Folld. Re Toogood's Trusts* (1887), 56 L. T. 703.

**2386.** —.—Where a fund in ct., paid in under Trustee Relief Act, 1847 (c. 96), exceeded £1,000, & there had been no prior application in the matter of the fund :—*Held*: a petition & not a summons was the proper mode of applying, under R. S. C., 1883, Ord. 46, rr. 12, 13, for a stop order on the fund so paid in.—*Re TOOGOOD'S TRUSTS* (1887), 56 L. T. 703.

## C. On Whom Served.

*See, now, R. S. C., Ord. 46, r. 13.*

**2387. On all parties interested in fund.**—*Semble*: notice of stop order should be given to all parties entitled to the fund.—*LAWRENCE v. BALDOCK* (1838), 2 Jur. 151.

**2388.** —.—Claim to share of undivided fund.—Where a petition for a stop order is presented by a party claiming a share of an undivided fund, such petition must be served on all parties interested.—*TREZEVANT v. FRASER* (1840), 3 Beav. 283; 4 Jur. 982; 49 E. R. 110.

**2389. On all persons with similar orders.**—*HULKES v. DAY*, No. 2348, *ante*.

**2390. On assignor.**—The assignor, though party to the cause, must, under the General Order of

## PART V. SECT. 3, SUB-SECT. 2.—A.

**a. Fund in court—Assignee of part of fund.**—A suit was instituted to administer the real & personal estate of an intestate & a fund of about £58,000 was standing to the credit of the cause. The distributive shares of the next of kin had not been ascertained. The intestate's widow & administratrix married again & died during the progress of the suit. By settlement on her second marriage she assigned her interest under the

intestacy to trustees, reserving a power of appointment, which she exercised by will in favour of her second husband to the extent of £5,000 appointing him & the trustees of the settlement exors. The husband, who was a party to the suit, assigned his legacy as security to a creditor. The creditor moved for a stop order, prohibiting any dealings with the fund in ct. without notice to him. Order refused with costs.—*WARE v. WARE* (1870), 1 V. R. 1.—*AUS.*

**b. — Party entitled.**—The ct.

has power to issue a stop order at the instance of a party entitled to funds in ct.—*WILSON v. MCCARTHY* (1877), 7 P. R. 132.—*CAN.*

**c. — Simple contract creditor.**—A stop order upon a fund in ct. to which debt. was entitled, was granted in favour of a simple contract creditor who had not obtained judgment, there being another creditor with execution in sheriff's hand against debt.—*BYERS*, 10 C. L. T. Occ. N. 41.—*CAN.*



*Sect. 3.—Stop orders: Sub-sect. 2, C. & D.; sub-sects. 3, 4, 5 & 6.]*

Apr. 1841, be served with the petition for a stop order.—*PARSONS v. GROOME* (1842), 4 Beav. 521; 49 E. R. 440.

2391. — Not on other parties to cause.]—*GLAZBROOK v. GILLATT*, No. 2422, *post*.

2392. On judgment debtor—Where charging order obtained.]—*REECE v. TAYLOR*, No. 2384, *ante*.

*D. What must be Shown.*

2393. Right of assignor to fund—By proceedings in action—Or by affidavit.]—Upon an application for a stop order, the assignor's right to the fund in ct. must be shown, either by the proceedings or by affidavit.—*QUARMAN v. WILLIAMS* (1842), 5 Beav. 133; 49 E. R. 527.

2394. — — —.]—*WIDGERY v. TEPPER, HALL v. TEPPER*, No. 2268, *ante*.

2395. — By petition.]—The ct. will not grant a stop order, unless it is stated in the petition how the interest of the party in the fund sought to be affected arose.—*LAMBERT v. HUTCHINSON* (1844), 13 L. J. Ch. 336.

**SUB-SECT. 3.—FORM OF ORDER.**

2396. Whether expressed to be without prejudice.]—The stop order can only be granted either on an admission or proof of the incumbrance; & will not be granted "without prejudice to the validity of the charge."—*WINCHELSEA v. GARRETY* (1839), 1 Beav. 223; 48 E. R. 925.

2397. — — —.]—*LUCAS v. PEACOCK*, No. 2408, *post*.

2398. Assignment by husband & wife of wife's reversionary chose in action.]—*MOREAU v. POLLEY* (1847), 1 De G. & Sm. 143; 63 E. R. 1007.

2399. Order should show—Name of party assigning.]—A stop order ought to show on the face of it the person by whom the assignment in respect of which it was obtained was made.—*MACLEOD v. BUCHANAN* (1864), 4 De G. J. & Sm. 265; 3 New Rep. 623; 33 L. J. Ch. 306; 10 L. T. 9; 10 Jur. N. S. 223; 12 W. R. 514; 46 E. R. 921, L. JJ.

*Annotation:—Consd. Mack v. Postle, [1894] 2 Ch. 449.*

2400. — Whether capital or income affected.]—In ascertaining the effect of a stop order upon a fund in ct., the ct. is not bound to confine its attention merely to the language of the order itself, but may have recourse to what appears from any part of the order.

Having regard to the practice which prevails in the Paymaster-General's Office of treating stop orders on funds in ct. as not affecting income except where income is mentioned on the face of such orders, care should be taken in drawing up stop orders to express on the face of them plainly whether capital or income or both are to be restrained.

The mtgees. of the interest of a tenant for life of a fund in ct. obtained a stop order, general in terms, upon "the share" of the mtgor.:—*Held*: the stop order affected the income, & gave the

mtgees. priority over the trustees of a prior settlement not disclosed by the mtgor., who had obtained no stop order upon the fund.—*MACK v. POSTLE*, [1894] 2 Ch. 449; 63 L. J. Ch. 593; 71 L. T. 153; 10 T. L. R. 475; 8 R. 339.

**SUB-SECT. 4.—TO WHAT FUNDS APPLICABLE.**

2401. Fund in court in name of Paymaster-General.]—A judgment having been obtained against a party to whom a sum standing to the credit of the cause had been ordered to be paid, the ct., on the application of the judgment creditor, stayed the delivery to the debtor of the Accountant-General's cheques.—*ROBINSON v. WOOD* (1842), 5 Beav. 388; 12 L. J. Ch. 93; 49 E. R. 628.

*Annotations:—Refd. Courtoy v. Vincent* (1852), 21 L. J. Ch. 291. *Mentd. Harris v. Beauchamp*, [1894] 1 Q. B. 801.

2402. — — —.]—Parties interested in a fund standing in the name of the Accountant-General in one suit, were ordered to pay debts in another suit their costs. These being taxed & a minute having been left with the senior master of the Common Pleas, the ct., on petition, made a charging order on the fund for such costs, & granted an interim stop order.—*WELLS v. GIBBS* (1856), 22 Beav. 204; 52 E. R. 1086.

2403. Securities in court.]—Stop order, directing that a tin box in ct., containing turnpike securities, should not be parted with without notice to petitioner.—*WILLIAMS v. SYMONDS* (1846), 9 Beav. 523; 50 E. R. 445.

2404. Fund not in court.]—Though the ct. will stay the payment of a fund out of ct. for the purpose of giving a stranger the opportunity of enforcing his right against it, yet it will not, for the same purpose, order into ct. a sum directed to be paid by one party to another.

By the decree, an arrear of dividends on stock was ordered to be paid to pltf. by her trustee. Shortly afterwards, such arrears were, under Judgments Act, 1838 (c. 110), s. 14, charged by a common law judge with the payment of a sum of money to B. A petition was presented by B. that the trustee might pay the amount into ct., & for a stop order thereon. The petition was dismissed with costs.—*NEWTON v. ASKEW* (1848), 11 Beav. 446; 12 L. T. O. S. 210; 12 Jur. 766; 50 E. R. 890.

*Annotation:—Mentd. Newton v. Ricketts* (1861), 31 L. J. Ch. 247.

2405. — — —.]—Where there is no fund in ct., & no order for bringing any fund into ct., the ct. will not entertain a petition for a stop order.—*WELLESLEY v. MORNINGTON* (1862), 1 New Rep. 13; 7 L. T. 590; 11 W. R. 17.

2406. Fund ordered to be brought into court.]—*SHAW v. HUDSON*, No. 2372, *ante*.

2407. Disputed portion of fund in court.]—Where a claimant to a fund in ct., his title to a portion of which was in dispute, became bkpt., & his assignees advertised the whole of the fund for sale, a stop order on the disputed portion was granted.—*HAWKSLEY v. GOWAN* (1864), 11 L. T. 134; 12 W. R. 1100.

**PART V. SECT. 3, SUB-SECT. 4.**

d. Fund in court.]—Pltfs. obtained a charging order against certain moneys in ct.:—*Held*: such an order was inappropriate; a stop order should be obtained & a subsequent application made for transfer of the fund to the sheriff for distribution.—*McDOUGALL v. INGLIS* (1909), 12 W. L. R. 78.—CAN.

e. — Garnished money.]—When garnished money lying in ct. in an action which had been settled, belonged to debt. as an execution debtor & it was sought to bind the fund for payment out to a sheriff for distribution among execution creditors:—*Held*: the proper practice was to obtain a stop order.—*STARR CO. OF CANADA, LTD. v. MERRILL*, [1922] 3 W. W. R. 926; 70 D. L. R. 557.—CAN.

f. Deposit by employee—For due performance of duties.]—Where money deposited with a railway co. by one of its servants as a guarantee for the due performance of his duties was attached by a judgment creditor of such servant:—*Held*: creditor was not entitled to have his decree satisfied out of the deposit, but was entitled to a stop order.—*KARUTHAN v. SUBRAMANYA* (1886), 1 L. R. 9 Mad. 203.—IND.

## SUB-SECT. 5.—EFFECT OF ORDER.

**2408. Does not decide rights of parties.]—**A stop order does not affect any right, & it is therefore unnecessary to specify that it is made "without prejudice."—*LUCAS v. PEACOCK* (1846), 9 Beav. 177; 50 E. R. 311.

*Annotations:—*Reid. *Mutual Life Assoc. Soc. v. Langley* (1884), 53 L. J. Ch. 996. *Mentd. Mackenzie v. Mackintosh* (1891), 64 L. T. 318.

**2409. —.]—**A married woman entitled under a will to a fund on which an annuity was charged, joined her husband in assigning her interest to a purchaser for valuable consideration: the purchaser obtained a stop order on the fund. On the death of the annuitant, the wife presented a petition for a settlement in a suit instituted for administering the estate of which the fund formed a part:—*Held*: the purchaser had, by means of the stop order, brought himself sufficiently before the ct. to enable it to deal with the case.

*Resps.* [purchaser], although neither plts. nor defts., have, by obtaining a stop order, brought themselves before the ct. sufficiently to enable it to deal with the case. The effect of the stop order is, that the fund cannot be paid out without notice to them; it has not the effect of varying the mode of proceeding by the party entitled to the fund; it only entitles *resps.* to notice, so as to give them a power of opposing the payment of the money out of ct. (*LORD TRURO, C.*)—*SCOTT v. SPASHETT* (1851), 3 Mac. & G. 599; 21 L. J. Ch. 349; 19 L. T. O. S. 37; 16 Jur. 157; 42 E. R. 391, L. C.

*Annotations:—**Mentd. Dunkley v. Dunkley* (1852), 2 De G. M. & G. 390; *Re Kincaid's Trust* (1853), 22 L. J. Ch. 395; *Re Disney* (1855), 4 W. R. 425; *Re Erskine's Trust* (1855), 1 K. & J. 302; *Aubrey v. Brown* (1856), 25 L. J. Ch. 446; *Taunton v. Morris* (1878), 8 Ch. D. 453.

**2410. —.]—**Where a fund is paid into ct. under Trustee Relief Act, 1847 (c. 96), a creditor of a party interested in the fund applies for a stop order & serves the trustees, who claim a lien for costs against the same party, the ct. will not determine the question of lien, but grant the stop order without prejudice to that question.—*Re BLUNT'S TRUST* (1862), 10 W. R. 379.

**2411. Fund not immediately divisible—Order by one of parties interested—Affects whole fund.]—**Where several persons are interested in a fund in ct., which cannot be immediately carried to their separate accounts, an order obtained by one of the parties interested, to prevent the fund being paid out without notice to him, will extend to the whole fund.—*BERGMAN v. TRESLOVE* (1835), 5 L. J. Ch. 4.

## SUB-SECT. 6.—PRIORITIES.

*See, generally, CHOSSES IN ACTION, Vol. VIII., pp. 468 et seq.*

**2412. Order obtained with notice of prior**

## PART V. SECT. 3, SUB-SECT. 5.

**g. In equity—On fund in court.]—**A stop order in equity gives no charge on a fund in ct. in favour of the party obtaining it, & he is not entitled to an order for payment out of ct. as against his judgment debtor without first getting a charging order on the fund.—*McWILLIAMS v. BAILEY* (1894), 9 Man. L. R. 563.—CAN.

**h. Amount bound by order.]—**A stop order can only bind so much of a debt as the judgment debtor can honestly deal with when the order is obtained & served, & does not affect the claims of creditors in whose favour he has charged the debt though they have not given notice of their claims.—*SHAW v. WESTERN CANADA MOTOR*

*CAR CO.* (1916), 34 W. L. R. 831; 10 W. W. R. 1086.—CAN.

## PART V. SECT. 3, SUB-SECT. 6.

**k. Where applicant has charge on "further advances."]—**The operation of a stop order is confined to the amount on which the order is founded; but where the affidavit on which a stop order was based showed that applicant had a charge on the fund for £1 for "various further sums from time to time advanced":—*Held*: the stop order conferred priority in respect of the total amount of such advances made prior to the date of the affidavit.—*Re CAHILL* (1909), 10 S. R. N. S. W. 106.—AUS.

**l. Fund in court—Effect of**

**incumbrance—No priority obtained.]—***DREVOR v. MAWDESLEY* (1836), 10 L. J. Ch. 23, n.

*Annotation:—**Expld. Hulkes v. Day* (1840), 10 L. J. Ch. 21.

**2413. —.]—**A. obtained a receivership order over a fund in ct. on Apr. 5, & at once obtained an order for a stop order, which fact he on the same day notified to the Paymaster-General, who thereupon indorsed notice thereof upon a cheque already drawn to the debtor's order & declined to pay over the cheque. On Apr. 21 A. lodged with the Paymaster the official stop order or a copy thereof. B. [with notice of A.'s receivership order] obtained a receivership order on Apr. 14, & on Apr. 16 lodged his official stop order with the Paymaster:—*Held*: the creditor who had first obtained the receivership order was entitled to priority.—*Re GALLAND* (1886), 2 T. L. R. 636.

**2414. Order obtained subsequent to bankruptcy.]—**The tenant for life of a fund in ct. mortgaged his interest & afterwards became bkpt. After the bkpcy. the mtgee. obtained a stop order on the dividends. The assignee in bkpcy. did not obtain a stop order:—*Held*: the mtgee. was entitled to priority over the assignee in bkpcy.—*STUART v. COCKERELL* (1869), L. R. 8 Eq. 607; 39 L. J. Ch. 127.

*Annotations:—**Apld. Birmingham Banking Co., Official Liquidators v. Carter* (1872), 20 W. R. 354. *Reid. Semphill v. Queensland Sheep Investment Co.* (1873), 29 L. T. 737; *Re Pooley, Ex p. Rabbinge* (1878), 38 L. T. 663. *Mentd. Re Russell's Policy Trusts* (1872), L. R. 15 Eq. 26; *Re Mills' Trusts* (1895), 73 L. T. 229.

**2415. Fund in court—Priority subject to prior claims.]—***HULKES v. DAY*, No. 2348, ante.

**2416. Where several orders—Priority according to date of order.]—**Where real estate was devised upon absolute trust for sale & proceeds of the sale were directed to be divided among testator's sons:—*Held*: judgment creditors who had obtained charging or stop orders on the fund which was in ct. had priority according to the dates of such orders.—*THOMAS v. CROSS* (1865), 2 Drew. & Sm. 423; 6 New Rep. 18; 34 L. J. Ch. 580; 12 L. T. 293; 11 Jur. N. S. 384; 13 W. R. 647; 62 E. R. 682.

**2417. —.]—**Orders obtained on same day rank *pari passu*.—The priority of incumbrancers on a fund in ct. is determined by the dates of their stop orders; & in ascertaining this the ct. will disregard all divisions of time less than a day, & allow all incumbrancers who obtain stop orders the same day to rank *pari passu*.—*Re METROPOLITAN RAILWAY COMPANY, TOWER HILL EXTENSION ACT, Re RAWLINS' ESTATE, Ex p. KENT* (1871), 19 W. R. 596.

**2418. —.]—**Order obtained subsequent to registration of composition deed.]—The first assignee of A.'s interest in a fund obtained a stop order which was subsequent in date to a duly registered composition deed by which A. assigned

*Creditors' Relief Act, 1880.]—*Since the coming into force of Creditors' Relief Act, 1880, execution creditors who obtain stop orders on funds in ct. do not obtain any priority thereby, but all must share rateably.—*DAWSON v. MOFFATT* (1886), 11 O. R. 484.—CAN.

**m. Must be lodged with Accountant General.]—**A stop order gives no priority to the party who has obtained it, unless it is lodged with the Accountant-General; the lodgment being equivalent to notice to the trustee of the fund, or the debtor.—*WALLER v. WILDRIDGE* (1853), 3 I. Ch. R. 155.—IR.

**n. —.]—**On Sept. 16, 1897, A. who had recovered judgment against



**Sect. 3.—Stop orders: Sub-sects. 6, 7 & 8. Sect. 4: Sub-sects. 1 & 2, A. & B.]**

all his property for the benefit of his creditors. The trustees of the composition deed also obtained a stop order subsequent to that of the first assignee:—*Held*: the first stop order, although subsequent in date to the registered composition deed, prevailed over it & entitled the first assignee to the fund.—*BIRMINGHAM BANKING CO. (OFFICIAL LIQUIDATORS) v. CARTER* (1872), 20 W. R. 354.  
*Annotation*:—*Reid. Re Pooley, Ex p. Rabbinge* (1878), 38 L. T. 663.

**2419. Administration action—Order obtained on fund carried to separate account—Priority over debt due to estate.]**—In an administration action under an order made in the presence of pltf.s., a fund was carried to the separate account of an annuitant & her issue, the dividends thereon to be paid to her for her life, & she charged her interest in favour of persons who obtained stop orders thereon. She was afterwards found to be indebted to the estate, & pltf.s. sought to have the dividends applied in satisfaction of her liability in priority to the charges she had created:—*Held*: the effect of carrying the fund to a separate account being to release it from the general questions in the cause, the persons who had made the advances on the faith of the order were entitled to priority over pltf.'s claim.—*Re EYTON, BARTLETT v. CHARLES* (1890), 45 Ch. D. 458; 59 L. J. Ch. 733; 63 L. T. 336; 39 W. R. 135.

*Annotations*:—*Consd. Edgar v. Plomley*, [1900] A. C. 431. *Reid. Thompson v. Thompson*, [1923] 2 Ch. 205. *Mentd. Cloutte v. Storey*, [1911] 1 Ch. 18.

**Priorities in assignments of Choses in Action.]**—*See CHOSSES IN ACTION*, Vol. VIII., pp. 474–476, Nos. 442–458, 462.

**Priorities in bankruptcy.]**—*See BANKRUPTCY*, Vol. V., pp. 775–782.

**SUB-SECT. 7.—PAYMENT OUT.**

**2420. Service of petition—Stop order placed by mortgagee of contingent interest—Death of mortgagor before contingency.]**—Where a contingent interest in a fund in ct. has been mortgaged, & the mtgee. places a stop order on the fund, but the mtgor. dies before his interest vests, the persons ultimately entitled to the fund upon applying for payment out need not serve such mtgee.—*VERNON v. CROFT* (1888), 58 L. T. 919; 36 W. R. 778.

**SUB-SECT. 8.—COSTS.**

*See, now, R. S. C., Ord. 46, r. 12.*

**2421. General rule.]**—Parties having a claim upon a fund in ct. are not entitled as a general rule, & under all circumstances, to the costs of getting a stop order.

D. having a lien on a fund by express agreement

B. obtained an order appointing himself receiver by way of equitable execution on entering into security over the beneficial interest of B. in £250 consols standing to the credit of this suit & on Dec. 17, 1897, A. obtained a stop order but omitted to perfect his security until 1901. On Nov. 2, 1897, C. another judgment creditor of B. obtained an order charging the interest of B. in the £250 consols & on Dec. 8, 1897, entered notice of this order in the books of the Accountant General:—*Held*: C. was entitled to be paid his debt out of the share of B. in the consols in priority to A.—

*FAHEY v. TOBIN*, [1901] 1 I. R. 511.—*IR.*

**PART V. SECT. 3, SUB-SECT. 7.**

**o. Fund in court.]**—Where a judgment creditor petitioned for payment out to him, or that the sheriff might be permitted to seize, under writs in his hands, funds in ct. standing to the credit of his debtor, upon which a stop order had been issued before the cheque was drawn, an order was made directing a cheque to be made out in favour of the petitioner.—*Re GILCHRIST* (1878), 7 P. R. 430.—*CAN.*

with the parties entitled to it, they by their acts departed from that contract, & D. was obliged to get a stop order, & appeared to ask for those costs & claim his lien:—*Held*: he was entitled to the cost of the stop order, & of his appearance.—*GRIMSBY v. WEBSTER* (1860), 8 W. R. 725.

**2422. Service on unnecessary parties.]**—A petition for a stop order was served not only on the assignor, but on the other parties to the cause:—*Held*: petitioner should be ordered to pay the costs of the latter.—*GLAZBROOK v. GILLATT* (1846), 9 Beav. 611; 50 E. R. 480.

**2423. Whether applicant entitled to costs—Application under express provision in mortgage deed.]**—The mtgee. of a fund in ct. is entitled to the expense of obtaining a stop order on the fund in a case in which he is empowered by the mortgage deed to apply to the ct. for that purpose, but such expenses are not allowed by the taxing master under the common order to tax the costs of the mtgee.—*WADDILOVE v. TAYLOR* (1848), 6 Hare, 307; 17 L. J. Ch. 408; 67 E. R. 1183; *sub nom. WADDILOVE v. TAYLOR, Ex p. WADDILOVE*, 12 Jur. 598.

*Annotation*:—*Reid. National Provincial Bank of England v. Games* (1886), 31 Ch. D. 582.

**2424. — Application after notice of petition for payment out.]**—A fund having become distributable, & a mtgee., with notice that the parties entitled had presented a petition for payment out of ct. to the mtgee. & to themselves, having applied for a stop order:—*Held*: he should be refused the costs of his application.—*HOOLE v. ROBERTS* (1848), 12 Jur. 108.

**2425. — Application necessitated by acts of other party.]**—*GRIMSBY v. WEBSTER*, No. 2421, *ante*.

**SECT. 4.—RESTRAINING TRANSFER OF STOCK IN BOOKS OF COMPANY.**

*NOTE*.—Cases dealing with the former practice under a writ of *distringas* are omitted.

**SUB-SECT. 1.—NOTICE IN LIEU OF DISTINGAS.**

*See, now, R. S. C., Ord. 46, rr. 2–11.*

**2426. Effect of notice—Similar to notice to a trustee.]**—The effect of a *distringas* is similar to that of notice to a trustee.

A trustee assigned his reversionary interest in a share of the trust fund, & then committed a breach of trust:—*Held*: such share in the hands of his assignee was subject to the equities originally affecting the whole trust fund.—*WILKINS v. SIBLEY* (1863), 4 Giff. 442; 8 L. T. 760; 9 Jur. N. S. 888; 11 W. R. 897; 66 E. R. 780.

**2427. — Does not act as injunction.]**—By putting a *distringas* on shares a legatee does not accept the shares so that he cannot afterwards disclaim.

**p. — For particular purpose—Surplus.]**—Defts., having in the hands of the sheriff an unsatisfied execution against pltf. for the costs of the action, & having obtained a stop order against the sum of \$200 paid into ct. by pltf. as security for the costs of an appeal to the Ct. of Appeal, which had been dismissed with costs, were held entitled to payment of the surplus of the \$200, after satisfying their costs of appeal, to be applied on their costs of the action.—*EVANS v. HUNTSVILLE TOWN* (1904), 7 O. L. R. 540; 24 C. L. T. 297; O. W. R. 423.—*CAN.*

It [*distringas*] does not act as an injunction, but he has to have notice if any one wishes to transfer the fund, & unless he then moves within a certain time the *distringas* is gone (KEKEWICH, J.).—HOBBS v. WAYET (1887), 36 Ch. D. 256; 56 L. J. Ch. 819; 57 L. T. 225; 36 W. R. 73.

*Annotations*:—*Mentd.* Wolmershausen v. Gullick, [1893] 2 Ch. 514; St. Thomas's Hospital v. Richardson, [1910] 1 K. B. 271.

**2428.** — By legatees—Does not amount to acceptance of shares.]—HOBBS v. WAYET, No. 2427, *ante*.

**2429.** — Prevents registration of transfer.]—The owner of shares assigned all his property to plffs. for the benefit of his creditors; plffs. demanded the certificates, but were told that they were abroad. They then gave notice of the assignment to the co., but did not proceed under R. S. C., Ord. 46. The owner subsequently instructed defts., his stockbrokers, to sell the shares, which they did, paying the proceeds to the owner & receiving from him the certificates, which they lodged with the co. for certification. The co., having notice of the assignment, refused to register the transfers to the purchasers. The stockbrokers thereupon purchased & delivered to the purchasers other shares in substitution for those originally sold. These latter shares the stockbrokers now claimed to have registered in their names:—*Held*: plffs. had not disentitled themselves by negligence, & their prior equitable title must prevail.

A *distringas* would not have prevented payment although it would have prevented any registration of the transfer (JOYCE, J.).—PEAT v. CLAYTON, [1906] 1 Ch. 659; 75 L. J. Ch. 344; 94 L. T. 465; 54 W. R. 416; 22 T. L. R. 312; 50 Sol. Jo. 291; 13 Mans. 117.

**2430.** Effect of failure to proceed with claim—Whether injunction may be applied for—Court of Chancery Act, 1841 (c. 5), s. 4.]—The remedies given by sects. 4 & 5 of above Act are in substitution for the writ of *distringas* under the former practice in the Exchequer: & therefore, where a party had put a *distringas* upon a sum of stock before the passing of that Act, & that *distringas* had been removed upon the usual notice:—*Held*: it was not competent to him, after the passing of the Act, to apply for an injunction under sect. 4.—*Ex p.* AMYOT (1841), 1 Ph. 130, n.; 0 Jur. 137; 41 E. R. 581, L. C.

*Annotations*:—*Consd.* *Re Hertford* (1842), 1 Hare, 584. *Expld.* *Re Suisse* (1842), 6 Jur. 654.

**2431.** — — — — —.]—*Re HERTFORD* (MARQUIS), No. 2434, *post*.

**2432.** — — — — —.]—HOBBS v. WAYET, No. 2427, *ante*.

**2433.** Interim injunction obtained—Order served on legal owners of stock.]—A notice having been served on the Bank of England under R. S. C., Ord. 46, rr. 4, 7, to prevent the transfer of stock or the payment of dividends thereon without notice to the persons serving the notice, the bank gave notice to them that an application had been made to the bank to allow the transfer of stock & to pay the dividends thereon, & that they should comply with the application, unless an order of the ct. should be served on them within eight days. A motion was then made *ex p.* for an order to restrain the bank from permitting the transfer or paying the dividends:—*Held*: the proper course was to grant an *interim* injunction over the next regular motion day, & notice of the order must be served on the legal owners of the stock.—*Re BLAKSLEY'S TRUSTS* (1883), 23 Ch. D. 549; 48 L. T. 776.

## SUB-SECT. 2.—INTERIM INJUNCTION OR RESTRAINING ORDER.

### A. In General.

*See* Court of Chancery Act, 1841 (c. 5), s. 4.

**2434.** Notice of proceedings—Protection until proceedings instituted.]—Court of Chancery Act, 1841 (c. 5), s. 4, does not confer any new or summary jurisdiction on the ct. To continue a restraining order, a bill must be filed.

On May 28, a restraining order was obtained under sect. 4. On a motion to dissolve, on June 30, no bill being filed, & no sufficient excuse given for the omission, the ct. refused to continue the order till a bill could be filed, & discharged it with costs.

*Qu.*: whether a party, who has obtained a *distringas* under sect. 5, is entitled to come afterwards for a restraining order under sect. 4:—*Semble*: he might, under special circumstances; e.g. in case of new discovery after *distringas* issued, or the erroneous refusal of the bank to notice the *distringas*, & a strong case of merits & urgency.

*Qu.*: whether a party prosecuting for felony can institute proceedings in equity to protect the property in the meantime.—*Re HERTFORD* (MARQUIS) (1842), 1 Hare, 584; 11 L. J. Ch. 317; 66 E. R. 1164.

**2435.** — — — — — Unless grounds for granting order displaced.]—In order to sustain an injunction granted upon a summary application under sect. 4 of Court of Chancery Act, 1841, the party obtaining it must proceed to file a bill within due time afterwards.

Upon a bill being filed, the proceeding under the statute is not thereby determined; & if deft. cannot satisfactorily displace the grounds upon which the injunction was originally issued, the ct. will continue it until the hearing.—*Re HERTFORD* (MARQUIS) (1843), 1 Ph. 203; 41 E. R. 609; *sub nom.* *Re HERTFORD* (MARQUIS), *HERTFORD* (MARQUIS) v. SUISSE, 8 Jur. 71.

**2436.** Failure to move for injunction—Application for order to permit transfer.]—On a bill filed against a bank, & others claiming stock, & praying an injunction against the bank to prevent a transfer, a *subpœna* was served on the bank, with notice not to permit a transfer. The answers were afterwards put in, but no injunction was moved for by plff.

Defts. moved for an order that the bank might be at liberty to permit a transfer; & an order was made to that effect, unless, on or before a given day, plff. should move for an injunction to restrain the transfer.—ROSS v. SHEARER (1821), 5 Madd. 458; 56 E. R. 970.

### B. The Application.

*See* Court of Chancery Act, 1841 (c. 5), s. 4; R. S. C., Ord. 46, rr. 2–11.

**2437.** Who may apply—Party prosecuting felon.]—*Re HERTFORD* (MARQUIS), No. 2434, *ante*.

**2438.** — — — — — Party interested.]—*Re CARTER*, *Ex p.* WATSON (1845), 6 L. T. O. S. 97.

**2439.** — — — — — Party presumptively entitled.]—*Re ASHTON* (1900), 44 Sol. Jo. 429.

**2440.** — — — — — Married woman—Upon undertaking as to damages.]—An application was made on behalf of a married woman for an injunction restraining the Bank of England, until further order, from permitting the transfer of certain stocks, standing in the names of the exors. of a testator, & to which the married woman claimed to be beneficially entitled. An injunction was granted for a fortnight on the usual undertaking of the married woman to be answerable in damages. The registrar refused to draw up the order on the



*Sect. 4.—Restraining transfer of [stock in books] of company: Sub-sect. 2, B. & C. Sect. 5: [Sub-sects. 1, 2]*

sole undertaking of the married woman as to damages:—*Held*: the sole undertaking of the married woman must be accepted.—*Re PRYNNE* (1885), 53 L. T. 465.

*Annotation*:—*Reid. Pike v. Cave* (1893), 62 L. J. Ch. 937.

**2441. How application intitled.]—*Re PIKE*, [1902] W. N. 42.**

**2442. Necessity for affidavit.]—Sects. 4, 5, of Court of Chancery Act, 1841 (c. 5), relate to different subjects; &, to authorise an application to the ct. under the former sect. it must be founded on affidavit.**

Under sect. 5, the officers of the Ct. of Chancery are bound to issue the writ of *distringas* in the same manner as the officers of the Ct. of Exchequer did.—*Ex p. FIELD* (1841), 1 Y. & C. Ch. Cas. 1; 5 Jur. 984; 62 E. R. 764.

**2443. — Showing special grounds.]—The ct. will not accede as of course to an application, by a creditor, under sect. 4 of Court of Chancery Act, 1841 (c. 5), to restrain the transfer of shares belonging to his debtor, but will require special grounds in support thereof.—*Re EAST OF ENGLAND BANK* (1865), 6 New Rep. 81.**

**2444. In respect of what funds—Government annuity.]—Under sect. 4, Court of Chancery Act, 1841 (c. 5), an injunction may be obtained in a summary way to restrain the payment of a Govt. annuity.—*Ex p. WATTS* (1871), 19 W. R. 400; *sub nom. WATTS v. WATTS*, 40 L. J. Ch. 388; 24 L. T. 120.**

#### C. Costs.

**2445. Where bank unnecessarily made party to suit.]—If the Bank of England are unnecessarily made parties to a suit, the relief against them being obtainable under Transfer of Stock Act, 1800 (c. 36), the bill will be dismissed against them with costs, to be personally paid by pltfs.—*EDRIDGE v. EDRIDGE* (1818), 3 Madd. 386; 56 E. R. 547.**

*Annotation*:—*Consd. Perkins v. Bradley* (1842), 1 Hare, 219.

**2446. —.]—The Bank of England ought not to be made a party to a suit for the purpose of giving effect to a charge upon stock standing in the name of a felon convict.**

The A.-G. on behalf of the Crown, deft. in a suit, claiming an interest in the goods of a felon convict, subject of the suit, against purchasers for value, & failing in that claim, is not entitled to his costs out of the fund, as a matter of course.—*PERKINS v. BRADLEY* (1842), 1 Hare, 219; 6 254; 66

Hare, 394;  
16 W. R. 419.

### SECT. 5.—EQUITABLE EXECUTION.

#### SUB-SECT. 1.—NATURE OF PROCESS.

**2448. Not execution but equitable relief.]—S., being entitled to a freehold subject to a mtge., a judgment creditor, shortly before the death of S., applied for a receiver by way of equitable execution. The application was adjourned & in the meantime S. died intestate. Two days after his**

death an order for a receiver was made without reviving the action or bringing the heir-at-law before the ct.:—*Held*: the order was ineffectual having been made after the death of S., & in the absence of any person to represent his estate. What is commonly called equitable execution is not in fact execution but equitable relief which is granted because there is a hindrance in the way of execution at law, & it is subject to the ordinary rule that equitable relief can be granted only when proper parties are before the ct.

Jud. Act, 1873 (c. 66), does not give any right to equitable execution where there is no impediment in the way of legal execution.—*Re SHEPHARD, ATKINS v. SHEPHARD* (1889), 43 Ch. D. 131; 59 L. J. Ch. 83; 62 L. T. 337; 38 W. R. 133; 6 T. L. R. 55, C. A.

*Annotations*:—*Consd. Blackman v. Fysh*, [1892] 3 Ch. 209; *Harris v. Beauchamp*, [1894] 1 Q. B. 801. *Expld. Thompson v. Gill*, [1903] 1 K. B. 760. *Consd. Morgan v. Hart*, [1914] 2 K. B. 183. *Reid. Duke v. Davis*, [1893] 2 Q. B. 260; *Holmes v. Millage*, [1893] 1 Q. B. 551; *Re Potts, Ex p. Taylor*, [1893] 1 Q. B. 648; *Minter v. Kent, Sussex & General Land Soc.* (1895), 72 L. T. 186; *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154; *Stewart v. Rhodes*, [1900] 1 Ch. 386; *R. v. Selfe*, [1908] 2 K. B. 121. *Mentd. Re Goudie, Ex p. Official Receiver*, [1896] 2 Q. B. 481; *Ellis v. Wadeson*, [1899] 1 Q. B. 714.

**2449. —.]—(1) Resps. recovered judgment for a sum of money against a foreign co. carrying on business in France. Goods belonging to the co. being, at the date of the judgment, in the possession of a firm in England who had a lien upon them; resps. obtained an order appointing a receiver of the co.'s interest in the goods, & directing that any money received by him should be paid to resps. in satisfaction of their debt. Shortly after the receivership order was made the co. was adjudicated by a French ct. to be in judicial liquidation, & applts. were appointed liquidators. Subsequently, applts. having claimed to be entitled to the goods, the goods were sold; the lien was paid off, the balance in the hands of the receiver was paid into ct., & an issue was directed to try whether applts. or resps. were entitled to such balance:—*Held*: assuming that by the law of France applts. became entitled to the goods at the date of the liquidation, yet the receivership order had the effect of entitling resps. to the goods, or the proceeds of them, as & from the date upon which it was made, subject only to the discharge of the lien which was a legal impediment to execution, therefore, resps. were entitled to the balance paid into ct.**

(2) A receivership order has been called a step or process of equitable execution. Using language which, to my mind, is plainer & less likely to mislead, I should say that it is an order which shows that, in the judgment of the ct., the person obtaining it would be entitled to execution, but that from some legal impediment execution cannot be had (LORD COLERIDGE, C.J.).

(3) The process adopted by the Ct. of Chancery was to make a receivership order & appoint a receiver. The receiver could not, of course, get the goods until the lien was satisfied; but the moment it was satisfied he could get them. The object of the process was to remove the difficulty of the judgment creditor being unable to get possession of that to which he had a right, & the moment the difficulty was removed to give the thing in question to the judgment creditor. That process has been called "equitable execution." In one sense it is not execution at all. It is a process which gives to the judgment creditor that to which the judgment has given him a right, & does away with the difficulty of his getting possession of it (LORD ESHER, M.R.).—LEVASSEUR

*v. MASON & BARRY*, [1891] 2 Q. B. 73; 60 L. J. Q. B. 659; 64 L. T. 761; 39 W. R. 596; 7 T. L. R. 436, C. A.

*Annotations*:—*As to* (1) *Consd. Re Potts, Ex p. Taylor*, [1893] 1 Q. B. 648; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727. *Reid. Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157; *Re Pearce, Ex p. Official Receiver, The* to  
Fry (1915), 84 L. J. K. B. 2025.

**2450.** —.]—The appointment of a receiver of the property or interest of a judgment debtor is not execution within R. S. C., Ord. 42, rr. 8, 23. The exors. of a deceased judgment creditor are not entitled to obtain an order for a receiver of the judgment debtor's property or an injunction against his dealing with it.—*NORBURN v. NORBURN*, [1894] 1 Q. B. 448; 63 L. J. Q. B. 341; 70 L. T. 411; 42 W. R. 127; 38 Sol. Jo. 11; 10 R. 10, D. C.

*Annotations*:—*Reid. Thompson v. Gill*, [1903] 1 K. B. 760. *Mentd. Re Clements, Ex p. Clements*, [1901] 1 K. B. 260.

#### SUB-SECT. 2.—JURISDICTION OF COURT.

**2451. Effect of Judicature Act, 1873 (c. 66)—Jurisdiction not enlarged.**—Sect. 25 (8) of the above Act does not give jurisdiction to appoint a receiver by way of equitable execution in cases where prior to that Act no ct. had such jurisdiction. In order to justify the making of an order for the appointment of a receiver at the instance of a judgment creditor, the circumstances of the case must be such as would have enabled the Ct. of Chancery to make such an order before the Jud. Act. The ct. therefore has no jurisdiction to appoint a receiver merely because, in the circumstances of the case, it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution.—*HARRIS v. BEAUCHAMP BROTHERS*, [1894] 1 Q. B. 801; 63 L. J. Q. B. 480; 70 L. T. 636; 42 W. R. 451; 9 R. 653, C. A.

*Annotations*:—*Consd. Thompson v. Gill*, [1903] 1 K. B. 760; *Morgan v. Hart*, [1914] 2 K. B. 183. *Reid. Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157. *Mentd. Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338; *Lovell & Christmas v. Beauchamp* (1894), 63 L. J. Q. B. 802; *Tyrrell v. Panton*, [1895] 1 Q. B. 202; *Dean v. Brown*, [1909] 2 K. B. 573.

**2452. Of Court of Bankruptcy.**—The Ct. of Bkpcy. has jurisdiction under sect. 25 (8) of Jud. Act, 1873 (c. 66), to appoint a receiver by way of equitable execution for the purpose of enforcing orders for the payment of money to the trustee in bkpcy.; but such an order will not, as a general rule, be made on an *ex p.* application.—*Re GOUDIE, Ex p. OFFICIAL RECEIVER*, [1896] 2 Q. B. 481; 65 L. J. Q. B. 671; 75 L. T. 277; 45 W. R. 80; *sub nom. Re GOUDIE, Ex p. OFFICIAL RECEIVER v. STRAND*, 3 Mans. 224.

#### PART V. SECT. 5, SUB-SECT. 2.

**a. Effect of Judicature Act, 1897 (c. 51), s. 58 (9)—Jurisdiction not enlarged.**—The above sub-sect. does not give jurisdiction to appoint a receiver in cases where prior to above Act no ct. had such jurisdiction, & in order to justify the making of an order for the appointment of a receiver at the instance of a judgment creditor, the circumstances of the case must be such as would have enabled the Ct. to make such an order before the Act.—*O'DONNELL v. FAULKNER* (1901), 1 O. L. R. 21; 21 C. L. T. 75.—CAN.

**r.** —.]—The provisions in the above sub-sect., that a receiver may be appointed in all cases in which shall appear to be just or convenient that such order should be made, was

intended merely to expressly confer upon all the cts. that jurisdiction which, under the designation of equitable execution, had, before the fusion of law & equity, been exercised by the Ct. of Ch. alone.—*Re ASSELIN & CLEGHORN* (1903), 6 O. L. R. 170; 23 C. L. T. 288; 2 O. W. R. 712.—CAN.

#### PART V. SECT. 5, SUB-SECT. 3.—A. (a).

**2453 i. Receiver not appointed if legal remedy available.**—The ct. of equity will not appoint a receiver of an equitable interest by way of equitable execution where the judgment creditor can issue execution against such interest at law.—*BULL (HENRY) & Co. v. MURPHY* (1900), 21 N. S. W. (Eq.) 1.—AUS.

#### SUB-SECT. 3.—IN WHAT CASES GRANTED.

##### A. Where Impediment to Legal Remedy.

###### (a) In General.

**2453. Receiver not appointed if legal remedy available.**—It has been long settled that if a judgment creditor takes execution & finds the estate protected by circumstances respecting a prior title he may apply for a receiver (*LORD ELDON, C.*)—*CURLING v. TOWNSHEND (MARQUIS)* (1816), 19 Ves. 628; 34 E. R. 649, L. C.

*Annotations*:—*Distd. Free v. Hinde* (1827), 2 Sim. 7. *Mentd. Greenwood v. Atkinson* (1830), 4 Sim. 54.

**2454.** —.]—A creditor, who had recovered judgment in an action in the Ch. Div. for payment of a sum of money, sued out a writ of *elegit* against his debtor, whose only interest in land was an equity of redemption in fee. The creditor then commenced an action in the Ch. Div., claiming to have it declared that he was entitled to a charge on the land, & to have such charge enforced by sale, foreclosure, delivery in execution, or otherwise as the ct. might direct, & asking for a receiver. Pltf. then moved for a receiver in the new action:—*Held*: Judgments Act, 1864 (c. 112), s. 1, did not take away the old right which a judgment creditor had before Judgments Act, 1838 (c. 110), to take proceedings in equity to obtain the benefit of a judgment which there were legal impediments to his enforcing at law, & pltf. was not obliged to wait till the trial, but might obtain a receiver on interlocutory application in the new action. *Qu.*: whether the appointment of a receiver could have been obtained in the old action.—*ANGLO-ITALIAN BANK v. DAVIES* (1878), 9 Ch. D. 275; 47 L. J. Ch. 833; 39 L. T. 244; 27 W. R. 3, C. A.

*Annotations*:—*Apld. Bryant v. Bull, Bull v. Bryant* (1878), 10 Ch. D. 153. *Folld. Re Watkins, Ex p. Evans* (1879), 13 Ch. D. 252; *Oliver v. Lowther* (1880), 42 L. T. 47. *Consd. Smith v. Cowell* (1880), 6 Q. B. D. 75. *Apld. Westhead v. Riley* (1883), 25 Ch. D. 413. *Consd. Re Pope* (1886), 17 Q. B. D. 743; *Holmes v. Millage*, [1893] 1 Q. B. 551; *Ashburton v. Nocton*, [1915] 1 Ch. 274. *Reid. Re Peace & Waller* (1883), 24 Ch. D. 405; *Re Whiteley, Whiteley v. Learoyd* (1887), 56 L. T. 846; *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338; *Harris v. Beauchamp*, [1894] 1 Q. B. 801; *Re Jones* (1895), 39 Sol. Jo. 671; *Tyrrell v. Panton*, [1895] 1 Q. B. 202; *Thompson v. Gill*, [1903] 1 K. B. 760; *R. v. Selfe*, [1908] 3 K. B. 121; *Re Pearce, Official Receiver v. Pearce* (1918), 120 L. T. 334.

**2455.** —.]—Since the Judicature Acts the ct. can grant equitable execution by the appointment of a receiver at the instance of a judgment creditor against debts & sums of money payable to the judgment debtor to which garnishee proceedings are not applicable.—*WESTHEAD v. RILEY* (1883), 25 Ch. D. 413; 53 L. J. Ch. 1153; 49 L. T. 776; 32 W. R. 273.

*Annotations*:—*Apld. Archer v. Archer*, [1886] W. N. 66. *Consd. Flegg v. Prentis*, [1892] 2 Ch. 428; *Holmes v. Millage*, [1893] 1 Q. B. 551. *Reid. Harris v. Beauchamp*, [1894] 1 Q. B. 801.

**2453 ii.** —.]—*BLAKE v. JARVIS* (1870), 16 Gr. 295; 17 Gr. 201.—CAN.

**2453 iii.** —.]—A judgment creditor cannot file a bill in equity to enforce his judgment against the lands of his debtor, until he has taken all necessary proceedings to enforce his judgment at law, & is unable there to obtain the relief to which he is entitled.—*BLACK v. HAZEN* (1871), (1825–1897), N. B. Dig. 454.—CAN.

**2453 iv.** —.]—Before a receiver can be appointed there must be some legal impediment in preventing the interest of the debtor being reached by law; & the fact that the interest in the property is of such a nature that it can be made subject to a charging order is fatal to an application for the appointment of a receiver.—*EVANS v. ROBERTSON ORR*, [1923] N. Z. L. R. 769.—N.Z.



*Sect. 5.—Equitable execution: Sub-sect. 3, A. (a) (b) & E*

**2456.** —.]—After judgment for foreclosure absolute, the action being at an end, pltf. cannot obtain an order for the appointment of a receiver of the mortgaged property, even though the conveyance of the property to pltf. remains to be settled.

Equitable execution is a process which the ct. allows for the purpose of enabling a judgment creditor to obtain payment of his debt when the position of the real estate is such that ordinary execution will not reach it (*CHITTY, J.*).—*WILLS v. LUFF* (1888), 38 Ch. D. 197; 57 L. J. Ch. 563; 36 W. R. 571.

*Annotations:—Consd. Manchester & Liverpool Bank v. Parkinson* (1889), 60 L. T. 258. *Refd. Holmes v. Millage*, [1893] 1 Q. B. 551.

**2457.** —.]—A judgment having been obtained in an action to recover money due, the judgment debtor died, leaving a will by which she appointed an exor. The judgment debtor at the time of her death was possessed of certain furniture & chattels, & was carrying on a business. The judgment remaining unsatisfied, the judgment creditors obtained an order appointing a certain person receiver of the furniture & chattels & of the business, & to get in & receive the debts due to such business, & directing him to pay the balance which should appear due on his accounts in or towards satisfaction of the judgment:—*Held*: in the absence of any legal impediment to obtaining execution of the judgment in the ordinary course of law by *fi. fa.* or attachment of debts, & there being no special circumstances showing it to be just or convenient that a receiver should be appointed, the order for appointment of a receiver was wrongly made, & ought to be rescinded.—*MANCHESTER & LIVERPOOL DISTRICT BANKING CO. v. PARKINSON* (1888), 22 Q. B. D. 173; 58 L. J. Q. B. 262; 37 W. R. 264; 5 T. L. R. 135, C. A.

*Annotations:—Distd. Re Hartley, Nuttall v. Whittaker* (1892), 66 L. T. 588. *Consd. Holmes v. Millage*, [1893] 1 Q. B. 551; *Harris v. Beauchamp*, [1894] 1 Q. B. 801. *Apld. Goldschmidt v. Oberheinische Metallwerke*, [1906] 1 K. B. 373. *Refd. Morgan v. Hart*, [1914] 2 K. B. 183.

**2458.** —.]—*Re SHEPHARD, ATKINS v. SHEPHARD*, No. 2448, *ante*.

**2459.** —.]—*LEVASSEUR v. MASON & BARRY*, No. 2449, *ante*.

**2460.** —.]—(1) The ct. has not jurisdiction to enforce satisfaction of a judgment debt by appointing a receiver of the future earnings of the judgment debtor.

(2) The ct. cannot grant equitable execution by the appointment of a receiver in a case where prior to Jud. Acts no ct. could grant such relief.

The only cases in which cts. of equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law if he had the legal interest in it instead of the equitable interest (*LINDLEY*,

(3) There is no doubt that since Jud. Acts, receivers by way of equitable execution can be appointed in proper cases by all divisions of the High Court on a motion or summons without the necessity of a fresh suit or action on the judgment (*LINDLEY, L.J.*).—*HOLMES v. MILLAGE*,

[1893] 1 Q. B. 551; 62 L. J. Q. B. 380; 68 L. T. 205; 57 J. P. 551; 41 W. R. 354; 9 T. L. R. 331; 37 Sol. Jo. 338; 4 R. 332, C. A.

*Annotations:—Distd. Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338. *Apld. Pearce v. Johns* (1897), 41 Sol. Jo. 661. *Folld. Edwards v. Picard*, [1909] 2 K. B. 903. *Consd. Morgan v. Hart*, [1914] 2 K. B. 183. *Refd. Harris v. Beauchamp*, [1894] 1 Q. B. 801; *Willis v. Cooper*, *Slattery v. Cooper*, *Willis v. Cooper* (1900), 44 Sol. Jo. 698; *Re Pearce, Ex p. Official Receiver, The Trustee*, [1919] 1 K. B. 354.

**2461.** —.]—*PEARCE v. JOHNS* (1897), 41 Sol. Jo. 661, C. A.

**2462.** —.]—*EDWARDS & CO. v. PICARD*, No. 2492, *post*.

**2463.** —.]—The ct. has no jurisdiction to appoint a receiver by way of equitable execution, so called, in aid of a judgment at law except in cases in which execution cannot be levied in the ordinary way, by reason of the nature of the property, & in which the Ct. of Ch. before Jud. Act, 1873 (c. 66), would have had jurisdiction to make the order.—*MORGAN v. HART*, [1914] 2 K. B. 183; 83 L. J. K. B. 782; 110 L. T. 611; 30 T. L. R. 286, C. A.

*Annotation:—Refd. Re A Company*, [1915] 1 Ch. 520.

**2464. Whether legal remedy must be exhausted.** —In a case to procure relief in equity in aid of a process at law, pltf. must show by his bill that he has proceeded with the process at law to its utmost extent to the extent necessary to give him a complete title.—*NEATE v. MARLBOROUGH (DUKE)* (1838), 3 My. & Cr. 407; 2 Jur. 76; 40 E. R. 983, L. C.

*Annotations:—Consd. Gordon v. Horsfall* (1846), 5 Moo. P. C. C. 393; *Smith v. Hurst* (1852), 10 Hare, 30; *Benham v. Keane* (1861), 3 De G. F. & J. 318. *Folld. Godfrey v. Tucker* (1863), 33 Beav. 280. *Consd. Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275; *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338. *Refd. Bond v. Bell* (1857), 4 Drew. 157; *Re Watkins, Ex p. Evans* (1879), 13 Ch. D. 252; *Flegg v. Prentis*, [1892] 2 Ch. 428; *Tyrrell v. Panton*, [1895] 1 Q. B. 202. *Mentd. Doswell v. Reece* (1865), 13 L. T. 156; *Marshall v. South Staffordshire Tram Co.*, [1895] 2 Ch. 36.

**2465.** —.]—Since the coming into operation of Jud. Act, 1873, it is not necessary for a judgment creditor, who seeks to obtain equitable execution of the judgment debtor's equitable interest in land, previously to sue out a writ of *elegit*. The appointment of a receiver of the rents of land at the instance of a judgment creditor, though conditional upon the receiver's giving security, operates as an immediate delivery of the land in execution. When the security is afterwards given the order relates back to the date when it was made.

A judgment creditor became the transferee of a legal mtge. of leaseholds belonging to the judgment debtor. He then commenced an action in the Ch. Div., claiming an account & payment of what was due to him on both mtge. & judgment; or a sale of the property & payment out of the proceeds; & the appointment of a receiver. On the same day he obtained *ex parte* an order extending over eight days, appointing an interim receiver of the rents, without security. On the eighth day he obtained, on notice, an order absolute for the appointment of the same person to be receiver of the rents, upon his giving security. On the same day the debtor filed a liquidation petition, & a receiver of his property was appointed by the Ct. of Bkpcy. It did not appear which

**2464 i. Whether legal remedy must be exhausted.** —Where there is no form of legal proceeding or process whereby a fund can be reached. *Semble*: the Ct. of Chancery has power to apply a remedy by equitable attachment.—*BANK OF BRITISH NORTH AMERICA v. MATTHEWS* (1860), 8 Gr. 486.—*CAN.*

**2464 ii.** —.]—A receiver for the purpose of giving a judgment creditor equitable relief will not be appointed until the judgment creditor has exhausted his legal, as distinguished from equitable, remedies.—*DAVIDGE v. KIRBY* (1903), 10 B. C. R. 231.—*CAN.*

**2464 iii.** —.]—A judgment creditor will not be debarred from his right to equitable relief upon the ground of the existence of a remedy at common law, unless a fruitful remedy be shown to exist.—*O'DONOVAN v. GOGGIN* (1892), 30 L. R. Ir. 579.—*IR.*

receiver was appointed first. The receiver in the action never gave security. The creditor had not sued out a writ of *elegit*:—*Held*: the appointment of the receiver in the action was such a delivery in execution by lawful authority of the mortgaged lands, within Judgments Act, 1864 (c. 112), s. 1, as to render the judgment creditor a secured creditor, within Bkpcy. Act, 1869 (c. 71), s. 16 (5), & he was entitled to hold the lands as a security for his judgment debt as well as for his mtge. debt.—*Re WATKINS, Ex p. EVANS* (1879), 13 Ch. D. 252; 49 L. J. Bcy. 7; 41 L. T. 565; 28 W. R. 127, C. A.

*Annotations*:—*Consd.* *Re Whiteley, Whiteley v. Learoyd* (1887), 56 L. T. 846; *Thompson v. Gill*, [1903] 1 K. B. 760; *Ashburton v. Nocton*, [1915] 1 Ch. 274. *Refd.* *Smart v. Flood* (1883), 49 L. T. 467; *Re Pope* (1886), 17 Q. B. D. 743; *Re Shephard, Atkins v. Shephard* (1889), 43 Ch. D. 131; *Re Potts, Ex p. Taylor*, [1893] 1 Q. B. 648; *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338; *Ridout v. Fowler*, [1904] 1 Ch. 658; *R. v. Solfo*, [1908] 2 K. B. 121.

2466. —.]—Deft. was joint tenant of a freehold house & of two leasehold houses. Two of the houses were subject to a mtge. Pltf. was an unsatisfied judgment creditor of deft., & applied for a receiver, by way of equitable execution, of deft.'s share of the rents & profits of the three houses. There was no evidence as to the value of deft.'s interest in the unmortgaged house:—*Held*: (1) a receiver could be appointed in the case of a joint tenancy; (2) in the circumstances, a receiver would be appointed in the case of the mortgaged houses without first compelling pltf. to pursue his legal remedy against the unmortgaged house; (3) a receiver might also at the same time, in the very special circumstances of the case, be appointed in the case of the unmortgaged house.—*HILLS v. WEBBER* (1901), 17 T. L. R. 513, C. A.

(b) *What amounts to an Impediment.*

2467. Existence of unsatisfied term.]—*Semble*: an equitable execution can be maintained only where there is an unsatisfied term, or where a person has converted his legal into an equitable estate, for the purpose of defeating his creditors.—*KIRKBY v. DILLON* (1824), Coop. Pr. Cas. 504; 47 E. R. 623; *sub nom.* *KIRBY v. DILLON*, 2 L. J. O. S. Ch. 140.

2468. Legal estate outstanding.]—A judgment creditor, who has sued out an *elegit*, but is unable to obtain delivery by the sheriff of debtor's lands by reason of the legal estate being outstanding, & the existence of prior incumbrances, is not bound to redeem such prior incumbrances, but may obtain a decree for the appointment of a receiver & a sale in a suit to which debtor & subsequent incumbrancers only are parties.—*WELLS v. KILPIN* (1874), L. R. 18 Eq. 298; 44 L. J. Ch. 184; 22 W. R. 675.

*Annotation*:—*Refd.* *Anglo-Italian Bank v. Davies* (1878), 11 Ch. D. 275.

2469. Address of debtor unknown.]—Pltf. in an action which had been followed by a cross-action obtained an order in both actions that his costs of the cross-action should be paid by deft. in the action, a married woman, entitled for life, for her separate use, to the dividends of a sum of stock, standing in the names of trustees, who were not parties to either action. Pltf. had endeavoured to obtain a sequestration, but failed from not being able to find deft.'s address so as to serve the *subpoena* for costs. He then moved the ct. for a receiver under Jud. Act, 1873 (c. 66), s. 25 (8). After service of notice of motion, but before the motion was heard, deft. made an affidavit in which her address was set forth:—*Held*: pltf. was entitled to a receiver.—*BRYANT v. BULL*,

*BULL v. BRYANT* (1878), 10 Ch. D. 153; 48 L. J. Ch. 325; 39 L. T. 470; 27 W. R. 246.

*Annotation*:—*Refd.* *Oliver v. Lowther* (1880), 28 W. R. 381.

2470. Creditor withdrawing property from jurisdiction.]—Pltf. in an action had obtained judgment against defts., who were a co. incorporated, & carrying on business as manufacturers, in Germany, & who had no property within the jurisdiction which could be taken in execution by any ordinary process of execution. It appeared that divers customers of defts. in this country either were, or would shortly become, indebted to defts. for goods supplied, but pltf. had no means of ascertaining particulars of any such debts, & therefore could not make an affidavit in the form No. 25, Appendix B, to the R. S. C., 1883, in order to found garnishee proceedings; & it further appeared that there was reason to believe that defts. were endeavouring to collect all debts due to them from customers in this country in order to avoid such proceedings:—*Held*: having regard to the special circumstances, the case was one in which a receiver of such debts as aforesaid might be appointed by way of equitable execution.—*GOLDSCHMIDT v. OBERRHEINISCHE METALLWERKE* [1906] 1 K. B. 373; 75 L. J. K. B. 300; 94 L. T. 303; 54 W. R. 255; 22 T. L. R. 285; 50 Sol. Jo. 238, C. A.

2471. No means of ascertaining debts due to debtor.]—*GOLDSCHMIDT v. OBERRHEINISCHE METALLWERKE*, No. 2470, *ante*.

B. *To Enforce Order for Payment into Court.*

2472. Address of debtor unknown.]—*STANGER LEATHES v. STANGER LEATHES*, [1882] W. N. 71.

*Annotation*:—*Folld.* *Re Coney, Coney v. Bennett* (1885), 29 Ch. D. 993.

2473. Debtor outside jurisdiction.]—Under the general power to appoint receivers given by Jud. Act, 1873 (c. 66), s. 25 (8), & having regard to R. S. C., 1883, Ord. 42, rr. 4, 28, the ct. has jurisdiction to enforce a judgment for payment of money into ct. by a defaulting trustee, by the appointment of a receiver of his equitable interest in property in this country; & order accordingly where, from debtor being out of the jurisdiction, service of a writ of attachment could not be effected.—*Re CONEY, CONEY v. BENNETT* (1885), 29 Ch. D. 993; 54 L. J. Ch. 1130; 52 L. T. 961; 33 W. R. 701.

*Annotations*:—*Apld.* *Archer v. Archer*, [1886] W. N. 66. *Folld.* *Re Pemberton, Pemberton v. Royal Hospital for Incurables*, [1907] W. N. 118. *Refd.* *Holmes v. Millage*, [1893] 1 Q. B. 551.

2474. —.]—*Re PEMBERTON, PEMBERTON v. ROYAL HOSPITAL FOR INCURABLES*, [1907] W. N. 118.

2475. Though sequestration appropriate remedy.]—An order was made against defts. in an action, who were defaulting trustees, for the payment of money into ct. Defts. having failed to comply with such order, an application was made by pltf. that a writ of attachment might issue against them.

At defts.' instance, however, the ct. made an order allowing payment by weekly instalments. L., one of defts., had made an affidavit on that occasion stating that all the property he possessed was the furniture in his house. It subsequently transpired that L. had executed bills of sale affecting the furniture; but that pltf., in other proceedings, had successfully disputed the validity of such bills of sale. An application was accordingly made on behalf of the pltf., for the appointment of a receiver of the furniture by way of equitable execution.

For deft. L., it was contended that the legal &



*Sect. 5.—Equitable execution: Sub-sect. 3, B. & C.]*

proper remedy of plffs. was by sequestration, & that the ct. had no jurisdiction to appoint a receiver:—*Held*: although under R. S. C., 1883, Ord. 42, r. 4, sequestration was the appropriate remedy, yet under Jud. Act, 1873 (c. 66), s. 25 (8), the ct. had jurisdiction to appoint a receiver if it appeared just or convenient so to do, & in the present case, it was just & convenient to appoint a receiver, & an order must be made accordingly.—*Re WHITELEY, WHITELEY v. LEAROYD* (1887), 56 L. T. 846.

*C. Particular Instances.*

**2476. Salary—Assistant parliamentary secretary to Treasury.]**—The salary of the assistant parliamentary counsel to the Treasury is not assignable & the ct. will not appoint a receiver of it.—*COOPER v. REILLY* (1829), 2 Sim. 560; 57 E. R. 897; *subsequent proceedings* (1830), 1 Russ. & M. 560, L. C.

*Annotation*:—*Refd. Re Mirams*, [1891] 1 Q. B. 594.

**2477. — Master forester of Royal forest.]**—Receiver granted, at the suit of a judgment creditor, of the office of master forester of a Royal forest.—*BLANCHARD v. CAWTHORNE* (1831), 4 Sim. 566; 58 E. R. 212, L. C.

*Annotation*:—*Refd. Edwards v. Picard*, [1909] 2 K. B. 903.

**2478. — Unpaid director's fees.]**—*HAMILTON v. BROGDEN*, [1891] W. N. 36.

*Annotation*:—*Distd. Holmes v. Mittage* (1893), 11 T. L. R. 217.

**2479. Pension—Officer in army.]**—*LUCAS v. HARRIS*, No. 2157, *ante*.

**2480. — — —.]**—A sum standing in the bkpcy. estates account at the Bank of England to the credit of the judgment debtor, a retired deputy commissary in the army, on the annulment of his bkpcy., consisted partly of a sum paid to the trustee out of the retired pay of the judgment debtor, partly of a sum paid to the trustee out of

money paid by the Paymaster-General in respect of the commutation of a part of his retired pay:—*Held*: the judgment creditor was entitled to the appointment of a receiver in respect of the sum arising from commutation money, but not in respect of the sum arising from retired pay.—*CROWE v. PRICE* (1889), 22 Q. B. D. 429; 58 L. J. Q. B. 215; 60 L. T. 915; 53 J. P. 389; 37 W. R. 424; 5 T. L. R. 280, C. A.

*Annotation*:—*Consd. Jones v. Coventry*, [1909] 2 K. B. 1029.

**2481. Tolls & earnings of railway company.]**—A judgment creditor of a railway co. to whom the co.'s land, including the line, has been delivered under a writ of *elegit* is entitled to a receiver of the tolls & earnings, & is not accountable as a mtgee. in possession if he has not obtained beneficial possession.—*KINGSTON v. COWBRIDGE RY. CO.* (1871), 41 L. J. Ch. 152.

*Under Railway Companies Act, 1867 (c. 127).]*—*See RAILWAYS.*

**2482. Life estate in realty.]**—A judgment creditor who has sued out an *elegit*, & got a return from the sheriff that debtor was entitled to a life estate in realty of debtor, & registered the writ, may file a bill in the ct. of chancery for a receiver of that estate.—*TILLET v. PEARSON* (1873), 43 L. J. Ch. 93; 22 W. R. 209.

*Annotations*:—*Refd. Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275; *Ashburton v. Nocton* (1914), 84 L. J. Ch. 193.

**2483. Equitable reversionary interest.]**—Pltf., who had obtained judgment against defts., husband & wife, was upon his application *ex p.* appointed receiver of the income of the wife's reversionary interest under a will.—*FUGGLE v. BLAND* (1883), 11 Q. B. D. 711, D. C.

*Annotations*:—*Apld. Westhead v. Riley* (1883), 25 Ch. D. 413. *Folld. Tyrrell v. Painton*, [1895] 1 Q. B. 202.

**2484. — — —.]**—*TYRRELL v. PAINTON*, No. 1378, *ante*.

**2485. Reversionary interest in legacy.]**—A judgment debt being unsatisfied for want of goods of debt., who was entitled, expectant on

**PART V. SECT. 5, SUB-SECT. 3.—C.**

**s. Salary—Teacher in public school.]**—Pltf., who had obtained an assignment from debt., subsequently obtained an order for the appointment of a receiver, for the purpose of obtaining payment of the sum of \$50 or \$60, which debt., as a teacher was entitled to receive from the inspector of his district. Debt.'s contract for the performance of his duties being made with the trustees of the school section in which he was employed, & there being no contract directly or indirectly between debt. & the Govt.:—*Held*: debt.'s salary was not exempt from attachment for debt under the principle of the cases applicable to officers employed in the public service, & the amount coming to debt. being one that could not be reached by ordinary legal execution, or garnishee process, pltf. was entitled to the equitable relief sought.—*FISHER v. COOK* (1899), 32 N. S. R. 226.—*CAN.*

**t. — National schoolmaster.]**—The ct. has jurisdiction to appoint a receiver over an instalment of a national schoolmaster's salary which has actually become due; it is not against public policy that an instalment of such a salary, when actually due, should be liable to execution.—*PICTON v. CULLEN*, [1900] 2 I. R. 612.—*IR.*

**u. — Petty sessions clerk.]**—The ct. will not appoint a receiver by way of equitable execution over the salary of a petty sessions clerk, even where he has himself covenanted to assign future gales of his salary in favour of a judgment creditor.—

*M'CREERY v. BENNETT* (1903), 37 I. L. T. 240.—*IR.*

**y. Pension—Stipendiary magistrate.]**—Deft. was entitled to a pension given in consideration of services which had been rendered by him as stipendiary magistrate of the city, on his retirement from that office, when his official connection with the city ceased:—*Held*: debt.'s pension could be made available for the payment of his debt & as debt. was residing out of the jurisdiction of the ct. & had no property within the jurisdiction, & the ordinary modes of execution were not available, plffs. were entitled to the appointment of a receiver.—*IMPERIAL BANK OF CANADA v. MOTTON* (1897), 29 N. S. R. 368.—*CAN.*

**a. — Future instalments.]**—Pltf. the wife of a retired member of a police force, & entitled to interim alimony under an order theretofore made, applied to be appointed receiver of moneys to which debt., her husband, would become entitled as a pension, on application by him, which application he had not yet made:—*Held*: pltf. was not entitled to succeed, for, whereas, arrears of pension constitute a debt which may be attached by garnishee proceedings, unearned pension cannot be reached either by that procedure or by the appointment of a receiver.—*SLEMIN v. SLEMIN* (1903), 7 O. L. R. 67; 24 C. L. T. 57; 2 O. W. R. 1176.—*CAN.*

**b. — — —.]**—The ct. will not appoint a receiver by way of equitable execution over future instalments of a superannuation allowance, granted to a public servant, if such servant is, at the

time of the application to appoint a receiver, under the age of sixty years.—*MACDONALD v. O'TOOLE*, [1908] 2 I. R. 386; 42 I. L. T. 73.—*IR.*

**c. — Civil service.]**—The ct. can appoint a receiver by way of equitable execution, over civil service pension, payable monthly to debt., & by order direct the receiver to receive the entire of the said monthly instalments, & retain therefrom a certain amount per month, & apply same in discharge of the judgment debt & costs, & pay balance to debt.—*MOLONY v. CRUISE* (1892), 30 L. R. Ir. 99.—*IR.*

**d. — Royal Irish Constabulary.]**—The ct. has power to appoint a receiver over the pension of a retired officer of the Royal Irish Constabulary.—*MANNING v. MULLINS*, [1898] 2 I. R. 34.—*CAN.*

**2481 i. Tolls & earnings of railway company.]**—A judgment creditor of a railway co., with execution against their lands in the hands of the sheriff, is entitled to the appointment of a receiver of the earnings of the road, the profits thereof to be applied in payment of his demand.—*PEETO v. WELLAND RY. CO.* (1862), 9 Gr. 455.—*CAN.*

**2481 ii. — — —.]**—So long as a railway co. is a going concern, bondholders whose bonds are a general charge on the undertaking have no right, even although interest on these bonds is in arrear, to seize, or take, or sell, or foreclose any part of the property of the co. Their remedy is the appointment of a receiver.—*PHILIPS v. ST. CATHARINES & NIAGARA CENTRAL CO.* (1890), 19 O. R. 501.—*CAN.*

the death of a tenant for life, to a legacy of much larger amount than the debt:—*Held*: a receiver should be appointed by way of equitable execution to receive a sufficient portion of the legacy when it should become receivable.—*MACNICOLL v. PARNELL* (1887), 35 W. R. 773, D. C.

*Annotations*:—*Folld. Tyrrell v. Painton* (1894), 11 R. 589. *Consd. Campbell v. Campbell & Davis* (1895), 72 L. T. 294; *Re Harrison & Bottomley*, [1899] 1 Ch. 465.

**2486. Reversionary interest in real estate.**—*Re JONES & JUDGMENTS ACT, 1864* (1895), 39 Sol. Jo. 671.

*Annotation*:—*Refd. Re Harrison & Bottomley*, [1899] 1 Ch. 465.

**2487. Where no assets available.**—A receiver will only be granted in cases where the amount of the judgment debt warrants the expense, & where there is fair reason to suppose that there is something for the receiver to receive.—*I. v. K.*, [1884] W. N. 63; *Bitt. Rep. in Ch.* 185.

**2488. Money arising from land outside jurisdiction—Unless appointment useless.**—A co. incorporated by an American State, & domiciled in the United States, created an equitable charge on land in Mexico for payment of a debenture debt. The land became vested in an English co. subject to an express obligation by them to pay off such charge out of the proceeds of sale of the property. On motion for a receiver of the rents & other money to arise from the land:—*Held*: the English co. & its directors were accountable in an English ct. to the debenture holders for proceeds of such land come to their hands; but, in the circumstances the ct. being of opinion that a receiver would be useless, the motion was refused.—*MERCANTILE INVESTMENT & GENERAL TRUST CO. v. RIVER PLATE TRUST, LOAN & AGENCY CO.*, [1892] 2 Ch. 303; 61 L. J. Ch. 473; 66 L. T. 711; 36 Sol. Jo. 427.

*Annotations*:—*Mentd. Re Maudslay, Sons & Field* (1900), 82 L. T. 378; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129; *British South Africa v. De Beers Consolidated Mines* [1910] 1 Ch. 354.

**2489. Estate of deceased debtor.**—In a petition by a husband for divorce, a decree absolute had been pronounced & the co-respondent condemned in the costs of the petition. An arrangement

was subsequently made by which the co-respondent undertook to pay the amount of the costs by instalments; but he died intestate before the whole of such instalments had been paid. Immediately after his death an order was made restraining his widow from dealing with his estate. The ct., under R. S. C., 1883, Ord. 17, r. 4, & Ord. 42, r. 28, appointed petitioner receiver of the co-respondent's estate, but directed that the order should not be drawn up for a week, in order that the widow of the co-respondent might decide whether she would take out administration & give security for the debt.—*WADDELL v. WADDELL*, [1892] P. 226; 61 L. J. P. 110; 67 L. T. 389.

**2490. Future earnings.**—*HOLMES v. MILLAGE*, No. 2460, *ante*.

**2491. — Takings of theatre.**—A judgment debt was recovered against a theatre co. The theatre was subject to a mtge. The co. had no land except the theatre, of which they were lessees & were in occupation, & they were using it for the ordinary purposes of a theatre:—*Held*: (1) a receiver could not be appointed at the instance of the judgment creditor to receive by way of equitable execution the moneys paid by the public for entrance to the theatre: (2) a receiver ought to be appointed of the rents & profits of the co.'s lands by way of equitable execution, without prejudice to the rights of any prior incumbrancers, & the co. should be ordered to deliver up possession of the lands to him.—*CADOGAN v. LYRIC THEATRE, LTD.*, [1894] 3 Ch. 338; 63 L. J. Ch. 775; 71 L. T. 8; 10 T. L. R. 596; 7 R. 594, C. A.

*Annotation*:—*As to* (1) *Refd. Re Pearce, Ex p. Official Receiver, The Trustee*, [1919] 1 K. B. 354.

**2492. — Profits of patent.**—Deft., against whom pl'tfs. had recovered judgment in an action, which remained unsatisfied, was resident abroad, & had no property within the jurisdiction available for the purpose of a *fi. fa.*, or other ordinary process of execution. He was the registered owner of three English patents, but it was not shown that he was in receipt of any profits therefrom by way of royalties or otherwise. On an

**2487 i. Where no assets available.**—Pl'tf. recovered judgment against defts. in the county ct., & issued execution, but was unable to obtain satisfaction for want of property of defts. upon which to levy:—*Held*: the case was a proper one for the appointment of a receiver by way of equitable execution.—*BARROWMAN v. FADER* (1899), 32 N. S. R. 284.—*CAN.*

**2489 i. Estate of deceased debtor.**—A judgment debtor was entitled, as one of the next-of-kin of a deceased intestate, to whom no administration had been taken out, to a share of the personal estate of the deceased:—*Held*: the judgment creditor was entitled to have a receiver appointed over the share.—*MULLANE v. AHERN* (1891), 28 L. R. Ir. 105.—*IR.*

**2490 i. Future earnings.**—The application of a judgment creditor for the appointment of a receiver to receive the cheques for salary not yet due of the judgment debtor, a Dominion civil servant, was dismissed.—*FORIN v. WAGNER* (1908), 9 W. L. R. 593.—*CAN.*

**e. Fund in court.**—The ct. of equity can grant equitable execution by the appointment of a judgment creditor as a receiver of a sum of money in the equity ct. payable to the judgment debtor.—*CHURCH v. ARNOLD* (1902), 2 S. R. N. S. W. 127.—*AUS.*

**f. Interest in trust estate.**—The interest of a debtor in a trust estate consisting of the right to a share of the proceeds of the sale of such estate

when made by the trustees, is not attachable, moneys which may or may not become payable by a trustee to his *cestui que trust* are not debts. The proper course in such a case is to obtain equitable execution against the debtor's interest by the appointment of a receiver.—*STUART v. GROUCH* (1888), 15 A. R. 299.—*CAN.*

**g. Amount due to debtor as residuary legatee.**—An order may be made attaching the amount, if any, coming to a judgment debtor as residuary legatee under a will, although it is undetermined whether anything, & if anything, how much, is due to him.—*MCLEAN v. BRUCE* (1891), 14 P. R. 190.—*CAN.*

**h. Annuity secured by mortgage.**—Where in an agreement for the exchange of certain land between the sons of deft. & a third party, which was carried out, & in which deft. released her dower, & also conveyed lands of her own to the third party for the benefit of her sons, in consideration whereof they jointly with her covenanted with such third party to pay her an annuity to be secured by mtge.:—*Held*: a judgment creditor of hers was entitled to have equitable execution against her, & a receiver appointed to receive payment of the annuity.—*MOOR v. GIBSON* (1891), 21 O. R. 248.—*CAN.*

**k. Right to use of land under will.**—Where judgment debtors took no estate in the land under a will, & nothing more than the right to call

upon the trustee to permit them to use the land for "a home":—*Held*: their right to the use of the land for a home could not be reached through a receiver so as to make it available for the satisfaction of pl'tfs.' claim.—*CAMERON v. ADAMS* (1894), 25 O. R. 229.—*CAN.*

**l. Unliquidated damages.**—A receiver will not be appointed by way of equitable execution on behalf of a judgment creditor to receive the amount of a claim for unliquidated damages which his debtor is seeking to recover in a pending action.—*CENTRAL BANK OF CANADA v. ELLIS* (1896), 27 O. R. 583.—*CAN.*

**m. Property out of reach of ordinary execution.**—Where the property of a debtor is beyond the reach of an ordinary execution the ct. may afford relief in the form of equitable execution, if it has not the material before it, but only to obtain property or the proceeds of property which can be followed.—*TAYLOR v. CUMMINGS* (1897), 27 S. O. R. 589.—*CAN.*

**n. Interest under will—Executor's discretion.**—The mother of the judgment debtor by her will empowered her exors., if in their discretion they should see fit, to pay the income of her estate, in part or in whole, to & for his benefit & advantage, at such time & in such manner & sums as they should see fit, leaving it to their option & discretion whether they should pay him any sum. An order was made in a div. ct. action, after judgment, appointing judgment creditor receiver



*Sect. 5.—Equitable execution: Sub-sect. 3, C.; sub-sects. 4 & 5, A. & B.]*

application for the appointment of a receiver, by way of execution, of all rents, profits, & moneys receivable in respect of deft.'s interest in the patents:—*Held*: an order for appointment of a receiver could not in such a case be made.

Equitable execution is relief given on the ground that there is no remedy by execution at law; it operates by removing a hindrance which prevents execution at law (BUCKLEY, L.J.).—EDWARDS & CO. v. PICARD, [1909] 2 K. B. 903; 78 L. J. K. B. 1108; 101 L. T. 416; 25 T. L. R. 815, C. A.

**2493. Enforcement of payment of money to trustee in bankruptcy.]—***Re GOUDIE, Ex p. OFFICIAL RECEIVER*, No. 2452, *ante*.

**2494. Untaxed costs.]—**An action by a married woman suing in respect of her separate estate was at the trial dismissed with costs, to be taxed & payable out of her separate property, but not otherwise. The only separate property of pltf. consisted of a share coming to her under a will. Before the taxation of defts.' costs had been completed by certificate, the trustees of the will being about to distribute their estate & pay pltf. her share, defts. applied for the appointment of a receiver to receive the share & hold it as security for the costs when taxed:—*Held*: there was jurisdiction to protect by injunction or the appointment of a receiver the fund out of which the costs were payable, & a receiver ought to be appointed.—CUMMINS v. PERKINS, [1899] 1 Ch. 16; 68 L. J. Ch. 57; 79 L. T. 456; 47 W. R. 214; 43 Sol. Jo. 112, C. A.

**2495. —.]—**These are three applications for the appointment of a receiver by way of equitable execution. The actions, although brought in the Ch. Div., are in the nature of common law actions, inasmuch as the judgment was one for a sum of money & costs to be taxed. The time for issuing a writ of *fi. fa.* or *elegit* upon a judgment is fixed by R. S. C., Ord. 42, r. 17. In a note to this rule in the Annual Practice it is said that "both in the Ch. Div. & the Q. B. Div. a judgment or order for costs to be taxed is enforceable by execution on production of the judgment or order & taxing officer's certificate." In this case the costs have

to receive the amount of his judgment from the exors., whenever they should exercise their discretion to pay the judgment debtor the amount of the judgment, or any part thereof:—*Held*: if the order was intended to interfere with the action of the exors., it should not have been made; & if it did not so interfere, it was nugatory.—*Re MCINNIS v. MCGAW* (1898), 30 O. R. 38.—CAN.

**o. Costs under order of master of titles.]—**A person entitled to payment of costs under an order of a master of titles can have "execution issued" by the proper officer, upon the order & certificate of the master, but this does not include that mode of enforcing payment, by way of a receiver, usually called "equitable execution."—*Re CRAIG & LESLIE* (1898), 18 P. R. 270.—CAN.

**p. Trade union dues—No contract on part of members to pay.]—**If there is nothing in the constitution or rules of a trade union importing a contract express or implied on the part of members to pay dues or assessments, a receiver will not be appointed to collect them by way of equitable execution to satisfy a judgment against the union, as a receiver could not recover such dues & assessments by action.—COTTER v. OSBORNE (1909), 19 Man. L. R. 145.—CAN.

**q. Equitable interest in land.]—**A

legal execution against land cannot bind an equitable interest in lands registered in the name of a person other than an execution debtor; some form of equitable execution is necessary for the purpose.—SEAY v. SOMMERVILLE HARDWARE CO., LTD., [1917] 1 W. W. R. 1497; 33 D. L. R. 508.—CAN.

**r. Stock dividends.]—**Stock standing in the name of a judgment debtor cannot be reached by the appointment of a receiver, but a receiver may be appointed of the dividends. To reach the stock itself an order charging it may be granted upon notice of motion.—LEHANE v. PORTEUS, [1917] 2 W. W. R. 560.—CAN.

**s. Amounts of attached decrees.]—**Where a decree holder had in execution of his decree attached two decrees held by judgment debtor against third parties:—*Held*: Code of Civil Procedure, s. 503, gave power to the ct. to appoint a receiver to realise the amounts of the attached decrees where it appeared that by so doing the interests of both decree holder & judgment debtor would be better protected.—PARTAP SINGH v. DELHI & LONDON BANK, LTD. (1908), 1 L. R. 30 All. 393.—IND.

**t. Deposit receipt in joint names of debtor & another—Beneficial interest in debtor.]—**The appointment of a receiver by way of equitable execution

not been taxed. When the interim order appointing the receiver was made the amount of the judgment was not paid. But now the judgment debt has been wholly paid, & there simply remains a judgment for the untaxed costs. No execution at law could issue for them. The question is, can I, under these circumstances, grant equitable execution which is a substitute for legal execution? I think . . . that I cannot (FARWELL, J.).—WILLIS v. COOPER, SLATTERY v. COOPER, WILLIS COOPER (1900), 44 Sol. Jo. 698.

**2496. Joint tenancy.]—**HILLS v. WEBBER, No. 66, *ante*.

**2497. Book debts of business—Not if got in & expended.]—**HARPER v. MCINTYRE (1907), 51 Sol. Jo. 701; *subsequent proceedings* (1908), 99 L. T. 191.

**Married woman.]—**See HUSBAND & WIFE.

#### SUB-SECT. 4.—IN RESPECT OF WHAT JUDGMENTS OR ORDERS.

**2498. Judgment obtained in Scotland—Registered under Judgments Extension Act, 1868 (c. 54).]**—An appointment of a receiver by way of equitable execution may be made upon the certificate of a decree of the Ct. of Session in Scotland registered in the High Ct. under sects. 3, 4, of above Act.—THOMPSON v. GILL, [1903] 1 K. B. 760; 72 L. J. K. B. 411; 88 L. T. 714; 51 W. R. 484; 19 T. L. R. 366; 47 Sol. Jo. 418, C. A.

#### SUB-SECT. 5.—THE APPLICATION.

##### A. How Made.

*See, generally*, RECEIVERS; R. S. C., Ord. 35, r. 6; Ord. 50, r. 15A.

**2499. No fresh action necessary.]—**ANGLO-ITALIAN BANK v. DAVIES, No. 2454, *ante*.

**2500. —.]—***Re WATKINS, Ex p. EVANS*, No. 2465, *ante*.

**2501. —.]—**The words "interlocutory order" in Jud. Act, 1873 (c. 66), s. 25 (8), are not confined in their meaning to an order made between writ

is the proper mode of attaching a deposit receipt held in the joint names of the judgment debtor & another, even though the whole beneficial interest in the fund be in the judgment debtor.—O'DONOVAN v. GOGGIN (1892), 30 L. R. Ir. 579.—IR.

**a. Legacy.]—**Defts., exors. of a testatrix, obtained a judgment for their costs against pltf., who was entitled to a legacy under the will which was the subject of the action. The judgment was unsatisfied, & in an affidavit filed on behalf of defts. it was stated that, except through this legacy, they had no means of obtaining payment of their demands:—*Held*: a receiver, by way of equitable execution, could be appointed over the legacy.—*Re M'NULTY* (1893), 31 L. R. Ir. 391.—IR.

**b. Dividends from bankrupt estate.]—**A judgment creditor is entitled to an order appointing a receiver by way of equitable execution over such sum, if any, as may become payable by way of dividend or otherwise to the debtor out of the estate of a bkpt. on whose statement of affairs the judgment debtor appears as a creditor.—LANGDALE CHEMICAL MANURE CO. v. GINTY (1907), 41 L. L. T. 40.—IR.

#### PART V. SECT. 5, SUB-SECT. 5.—A.

**c. Motion—In court.]—**A motion for the appointment of a receiver by

& final judgment, but mean an order other than final judgment in an action, whether such order be made before judgment or after. A creditor who had recovered judgment in an action sued out a writ of *elegit*, to which writ the sheriff returned that there were no goods or lands of the debtor which he could deliver. It appearing, however, that the debtor was entitled to an equity of redemption of certain land, the creditor, without commencing any fresh action for the purpose, made an application to a judge at chambers for the appointment of a receiver:—*Held*: such application was rightly made in the original action, & it was unnecessary to commence a new action for the purpose.—*SMITH v. COWELL* (1880), 6 Q. B. D. 75; 50 L. J. Q. B. 38; 43 L. T. 528; 29 W. R. 227, C. A.

*Annotations*:—*Consd.* *Morgan v. Hart*, [1914] 2 K. B. 183. *Refd.* *Manchester & Liverpool District Banking Co. v. Parkinson* (1888), 22 Q. B. D. 173; *Holmes v. Millage*, [1893] 1 Q. B. 551.

**2502.** —.]—In an action by a creditor against a debtor in which pltf. has obtained final judgment, the ct. has power, under Jud. Act, 1873 (c. 66), s. 24 (7), in order to satisfy the judgment, to grant equitable execution against deft. by appointing a receiver upon motion in that action, although the writ may not have been indorsed with a claim for a receiver; it being unnecessary in such a case to bring another action for the purpose.—*SALT v. COOPER* (1880), 16 Ch. D. 544; 50 L. J. Ch. 529; 43 L. T. 682; 29 W. R. 553, C. A.

*Annotations*:—*Consd.* *Holmes v. Millage*, [1893] 1 Q. B. 551; *Re Hearn, De Bertodano v. Hearn* (1913), 108 L. T. 452. *Refd.* *Leggott v. Western* (1884), 12 Q. B. D. 287; *Walmsley v. Mundy, Ex p. Goodenough* (1884), 50 L. T. 317; *Brere v. Edwards* (1888), 37 W. R. 47; *Wills v. Luff* (1888), 38 Ch. D. 197; *Harris v. Beauchamp*, [1894] 1 Q. B. 801. *Mentd.* *Re Whiteley, Whiteley v. Learoyd* (1887), 56 L. T. 846; *Ponnamma v. Arumogam*, [1905] A. C. 383.

**2503.** —.]—The mode of enforcing a claim against separate property is to obtain equitable execution appointing a receiver or directing the trustees to pay. Such an order may be obtained in a suit brought for that purpose or, in my opinion, where proceedings are already pending, it may be made in those proceedings without any fresh suit (*COTTON, L.J.*).—*Re PEACE & WALLER* (1883), 24 Ch. D. 405; 49 L. T. 637; 31 W. R. 899, C. A.

*Annotation*:—*Refd.* *Holmes v. Millage*, [1893] 1 Q. B. 551.

**2504.** —.]—*PROSKAUER v. SIEBE*, [1885] W. N. 159.

**2505.** —.]—*HOLMES v. MILLAGE*, No. 2460, *ante*.

**2506. Whether made ex parte.**—*FUGGLE v. BLAND*, No. 2483, *ante*.

**2507.** — On undertaking in damages.]—*EVANS v. LLOYD*, [1889] W. N. 171.

*Annotation*:—*Refd.* *Minter v. Kent, Sussex & General Land Soc.* (1895), 72 L. T. 186.

**2508.** —.]—Judgment creditors obtained, in the action in which they had recovered the judgment, an *ex p.* order appointing a receiver, to receive the moneys receivable in respect of the share to which the debtor was entitled in the residuary estate under the will of his mother; & it was ordered that the receiver should pay the balance or balances appearing due on his accounts, or such part thereof as should be certified as proper to be so paid, in or towards satisfaction of what should for the time being be due in respect of the judgment. After the order had been made,

notice of it was served upon the exors. of the mother. Before any payment had been made by the exors. to the receiver on account of the debtor's share, a receiving order in bkpcy. was made against him, & he was soon afterwards adjudicated bkpt.:—*Held*: such an order appointing a receiver ought not to be made *ex p.*—*Re POTTS, Ex p. TAYLOR*, [1893] 1 Q. B. 648; 62 L. J. Q. B. 392; 69 L. T. 74; 41 W. R. 337; 9 T. L. R. 308; 37 Sol. Jo. 306; 10 Morr. 52; 4 R. 305, C. A.

*Annotations*:—*Expld.* *Tilling v. Blythe* (1899), 47 W. R. 273. *Consd.* *Singer v. Fry* (1915), 84 L. J. K. B. 2025; *Re Pearce, Ex p. Official Receiver, The Trustees*, [1919] 1 K. B. 354; *Giles v. Kruyer*, [1921] 3 K. B. 23. *Refd.* *Minter v. Kent, Sussex & General Land Soc.* (1895), 14 R. 236; *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154; *Re Gershon & Levy, Ex p. Coote & Richards, Ex p. Westcott*, [1915] 2 K. B. 527. *Mentd.* *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727; *Ridout v. Fowler*, [1904] 1 Ch. 658; *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157; *Re Beaumont, Woods v. Beaumont* (1910), 79 L. J. Ch. 744; *Re Levy & Gershon, Ex p. Coote & Richards* (1915), 59 Sol. Jo. 440.

**2509.** —.]—A receiver may be appointed, by way of equitable execution, upon an *ex p.* application, where the circumstances are exceptional.—*MINTER v. KENT, SUSSEX & GENERAL LAND SOCIETY* (1895), 72 L. T. 186; 59 J. P. 102; 11 T. L. R. 197; 39 Sol. Jo. 230; 14 R. 236, C. A.

*Annotation*:—*Expld.* *Tilling v. Blythe* (1899), 80 L. T. 44.

**2510.** —.]—*Re GOUDIE, Ex p. OFFICIAL RECEIVER*, No. 2452, *ante*.

**2511. Whether by motion or summons.**—A motion was made in an action for the appointment of a receiver by way of equitable execution of the property by two debts in an action, for the purpose of obtaining payment of costs, which they had been ordered to pay. It was contended on the part of the two debts that the application should have been made by the less costly method of summons in chambers, according to the practice of the Q. B. Div., & that such an appointment should not be made unless it was shown to be absolutely necessary in order to obtain payment of the debt:—*Held*: appts. were justified in proceeding by motion according to the practice in the Ch. Div., but it was worthy of consideration whether such an application should not be made in chambers in the future, & where such an application was made by motion it would be a question of consideration whether applt. should have the whole of his costs.—*Re HARTLEY, NUTTALL v. WHITTAKER* (1892), 66 L. T. 588; 36 Sol. Jo. 347.

#### B. Service.

**2512. Service out of the jurisdiction.**—Pltf. having obtained judgment against deft., a foreigner resident out of the jurisdiction, a summons was issued by leave of a judge at chambers calling on deft. to show cause why a receiver should not be appointed. On an application for leave to serve this summons on deft. out of the jurisdiction:—*Held*: there was no jurisdiction to grant such leave.—*WELDON v. GOUNOD* (1885), 15 Q. B. D. 622; 1 T. L. R. 631, D. C.; *subsequent proceedings*, 15 Q. B. D. 624, C. A.

*Annotations*:—*Expld.* *Re Bouron, Ex p. Brandon* (1886), 54 L. T. 128. *Refd.* *Re Busfield, Whaley v. Busfield* (1886), 32 Ch. D. 123; *Re Proceeding against Party, a foreigner out of England* (1886), 2 T. L. R. 238.

*See, now*, R. S. C., Ord. 11, r. 8A.

**2513. Personal service necessary—Or leave for substituted service.**—Where deft. has not appeared, & an application is made for the

way of equitable execution is properly made in ct.—*KINCAID v. KINCAID* (1888), 12 P. R. 462.—CAN.

#### PART V. SECT. 5, SUB-SECT. 5.—B.

**2512 l. Service out of jurisdiction.**—

Pltf., a foreigner, sued deft., also a foreigner, upon a foreign judgment, & alleging that deft. was the owner of lands in Ontario, also claimed relief by way of equitable execution against such lands & an interim injunction

restraining deft. from dealing therewith:—*Held*: this was not a case in which service of the writ of summons out of the jurisdiction could be allowed under rule 271.—*SEARS v. MEYERS* (1893), 15 P. R. 381.—CAN.



*Sect. 5.—Equitable execution: Sub-sect. 5, B. & C.; sub-sect. 6, A. & B.; sub-sect. 7.]*

appointment of a receiver, it is not sufficient to the file summons at the central office, but it must be served on debt., or leave must be obtained for substituted service.—*TILLING LTD. v. BLYTHE*, [1899] 1 Q. B. 557; 68 L. J. Q. B. 350; 80 L. T. 44; 47 W. R. 273; 15 T. L. R. 205; 43 Sol. Jo. 258, C. A.

*Annotation:—Reid. Jamaica Ry. v. Colonial Bank*, [1905] 1 Ch. 677.

### C. Interim Injunction.

**2514. Whether granted—Where no proof of likely destruction of property.]—**Where on the issue of a summons for the appointment of a receiver of property by way of equitable execution an order was made *ex p.* in the form App. K., No. 61 (a) (1), for an injunction to restrain the judgment debtors from dealing with the property until after the hearing of the application:—*Held*: the injunction ought not to be granted in the absence of anything to show that there was danger of the property being made away with by the judgment debtor before the hearing of the application for a receiver.—*LLOYD'S BANK, LTD. v. MEDWAY UPPER NAVIGATION CO.*, [1905] 2 K. B. 359; 74 L. J. K. B. 851; 93 L. T. 224; 54 W. R. 41, C. A.

### SUB-SECT. 6.—EFFECT OF APPOINTMENT OF RECEIVER.

#### A. On Realty.

**2515. Whether "taking in execution"—Judgments Act, 1864 (c. 112).]**—*HATTON v. HAYWOOD*, No. 1466, *ante*.

**2516. ——— Though conditional on security being given.]—***Re WATKINS, Ex p. EVANS*, No. 2465, *ante*.

**2517. ———.]—***Re POPE*, No. 1450, *ante*.

**2518. ——— Within defeasance clause in will.]—**A testator devised a freehold estate to his son for life, & after his death among all the children of the son born or to be born who should live to attain twenty-one, in equal shares as tenants in common in fee; by a subsequent clause he directed that if the son should attempt to dispose of his life interest, or should become bankrupt or insolvent, or the estate devised to him "should be taken in execution by any process of law for the benefit of any creditor or creditors," then the gift to him should become void & cease as if he were dead, & the estate devised to him should "thenceforth absolutely vest in & belong to the person or persons who under the devises & limitations hereinbefore contained would be next entitled thereto." A judgment for debt having been recovered against the son who was in possession, the judgment creditor obtained the appointment of a receiver of the rents. At this time the son had two children, one of age & one under age, & he afterwards had other children:—*Held*: (1) the appointment of a receiver was a taking in execution within the meaning of the clause, & the son's life estate determined.

### PART V. SECT. 5, SUB-SECT. 6.—A.

**d. Administration — Executor — Removal of.]—**A receiver appointed by the ct. to aid a judgment creditor in recovering his claim, by receiving the judgment debtor's share in an estate which could not be reached by execution, after the refusal of the judgment debtor to allow the use of his name, was authorised, on giving

security to him, to take proceedings in his name for the administration of the estate, & if necessary for the removal of the exor.—*MONES v. MCCALLUM* (1897), 17 P. R. 398.—*CAN.*

**e. Priority—Over garnishee order.]—**A judgment creditor obtained a conditional order attaching the tenant's rents of the lands of C., payable to the judgment debtor. The Comrs. of

(2) As the limitations to the children of the son on the determination of the life estate by forfeiture did not take effect on the natural determination of the prior estate, they were not contingent remainders but executory devises, & took effect in favour of all such children of the son whenever born as attained twenty-one.—*BLACKMAN v. FYSH*, [1892] 3 Ch. 209; 60 L. J. Ch. 666; 67 L. T. 802; 2 R. 1, C. A.

*Annotations:—As to (1) Consd. Thompson v. Gill*, [1903] 1 K. B. 760. *As to (2) Consd. Re Canney's Trusts*, *Mayer v. Strover* (1910), 101 L. T. 905.

### B. On Personality.

**2519. Title not complete till security given.]—**An order was made at the suit of an equitable mtgee. "that M., upon his giving security, be appointed receiver," of certain chattels comprised in the security. After this order, but before security had been given, & an execution creditor of the mtgor. took the chattels in execution:—*Held*: the receiver was not constituted receiver till he had given security, & the taking the chattels in execution was not a contempt of ct.—*EDWARDS v. EDWARDS* (1876), 2 Ch. D. 291; 45 L. J. Ch. 391; 34 L. T. 472; 24 W. R. 713, C. A.

*Annotations:—Distd. Re Watkins, Ex p. Evans* (1879), 13 Ch. D. 252. *Reid. Smart v. Flood* (1883), 49 L. T. 467. *Mentd. Re Walden, Ex p. Odell* (1878), 39 L. T. 333; *Re Roberts, Evans v. Roberts* (1887), 36 Ch. D. 196; *Re Standard Manufacturing Co., Ex p. Lowe* (1891), 39 W. R. 369; *Re Monolithic Building Co., Tacon v. The Co.*, [1915] 1 Ch. 643; *Shears v. Jones*, [1922] 1 Ch. 802.

**2520. ———.]—**In June, 1901, the purchaser under a contract for the sale of land paid a deposit, & was let into possession. The purchaser did not complete, & litigation ensued between him & the vendor. In Aug. 1902, a judgment creditor of the purchaser obtained by way of equitable execution, an order appointing himself, upon giving security, receiver of the purchaser's interest in the land under the contract for sale, & at once gave notice of this order to the vendor, but did not perfect his security as receiver until May, 1903. In the meantime in Jan. 1903, the purchaser being unable to complete, the litigation between him & the vendor was, without notice to the judgment creditor, compromised by the contract for sale being rescinded, & the vendor paying the purchaser £110, not in part repayment of the deposit, but to give up possession of the property:—*Held*: as the judgment creditor did not perfect his security as receiver until after the compromise, he had no claim against the vendor in respect of the £110.—*RIDOUT v. FOWLER*, [1904] 1 Ch. 658; 73 L. J. Ch. 325; 90 L. T. 147; *affd.*, [1904] 2 Ch. 93, C. A.

**2521. Title relates back to date of appointment.]—***LEVASSEUR v. MASON & BARRY*, No. 2449, *ante*.

**2522. Receiver trustee of money received.]—**Money not accounted for & due from a receiver under the ct. is, by his recognisance, made a debt of record, although the balance due has not been ascertained. The receiver is a trustee of such money for the persons entitled thereto, & cannot, as against them, avail himself of Stat. Limitations, although his final accounts have been passed & the recognisances vacated.—*SEAGRAM v. TUCK*

Public Works were entitled to a charge on the lands, & before the conditional order was made absolute the Comrs. obtained in the Ch. Div. an order for a receiver over the lands of C., & obtained leave to show cause against the conditional order:—*Held*: the conditional order should be discharged.—*O'CONNOR v. IRELAND*, [1897] 2 I. R. 150.—*IR.*

(1881), 18 Ch. D. 296; 50 L. J. Ch. 572; 44 L. T. 800; 29 W. R. 784.

**2523. Money not held in custodia legis.]—**Money in the hands of a receiver is not *in custodia legis* in the same way as if it were in the hands of a sequestrator.

In June, 1886, H. borrowed from R. £7,000 on the security of a transfer of shares in a co. R. took no steps to have himself registered as owner of the shares until 1892. H. died in 1889, having paid interest on the mortgage debt down to Apr. 1888. In June, 1889, in a creditor's action to administer H.'s estate, a receiver was appointed. In July, 1889, the co. issued to the receiver debentures representing arrears of dividends upon the shares accrued prior to H.'s death. In 1892 R. valued his security of £1,000, & proved for the balance of his debt. He was afterwards registered by the co. as transferee of the shares, & then claimed to have the debentures handed over to him by the receiver:—*Held*: he was not so entitled, the debentures not being *in custodia legis* for his benefit, but being assets in the hands of the receiver, who for this purpose was in the same position as an exor.—*Re HOARE, HOARE v. OWEN*, [1892] 3 Ch. 94; 61 L. J. Ch. 541; 67 L. T. 45; 41 W. R. 105; 36 Sol. Jo. 523.

*Annotations*:—*Reid. Preston v. Tunbridge Wells Opera House*, [1903] 2 Ch. 323; *Re Metropolitan Amalgamated Estates, Fairweather v. The Co.*, [1912] 2 Ch. 497.

**2524. Whether creating charge on property.]—**The ct. has no jurisdiction to make a declaration of charge upon a judgment debtor's reversionary personalty in favour of a judgment creditor who has been appointed receiver of such property.—*FLEGG v. PRENTIS*, [1892] 2 Ch. 428; 61 L. J. Ch. 705; 67 L. T. 107.

*Annotations*:—*Folld. De Peyrecave v. Nicholson* (1894), 71 L. T. 255. *Reid. Re Potts, Ex p. Taylor*, [1893] 1 Q. B. 648; *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157.

**2525. Does not give power of sale.]—**When at the instance of a judgment creditor a receiver has been appointed by way of equitable execution of the goods & chattels of the debtor, the ct. has no jurisdiction to order a sale of such goods & chattels to satisfy the debt.—*DE PEYRECAVE v. NICHOLSON* (1894), 71 L. T. 255; 42 W. R. 702; 10 R. 532, D. C.

**2526. On property outside jurisdiction.]—**A receiver is not put in possession of foreign property by the mere order of an English ct.; the requirements of the law of the country where the property is situate must also be complied with. Until this is done, a person not a party to the action taking proceedings in the foreign country is not guilty of contempt of ct. either on the ground of interfering with the receiver's possession or otherwise.—*Re MAUDSLAY, SONS & FIELD, MAUDSLAY v. MAUDSLAY, SONS & FIELD*, [1900] 1 Ch. 602; 69 L. J. Ch. 347; 82 L. T. 378; 48 W. R. 568; 16 T. L. R. 228; 8 Mans. 38.

*Annotations*:—*Reid. Re Derwent Rolling Mills Co., York City & County Banking Co. v. Derwent Rolling Mills Co.* (1904), 21 T. L. R. 81. *Mentd. Bank of Africa v. Cohen*, [1909] 2 Ch. 129; *The Kronprinz Olav*, [1921] P. 52; *New York Life Insce. v. Public Trustee*, [1924] 1 Ch. 15.

**2527. Money in hands of bank—Order made in absence of bank.]—**Pltf. recovered judgment against deft., but as his costs remained unsatisfied he obtained an order dated Mar. 28, 1919, for the appointment of receivers by way of equitable

execution, & on Apr. 17, 1919, a copy of that order was served on the bank in which deft. had then a sum on deposit. The order was made in the absence of the bank, & no steps were taken by pltf. to make the order binding on the bank till after Dec. 4, 1919, on which date the bank, having heard nothing further of the matter, paid to deft., their customer, the amount standing to her credit. Thereafter pltf. took out a summons for an order on the bank to pay to the receivers the amount standing to deft.'s credit on Mar. 26, 1919, with interest:—*Held*: the order appointing the receivers, made in the absence of the bank, did not create a charge on the moneys in the bank or affect the rights & duties of the bank, & as the bank had properly paid the money to deft., its customer, it was not liable to pay the amount over again to the receivers.—*GILES v. KRUYER*, [1921] 3 K. B. 23; 90 L. J. K. B. 1274; 125 L. T. 731; 37 T. L. R. 561.

**On landlord's power to distrain.]—**See DISTRESS, Vol. XVIII., pp. 277, 278, Nos. 141–148.

**As constituting secured creditor in bankruptcy.]—**See BANKRUPTCY, Vol. IV., pp. 360, 361, Nos. 3360–3365.

#### SUB-SECT. 7.—PRIORITIES.

**2528. Order made without prejudice to previous incumbrances.]—**A judgment creditor, who has issued an *elegit*, is entitled to file a bill & have a receiver appointed, the order to be without prejudice to the rights of any of the previous incumbrancers.—*RHODES v. MOSTYN (LORD)* (1853), 1 Eq. Rep. 212; 22 L. T. O. S. 92; 17 Jur. 1007; 1 W. R. 366.

*Annotation*:—*Consd. Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338.

**2529. Remedy of previous incumbrancer—By application to court.]—**Mtgees. of the tolls of B. Docks:—*Held*: to have a priority over judgment creditors of the concern.

In a suit by mtgees. of a dock against the trustees & a judgment creditor, the chairman was appointed receiver of the tolls, with direction to pay into ct. the balance, after paying the expenses of carrying on the concern & the interest on the mtges. A judgment creditor having afterwards proceeded to attach the tolls under C. L. P. Act, 1854 (c. 125), was restrained by injunction. It was insisted that the possession of the receiver was either that of the dock co. or of the mtgees., & that in the former case the judgment creditor ought not to be restrained in the exercise of his legal remedies against the co., & in the second, that the mtgees. had no power, under the Acts of Parliament, to carry on the concern:—*Held*: this argument was unavailing.

The ct. will not permit its receiver to be interfered with or dispossessed of the property, nor will it allow payment to him to be intercepted, although the order appointing him may be perfectly erroneous. An application must first be made to the ct. for leave.—*AMES v. BIRKENHEAD DOCKS TRUSTEES* (1855), 20 Beav. 332; 24 L. J. Ch. 540; 25 L. T. O. S. 121; 1 Jur. N. S. 529; 3 W. R. 381; 52 E. R. 630.

*Annotations*:—*Mentd. G. S. & W. Ry. v. Corry & Turquand* (1867), 15 W. R. 650; *Re Manchester & Milford Ry., Ex p. Cambrian Ry.* (1880), 14 Ch. D. 645; *Davies v. Thomas*, [1900] 2 Ch. 462.

#### PART V. SECT. 5, SUB-SECT. 7.

**f. Wages — Payable by judgment creditor.]—**The appointment of a receiver of the estate of a judgment debtor at the instance of his judgment creditor

by way of recovering upon the judgment is not an "execution" within Execution Act, s. 21, & clerks & servants of the execution debtor have no right to an order for payment of their wages out of the amount realised

by the receiver in priority to the claim of the judgment creditor.—*ASPLAND v. HAMPSON* (1894), 3 B. C. R. 299.—**CAN.**

**g. Assignment of chose in action—**

X X



*Sect. 5.—Equitable execution: Sub-sects. 7 & 8. Part VI.]*

**2530.** ———.]—SEARLE v. CHOAT, No. 276, *ante*.

**2531. Validity of previous incumbrance—How decided.]**—Pltf., having obtained judgment, was by an order made at chambers appointed receiver of the rents of some houses belonging to deft.: the order was made without prejudice to prior incumbrances. G. having applied to discharge the order appointing the receiver on the ground that he was a second mtgee. under a deed executed by deft. before the judgment in the action, the Q. B. Div. referred the question as to the validity of G.'s mtge. to a master, who after hearing evidence reported that the mtge. was a sham & had been executed in order to defeat deft.'s creditors. The Q. B. Div. declined to review the evidence upon which the master had acted, accepted his report as conclusive, & refused G.'s application:—*Held*: inasmuch as the receiver was appointed under an equitable jurisdiction now vested in the Q. B. Div., the evidence before the master might have been reviewed; & the Ct. of Appeal being of opinion on the evidence that the mtge. had been executed in good faith, discharged the order made at chambers, whereby pltf. was appointed receiver.—WALMSLEY v. MUNDY (1884), 13 Q. B. D. 807; 32 W. R. 602; *sub nom.* WALMSLEY v. MUNDY, *Ex p.* GOODENOUGH, 53 L. J. Q. B. 304; 50 L. T. 317, C. A.

*Annotation*:—*Mentd.* Chance & Hunt v. G. W. Ry., L. & N. W. Ry., Mid. Ry. & North Staffordshire Ry. (1914), 15 Ry. & Can. Tr. Cas. 241.

**2532. Effect of notice of appointment to previous incumbrancer.]**—A judgment creditor cannot by giving notice to the trustee put himself in a better position than the judgment debtor; & a judgment creditor who has obtained equitable execution by the appointment of receiver subject to existing incumbrances:—*Held*: to have obtained no priority by giving notice of the appointment to the trustee of the judgment debtor.—ARDEN v. ARDEN (1885), 29 Ch. D. 702; 54 L. J. Ch. 655; 52 L. T. 610; 33 W. R. 593.

*Annotations*:—*Consd.* *Re* Anglesey, *De Galve v. Gardner*, [1903] 2 Ch. 727. *Refd.* *Re* Dallas, [1904] 2 Ch. 385; *Ipswich Permanent Money Club v. Arthy*, [1920] 2 Ch. 257. *Mentd.* *Gresham Life Assce. Soc. v. Crowther*, [1915] 1 Ch. 214.

**2533. Effect as forfeiture under defeasance clause.]**—A will giving a life interest in testator's residuary estate contained a forfeiture clause to take effect when the life interest "should belong to or become vested in" any person other than the tenant for life. Under an order in K. B. Div. a receiver of the life interest was appointed with a direction to pay the income "in or towards the satisfaction of" a judgment debt. No money had been received under the order:—*Held*: the order gave no property or estate to the receiver or the creditor & there was no forfeiture of the life interest.—*Re* BEAUMONT, *WOODS v. BEAUMONT* (1910), 79 L. J. Ch. 744; 103 L. T. 124.

**2534. Effect of adjudication in bankruptcy after receiver appointed.]**—*Re* DICKINSON, *Ex p.* CHAR- RINGTON & Co., No. 1008, *ante*.

**Effect of subsequent winding-up order.]**—*Sec* COMPANIES, Vol. X., p. 947, No. 6483.

**2535. Priority not gained by appointment in absence of other judgment creditors.]**—*Re* CAVE, *MAINLAND v. CAVE*, [1892] W. N. 142, C. A.

#### SUB-SECT. 8.—ACCOUNTS.

**2536. Money must be paid to creditor direct.]**—The appointment of a receiver by way of equitable execution set out the names of the creditors, the sums due to each, & the order in which they were to be paid. Instead of paying the creditors personally, the receiver handed the sums which from time to time came into his hands to solr. who had conducted the action for pltf., & who had obtained the receiving order on behalf of pltf. & the rest of the creditors. These sums did not reach the hands of the creditors:—*Held*: the receiver could not take credit for the sums so paid to the solr., his duty was to pay the creditors himself. Having failed to do so, he must recoup them by bringing the whole amount received into ct.—*IND, COOPE & Co. v. KIDD* (1894), 63 L. J. Q. B. 726; 10 T. L. R. 603; 38 Sol. Jo. 651; 10 R. 528; *sub nom.* *IND, COOPE & Co., LTD. v. KIDD, AITCHESON & Co. v. KIDD*, 71 L. T. 203, D. C.

## Part VI.—Discovery in Aid of Execution.

*See, generally*, DISCOVERY, Vol. XVIII., pp. 38 *et seq.*

*See, now*, R. S. C., Ord. 42, rr. 32, 33.

**2537. In what cases available—After judgment for payment by instalments.]**—A judgment debtor was ordered to attend on Dec. 7 to be examined, under R. S. C., Ord. 45, r. 1, as to the debts owing to him, with a view to attaching them. He did not attend on that day, & the examination was adjourned to Dec. 21. Before Dec. 21, upon a judgment debtor's summons, he was ordered to pay the judgment debt by instalments. He did not attend upon Dec. 21. Upon the application of the judgment creditor that an attachment

might issue for contempt:—*Held*: the having obtained an order that the debt should be paid by instalments was not inconsistent with examining the debtor as to debts owing to him, & the attachment ought to issue unless the debtor attended to be examined within fourteen days.—*HAYTER v. BEALL* (1881), 44 L. T. 131, C. A.

*Annotation*:—*Refd.* *White, Son & Pill v. Stennings* (1911), 104 L. T. 876.

**2538. — Second examination under R. S. C., 1883, Ord. 42, r. 32—On further information obtained.]**—Pltf. obtained against deft. two judgments, which remained largely unsatisfied, & under an order made under above Ord. deft. wa

*Receiver appointed before notice of assignment given to debtor.]*—An assignee for value of a debt has priority over a person who subsequently obtains an order appointing him receiver by way of equitable execution over such debt, although the order was obtained before notice of the assignment was given by the assignee to

debtor.—*Re* BRISTOW, [1906] 1 I. R. 215; 40 I. L. T. 30.—*IR.*

#### PART VI.

**h. General rule—Whether subpoena must be served.]**—A person liable to be examined in aid of execution, may be compelled to attend & testify, & to produce books & documents in

the same manner . . . as in the case of a witness on a trial. The person to be examined must be served with a subpoena before he can be required to attend.—*PROBY v. ERRATT Co., LTD.*, [1917] 1 W. W. R. 161.—*CAN.*

**k. —.]**—The same principles apply to an examination for discovery in aid of execution as to an examination

examined as to her means. On a subsequent application by pltf. for the appointment of a receiver of certain effects of deft. an interim injunction was granted restraining deft. from dealing with them. Subsequently a receiver was appointed & he ascertained that certain articles had been removed from deft.'s residence. It appeared that some of the articles had been removed while the interim injunction was in force, & that a picture had been sold, but pltf. could not ascertain what had become of the other articles:—*Held*: pltf. was entitled to a further order under above rule for the examination of deft. as to whether she had any means of satisfying the judgments; & pltf. was also entitled to an order under rule 33 of above Ord., for the examination of deft. as to the execution & enforcement of the injunction & as to deft.'s dealings with certain property subject to the injunction, inasmuch as the object of rule 33 was to make orders under rule 32 more efficacious.—*STURGES v. WARWICK (COUNTESS)* (1913), 30 T. L. R. 112; 58 Sol. Jo. 196, O. A.

**2539. — Examination under R. S. C., 1883, Ord. 42, r. 33—As to dealings with property contrary to injunction.]**—*STURGES v. WARWICK (COUNTESS)*, No. 2538, *ante*.

**2540. Who may be examined—Garnishee—When order absolute.]**—A garnishee, against whom an order absolute has been made & execution issued under R. S. C., Ord. 45, rr. 3, 4, is a debtor within R. S. C., Ord. 42, r. 32, & the judgment creditor is entitled under that rule to an order for the garnishee's examination as to his means.—*COWAN & CO. v. CARLILL* (1885), 52 L. T. 431; 33 W. R. 583, D. C.

**2541. — When liability disputed.]**—A garnishee who disputes his liability to the judgment debtor is not a person who can properly be ordered to attend for examination under R. S. C., Ord. 42, r. 32. If the power to order such examination is given by the rule it is a discretionary power & ought only to be exercised with great caution.—*JEFFRIES v. TOMLINSON* (1886), 3 T. L. R. 193, D. C.

**2542. — Officer of defendant corporation.]**—

for discovery before trial.—*BADGER v. TOROSOFF*, [1919] 1 W. W. R. 919.—CAN.

**l. In what cases available—After transfer of action to county court.]**—Where, after judgment in an action in the Common Pleas Div., an issue on a garnishee application was directed to be tried under Rule 373, O. J. Act, by a county ct. judge & jury:—*Held*: such judge had no jurisdiction to make an order to produce before trial, & consequently no authority to make any order on a failure to produce.—*COCHRANE v. MORRISON* (1885), 10 P. R. 606.—CAN.

**m. Who may be examined—Garnishee.]**—The ct. will order the examination of the deft. to ascertain what debts are due to him; under 22 Vict. c. 33, s. 12, with a view of garnishing such debts.—*BOSTWICK v. SHORTIS* (circa 1860), 1 Ch. Ch. 69.—CAN.

**— Judgment debtor for costs only.]**—A pltf. against whom a deft. has recovered judgment for costs only, in either of the Superior Cts. of common law or a county ct. is not liable to be examined or committed.—*HAWKINS v. PATERSON* (1863), 23 U. C. R. 197.—CAN.

**o. —.]**—A judgment creditor, whose judgment is for costs only, cannot examine his judgment debtor under R. S. O., 1877, c. 50, s. 304, nor garnish debts due to him.—*GHENT v. MCCOLL* (1881), 8 P. R. 428.—CAN.

**p. — Married woman.]**—A married woman, a judgment debtor, who refuses to attend & be examined as to her estate & effects, or refuses to disclose her property, or to give satisfactory answers to questions may be committed.—*METROPOLITAN LOAN & SAVINGS CO. v. MARA* (1880), 8 P. R. 355.—CAN.

**q. — Solicitor of absconding judgment debtor.]**—The solr. of a judgment debtor who had absconded, transferred property of the judgment debtor to a purchaser, under power of attorney, & received the consideration money, \$4,000. Upon an application to examine the solr. under 49 Vict. c. 16, s. 12 (O.):—*Held*: this provision being remedial & for the purpose of enabling the judgment creditor the better to discover property of his debtor, it should be construed so as to advance the remedy, so far as the fair meaning of the words would permit. The word "transfer" in the expression, "any person to whom debtor has made a transfer of his property or effects," should not be limited to the transfer of the title to the property or effects, but should be regarded as equally applicable to the transfer of the possession; & therefore the solr. was a person to whom a transfer of debtor's property & effects to the extent of \$4,000 had been made, for the possession of that sum had been transferred to him by his debtor. The solr. was also an employee of the judgment debtor within

There is no power under R. S. C., Ord. 17, r. 32, when a judgment or order has been obtained for the recovery or payment of money, to make an order for the examination of any person other than the debtor liable under such judgment or order, or in the case of a corpn., other than an officer of deft. corpn.—*IRWELL v. EDEN* (1887), 18 Q. B. D. 588; 56 L. J. Q. B. 446; 56 L. T. 620; 35 W. R. 511; 3 T. L. R. 535, C. A.

*Annotation*:—*Consd. Hood Barrs v. Heriot, Ex p. Blyth*, [1896] 2 Q. B. 338.

**2543. — Though retired.]**—Where a judgment or order is obtained against a co. for the recovery or payment of money, an order may be made under R. S. C., Ord. 42, r. 32, upon a person who has been a director of a co., but has ceased to be so at the time of the making of the order, to attend to be examined as to debts owing to the co., & whether the co. has property or means of satisfying the judgment or order.—*SOCIÉTÉ GÉNÉRALE DU COMMERCE ET DE L'INDUSTRIE EN FRANCE v. FARINA (JOHANN MARIA) & CO.*, [1904] 1 K. B. 794; 73 L. J. K. B. 355; 90 L. T. 472; 52 W. R. 404; 20 T. L. R. 367; 48 Sol. Jo. 329, C. A.

**2544. — No one but party liable.]**—*IRWELL v. EDEN*, No. 2542, *ante*.

**2545. —.]**—A direction that an inquiry is to be held as to the estate of a married woman against whom judgment has been obtained with a view to ascertaining whether she has separate property free from restraint or anticipation, does not authorise the examination of any person other than the judgment debtor.—*HOOD BARRS v. HERIOT, Ex p. BLYTH*, [1896] 2 Q. B. 338; 65 L. J. Q. B. 622; 75 L. T. 15; 45 W. R. 1; 40 Sol. Jo. 667, C. A.

**2546. Service of order — On wife.]**—Service of a rule under O. L. P. Act, 1854 (c. 125), s. 60, upon the wife of the party, without showing that it came to his knowledge, is not sufficient.—*MASON v. MUGGERIDGE* (1856), 18 O. B. 642; 139 E. R. 1522.

**2547. — On father at defendant's usual place of business.]**—A judge's order, under the garnishee

sect.—*GOWANS v. BARNET* (1887), 12 P. R. 330.—CAN.

**2543 i. — Officer of defendant company—Retired.]**—Pltf. having recovered judgment for a large sum of money against deft. co., obtained a summons for an order for the attendance of resp. D., a former officer of the co., before a master of the ct. for examination as to debts owing to the co. & as to whether the co. had property or other means of satisfying the judgment. D. was described in the summons as "formerly a director & vice-president of the co." There was no personal service upon D., & no actual notice to him of the application for the order, C., the solr. for the co. was present, & stated that the summons was served upon him:—*Held*: D. was not an "officer of the co." within O. 40, r. 44, & as such, liable to examination under the provisions of the order, the words "officer thereof" meaning an existing officer.—*HAMILTON v. STEWART VALLEY RY. CO. & DICKIE* (1897), 30 N. S. R. 10.—CAN.

**r. — Judgment debtor.]**—A judgment debtor is examinable under Rule 486, notwithstanding that a *fi. fa.* in the sheriff's hands has not yet been returned *nulla bona*.—*STEELE v. PIONEER TRADING CORPN.* (1898), 6 B. C. R. 158.—CAN.

**s. —.]**—An execution creditor may examine his execution debtor not only as to the latter's present



clauses of the C. L. P. Act, 1854 (c. 125), calling upon deft. to attend before the master to be examined touching any debts which may be due to him, was served on deft.'s father at deft.'s usual place of business, pltf. being unable to discover deft.'s place of abode. On motion to make the judge's order a rule of the ct., a rule was granted absolute in the first instance.—*BIRD v. WRETTON* (1858), 30 L. T. O. S. 258; 6 W. R. 211.

—.]—See CONTEMPT OF COURT, Vol. XVI., pp. 51-57, Nos. 547-644.

**2548. Place of examination—Residence of witness.]—**A party applying for the attachment of a judgment debtor for non-compliance with an order for his oral examination, must make an affidavit that conduct money has been tendered to the debtor, & also there must be an affidavit showing some good reason for not examining the debtor at his place of residence, & also that there were no other means of ascertaining what debts were owing to the debtor.—*PROTECTOR ENDOWMENT CO. v. WHITLAM* (1877), 36 L. T. 467.

*Annotation:—Refd. Costa Rica Republic v. Strousberg* (1880), 43 L. T. 399.

**2549. Witness entitled to conduct money.]—***PROTECTOR ENDOWMENT CO. v. WHITLAM*, No. 2548, *ante*.

**2550. — But not witness's expenses.]—**A judgment debtor, for whose examination an order has been made under R. S. C., Ord. 42, r. 32, though entitled to a reasonable sum for conduct money, does not come within R. S. C., Ord. 37, r. 9, & therefore is not entitled under that rule to the "like conduct money & payment for expenses & loss of time as upon attendance at a trial in ct."

On an application by pltf. at chambers for leave to issue a writ of attachment against deft. for disobedience of an order of the ct., deft.'s solr. took the objection that copies of affidavits, on which the application was founded, had not been served with the summons in accordance with R. S. C., Ord. 52, r. 4. The judge thereupon offered to adjourn the further hearing until the following day, in order that deft. might have an opportunity of answering the affidavits: & it was adjourned accordingly. The affidavits were shown to deft.'s solr., who subsequently attended at the adjourned hearing, & admitted that deft. could not answer the affidavits. The judge then made the order for an attachment:—*Held*: assuming that the provisions of R. S. C., Ord. 52, r. 4, applied & that there had been an irregularity, nevertheless, by reason of what subsequently happened, deft., having accepted what was equivalent to the advantages intended to be conferred by the rule, was not entitled to insist on the irregularity, & the order for an attachment was rightly made.—*RENDELL v. GRUNDY*, [1895] 1 Q. B. 16; 64 L. J. Q. B. 135; 71 L. T. 564; 43 W. R. 50; 39 Sol. Jo. 26; 14 R. 19, C. A.

means of satisfying the judgment, but as to what disposition he has made of any real or personal property since the creation of the debt up to the date of the examination.—*BANK OF HAMILTON v. BOYD*, [1920] 1 W. W. R. 829.—CAN.

**t. — Wife of judgment debtor.]—**Inquiry may be made as to property alleged to belong to wife of debtor.—*CLINTON v. SELLARS* (1907), 6 W. L. R. 367.—CAN.

**a. — .]**—The wife of a judgment debtor to whom he has transferred any of the property referred to in Rule 636, Alberta, may be compelled to answer upon her examination for discovery in aid of an execution

against the judgment debtor, questions as to the terms of a further transfer of the same property or as to the disposition of the proceeds or consideration for the transfer.—*KILLIPS v. PORTER* (1915), 32 W. L. R. 469; 9 W. W. R. 181, 949; 24 D. L. R. 888.—CAN.

**b. — Defendant in the action.]—**Deft. in an action is not a person "for whose immediate benefit" a garnishee issue in the action is being prosecuted, to permit him to be examined for discovery by the garnishee.—*UNITED STATES FIDELITY & GUARANTY CO. v. GOVIN* (1915), 31 W. L. R. 912; 8 Sask. L. R. 182.—CAN.

**Conduct money generally.]—See EVIDENCE.**

**2551. Scope of examination—Limited to discovery of assets to satisfy judgment.]—**A judgment debtor had deposited, before the judgment was obtained, with the judgment creditor a debenture bond of a co., payable to bearer, for £1,000 as security for the sum of £300, & the judgment creditor had commenced an action against the co. to recover the amount of the bond. The co. obtained leave to defend that action. The judgment was for £600, & the judgment creditor obtained an order for the examination of the debtor under R. S. C., Ord. 42, r. 32. The debtor refused to answer certain questions as to the validity of the bond, & the judge at chambers & the ct. refused to order him to answer those questions. The judgment creditor appealed:—*Held*: the interest of the judgment debtor in the bond was property of the debtor within the rule, as to which he could be examined, but the appeal must be dismissed, the judge & the ct. having refused, in the exercise of their discretion, to order the debtor to answer these questions.

The rule requires a deft. to state not merely the name of his debtor & his property, but also to give a description of his assets sufficient to enable pltf. to know what they are. . . . I am satisfied it is a matter of discretion whether the order to answer further will be made. The Div. Ct. has exercised a discretion in this matter & we cannot disagree with them (*LORD ESHER, M.R.*).

The real object of the questions which deft. objected to answer was to get information as to the alleged defence to the action on the bond. That was not within the scope of rule 32. . . . The object of the rule is to enable a judgment creditor to get discovery from a judgment debtor as to what assets he has got to satisfy the judgment. These questions go beyond that, & as the ct. in the exercise of its discretion has refused to order deft. to answer them I cannot see how we can interfere (*KAY, L.J.*).

The object of this rule is plain enough; it is to make a judgment debtor tell what assets he has got to satisfy the judgment (*LINDLEY, L.J.*).—*WATKINS v. ROSS* (1893), 68 L. T. 423; 4 R. 365, C. A.

**2552. Nature of examination—Cross-examination of strictest character.]—**The examination of a judgment debtor under R. S. C., 1875, Ord. 45, r. 1, touching the debts due to him is intended to be a cross-examination of the strictest character, & the debtor when under such an examination is bound to answer all questions relevant to the subject-matter & cannot insist on the examination being confined to the simple question "whether any & what debts are due to him."—*COSTA RICA REPUBLIC v. STROUSBERG* (1880), 16 Ch. D. 8; 50 L. J. Ch. 7; 43 L. T. 399; 29 W. R. 179, C. A.

*Annotation:—Refd. Watkins v. Ross* (1893), 68 L. T. 423.

**c. Powers of judge.]—**Where an order for discovery in aid of execution is made *ex p.* that could not be legally granted in that way, the judge by whom the order is made has power to rescind on application to him for that purpose, & such application should be made in the first instance to him.—*HAMILTON v. STEWART VALLEY RY. CO. & DICKIE* (1897), 30 N. S. R. 92.—CAN.

**d. Copy of examination—Whether service necessary.]—**It is not necessary to serve a copy of the examination for discovery in aid of execution with the notice of motion.—*FRASER v. KIRKPATRICK* (1906), 4 W. L. R. 1.—CAN.

## Part VII.—Execution in Inferior Courts.

### SECT. 1.—IN GENERAL.

**2553. Execution outside jurisdiction—Liability of bailiff & attorney.]**—In trespass for taking goods under process, upon a regular judgment, but in a place to which the process did not run, pltf. may recover the whole value of the goods, & not merely the amount of damage which he has sustained by their being taken in a wrong place.

Attorneys (partners) delivered to a bailiff, for the purpose of being executed, a precept, issued from a local ct., indorsed with the attorneys' names, & directing a levy upon goods within the jurisdiction. The attorneys carried on business at F.; & the party to be levied upon had had, for many years, a house & goods at P., & was not known to have a residence or property elsewhere. The levy was made in that house. The attorneys had sent a message to the debtor, as to the time at which the bailiff would levy; & the bailiff while levying, said that he was employed by those attorneys. In an action against them & the bailiff for unlawfully levying, the attorneys pleaded not guilty: a justification under the process: the bailiff pleaded the justification only: pltf. replied that the house was not within the jurisdiction; & issues were joined thereon:—*Held*: the attorneys were not entitled to an acquittal at the close of pltf.'s case, in which the facts had appeared as above stated; & on the close of the whole case, nothing material having been added except that defts., though they proved a regular judgment, failed to bring themselves within the jurisdiction, the judge ought to have told the jury that there was no evidence to implicate the attorneys; & this, even assuming them to have known that pltf. intended levying at the house in question; although, if they had known also that the house was beyond the jurisdiction, they might possibly have been considered joint trespassers with the bailiff.—*SOWELL v. CHAMPION* (1837), 6 Ad. & El. 407; 2 Nev. & P. K. B. 627; Will. Woll. & Dav. 667; 7 L. J. Q. B. 197; 1 Jur. 54; 112 E. R. 150.

*Annotations*:—*Refd.* Rowles v. Senior (1846), 8 Q. B. 677; Wakeman v. Lindsey (1850), 14 Q. B. 625; Allum v. Boulton (1854), 9 Exch. 738. *Mentd.* White v. Hill (1844), 6 Q. B. 487.

**2554. How far garnishee proceedings available.]**

—*DAWLER v. BARNES*, No. 2054, *ante*.

**2555. — Wages Attachment Abolition Act, 1870 (c. 30).]**—*BOOTH v. TRAIL*, No. 2144, *ante*.

**2556. Service of process—Hull Court of Requests.]**—The general rule of law is that execution

shall not issue against a party who has not had notice to defend himself in the suit or prosecution. But where statutes, establishing a Ct. of Requests for a sea-port town (Hull), with the usual clauses in favour of debtors, limiting the time of imprisonment, allowing payment by instalments, etc., enacted that process by summons might issue against any person residing or keeping & using any house, etc., in the town, or frequenting the markets, or sailing or navigating to & from the port, & that if such person, having been duly summoned should not appear, the ct. might proceed *ex parte*, & that the summons should be served "either personally, or by leaving the same at the dwelling-house, lodging, place of abode," etc., of such debtor within the limits, with his servant, or other persons belonging to him:—*Held*: a summons left with the wife of a seafaring man at his lodging, within the jurisdiction, was sufficient to warrant execution under these statutes, though the debtor himself was, during the whole time of the proceedings, & had been for several months before, absent on a voyage to India.—*CULVERSON v. MELTON* (1840), 12 Ad. & El. 753; 4 Per. & Dav. 445; Woll. 73; 10 L. J. Q. B. 31; 4 Jur. 1130; 113 E. R. 999.

**2557. Bailiff's fees—Poundage—Palace Court of Rochester.]**—The bailiff of the Palace Ct. of the Bishop of Rochester is not entitled to poundage under 29 Eliz. c. 4, for executing a judgment of that ct.—*BROCKWELL v. LOCK* (1695), 5 Mod. Rep. 97; 1 Salk. 331; 87 E. R. 543.

### SECT. 2.—COUNTY COURTS.

*See* COUNTY COURTS, Vol. XIII., pp. 453, 454, 514–517, Nos. 36–49, 634–670.

### SECT. 3.—MAYOR'S AND CITY OF LONDON COURT, LONDON.

*See* MAYOR'S COURT, LONDON.

### SECT. 4.—REMOVAL OF PROCEEDINGS AND JUDGMENTS TO THE HIGH COURT FOR PURPOSES OF EXECUTION.

*See* JUDGMENTS.

## Part VIII.—Interpleader.

*See* INTERPLEADER.



## EXECUTION CREDITOR.

*See* BANKRUPTCY AND INSOLVENCY; EXECUTION.

## EXECUTION OF DOCUMENTS.

*See* DEEDS AND OTHER INSTRUMENTS; EVIDENCE; WILLS.

## EXECUTION OF POWER.

*See* POWERS.

## EXECUTIVE.

*See* CONSTITUTIONAL LAW.

END OF VOL. XXI.













